UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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AMERICAN LUNG ASSOCIATION AND :
AMERICAN PUBLIC HEALTH :
ASSOCIATION, :
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Petitioners, :
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v. : Nos. 19-1140, et al.
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ENVIRONMENTAL PROTECTION :
AGENCY AND ANDREW WHEELER, :
ADMINISTRATOR, :
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Respondents. :
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Thursday, October 8, 2020

Washington, D.C.

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

BEFORE:

CIRCUIT JUDGES MILLETT, PILLARD, AND WALKER

APPEARANCES:

ON BEHALF OF THE STATE AND MUNICIPAL PETITIONERS:

STEVEN C. WU, ESQ.

ON BEHALF OF THE POWER COMPANY PETITIONERS:

KEVIN POLONCARZ, ESQ.

ON BEHALF OF THE COAL INDUSTRY PETITIONERS:

MARK W. DELAQUIL, ESQ.

ON BEHALF OF THE ROBINSON PETITIONERS:

THEODORE HADZI-ANTICH, ESQ.

ON BEHALF OF THE HEALTH AND ENVIRONMENTAL PETITIONERS:

SEAN H. DONAHUE, ESQ.

ON BEHALF OF THE STATE AND MUNICIPAL PETITIONERS:

MICHAEL J. MYERS, ESQ.

ON BEHALF OF THE BIOGENICS PETITIONERS:

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ON BEHALF OF INTERVENORS:

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C O N T E N T S

ISSUE IV:

P R O C E E D I N G S

THE CLERK: Case Number 19-1140, et al. American Lung Association and American Public Health Association, petitioners, versus Environmental Protection Agency and Andrew Wheeler, Administrator.

JUDGE MILLETT: Before counsel starts, I'm just going to give you all a heads up that the Court will be taking at least one break if not more, depending on how arguments go during this proceeding. And we'll do it, when we do do it, we will do it between sort of the four divided issues that we have in this case. Okay? All right, Mr. Wu, you may start.

ORAL ARGUMENT OF STEVEN C. WU, ESQ.

ON BEHALF OF THE STATE AND MUNICIPAL PETITIONERS

MR. WU: Thank you. May it please the Court, Steven Wu representing the state and municipal petitioners. For this portion on the repeal, I will be sharing time with Kevin Poloncarz, who represents the power company petitioners, and I'd like to reserve four minutes for rebuttal.

EPA repealed the Clean Power Plan on the ground that Section 111 unambiguously prohibits the agency from considering available emission reductions that can be achieved by power plants on the electric grid shifting generation from dirtier to cleaner sources. But nothing in

the statute imposes such an unambiguous prohibition. To the contrary, the statute's use of the phrase best system is broad language that gives EPA flexibility to consider a wide range of methods that would effectively reduce emissions from regulated sources.

And while the statute does impose constraints on EPA, such as requiring that any system it chooses be adequately demonstrated, it does not, then, impose the constraint that EPA claims is unambiguous here. The breadth of that language contrasts with other provisions of the Clean Air Act that use consciously narrower language to talk about the methods that either EPA or sources can consider emission limitations.

Section 111 itself elsewhere refers to technological system, and other statutes talk about control technologies, retrofit technologies, and so on. But Section 111(a)(1) does not use that limiting language. And what this shows is that when Congress did want EPA to set emission limits based on a more limited subset of methods, it said so expressly. And its decision not to do so in (a)(1) is a meaningful one that should be given credence here. EPA's ability --

JUDGE MILLETT: Mr. Wu, can I just ask one technical question? Because it didn't seem consistent to me throughout the briefing. When you used the phrase

generation shifting, are you talking about simply using, as the grid might, shifting from a coal fire power plant as a source to a gas fire power plant or a wind or solar-powered one, or are you using that as more of an umbrella term that would include things like credit trading?

MR. WU: It's a little bit of both. Generation shifting --

JUDGE MILLETT: Well, that's the problem in the briefing. Sometimes they're carved out as two, distinct things, and sometimes it's used as an umbrella. So I just wanted to make sure --

MR. WU: Sure.

JUDGE MILLETT: How you were using it.

MR. WU: Sure. And let me try to be specific about it. Generation shifting I think is most accurately understood as referring to the physical ability, the natural ability of plants to shift generation among themselves. Things like trading and credit schemes are ways of taking advantage of generation shifting. Basically, they leverage the ability of sources to engage in such shifts and use something like a trading market to allocate that generation shifting among all the sources on the grid. But they're not synonymous in the sense that generation shifting can happen without a trading market, and there are methods that leverage generation shifting, such as investment in cleaner

energy, that don't require some sort of market to be set up, either by a state or by the, or by the federal government.

I think all that's necessary for regulation that takes advantage of generation shifting is for there to be some decision about how the, what power plants do on the grid can be credited to their emission limitations, whether they're imposed by the state or the federal government.

JUDGE MILLETT: Okay.

MR. WU: And in terms of the statutory argument here, I mean, the position that EPA previously took, which is that it had the discretion to consider how power plants operate on the grid and shift generation between them is particularly appropriate given the regulatory stage at which EPA is making this (indiscernible) determination. It's the role of EPA in setting the best system and the states in establishing --

JUDGE MILLETT: Wait. You've been, for me, at least, you've been freezing up occasionally. So, could you -- this is very hard to do, I know. But if you could back up about 30 seconds in your remarks because I missed something in there.

MR. WU: Yes. I'm sorry. I have some remote schooling go on in the background I have not been able to stop.

JUDGE MILLETT: Completely understandable.

MR. WU: All right. Well, let me rewind. But it's, the position that --

JUDGE PILLARD: It's your --

MR. WU: -- EPA previous --

JUDGE PILLARD: Go ahead. You were saying that it was useful, but all that matters is there be some way to credit to plants the limitations that they achieve, which is (indiscernible) clarifying because one of the questions I have is why does it, you know, there's a lot of emphasis in some of the briefing, and an entire amicus brief of the grid experts devoted to it. Why does it matter that the grid is integrated when at the end of the may it please the Court the regulated actors are the ones who are making decisions and are the target necessarily of both federal and state regulatory steps?

So I guess the question is apparently, why does it matter? I understand functionally that it's, like, makes sort of automatic shifting, you know, as a physical matter. But in terms of, as you said, at the end of the may it please the Court, one has to take a measure of who's doing what and who's complying.

MR. WU: Well, that's right. And I think because the Clean Power Plan, another 111 regulations, applied two sources at the end of the may it please the Court by spending emission limits on them, that that does fit

squarely within EPA's authority to regulate such sources.

And where the fact of the electric grid features into that scheme is in this way. What EPA is basically doing is in setting the stringency of those emission limits, looking out in the world and figuring out what is practically and readily available to sources to achieve those limitations. And I think the answer to that question, which is what is available for sources, is what the power shifting or the generation-shifting ability of the grid answers.

What it says is that sources are able to do things that reduce carbon dioxide emissions, not just by doing things on their own plant, by changing their own equipment, but also by engaging in things that the industry has long engaged in, such as trading and other measures that result in reductions of emissions from elsewhere on the grid. And the reason why it makes sense --

JUDGE PILLARD: (Indiscernible) Mr. Wu, that EPA, given what you've just said, that EPA would have the authority to impose a carbon tax on sources on the grid?

MR. WU: Not directly. What EPA has authority to do is to issue guidelines, or for 111(b) sources to do it itself, that result in standards of performance for sources, which means emission limitations. And what we are debating here is what EPA (indiscernible) when it sets under the

guidelines or the emission limitations itself. In other words, what it can consider in deciding what is feasible for sources on the grid to attain. Saying earlier, that range of options is what really is at the crux of this debate here.

What EPA did in the Clean Power Plan was to understand, correctly, as a fact of the world that power plants not only can reduce emissions in the grid through their own actions within sort of the four corners of their plant, but also by doing things like purchasing allowances when markets allow it, that reflect a reduction of emissions from elsewhere on the grid, and that accomplished the same objectives as a reduction from the source itself. And I think that point that I just made about the substitution of that emission reduction is another fact that follows from the unique nature of the pollutant that's at issue here.

JUDGE MILLETT: Can I just ask on that substitution or purchasing an allowance on the grid, grids cover lots of states. Are these allowances purchased from someone on the grid that's in-state, or are they out-of-state? Because if they're out-of-state, then they're not going to help the state accomplish reductions in emissions.

MR. WU: In the Clean Power Plan, the states have the flexibility to set up trading markets, I think, for themselves. And I forget now, unfortunately, if they had

the ability to partner (indiscernible) across state lines on a voluntary basis. But they certainly weren't compelled to do so. And again, the point of the trading schemes is to allow sources to achieve emission limitations by purchasing these allowances that represent these emission reductions. It makes sense for carbon dioxide --

JUDGE PILLARD: Are you agreeing with the premise to Judge Millett's question that it wouldn't allow a state to attain its, or to meet its requirements if it sources purchase credits from out-of-state? I'm not sure, I'm just not sure whether that follows, and I'd be interested in whether you agree --

MR. WU: So, where I am unfortunately drawing a blank is whether the Clean Power Plan (indiscernible) interstate trading. What I would say is that --

JUDGE MILLETT: Just as a statutory matter, would it make textual sense if a state could, every utility in a state kept emitting full throttle but was buying credits from a different state, and so that state's emissions never changed, but some other state that had a lot of credits because they have a lot of solar or wind power or something, it probably stayed where it was too.

MR. WU: So it would make statutory sense, and more importantly, it would make sense given the nature of the pollutant that's at issue here. Because what is

distinct about carbon dioxide in particular is that it's (indiscernible) global level really. And it's really indifferent to the particular source of the pollutant. And so if a source is responsible for a reduction of emissions elsewhere in the grid, including in another state, then that action has the same salutary benefit as if the source reduced its own emissions. And that distinct feature is what makes it particularly reasonable for EPA in the Clean Power Plan to have considered generation shifting and the ability of sources to engage in things like trading as part of the compliance mechanism for establishing these emission limitations here.

And I was saying earlier that it also made sense where EPA sat on the regulatory structure because, again, EPA's reasoning here in the repeal rule is that because states set performance standards for individual sources, EPA's discretion is similarly limited (indiscernible) what a single source can do. But what nobody disputes is that EPA, in determining the best system, is not deciding what happens at individual sources. It is instead establishing guidelines across the sector that states can then implement by establishing source-specific standards. And so it's particularly appropriate for EPA at that threshold stage to be considering not what is feasible for individual sources, but what happens when sources interact on this

interconnected grid, and precisely what EPA did in the Clean Power Plan.

JUDGE PILLARD: EPA does now seem to contest that in disallowing certain options by the states, but we'll get to that. We'll get to that later. Just as a matter of statutory interpretation, both rules are promulgated under the authority of 111(d)(1). And given that, what does it matter whether (a)(1) is ambiguous if it's clear that (d)(1) focuses on individual sources?

MR. WU: I think the answer to that is that (a)(1) is the provision that establishes EPA's authority and obligation to make the best system determination, (d)(1) then explains how states, in implementing source-specific standards have to issue standards that reflect that best system determination. But again, (a)(1) explicitly refers to the administrator, says that the administrator, you know, shall determine what has been adequately demonstrated for a best system. And then (d)(1) then sort of reflects that standard upon the states as well.

JUDGE PILLARD: It's very odd. I mean, everyone seems to agree this is the definitions provision, that that would be the place that Congress delegates authority to the EPA. But that is, in fact, your position, that that's where EPA's role is described, insofar as it's described at all.

MR. WU: That's correct, at least on this part.

(d)(1) describes a separate role for EPA, which is to promulgate regulations for states to follow in issuing the state plans. But again, there's nothing that forecloses Congress from including in what you might call a definitional provision authority for EPA or other agencies to act. Any number of statutes, including the Clean Air Act and the Clean Water Act, have substantive definitional provisions that do a lot of the work in defining the scope of the regulatory program and regulated sources compliance obligations.

And we're not relying on an inference from the text. The text itself says the best system of emission reduction is something that EPA has to demonstrate has been adequately demonstrated and puts in constraints on what EPA has to consider in reaching that best system determination, including considerations of cost and energy requirements across the grid.

JUDGE PILLARD: Your brief talks about the language and responding to EPA's arguments and petitioners in support of EPA that, saying that it doesn't have to have an indirect object. But at some level, I mean, what the best system is has to contemplate action by regulated parties, right?

So it just, it struck me that there are alternative arguments. First, you know, no indirect object.

And then, you know, if there's an indirect object, it's the operators or the system or maybe the pollution. And I guess I'm just not following how it could, how a regulatory metric that EPA is coming up with, even though I understand the two steps, but the states are the ones that are kind of chapter and verse figure out what the sources are supposed to do.

But when EPA comes up with a regulatory metric, doesn't it necessarily have to think about, you know, if the regulated parties did such-and-such vis-a-vis emissions, like, that has to have been (indiscernible), no?

MR. WU: No. We absolutely agree with that. And I think the dispute between the parties is not about whether regulated sources have to be considered in the best system determination. It is instead about really like how many sources have to be considered. And I want to make this really concrete. Our argument in response to this indirect object point is not that application, you know, you can't infer an indirect object from there. What we are disputing is EPA's argument that in order to understand (a)(1), you can't look at that provision by itself. You have to look at (d)(1), and that (d)(1)'s use of the singular to describe any existing source or any particular source therefore restrains EPA's authority under (a)(1). That's the textual move that we are rejecting here. And the reason that that textual move doesn't work is because (a)(1) can be

understood by itself, including if you infer from context an indirect object for the word application.

As we point out in our brief, (a)(1) can be understood to be referring to the application to regulated sources or to the emissions that they generate in the plural, which would easily encompass EPA's discretion to consider the way that multiple sources contribute to this global problems of carbon dioxide pollution. By contrast, EPA's decision to sort of splice in the (d)(1) definition and its use of the singular to restrain (a)(1) is neither compelled by the text, nor does it make sense.

One of the reasons it doesn't make sense is that (d)(1) is only one of the provisions in 111 where the phrase standard of performance is used. And in provisions like 111(b), they don't use the singular to describe standards of performance. That statute, that provision refers to standards of performance for sources in the plural. So it doesn't make sense to think that a single provision's use of that phrase in the singular sense restrains EPA's authority under (a)(1) in general.

It also doesn't make sense, because again, where EPA --

JUDGE MILLETT: You would agree that in formulating the best system, Congress surely wanted the Administrator to have in mind sort of where the boots on the

ground are going to be. I mean, it's not a best system if the people are going to have to put this into action. You can't do, I mean --

MR. WU: That's correct. That is correct. And that is accomplished by (a)(1)'s requirement that EPA consider what is achievable for these emission reductions, taking into --

JUDGE MILLETT: Accountable by whom? By the state or by the facilities, by the individual facilities, the collective facilities? I mean, you could end up having the same object issue going on there. Achievable by whom?

MR. WU: I think by regulated sources, again in the plural. And the reason that's both sort of permissible under the statutory text, and again, sensible for something like carbon dioxide where what the regulated agency should care about is sort of the overall emissions of that pollutant, not its particular source here.

And I do want to back up a little bit and make this --

JUDGE PILLARD: Let me just ask you there, though. I mean, I understand that as a policy matter that the fact that this is carbon dioxide needs a lot of constraints that might have made sense where other more localized pollution don't make sense here. But we're construing a statute that applies trans-substantively to all different kinds of

pollutants. So to use that as a basis to confer anything about the statutory language seems to me a nonstarter.

MR. WU: Well --

JUDGE PILLARD: Am I misunderstanding how you're using that?

MR. WU: Right. I disagree with that, Judge Pillard, for this reason, which is that 111(a)(1) was written broadly precisely to allow EPA to consider a broad nature of pollutants and to consider industry and pollutant-specific factors for regulation. And the Jorling amicus for one of the drafters of 111(a)(1) sort of explains this in detail. I mean, part of the reason for that is that one of them was meant to be sort of a catch-all provision in contrast to the more specific programs that are set up elsewhere in the Act.

The other is that it makes sense for Congress to delegate to an expert agency these sort of factual determinations about what is necessary for a certain industry, what is necessary for a certain pollutant to protect the public, which is the ultimate objective of the statute. I mean, that's precisely what EPA did in the Clean Power Plan.

I mean, I do want to emphasize, the concept of generation shifting here is not one that EPA came up by itself or imposed on the industry unwillingly across the

board. As my colleague will explain in a few minutes, generation shifting and schemes that leverage it, such as trading, were already a part of the industry. They were used for the industry's own economic purposes, and they were also a key feature of other regulatory programs involving power plants, such as the CSAPR, the cross-state air pollution rule, the acid rain program, and state programs like the Regional Greenhouse Gas Initiative.

And so the idea, and what those programs show, even though they're under different statutes for the most part, what they show is that when sources and regulators confronted the question of how you reduce emissions from power plants, one answer, again, as a practical boots on the ground matter, is to allow schemes that leverage generation-shifting. And they reasoned that there has been a convergence on this idea is because the industry has used it, and experience has shown that it is a way of accomplishing emissions reductions in a meaningful way at less cost to both sources and to the economy as a whole.

And it is EPA's rejection of that judgment, not just as a matter of expertise, but as an unambiguous interpretation statute that represents the (indiscernible) in this case.

JUDGE MILLETT: Can I ask, the definition of standard performance is 7602(l), requires continuous system

of emission reduction. Do you agree that that is part of what the obligation is here in setting a standard of performance, that 7602(l) continuous system? What's your reaction to those two definitions of standard of performance for purposes of existing sources?

MR. WU: Well, I think that that is meant to foreclose sort of what Congress at the time considered to be just really intermittent sources of regulation. And I think we do take the position that the types of schemes that we're considering here, that EPA considered in the Clean Power Plan, would satisfy that definition regardless.

JUDGE MILLETT: How does generation shifting do that, since it makes, it presupposes that one generator stops performing? It should --

MR. WU: It --

JUDGE MILLETT: -- fits right within the intermittent concern.

MR. WU: It doesn't presume that they stop generating. The way that these credits are generated on like an allowance market, for instance --

JUDGE MILLETT: So this is where I was getting confused between, I'm talking about generation shifting like just on the grid, back and forth between different things without the credits, all right?

MR. WU: Sure.

JUDGE MILLETT: That wouldn't comply with it, so you'd have to have a cap and trade program to go with it?

MR. WU: No. Let me answer it in this way.

JUDGE MILLETT: Sorry --

MR. WU: Because that when a source, when a source reduces, when a cleaner source, for instance, sorts of ramps up its generation on a continuous level in a way that will either generate credits on allowance market or through some other scheme, the natural effect of that increased generation is to reduce the output of dirtier sources on the grid. That's just a matter of physical reality of how the grid operates. And so it's not a situation where like a source will just shut down for six hours or a day for example, and that that happens to have effects on the rest of the grid because that, that is, again, not the way that these sources operate and practice. And the physical feature that these regulations take advantage of is this automatic ability to adjust by dirtier sources when cleaner sources increase their production.

And I think that is sort of the key feature of the Clean Power Plan that EPA is erroneously rejecting here. I mean, what generation shifting allows is for sources to take advantage of the more efficient generation of energy by other sources on the grid. And the reason that sources have preferred generation shifting and similar schemes in the

past is because it's often cheaper to take advantage of another source's more efficient generation than to be compelled to install technology at your own plant.

And because that method has been available, it was entirely appropriate for EPA, and it was authorized by the statute to consider the availability of that method of emission reduction in setting emission limits for power plants.

JUDGE MILLETT: If my colleagues don't have any further questions, we will go on to hear from Mr. Poloncarz. Did I say that correctly?

MR. POLONCARZ: Yes, Your Honor.

JUDGE WALKER: Judge Millett, can I ask Mr. Wu --

JUDGE MILLETT: Yes.

JUDGE WALKER: -- a quick question or two? Mr. Wu, do you think that the CPP is a major rule?

MR. WU: We do not think it implicates the Major Questions Doctrine here for a couple of reasons. One is that it reflects the authority that Congress expressly delegated to the agency to consider the best system. But the other is that it doesn't impose regulations on anybody other than sources that have long been subject to 111 and to many other provisions of the Clean Air Act.

And I guess the final point I'd say there is that it's also not major because the method that it adopted,

which is in dispute here, is not one that was revolutionary. What EPA did is what it's required to do under the statute, which is to look at practices that are already extant in the industry.

And what the Clean Power Plan did was essentially leverage those existing practices, and maybe, or at least the intent was to somewhat accelerate them at the time. And that sort of incorporation of existing industry practice to impose regulations only on sources that are well-within the ambit of EPA's authority does not trigger the Major Questions Doctrine.

JUDGE WALKER: Mr. Wu, when the petitioner NRDC called this a groundbreaking policy, do you disagree with that description?

MR. WU: We don't disagree. I think that description doesn't have to match up with the doctrine of the Major Questions Doctrine. And I think the reason --

JUDGE WALKER: What about when petitioner Solar Energy Association called it historic and critically needed? You don't think that's describing a major rule?

MR. WU: It is describing a major rule in the common sense. But I think those statements have to be understood in context, which is a world in which power plant regulation, and especially of greenhouse gas emissions had not been a feature of EPA for years, notwithstanding years

of evidence that it was causing serious harm to the public. And so this, and so the Clean Power Plan was a major and groundbreaking rule, and that it represented an effort by the federal agency to engage with this major problem for the first time. But that fact, the fact that it was action rather than inaction, which made it significant, does not mean that what the agency was doing was exercising a power that was beyond its delegated authority. And I think that second part is why, explains why this isn't a Major Questions Doctrine.

JUDGE WALKER: Am I right, and I might not be, that the CPP was not the first EPA regulatory initiative to attempt to address the problems of climate change?

MR. WU: It was not. There had earlier been like the tailpipe rule, for instance, to deal with climate change from automobiles, if that's what you're, if that's what you're asking about.

JUDGE WALKER: Do you think that this rule, compared to the tailpipe rule, was major in terms of its scope and impact?

MR. WU: (Indiscernible). It was major, again, in the sense that it finally imposed regulations on power plants that are one of the major contributors to climate change. But both the way that it did it and the sources that it regulated sort of fell well within what EPA had been

delegated the authority to do, which is to consider what emissions from power plants cause major problems, and to choose those systems of emission reduction that have been adequately demonstrated, which is proven here by the fact that the industry had long been engaging in generation shifting for both its own private purposes and for other regulatory purposes as well.

JUDGE WALKER: And I appreciate that, Mr. Wu. And I know that, you know, well, let me just ask, let me try it one more time. And I'm not predicting you will agree, but I just want to see how, I would appreciate it if you can help me walk through how challenging I think it is to find that a program of this kind does not meet the test for a major rule.

When it was announced, when the CPP was announced in the White House's East Room, President Obama called it the single most important step America has ever taken in the fight against global climate change. And he said it was the equivalent of taking 166 million cars off the road. I understand that EPA had engaged in climate change regulation before some of those regulations involved cars on the road. Certainly, we didn't wake up the day after those earlier regulations and find that there were 166 million fewer cars on the road.

So, if you would, and then I'll let this go, with

regard to you and your time, but how can something not be a major rule when it's the single most important step America has ever taken in the fight against what I think you and the other parties on your side of this case, and I think even the parties opposing you, most of them at least, would call in terms of climate change one of the most pressing and consequential issues of our time.

MR. WU: I think the answer is that something can be a significant and very important rule without, as I said, transgressing on the, or triggering the special scrutiny that comes from major rules in the constitutional sense. And (indiscernible) from the way in which (indiscernible) non-regulatory status quo, which is a situation where the Supreme Court held in Massachusetts, the Clean Air Act had long given the agency the authority and the obligation to regulate carbon dioxide and greenhouse gas emissions.

There were, in fact, no such regulations of power plants until really the Clean Power Plan came into existence. And that change from the status quo is what was being heralded by the President and by (indiscernible) to the Clean Power Plan such as the petitioners here.

Now, that is not synonymous with saying that what EPA did was as a legal or constitutional matter a major exercise of its power. I think to the contrary, and if you look at the arguments that were made by both EPA and other

parties in the Clean Power Plan litigation, the argument there was that EPA was exercising well-established powers there. What made it significant was that it was doing so for the first time to regulate a major problem. So, that's, I think, the way that I would reconcile the significance and the conceded significance of the Clean Power Plan, and with our argument that it fits well within the wheelhouse of what EPA has been delegated the authority to do.

JUDGE WALKER: Thanks, Mr. Wu. I appreciate that.

MR. WU: Thank you.

JUDGE MILLETT: Okay. Any other questions from my colleagues? No? Okay. Then I apologize for the false-start, Mr. Poloncarz, but we'll hear from you now.

ORAL ARGUMENT OF KEVIN POLONCARZ, ESQ.

ON BEHALF OF THE POWER COMPANY PETITIONERS

MR. POLONCARZ: Thank you, Your Honor. May it please the Court, Kevin Poloncarz for power company petitioners. Because Mr. Wu will be doing rebuttal for our side, I am not reserving any time for rebuttal.

EPA should have known it took a wrong interpretive turn when it contorted reading of Section 111 led it to conclude that the statute categorically excludes the actual means by which the power sector has been reducing emissions of CO2. And I want to explain, Judge Pillard, you had your question about why it matters. Generation shifting is the

inescapable physical and operational reality of all power plants. It's how grid operators balance supply and demand at least cost to consumers, taking into account other constraints like transmission and pollution controls.

Power plants are unique in their interconnection to one another, and that interconnectedness is what makes generation shifting a particularly appropriate system of emission reduction for them. It also means that regardless how a standard is set, whether it was set based upon gas or coal firing, whether it was set upon partial carbon capture and sequestration, it's inevitably going to cause generation to shift to lower emitting units. And clean power plants simply acknowledge this reality.

Generation shifting is also not a radical new approach to emissions control. Prior rules for this sector under this very section and other sections of the Clean Air Act were based upon generation shifting. Reading Section 111 for bid generation shifting requires EPA to do three things. First, it infers an indirect object for application of the best system where none was specified by Congress. That imposes much more weight on the preposition for than it can bear, and then it substitutes two wholly different prepositions, at and to, for the one that's actually provided by Congress.

Third, it tries to shoehorn the definition of

standard of performance into 111(d)(1), and to make it fit, it has to cut out 28 critical words. This is not a plain textual at Chevron Step 1.

I want to talk about some of the other rules that were premised upon generation shifting.

JUDGE MILLETT: But just to back up there, you don't dispute that standard of performance as defined in 7411(a)(1) is the same standard of performance that's referenced in, and that states are determining in (d)(1), right?

MR. POLONCARZ: That's correct.

JUDGE MILLETT: Okay.

MR. POLONCARZ: Here, performance, as it's defined in (d)(1), as it's defined in (a)(1), is where EPA makes the determination the best system, and in (d)(1), the state that imposes those standards of performance on the --

JUDGE MILLETT: Right. But state standard of performance has to, in the words of (a)(1), reflect --

JUDGE WALKER: Reflect.

JUDGE MILLETT: -- whatever emissions guideline gets spit out at the end of EPA's application of the BSER.

MR. POLONCARZ: The level of emission reduction achievable through application of the best system of emission reduction. So it can be a standard of any various sort. And it's important, I think, Judge Millett, to

acknowledge that the details of the Clean Power Plan aren't really germane to this argument. What's really germane is that EPA decided that the statute categorically and unambiguously excludes anything other than what can be done in the four corners of a power plant. And we disagree with that and think that that's just not supported by the statute.

I'd like to talk about some of the other rules that were based upon generation shifting. Judge Pillard, do you have a question? I'm sorry.

JUDGE PILLARD: No, proceed. I'd like to hear about that.

MR. POLONCARZ: In the Clean Air Mercury Rule, which was also promulgated under 111(d), EPA based the best system on the combination of a cap and trade system and the technology that was needed to achieve the cap. EPA didn't intend that all the sources would install the control technology. Instead, they based the stringency of the caps on the availability of what they called dispatch changes. That's generation shifting.

Also, because the near-term emission cap was set to take effect years before they anticipated there'd be broad availability of the control technology, EPA expressly contemplated that trading would need to occur to comply. And other rules for the power sector were also premised on

generation shifting and trading, both in setting the stringency of the emissions limits and for purposes of compliance. This includes the Cross-State Air Pollution Rule where EPA specifically rejected a direct control approach, meaning putting scrubbers on sources --

JUDGE MILLETT: That's not under 7411.

MR. POLONCARZ: No, it isn't, Your Honor --

JUDGE MILLETT: (Indiscernible), right?

MR. POLONCARZ: It's under 110 out of the Good Neighbor Provision. And the Good Neighbor Provision similarly has no express, clear statement that EPA can go beyond the boundaries of the individual source in determining what makes sense to reduce the pollution. And --

JUDGE MILLETT: I don't mean to interrupt, and I'd love to, I want to hear your whole list, but are there others that are under 7411 under the Mercury Rule?

MR. POLONCARZ: Well, the only other one under 7411 that was really premised upon trading is the Municipal Waste Combustion Rule, and that was a joint rule under Section 129 as well. So it's a little bit inapt, but under that rule, if a source wanted to elect trading or averaging among units, it had to achieve deeper reductions, a lower NAAQS limit. And so there, again, is an acknowledgement that when there is the availability of going beyond the

single source, deeper reductions can be achieved, and that's consonant with the statute.

And, you know, beyond the Cross-State Air Pollution Rule and other rules for this sector, trading is just something that's ubiquitous throughout the Clean Air Act. And this Court upheld in the Small Refiners Lead Phase-Down case a standard for lead content in gasoline, that was specifically premised on the fact that not all refiners would be able to comply, but that they would need to buy blending components or credits from other refiners.

Another example is just the averaging, banking, and trading rules for new motor vehicles, which were upheld by this Court in NRDC v. Thomas. There, it's not expressly authorized by the statute at all, but this Court says, yes, this is permissible. In sum, the flexibility afforded by a trading-based approach has allowed the agency in many contexts under many statutory provisions to set the standard beyond what's achievable by the lowest common denominator.

I want to talk a little bit about the relevance of the singular and the plural, because I think it's really misleading the way that EPA posits this in its brief. EPA said that in (d)(1), what really matters is that it talks about any existing source. I mean, first of all, the Supreme Court has made clear that any is an expansive term and could really just mean, you know, some without regard to

quantity. So saying that a state needs to prescribe standards for any existing source can really just mean you need to apply standards to every source in your state, and you can't provide free passes to some. That's all it could possibly mean.

But in addition, you know, in (d)(2), EPA says it's really relevant that in (d)(2), as opposed to (d)(1), it speaks in the plural remaining useful lives of the sources and the category of sources. So they say, well, (d)(1) speaks in the singular, (d)(2) is in the plural. But then EPA in the next move says that this distinction is of no consequence because its authority under (d)(2), that's if it's issuing a federal plan when a state's failed to do so and it has to go and issue a federal plan in its place. It says its authority to do so would also be circumscribed to measures that can be applied in a singular source. It either means something that Congress used the singular in (d)(1) and the plural in (d)(2) or it doesn't.

EPA also would have us believe that the title of 111(d) is relevant because it speaks of the remaining useful life of a singular source. In full, Your Honors, the title reads Standards of Performance for Existing Sources, plural, semicolon, Remaining Useful Life of Source. If the title matters at all, then its use of the plural for existing sources completely eviscerates EPA's argument that the clear

intent of Congress as reflected by the singular for any existing source in (d)(1). EPA can't have it both ways and say these distinctions between singular and plural matter unless they don't.

I also want to comment on the indirect object argument, why it makes no sense from our perspective. EPA says that the primary object in the first sentence of (d)(1) is each state's plan. They admit that. And they say grammatically, for any existing source is the indirect object of each state's plan in (d)(1). But they also then say it's the indirect object of application of the best system in (a)(1), concluding that for any existing source is the indirect object of two separate regulatory acts in separate statutory sections is not only not compelled by the statute, it's nonsensical.

And then, to make it fit, they have to cut off 28 words from the definition of standard of performance. It makes no sense if they try to put the whole definition in. So they cut it off and put an ellipsis in the place where it talks about the Administrator's act of determining what the best system is. If the whole definition were inserted, it would imply that the Administrator determines the best system for any existing source, which everyone acknowledges is just not the way the regulation works. And so --

JUDGE PILLARD: So can you say just a little bit

more about that, Mr. Poloncarz, how the system works? And I understand your argument in gross that we shouldn't take language that's speaking to how states sort of bring the requirements down to the individual, regulated entities. But what is usually, and I realize we're talking about this in more detail later, but just to sort of help us get oriented, what is usually the form of the guidance that EPA gives as a result of having assessed and determined the best system?

MR. POLONCARZ: We'll talk about that a lot later.

JUDGE PILLARD: I know, I know. But just give us, like, because you're in the industry, or representing the industry, I'm just curious what your understanding is of that in brief.

MR. POLONCARZ: Well, in this particular instance, Your Honor, it's not all that relevant that, for this industry because we've only had two rules under 111(d), the Clean Air Mercury Rule, which established a very comprehensive cap and trade system, and EPA established those budgets, and it involved multi-state trading, et cetera. And now, and then we had the Clean Power Plan under 111(d) as well. But the best system must reflect the level of reduction that's achievable through application of the best system of emission reduction. And so that, in my mind, means the EPA needs to look out at the terrain and say for

this particular source category, for the interconnected electricity grid, electrons flow across state lines. There is no differentiating among them. We need to determine what constitutes the best system.

We know, unlike other sectors, we know that if you add a new, clean source to the grid, just because of the physics and economics of the way the grid works, another source, a dirtier source, is going to stop operating. And it's not going to be dispatched. That's different than any other source category.

If you have petroleum refiners and somebody starts producing renewable diesel or renewable, that doesn't mean that somebody else whose market is now being served by renewables can't export it. That's just not the way the grid works. We can't export large, vast quantities of power. And so there's a certainty there that those reductions will occur from the source category. And so from my perspective, what I would expect, and what I think my clients would expect when EPA determines the best system of emission reduction is that they look out and they assess what is actually achievable. And that's what we wanted EPA to do. We wanted them to look at what could be accomplished with generation shifting. And in my client's view, something more meaningful could be accomplished than the do-nothing rule that was promulgated in replacement of the

Clean Power Plan.

JUDGE PILLARD: But just very briefly, you said the word budgets. So it's some quantum of --

MR. POLONCARZ: It's a quantum. Yes, Your Honor.

JUDGE PILLARD: State by state or federally?

MR. POLONCARZ: I would imagine that given the cooperative federalism framework, it likely would need to be state-by-state.

JUDGE PILLARD: Right.

MR. POLONCARZ: Those details aren't --

JUDGE PILLARD: Yes.

MR. POLONCARZ: -- really germane. I mean --

JUDGE PILLARD: I know they're not relevant here. But except in, I mean, the reason I'm asking now is because I think that the EPA's argument really depends on this idea that there is some kind of equivalence between the inquiry that's made in determining BSER and the implementation by the state, that there's a kind of one-to-one correspondence there. And it just helps me to sort of, even at a very general level to understand that, to know something about the form in which the BSER is expressed other than the sort of descriptive of the physical world, but actually how that's conveyed.

MR. POLONCARZ: I mean, yes, Your Honor. EPA does take the position that it needs to be equivalent. And they

really bought into that, hook, line, and sinker. You know, four years ago, when we had this argument in front of the en banc Court, we talked about the symmetry provision, that while if sources were going to comply like this anyway and wanted trading, and they wanted these more robust, flexible mechanisms, then of course that was allowable. But the other side said no, we want trading. We want flexibility. But we want the standard set by what you can only do at a particular source.

And so acknowledging that, and in my mind acknowledging the traction that that argument got in front of the en banc court, EPA went in the other direction. It did what from my clients' perspective is really nonsensical. They completely forbade trading. I know that's not the subject of this discussion, but it's intimately tied because trading is the corollary in generation shifting.

JUDGE PILLARD: But putting aside trading and generation shifting, are there any ways to meet the levels in the, established by the CPP without generation shifting and --

MR. POLONCARZ: Absolutely, Your Honor. Absolutely. And the record reflects that it could have been done. Judge Millett asked me this question four years ago. The record reflects that it could be done through co-firing with gas, it could be done through partial carbon capture

and sequestration. And EPA's record also reflected, Your Honors, that it could be done at a cost that EPA deemed reasonable in other regulatory constructs and other contexts. But they then acknowledged that, well, no one's going to go and do that because instead, what the trends are showing is they're going to add lower-emitting generation to the grid.

And the remarkable thing, of course, is that that trend only continued in spades since we last had this argument in 2016. The Clean Power Plan's 2030 goals were achieved a decade in advance, in the absence of any federal regulation, just going to show that the trends were present, and they proved to achieve the reductions that were always planned to be achieved.

JUDGE PILLARD: When you say EPA deemed those costs reasonable in other regulatory contexts, what are you thinking of?

MR. POLONCARZ: I --

JUDGE MILLETT: I couldn't hear the question. Something happened.

JUDGE PILLARD: Oh, I'm sorry. I said when --

JUDGE MILLETT: My apologies.

JUDGE PILLARD: You said that EPA had deemed the costs of co-firing and carbon capture to be reasonable in other regulatory contexts, but also recognized that they

still exceeded the BSER it defined in the Clean Power Plan. I was just wondering what you were thinking of when you mentioned the reasonableness of --

MR. POLONCARZ: Your Honor, I believe, I believe what EPA meant when it said that is that they were in the range of what was deemed acceptable and not prohibitive under other Section 111 rules. But then, considering the criteria of cost in what is the best system, EPA decided that there is this much cheaper available compliance mechanism and basis for the best system, and that is generation shifting. And that's why it based the best system upon the availability of generation shifting and trading.

JUDGE MILLETT: Can I ask, related to that, and in particular I'm thinking of the co-firing, it doesn't say here, but it had been in the prior case. In the prior case, there was information in the record that 77 percent of coal-fired generation is co-owned with natural gas. And, yes, and so is, one, just in response to the argument about the expense or infeasibility of, and maybe, I'm sorry if I'm jumping ahead to another issue, but of a co-firing, if you can't answer for someone else, then I will just ask someone else. But I was trying to understand, is that still a case. Has it increased, decreased? Do you know? Or is that not in this record this time?

MR. POLONCARZ: I don't know, Your Honor. It may be in the record, and Donahue can probably best --

JUDGE MILLETT: Okay. I will save it for him.

JUDGE WALKER: Mr. Poloncarz, can I follow up on something you said? You said that trading is a corollary to generation shifting. And I wondered if you could expand on that, and especially to someone like me who is very new to the science of all this.

MR. POLONCARZ: So the way that generation shifting can work, and EPA's record reflects that generation shifting is being employed by all forms of utilities, from investor-owned utilities to publicly owned utilities to municipal and world co-ops. What that means is that you have a co-op, and they have a coal-fired power plant, but then they are also adding solar and wind elsewhere. And that solar and wind is preferentially dispatched by the grid because it has no variable operating costs. It doesn't cost when the sun shines, and it doesn't cost when the wind blows, whereas coal has a cost.

And so that is how generation shifting works in the context of one particular entity, a municipal or a utility or cooperative employing it itself. However, if you really wanted to avail yourself of market efficiencies, and my clients love market efficiencies, they're going to say let's go broader because why just look at what we can do in

our own territory here. The electricity grid, you know, we're all interconnected. Why don't we look at what can be achieved more broadly by, you know, trading with one another. And this is just so common in the electricity sector.

And, you know, it's something that even the folks on the other side, the utilities on the other side have clamored for for years to say let's find the most optimal market efficiency results to achieve the reductions. And usually that is through trading. But it could be done, Your Honor, at the more micro level of a particular world co-op or utility saying, hey, we're just going to reduce the dispatch of our coal-fired generation plant by adding more wind or solar in the same territory.

JUDGE WALKER: So, that's helpful. And, you know, the law on all of this is complex enough that I want to make sure that at the very least I get the facts and the science right, especially the facts and the science that is not in dispute. So, with apologies if this question is too elementary, but can you walk me through the process from, let's say a miner mines a piece of coal all the way through I turn on my light switch. And not just how things are happening, but who is owning each part of that process.

And let's say Duke Energy owns the, let's say Duke Energy buys the coal, and they generate it, and they

transmit it. But beyond that, can you walk me through that process?

MR. POLONCARZ: Well, electricity generation and transmission 101 would probably take longer than we have, but. It's a very complex process, Your Honor, and it varies by state based upon whether you have what we consider a vertically integrated utility, one that is subject to rate regulation by a public utility's commission and rate bases all of their assets and uses those assets as the basis of their generation mix, or whether you have one that participates in RTOs or ISOs, regional transmission organizations and independent system operators, which are established on a regional basis and usually involve those resources, all bidding their resources into a regional market. And that's what's predominant throughout a lot of the country now.

I'm not quite certain with Duke. I don't know what they do in the Southeast there, but in most --

JUDGE WALKER: It doesn't have to be Duke. Can you just take one of the ICO examples, but -- ISO examples rather, but.

MR. POLONCARZ: Yes. Yes, let's talk about --

JUDGE WALKER: The coal gets mined. It gets bought by a coal-generating plant. The coal-generating plant converts that coal into electricity, and then what

happens?

MR. POLONCARZ: Well, so what happens, Your Honor, is in a day-ahead market, let's imagine you're in the PJM Market, and that stands for Pennsylvania, Jersey, and Maryland, so, but we just call it PJM. That kind of serves where you guys are. In the PJM market, there would be a day-ahead market. And so what would happen is that if somebody was going, had a coal-fired generating facility there and they wanted to generate, they would bid into that market, and they would bid a bid based upon what their variable operating costs are, as well as whatever they needed to recover their capital expenses.

And the way that that, the market operator would then accept the bids in declining order from the lowest-cost bid. And that would usually include, you know, something that has no costs, like a solar facility or a wind facility, until it gets to what's needed to meet all supply. And then, everybody gets that clearing price, that, we consider that, you know, that's the clearing price that everybody gets in the market. And then, if the coal-fired generator bid at a price that was lower than that clearing price, it, the next day, would get a dispatch order from the grid operator saying you need to run your power plant from this time to that time. And it would combust the coal, and the coal would produce steam. The steam would produce, run a

turbine. The turbine would drive a generator. The generator would put power onto the grid. The grid would go from the transmission system to the distribution system. That's the poles and wires that bring power to your house. Transmission are the big towers. And then you would turn the light, and there it would be.

JUDGE WALKER: The market operator in that story -- thank you so much. The market operator in that story, who is that market operator?

MR. POLONCARZ: It is --

JUDGE WALKER: Give an example.

MR. POLONCARZ: In that instance, it's the PJM market operators, the RTO, the regional transmission organization, the independent system operator. He --

JUDGE WALKER: And who owns the, who owns the RTO?

MR. POLONCARZ: So what they do, what they are charged with doing is they are the balancing authority. They are the ones who are charged by NERC with keeping the lights on. They are the ones who have to observe protocols and principles to assure that reserves never fall below certain levels and that power is available, and we don't have blackouts. And so they are the ones who are in charge --

JUDGE WALKER: So the RTO is a government entity of some sort?

MR. POLONCARZ: Yes, some quasi-public entity sometimes. In California, for instance, our independent system operator, which now has a footprint that's broader than the state, is a quasi-non-profit entity created by the state. So they're an interesting breed that's not really a governmental entity, that's a subunit a state. They're governed by NERC principles.

JUDGE MILLETT: They're heavily regulated.

JUDGE WALKER: Okay.

MR. POLONCARZ: Yes.

JUDGE MILLETT: And so does that mean, just, can I inject one question, Judge Walker?

JUDGE WALKER: Yes.

JUDGE MILLETT: In that process?

JUDGE WALKER: Please.

JUDGE MILLETT: Does that mean the coal company that's going to burn that lump of coal that Judge Walker referenced isn't even going to order that piece of coal. It orders it a day before, a week before, just depending on whatever projections it's getting from, say, PJM?

MR. POLONCARZ: That's correct, Your Honor. They probably won't order it if they believe that the price of power on the wholesale markets is going to be below what would sustain their burning of coal, and that's why there have been so many bankruptcies of coal companies, and that's

why the coal petitioners in this case are objecting to the Clean Power Plan.

JUDGE MILLETT: Okay.

JUDGE WALKER: When one of these companies, whether it's a coal company or a wind energy company, bids to the, into the RTO, you said that the cost of renewable is free, is at no cost, but I mean, obviously there is a huge investment in building the infrastructure to generate solar power or wind-paneled. Those owners do not factor those capital investments into the costs that they bid?

MR. POLONCARZ: There are two. What they would factor in is their variable operating costs, that would be a lump of coal versus a ray of sun. But they also project what they need to recover their capital costs as well. And so usually, those capital costs, in many jurisdictions for, notwithstanding the fact that it takes a lot of money and a lot of capital to build utility-scale solar farms and wind farms. Usually those are lower than the overall variable operating costs of fossil generation, and so those usually get dispatched first.

JUDGE WALKER: Okay. I'm going to shift to the, to a law question or two, unless Judge Pillard or Judge Millett have follow-ups on the science stuff. Do you think that in order for the EPA to have promulgated the Clean Power Plan, that, well, I guess I would ask it this way. Do

you think that 7411(b) is sufficiently ambiguous that the EPA can promulgate the Clean Power Plan, could have, or do you think that it unambiguously authorizes the EPA to promulgate the Clean Power Plan?

MR. POLONCARZ: I don't think it unambiguously authorizes it at all, Your Honor. What we think is that it would be a reasonable construction of an ambiguous statute to interpret what is achievable through the best system is something other than what can be achieved within the four corners of an individual plan. But it's certainly in no way mandated by the statute.

JUDGE MILLETT: Just so I understand the exchange, I apologize. Judge Walker, could you explain what you mean by unambiguously authorized so that it's, is that what you mean, like Chevron I mandated --

JUDGE WALKER: Yes.

JUDGE MILLETT: -- or that it's just, it's clearly within the range of authorization? I was confused by --

JUDGE WALKER: No, I think I asked a confusing question or a question in as confusing a way as I could, unintentionally. I guess my question is, do you think that 7411(d) unambiguously authorizes power shifting, generation shifting?

MR. POLONCARZ: No, Your Honor, not at all. I mean, our view is that the rule must be remanded because

consonant with the Prill doctrine in the D.C. Circuit, EPA based its determination upon its erroneous conclusion that the statute unambiguously forbade generation shifting. Our view is EPA needs to go back to the drawing board, and if that is wrong, as we believe it is, go back to the drawing board and figure out, freed of that erroneous constraint, of tying its hands and saying we're just the dutiful statutory servant. We can do what we want --

JUDGE PILLARD: All right, now I'm confused because I thought it was your position that by broadly delegating through sort of the failure to specify the indirect object or through the calling on EPA to come up with the best system of emission reduction, that that plainly empowers EPA to do this if it believes for all of the reasons the statute requires it to consider, that this is the best system. It doesn't require EPA to say, oh, generation shifting, CPP, but it certainly unambiguously allows the agency to do that. Or are you saying otherwise?

Are you saying, well, we're just not answering that question. Maybe it doesn't, but because of where we're at in terms of the posture of this case, we have to send it back, Prill. Those are two different positions with actually I think some moment. And maybe I'm not being clear, but.

MR. POLONCARZ: No, Your Honor. And I apologize

if I wasn't clear. EPA never really determined, they never grappled with the facts in the record as to what would be the best system --

JUDGE PILLARD: Right, right.

MR. POLONCARZ: -- based upon the statutory --

JUDGE PILLARD: The prior question is, and I don't know if you have a position on this, but the prior question is, is the delegation unambiguously present in the case in the statute for EPA to decide what it thinks the scope of a plan should be, of a --

MR. POLONCARZ: Yes, Your Honor. I mean, that I agree with completely. AEP leaves no dispute, there's no room for dispute that EPA has the authority to regulate power plants' CO2 emissions, and to decide how to regulate those emissions. And, you know, AEP says this is EPA's, that's up to EPA. And I'm sorry if I was confusing in my response. We believe EPA has that authority to do that.

JUDGE WALKER: There are some things I think your brief says, and your fellow petitioners who come to the same conclusions say. There are some things under 7411(d) that the EPA just cannot do, even if it's trying to achieve the goal of reducing carbon emissions. That's correct, right?

MR. POLONCARZ: Yes, Your Honor.

JUDGE WALKER: Okay. And I think now, in answer to your question, in your answer to Judge Pillard's

question, you're saying that 7411 unambiguously allows the EPA to reduce carbon emissions through generation shifting. Is that your --

MR. POLONCARZ: No I'm not saying that, Your Honor. I feel like I'm playing --

JUDGE WALKER: You're not saying that?

MR. POLONCARZ: I feel like it's a Who's on First to some extent, and I'm sorry if I'm being confusing. What I answered Judge Pillard's question is, there's a clear statutory delegation of authority in 111(d) for EPA to determine what is the best system, and AEP affirms that. It says it's up to EPA to decide whether and how to regulate CO2 emissions from power plants. Couldn't be any clearer. End of case as far as whether EPA has that authority. I believe that was what Judge Pillard was asking.

Your question as to whether EPA unambiguously must employ, if I'm understanding it correctly, must decide that generation shifting is the best system. I don't agree with that. I don't think that that's what I intended to say, and I'm sorry if I was confusing in my response.

JUDGE WALKER: No. I think I do understand now, and that was not exactly what I was, the yes or no question I was asking. But I think you have answered the yes or no question that I was inartfully trying to ask. So I'm good if my colleagues are.

JUDGE MILLETT: Any further questions? All right. Thank you, Mr. Poloncarz. And now we will hear from, we'll give the EPA a chance here, from Mr. Brightbill.

ORAL ARGUMENT OF JONATHAN D. BRIGHTBILL, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. BRIGHTBILL: Yes, good morning, Your Honor. Jonathan Brightbill from the Justice Department. Before I get started on the statutory arguments, I want to explain the Clean Power Plan and respond to the suggestion from Mr. Wu that this was a normal application of Clean Air Act Section 111 and not revolutionary, and why this really was the Clean Power Plan, and not the Clean Power Standards.

If you go to the Clean Power Plan final preamble, 80 Fed. Reg. 64816, it lays out EPA's eight-step process for calculating the state caps in the Clean Power Plan. And more detail was given throughout the preamble, specifically in 80 Fed. Reg. 64808 to 809 on the various geographic and regional considerations that went into what they did. And this was, to be sure, I think Mr. Poloncarz called trading a complex process. This was also a complex process.

But as a practical matter, the Clean Power Plan really simplifies and boils down to this, The Clean Power Plan pulled out a map of America. It put colored pins in the map where coal plants are, where gas plants are, where renewable plants are in the year around 2014. Then they

made, effectively, another map with new pins for where they were projecting and wanted to see America's coal plants, gas plants, and then where they thought there could be renewable plants now, eight years into the future.

Then, after creating their map, their plan, the CPP then backed into and calculated state emission caps based on that plan for the future for eight years into the future, and then told states and industry of America they need to go out and figure out how to do something that no --

JUDGE MILLETT: Is that in the record (indiscernible)? Is that in the record --

MR. BRIGHTBILL: It is, Your Honor, in --

JUDGE MILLETT: That they do have maps and put down pins, and then sort of --

MR. BRIGHTBILL: No, no, no. I'm simplifying what the map and the pins --

JUDGE PILLARD: You mean this as kind of a metaphor or a parable --

JUDGE MILLETT: I'm just trying to make clear --

JUDGE PILLARD: (Indiscernible.)

JUDGE MILLETT: Yes.

MR. BRIGHTBILL: Yes. No, no, no. I'm using a metaphor there. But yes, in the cites that I just referred you to, you can go and read through the eight-step process. And in particular, then, you can see the geographic

considerations that went into it. They looked at, and this is on 64808, column 2. When they did their modeling, they looked at resource constraints, such as the resource quality, land use exclusions, terrain variability, distance to existing transmission, population density, system constraints, such as interregional transmission limits. It went on to say that they considered the projective regional location of the evaluated renewable energy deployment in this analysis, which shows that the majority of such deployment is occurring in the east, and then apportioned this renewable energy across the regions, and for each of the BSER regions, Your Honor. So you're --

JUDGE PILLARD: So you're pointing, Mr. Brightbill to where they're doing assessments of feasibility and cost. And they do a very detailed and rigorous examination of feasibility and cost. But just backing up where you started, I just, I'm a little bit puzzled by the position of the Government here given that there's sort of two models of regulation. One is kind of a flexible and market-harnessing model where the agency is supposed to be maximally hands-off and just say, look, this is where we need to go as a country with emissions. We need to protect the country, our resources, our people. You states, and then ultimately you industry, are the wise ones to figure out how we get there.

Now EPA, there's no question, I don't think, that

EPA could do what we sometimes disparagingly refer to as command and control regulation, right? EPA could come in and say to every coal plant, time for carbon capture. You guys have had implicit subsidy from the public and from future generations for too long. We want you to capture all the carbon that you're emitting. There's nothing in 111(d) that would prevent that, is there?

MR. BRIGHTBILL: Absolutely. There is a lot in 111(d) that would prevent that, Your Honor. And I'll walk through the statutory elements --

JUDGE PILLARD: But, I mean, we have in argument. I guess we haven't in argument, but just for purposes of my question, assume that one could require co-firing and one could require carbon capture or one could require, I mean, I know you have arguments against some of these things. But if we're talking about regulation of emissions, that nobody has a right to emit, then why isn't it the pro-industry, pro-government minimal approach to do it this way, a more flexible, you guys figure out how you want to get there?

MR. BRIGHTBILL: It may very well be that from a policy perspective, Your Honor. But ultimately, we are looking at Congress's statute, and what Congress's Clean Air Act Section 111 is. And really, Clean Air Act 111, there are parallels between the Clean Air Act and Clean Water Act, Your Honor, right? Which certain sections relate to overall

area planning, and then do allow for trade-offs between various areas, and emissions trading, and averaging and those types of things and also, in aggregate consideration of water quality contributions in the Clean Water Act section.

This is the technology and technique provision of the Clean Air Act. And that, and so while there might be policy reasons for why you might want to have an area planning regime to backstop this, at the end of the day, this provision is a command and control technology and technique provision, and has always been that for its 50 years of the Clean Air Act, Your Honor.

And the reason why I'm making the point is --

JUDGE MILLETT: What do you mean by -- sorry. I'm confused by what you mean by that. So that textually they can't do something like the Mercury rule, which involved trading rather than just technology enforcing?

MR. BRIGHTBILL: That's right, Your Honor. And in fact, EPA has acknowledged that you couldn't do in 111 now a trading because there is no language. With respect to the --

JUDGE MILLETT: All right, well, but certainly there was a time when EPA thought it could do the Mercury Rule trading under this very provision, so I don't know how you can quite go with the, that's the way it's been for 50

years.

MR. BRIGHTBILL: Well, except it was very different in that rule, Your Honor, because in that rule, there actually was a technology and technique requirement for scrubbers in the first instance. There was a premium --

JUDGE MILLETT: Well, but the Clean Power Plan had heat reducing elements just like you do, and it had trading options. So, that doesn't strike me as, you know, so if you're agreeing that they can do a combination of technology and more, what Judge Pillard described as market-based approaches, then that's no different.

MR. BRIGHTBILL: Well, they're not --

JUDGE MILLETT: And EPA certainly thought that was lawful. And then the Mercury Rule was never struck down on that ground. EPA never argued that that's not something that 7411(d) allows us to do.

MR. BRIGHTBILL: Well, it was vacated on other grounds, Your Honor, but.

JUDGE MILLETT: Yes.

MR. BRIGHTBILL: But this Court has actually issued a decision since then that is actually very relevant. And it relates, actually, to the municipal incinerator rule, the 111, 129 rule that was referenced earlier. And that's a case actually that was cited by the petitioners, United States Sugar case, Your Honor, which, candidly, we did not

respond to in our brief but reinforces our arguments. But I didn't note previously that this, that the D.C. Circuit in the United States Sugar case in 2016 actually in that case precluded averaging across units in the scope of a single trading facility for essentially the same structural reasons that we made in connection, and that EPA has now made in connection with the Clean Power Plan, Your Honor, and its repeal in the sense --

JUDGE MILLETT: But I'm just responding to your for 50 years everyone's known that. Right? EPA didn't know that for 50 years.

MR. BRIGHTBILL: That rule was set aside, was vacated --

JUDGE MILLETT: For 50 years, that hasn't been EPA's position. Is that fair?

MR. BRIGHTBILL: It is fair, Your Honor, that --

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: -- in the camera rule, EPA did attempt to incorporate a trading element in. That rule was the --

JUDGE MILLETT: And if you thought American Sugar was direct authority for your interpretation here, I would have expected to see that in your briefs. I guess you have an argument arising out of it that now you've noticed, and I get that.

MR. BRIGHTBILL: Yes.

JUDGE MILLETT: But no one thinks that it has yet been foreclosed by this Court.

MR. BRIGHTBILL: No, Your Honor, I would have liked to have had it in my brief, too, Your Honor. I apologize very sincerely.

JUDGE MILLETT: No, no. I'm not talking about that. I'm just sort of talking about this sense, this 50 years everybody's known. I mean this is, you know, this is, we never issued a decision in Clean Power Plan. And, you know, the Mercury Rule came up and down on different grounds. So this is just an open question, and it's not always, it hasn't always been for 50 years in EPA that it's been solely limited to technological measures.

MR. BRIGHTBILL: I acknowledge, Your Honor, that they attempted to incorporate into the compliance mechanisms and the matters in the camera case this. And they have now, reexamining this statute, committed themselves, and also in consideration of the United States Sugar case, which is also cited, it was actually cited by EPA --

JUDGE MILLETT: Yes.

MR. BRIGHTBILL: -- in response to comments when they were addressing these trading issues.

JUDGE MILLETT: Yes.

MR. BRIGHTBILL: So it was cited by EPA itself.

It was cited by petitioners in their brief, Your Honor. So, but, and then with respect to the other provisions --

JUDGE PILLARD: So, I mean, I think this gets to a point that, as I understood it Mr. Wu made about the context and the industry and emissions-specific nature of different rules. And I think in American Sugar, if we're dealing with hazardous waste and boilers, there are reasons to be more attentive to the local nature of an emission. And so a trading program, for example, is sort of, is indifferent as to where the emissions come out. And if you're dealing with, with (indiscernible) it would make sense that, I mean, I don't think you've foregone much is what I'm saying, in not having relied more heavily on American Sugar because the facts there are quite different, and it does make sense that you might not be sufficiently attentive to community exposures of something that isn't carbon dioxide, and that therefore might be foisted onto a community through trading that, in a way that wasn't adequately controlled.

MR. BRIGHTBILL: Well, Your Honor, the policy issue did not actually play into the decision. It was a Chevron step 1 interpretation of the statute --

JUDGE PILLARD: But not 111. That was Judge Millett's point, it wasn't 111.

MR. BRIGHTBILL: It was 129, Your Honor, which is kind of a bolt-on to 111, actually, and not actually 112.

It was kind of a side issue from the bigger dispute that was at issue there. The cite, by the way, is 830 F.3d 579 is the general case, and then the relevant discussion is 627 to 628, Your Honor.

But the analogy there that holds here, and holds to the EPA interpretation in its repeal of the Clean Power Plan, Your Honor, is that under the structure of the statute from a Chevron step 1 perspective, you had units, which was a separately defined term from the facility. And because the units were distinct within the context of the broader facility, Your Honor, the D.C. Circuit, your colleagues held that the statute unambiguously precluded averaging, which is needed and implicit in trading as well across the various units within a facility.

And that's one of our textual arguments here as well, Your Honor. There's the 111(d), is the operational provision in which 111(a) must be read. And that's not a novel position that was rolled out in connection with the repeal of the Clean Power Plan. That was the position of EPA in promulgating the Clean Power Plan. They said that reading the term existing source together with the instructions as to the best system of emissions reduction was an important limitation, Your Honor. And it was because of that limitation then that they, that EPA did and always has read 111(d) to be the operative provision in which

111(a) then operates that they then had to make other textual changes, always expanding the authority of EPA in order to arrive at the Clean Power Plan. The first of those was --

JUDGE MILLETT: Just to be clear, it also operates into (b). You're not -- when you say 111 operates into the (d) relationship, there's also a relationship between 111(a) and (b), correct?

MR. BRIGHTBILL: There is a relationship between 111(d) and (b), Your Honor, and it's important to note that --

JUDGE MILLETT: It's not (d) and (b). I'm talking about (a) and (b). Sorry.

MR. BRIGHTBILL: Oh, (a) and (b). Yes, Your Honor. It's important to note that when (a) is read into the context of (b) to respond, or to respond to an argument about Mr. Wu that that doesn't make sense. Actually, to the contrary, it makes perfect sense. And in fact, that's the point of why (d) has to be given a narrower reading, because in (b), Congress was providing authority for the regulation of new sources. And it talked about looking at those sources as a category, as a group, Your Honor. Whereas, then Congress uses much more precise specific language, refers to particular sources, when it moves to (b) under the (indiscernible) canon, that distinction between (b) and (d)

must be given effect, Your Honor.

Now once you have (b) and (d), and actually, Your Honor, again, to respond to this suggestion that we ellipsed 28 words of consequence, I would actually ask the Court, if you have it handy, to actually pull out the petitioners' reply brief where in Addendum A, they engage --

JUDGE MILLETT: Now, sorry, which petitioners? There's a lot of them.

MR. BRIGHTBILL: Yes. Thank you, Your Honor. It's the NGO petitioners' reply brief. So final reply brief of public health environmental petitioners.

JUDGE MILLETT: All right. Give us a second. We've got big piles here.

MR. BRIGHTBILL: Thank you very much. I think it would be helpful.

JUDGE PILLARD: Which page?

MR. BRIGHTBILL: You're going to turn to page 30 of the brief, Addendum A.

JUDGE PILLARD: Wait. Reply brief of public health and environmental petitioners?

MR. BRIGHTBILL: Yes, Your Honor.

JUDGE MILLETT: Oh, okay. Good.

JUDGE PILLARD: Oh, I see what you're saying.

JUDGE MILLETT: I was panicked because I didn't have one that said NGO, so.

MR. BRIGHTBILL: Yes.

JUDGE MILLETT: Okay. What page?

MR. BRIGHTBILL: Judge Walker, do you have it as well?

JUDGE WALKER: I'm working on it, but you can proceed.

JUDGE MILLETT: What page did you say?

MR. BRIGHTBILL: You know, the other thing we could do is, since we're working with technology, I can actually put it up on the screen. I've done that in other arguments, in other contexts. I don't know if that would be helpful or not if everyone doesn't have it available.

JUDGE MILLETT: What page did you say?

MR. BRIGHTBILL: I could actually, Judge Pillard, I could actually screen share, is one of the little nifty features here of this Zoom.

JUDGE MILLETT: If you could just tell me what page before you do that.

JUDGE PILLARD: 30, it's Addendum A.

MR. BRIGHTBILL: Yes.

JUDGE PILLARD: And I think you can talk about it.

MR. BRIGHTBILL: Okay, very good. So --

JUDGE MILLETT: Hang on, hang on. All right. I'm getting very confused. The public health, I've got their opening brief. That's why. Sorry. I apologize. Okay.

Got it.

MR. BRIGHTBILL: Okay. So, if you turn to Addendum A.

JUDGE MILLETT: Do you have it, Judge Walker? Would it help you if he puts it up on the screen?

JUDGE WALKER: I believe that if I don't have it, I'll have it within 10 seconds, so please, please don't wait on me.

JUDGE MILLETT: Talk slowly.

MR. BRIGHTBILL: Talk slowly. All right. So Addendum A engages in exactly the same exercise that, you know, that EPA has engaged in throughout the years, and which they disparage is one that you can't do, we can't make sense of. But in Addendum A, they do it. And when you read it, it's long, it's unwieldy, but it doesn't render something that is incomprehensible, like the 1983 Supreme Court case they had to go looking very hard to identify.

And what they do is akin to what we did. They leave in the 28 words. But the 28 words don't matter to either their argument or our argument, which is why we removed them, Your Honor, to tighten up the number of words in our brief. But they're all here now, so since that issue has been put on the table, you can now --

JUDGE MILLETT: But they say, one of the things they say is it ends up sounding like it's the Administrator

that's determining the standard for each. Right? The state will do it, but the state must submit to the administrator a plan in which the administrator has adequately determined for, has determined for an existing source.

MR. BRIGHTBILL: Yes. So let me explain how the, how it works because this question was asked earlier, and I don't know the answer was completely clear because there was a question about the standard. Okay? And the way that this statute works, has been interpreted by EPA for years, is, you know, you identify your category of sources, all right? And here in (d), it's for existing sources, and we're dealing with fossil fuel-powered electric utilities, Your Honor.

And then, what you then do is you go back, and you say what's the best system of emissions reduction? Essentially, what's the state-of-the-art (indiscernible) pollution for this category of sources, Your Honor. And so you then, so in the ACE Rule, which we'll come to, EPA has identified heat rate improvement as the best system, the best technologies and techniques for improving emissions reductions at this category of sources. So then, now, once you've identified the technology, then the technology is then used as the baseline for, again, this is EPA doing this. We totally acknowledge that. And that's why ultimately the ellipse does not matter.

Then what EPA does is they go out, and they create standards of some sort that reflect the degree of limitation that's achievable. So, sometimes it may be we think, as, I'll give an example, using the example of this record. In the Clean Power Plan, they ultimately backed into a number in order to achieve their planning objective. They ultimately backed into mathematically a number that would come down to 1305 pounds of CO2 per megawatt hour, Your Honor. So that was the, that was the standard in the Clean Power Plan.

In the ACE Rule, what the standard for emissions that they came up with were the heat rate improvement index table that is in the ACE Rule, Your Honor. So they come up with the standards that reflect the degree of a limitation achievable, okay? And then it's ultimately the state in 111(d) that sets the final standard, that emission standard that the actual source has to meet. So that's just the, that's the way the statute has been read by EPA continuously from the beginning until now.

JUDGE MILLETT: Well, a couple of things, but one is this indirect object theory of application, if I recall correctly has never before been articulated, included by any one of the 155 petitioners challenging the Clean Power Plan. Is that correct?

MR. BRIGHTBILL: It is correct, Your Honor, which

is one of the reasons --

JUDGE MILLETT: And the EPA, then, also did not advance this reading, this plain, apparently plain reading of this statutory language.

MR. BRIGHTBILL: Until the Clean Power Plan repeal, Your Honor --

JUDGE MILLETT: Yes, okay. All right.

MR. BRIGHTBILL: They did not advance the indirect object.

JUDGE MILLETT: Okay. So that aspect of your argument is not something you've been doing all along or that anyone else happened to notice.

MR. BRIGHTBILL: No, no. Not that aspect of the argument.

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: So let me tell you, then, what they did do in the Clean Power Plan --

JUDGE MILLETT: Which is kind of key to your Chevron step 1 argument.

MR. BRIGHTBILL: Well, here is what the Chevron step 1 argument now ultimately is here, with this in front of you, Your Honor. Which is that, what EPA did in the Clean Power Plan, and the preamble, the CPP preamble acknowledges this, is in order to make generation shifting work in the Addendum A, in what you see before you, they had

to strike out the word application and insert the word implementation. And application is narrower than implementation. Implementation doesn't require an indirect object --

JUDGE PILLARD: I don't see that. Are you still talking about page 30?

MR. BRIGHTBILL: Yes, page 30.

JUDGE WALKER: What line?

JUDGE PILLARD: I don't see application struck out anywhere.

MR. BRIGHTBILL: No, no, no. I'm telling you what the CPP interpretation is. This is the --

JUDGE MILLETT: We're not looking at this anymore.

JUDGE PILLARD: Can I look at the statute and just ask you a couple questions that I think go to your, to your theory?

MR. BRIGHTBILL: Yes. Yes, Your Honor.

JUDGE PILLARD: So, you talk in your brief about interpretative first principles, and you mention that because 111(a)(1) is entitled definitions, it can't have an independent effect. And again, I think the petitioners here have said, oh, often definition sections have independent effect and describe things like the, the scope of the authority of the agency. And you refer to this as contrary to statutory interpretation 101. What authority should I

look to for that, that proposition that 111(a)(1) by itself is, you know, unambiguously has to pick up 111(d)(1)?

MR. BRIGHTBILL: Well, I think it is a standard of legislative drafting that definitions are used as a shortcut to prevent you having to use long phraseology in the context of an operative provision. So would say that just is a basis.

JUDGE PILLARD: But, but --

MR. BRIGHTBILL: I'm not saying it always works. And --

JUDGE PILLARD: Right. No, I was asking you a slightly different question, which is your point that it doesn't have sort of legally operative effect, not, you know, actually being the place where a power is described.

MR. BRIGHTBILL: So, I'm not sure I understand your question, Your Honor, but. So, but EPA unambiguously, in the Clean Power Plan, and again, this is in the Clean Power Plan final preamble, 64762, column 2, where it acknowledges that these 111(a)(1) has to be read into context with 111(d)(1) in order to make sense of this. And that this is an important limitation of Congress. They wrote when read in context, they were referring to 111(a)(1) with (d)(1). The phrase system of emission reduction carries important limitations because the degree of emission limitation must be achievable through the application of the

best system of emissions reduction. The system of emissions reduction must be limited to a set of measures that work together to reduce emissions, Your Honor.

And then they further said at the, at Fed. Reg. 64720, column 2, that in another formulation of this same language, EPA interpreted this phrase to carry an important limitation because the emission guidelines for the existing sources must reflect the degree of emission limitation achievable through the application of the best system of emission reduction adequately demonstrated. This system must be limited to measures that can be implemented, quote, applied by the sources themselves that as a practical matter by actions taken by the owners or operators of the sources.

So EPA fully acknowledged, when you take a look at this, at what they did here, they crossed out application and inserted implementation. They crossed out existing source and inserted owner-operator so that the provision would now read and make sense, establishing standards for --

JUDGE MILLETT: Well, hang on a second. For these heat changes that your ACE rule does, my assumption is that the plant itself isn't doing it, but the owner-operators are making those changes.

MR. BRIGHTBILL: Well, they're both doing it, Your Honor. Under the --

JUDGE MILLETT: Well, the plant itself is a

physical, a physical building, the facility. It's not doing anything. It's an inanimate object. It's always, it's got to be something the owner-operators can do. Now you would say at their facility or on their machinery, I guess.

MR. BRIGHTBILL: Yes, but the distinction --

JUDGE MILLETT: But I don't understand, I guess I'm a little confused about the owner-operator thing because that's who's always doing, either applying or implementing whatever the standards are. Isn't that right?

MR. BRIGHTBILL: Yes. The distinction there, Your Honor, and this is the same distinction that was of consequence in the U.S. Sugar case or the D.C. Circuit found at Chevron step 1 that you couldn't average across units is, the distinction there, Your Honor, is that these sources under the Clean Power Plan, the actual sources don't have to do those things. Only the owner has to do it. So, the owner may choose to have no system of emissions reduction applied at certain existing sources and instead do other things other places other ways. And so what you have is you have a --

JUDGE MILLETT: In the Sugar court case, it was you had much more narrow language. And the fight wasn't about owners versus facilities, because it's always the owners-operators that are making the changes. These things don't evolve on their own. It was there you had language,

the plain language (indiscernible) was that, was by the way not 7411, 7429, which requires EPA to regulate emissions from solid waste incineration units and defines an incinerator unit as a distinct operating unit of a facility. And so it was in that sense that they said you can't sort of group facilities together in the way that they were for averaging. But you don't have that language here. You just have facility, and you have language that says you do, you set standards for, not at, for a facility.

MR. BRIGHTBILL: Your Honor, you --

JUDGE MILLETT: So that's the language I think we've got to grapple with here.

MR. BRIGHTBILL: Your Honor, you do have parallel language. First of all, again, 129, they only cite 129 in Sugar. But 129, if you go and pull the statute, is actually the 111 bolt-on that actually is derived from --

JUDGE MILLETT: I don't know. It's not the language in 7411 is all I'm saying. Or, that's right? We can agree on that?

MR. BRIGHTBILL: You are correct, Your Honor.

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: But I'm just explaining what --

JUDGE MILLETT: The plain language in the (indiscernible) plan is not the plain language we're interpreting here?

MR. BRIGHTBILL: Correct, Your Honor. But there are languages that do, there is language that does the same kind of lifting as unique in this structure, i.e. the singular, their use of the word particular, Your Honor, is, and then, but ultimately what you have there is, in the first instance --

JUDGE MILLETT: But I just want to, can we just take it one step at a time? I want to get your owner-operator. I guess I'm, again, I'm still just confused as to what that problem was because it's always going to be something that owner-operators can apply to a facility.

MR. BRIGHTBILL: Because --

JUDGE PILLARD: I don't want to interrupt because Judge Millett has a lot of questions we want her to be able to return to it. But I'm confused by why we're spending time on this, because in your own brief, EPA says it's a truism that the source does not by itself comply with a regulation. Its owner does by application of controls. And I don't think that there is anything turning on, you know, whether it's the source or whether it's the owner of the source. Well, I mean, I guess there is, but I thought you'd already conceded that the owner is the operative actor here.

MR. BRIGHTBILL: Yes, but the owner has to act in the context of the existing source. Okay? What the CPP did and where it goes beyond the scope of the statute is that

the owner-operator is able to comply by doing nothing at existing sources, Your Honor, whereas the statute requires application of the best system of emission reduction, heat rate improvement, at the source, Your Honor, to the source, Your Honor. So --

JUDGE MILLETT: Well, that at, your at and to is, again, so now we need to back up there. It has to be something, a standard of performance, which is just the emissions standard for the facility. I guess I'm not, I'm having trouble seeing how a standard of performance, an emission limit for a facility by plain language means application of a technology, a hard technology at the physical plant.

MR. BRIGHTBILL: Sure, so I'll just --

JUDGE MILLETT: That's what I'm having trouble with.

MR. BRIGHTBILL: Yes, let me just walk through it all the way, just reading the provision, Your Honor. And if you start at the (a) on page 30 which establishes, okay, establishes standards for emissions of air pollutants which reflect the degree of emission limitation achievable through the application of the. Now, here's where we get the dispute, and we have two different examples. We have the Clean Power Plan example, which inserts effectively the words generation shifting in there, and then the ACE

example, which inserts the words --

JUDGE MILLETT: Well, but the Clean Power Plan also did the heat, some of the same heat, heat efficiency, right? That was block 1, right?

MR. BRIGHTBILL: It was block 1, Your Honor, but that was, but the Clean Power --

JUDGE MILLETT: Was there anything wrong with the block 1 in the Clean Power Plan?

MR. BRIGHTBILL: The way they implemented block 1 in the Clean Power Plan was also based on averaging, ultimately, Your Honor, across a regional basis. It was not based on the implementation at particular sources. And so, yes, there was. It's not the same form of heat rate improvement as the heat rate improvement that was then developed and applied for particular sources by the ACE Rule.

JUDGE MILLETT: So that was textually --

JUDGE PILLARD: I'm confused by that. If we had only had only block 1 in the Clean Power Plan (indiscernible).

MR. BRIGHTBILL: It would still have been invalid, Yes, Your Honor, because it was based on averaging, regional averaging. It was not based on --

JUDGE MILLETT: What is the if it was based? The heat technology isn't based. You mean the standard was

based?

JUDGE PILLARD: The guideline that the federal government asked the states to --

JUDGE MILLETT: The BSER?

MR. BRIGHTBILL: Right, right. Under the --

JUDGE MILLETT: Or the state standard? The BSER was based on averaging --

JUDGE PILLARD: That is really interesting. Okay. That's helpful. That's come into focus.

MR. BRIGHTBILL: Okay. So, I'm sorry. So, yes, it was based on averaging. It wasn't based on particular sources. But it was based on average -- I'm tying myself up here a little bit, Your Honor. But it was based, it was based on averaging across what the industry could do. And to create --

JUDGE PILLARD: So, okay. So one could not have, so this, I mean, maybe this gets, we should maybe let this be argued in the later part of the argument where these questions are actually about what is open to the states in terms of implementation flexibility. But that's part of your argument that the BSER in the Clean Power Plan was based on an assumption that there might be some collaboration among, required by states to get better results using only building block 1?

MR. BRIGHTBILL: So the way the building block 1

focused in, and again, if you go back through the eight-step process that's laid out, is they looked at what they thought an average heat rate improvement reduction could be across the category, and then --

JUDGE MILLETT: Is that what the best system always does, or are you actually taking the view, I had thought you weren't, that the best system has to be targeted at individual facilities? Otherwise, EPA has to make sort of a sort of cross-cutting sense of the facilities here and what they can do. It's setting a single standard, is it not?

MR. BRIGHTBILL: Yes, no, you're right, Your Honor. I'm clarifying what I said earlier on how the heat rate improvement factored in. So, the way the heat rate improvement was done in the Clean Power Plan was different than how the heat rate improvement was implemented in the context of the ACE Rule. In there, it was still technologies that could be implemented at the source, and then they used that to create a rate that was kind of an average rate for all facilities, Your Honor.

JUDGE MILLETT: So that was good to there. That was under your theory, right?

MR. BRIGHTBILL: That's okay to there, Your Honor. And then, but at that point, and that, but at the point at which they then utilized this concept of generation-shifting

as the best system for building blocks 2 and 3 --

JUDGE MILLETT: That's block 2.

MR. BRIGHTBILL: Yes.

JUDGE MILLETT: I know, but we're only asking about building block 1.

MR. BRIGHTBILL: Right, right. But from a statutory --

JUDGE MILLETT: (Indiscernible) 2 and 3. If all you had was building block 1, who cares about averaging they would do if they had a building block 2?

MR. BRIGHTBILL: Right, it's --

JUDGE MILLETT: You have to do averaging or a typical sense of establishing, or some cross-view of what's most likely in establishing a BSER.

MR. BRIGHTBILL: To create the standard for building block 1, you do, Your Honor, yes. So what I'm talking about here is building blocks 2 and 3, though --

JUDGE MILLETT: Okay, but the question to you was whether there was a problem with building block 1.

MR. BRIGHTBILL: So building block, yes, building block 1 was, was systems that could be applied to the source, Your Honor. And so building block 1, they said it couldn't stand by itself.

JUDGE MILLETT: By the owners and operators.

MR. BRIGHTBILL: Right, by -- well, by the

sources. It had to be applied at the sources. The only --

JUDGE MILLETT: At the sources and by the source, right? I'm saying who's doing it at the source, the owners or operators?

MR. BRIGHTBILL: Correct. But ultimately, source is a subset of owner, Your Honor. And the reason why they had to expand the definition of source to encompass owner was because generation shifting would no longer require that the, that you had actual reduction -- we no longer looked to what was achievable at the source.

JUDGE MILLETT: Right. They used the preposition for, which is in the statute.

MR. BRIGHTBILL: Yes, for. Yes, for any existing source, Your Honor. But the --

JUDGE MILLETT: Which is what the statute says.

MR. BRIGHTBILL: It does say that, Your Honor. It says --

JUDGE MILLETT: It doesn't say at any existing source.

MR. BRIGHTBILL: Well, it says to any -- you have to say to any particular source later on the statute. So it uses both prepositions at different points. The preposition for --

JUDGE MILLETT: It's all a good argument for why it's ambiguous.

MR. BRIGHTBILL: It isn't, Your Honor, because the one thing that it doesn't do is, the statute can't, you can't change the word from, from the narrower word application to implementation. You can't excise out the words existing source and substitute in that you can set the compliance measure to determine the best system. What the owner or operator is able to do holistically, even if particular sources cannot apply the best system of emissions reduction, and that's what the Clean Power Plan leaves to statute is because --

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: -- existing sources cannot apply generation shifting. Generation shifting --

JUDGE MILLETT: Right. Sorry. I'm sorry --

MR. BRIGHTBILL: -- is applied to the grid.

JUDGE MILLETT: Got it. Sorry. Mr. Brightbill, we are getting way, way, way over time here, and we have a lot of people lined up to argue. I think you're even coming back again, so. I think what we will do, I want to see if my colleagues have more questions for you. Otherwise, I think we will let Lindsay See jump in. I'm trying to see, Ms. See, where you are. Okay. Judge Pillard or Judge Walker, do you have more questions for Mr. Brightbill at this stage?

JUDGE WALKER: No. I'm fine.

JUDGE MILLETT: Okay. I apologize. I could learn from you guys talking all day, but we have to let everyone have a chance, so. All right, Ms. See.

MR. BRIGHTBILL: Thank you.

ORAL ARGUMENT OF LINDSAY SEE, ESQ.

ON BEHALF OF THE INTERVENORS.

MS. SEE: Good morning, Your Honors. May it please the Court. I'm Lindsay See on behalf of the state and industry in support of EPA. Section 111 is about EPA's authority to help ensure that certain regulated sources operate efficiently. It's not about how we were to decide which electricity plants get to operate or how much they can produce. Those are very different questions for an energy planner or a public utility regulator. They have implications far beyond the environment, and they are squarely within the zone of the states' traditional powers.

Congress, and reviewing courts, for that matter, have been extremely careful not to infringe that zone, even in the context of FERC, which is the federal agency that plainly does have expertise over federal energy issues. So it would be extraordinary for Congress to delegate this authority implicitly to EPA. In this --

JUDGE PILLARD: Ms. See, I have a question in that framework. And this is a hypothetical. If carbon capture were equally as expensive or inexpensive as the heat rate

improvements that the agency has included within the best system of emission reduction under the ACE Rule, you would not think there would be any bar in the statute to requiring carbon capture?

MS. SEE: Your Honor, of course. As long as it's something that's applicable at the source and it's something that meets all of the other statutory criteria that EPA has to consider when setting the BSER, no, that that would not be the same problem that we have here, where we have a standard that requires changes across the entire regional energy grid. And that --

JUDGE PILLARD: And so too with co-firing of natural gas or of biofuels, questions of cost?

MS. SEE: Yes, Your Honor. Of course, as we'll discuss much more later, there are significant record-based concerns that justify EPA's decision not to require those here, the same way that EPA didn't under CPP.

JUDGE PILLARD: And the cost that EPA is supposed to consider, is that cost to the system as a whole, that sort of average cost to American rate payers, or does the agency have to take into account that maybe a plant is in a very disadvantageous economic situation, and that it can't afford to do something that as a social, as an aggregate matter would actually be good for somebody?

MS. SEE: Well, Your Honor --

JUDGE PILLARD: What's the unit of cost, what's the lens for considering cost?

MS. SEE: Your Honor, there's a little bit of both in there. And that's because when EPA is setting the best system, it is looking at more of a national focus to see what is adequately demonstrated across the nation. And there is, there also has to be room for the state to do their important role under 111(d), which is to consider source-specific factors. So when EPA is making this best system determination, it has to be something that allows states to have those deviations. And that's something that CPP did not allow.

The agency there backed itself into an emissions limit that would not allow any sources to actually achieve it in practice. And we can see that CPP was upfront about that, and so were Mr. Wu's (indiscernible) that the only way for a source to actually achieve the stringent emission limits would be through something like carbon capture and co-firing, which even in CPP the agency recognized would not be adequately demonstrated. So we have something very different here. We have a type of rule that is trying to change the type of sources that actually operate and how much that they can produce.

JUDGE PILLARD: Well, I mean, that's one way of characterizing it. But why isn't it also a standard of

performance to contemplate that a plant might be performing at 90 percent or 80 percent capacity, or 50 percent capacity? I mean that's something that the plant is doing at its cite, right?

MS. SEE: Yes, Your Honor. And in fact, as we'll talk about more with the ACE Rule, some of the seven options that the agency gave here actually take into account the actual, on-the-ground reality that some plants don't operate at 100 percent, so the rule actually gives flexibility for plants in that situation to still make efficiency improvements. But that's different from setting a BSER that tries to make the decision of how much they should operate. So the difference between --

JUDGE PILLARD: But the ACE Rule doesn't actually make any of the decisions about any individual plants. The states do. Actually you, the way you articulated it actually seemed quite clear to me in that regard. The federal government is not looking at the, what's required of individual plants.

MS. SEE: Well, Your Honor, it is true that the states set the particular (indiscernible) performance in this case. But that's the problem of something like the BSER in the CPP. It doesn't let the states actually do that because it already pre-judged what's achievable in that case by setting an overall average emission limit that any

particular unit can't meet. And it's not even just at the unit level.

CPP was very upfront that even many states would not be able to meet it by trading within the states themselves. That's why when you look at the methodology behind CPP, again, the agency was very upfront that they knew that trading would have to come from other states. We can see that at 80 Fed. Reg. 64807 through 809 where EPA explains that it's looking specifically at the regional level because it knows that some of these changes, in fact many of them, can't be achieved at a statewide level.

And that's easy to understand as a matter of geography. When there's an aggressive push to move away from fossil fuel-fired plants to natural gas and ultimately renewable, we have a very different sort of system with states like West Virginia and North Dakota that's predominantly coal-fired based is simply not going to be able to make those changes. And that results in to decreases in the number of plants that can operate, which has significant effect to the people of our states.

Those decisions, how many plants we need and what type of plants we need in order to give fair prices and effective reliability, that's what states do. That's what it means to be a public utility regulator. And CPP was taking the --

JUDGE MILLETT: But is the real point here of this statute is that states who do that, but boundaries are imposed because when states choose power production sources that pollute, and it turns out they don't keep that pollution within their state, and so it's not as though this is something that's a self-contained entire, you know, issue for states alone. That's the whole point of the Clean Air Act is there has to be a balance. And so if it turns out that some state choices, and maybe there's a mix of choices, but some choices within a state, not all of them are having deathly consequences for the United States, people in that state and neighboring states, and maybe in the entire United States. And the Clean Air Act gets to step in and set standards for what you're allowed to put into the air. And then your choice is within that range, right, you've got to meet that target? Correct?

MS. SEE: (Indiscernible.)

JUDGE MILLETT: It's still in the state's discretion, but it has to be, it's subject to that target number. And then the state gets to choose, maybe we can get to that target using our own forms of regulating the timing of production, the conditions under which production occurs, the technology that's used. Or maybe we can't, and then we're going to have to do something a little different. It's technology forcing, which is what the Clean Air Act has

long been recognized to be.

MS. SEE: Your Honor, when the agency, when the EPA is fulfilling its purpose to reduce pollution, it's important in the preamble to the Act Congress said that goal is subject to revisions of the statute. And we're looking specifically at 111(d), which has a more limited purview for the agency. Even under 111(b), for instance, the agency is allowed to have more extreme measures for new sources. And that makes sense, because when you're starting from scratch, you can require a new facility to incorporate all of the state-of-the-art technology controls that exist.

We don't have the same situation with states, and that's why Congress was very clear to ensure -- I'm sorry, with existing sources. And that's why Congress was clear to ensure that states would have the ability to consider what actually exists, what is actually possible for an existing source, and for states to be able to look at some of the consequences and ripple effects from dramatic changes to the existing composition of energy units within our fleet.

JUDGE MILLETT: Okay --

JUDGE PILLARD: Now --

JUDGE MILLETT: I'm sorry. This is in one -- is it okay, Judge Pillard, just one technical question to make sure I understand how the statute works. Between new and existing sources, when do we ask whether something is new?

Is it every time a new regulation is promulgated? So something that is a new source under one regulation, say it was a new source under the, under the, let's say, Clean Power Plan or under some regulation in, let's just imagine a regulation in 2010, they're a new source. And then a new regulation comes along setting new standards of performance in 2012. Would those new sources then turn into existing sources?

MS. SEE: Your Honor, it depends. In 111(b), it's not only focused on new sources but also modified sources.

JUDGE MILLETT: Right. But put that aside. Right, that's a separate question. But I'm just trying to understand when you're new and when you're existing, it changes each time a new standard of performance is set? Is that right?

MS. SEE: No, Your Honor. Because if that were the case, whenever EPA issued a standard under any of these provisions, then every source, new or existing, could be retroactively pushed back into the new source bucket. That would be the distinction between new and existing doesn't have any role in the statute.

JUDGE MILLETT: But when is it new? Because new is defined in terms of, you know, the timing of when a regulation was promulgated.

MS. SEE: Of course. And that has to do with some

of the regulations that are initially promulgated under the statute. But here, of course, there's no question we're talking about what is an existing source. That's the only authority that EPA relies on --

JUDGE MILLETT: That's a new, so something -- sorry. You're talking about the initial regulations? When were they promulgated?

MS. SEE: Your Honor, I'm not sure particularly which ones we're focusing on at that point. There's certainly been different ones at different times the Act was amended. But respectfully, Your Honor, that's not relevant to decide what --

JUDGE MILLETT: Well, I'm just trying to understand how the statute works, that's all. So, I guess that may not be relevant. But I don't understand why it's relevant or not if I don't know how it works, but.

MS. SEE: No, no, no. Of course, Your Honor. And here, what we do have is, the statute is clear --

JUDGE MILLETT: Are there things within, is it your state that were new and then became existing under a new regulation?

MS. SEE: I don't believe that's the case, Your Honor. I will have to confirm that. And I am speaking again later, so I could confirm some of the --

JUDGE MILLETT: So is existing locked in at like

1990, the last time the statute was amended, or? It's defined in terms of regulations, so I'm confused.

MS. SEE: Well, no, Your Honor. I think I, I think I may understand where this is -- the question is when we have a new regulation in place, the question is, so for instance, in 2015 when CPP was applied, what existed at that point and what was going to be new at that point going forward? So I think that --

JUDGE MILLETT: The things that were new then are now existing under the ACE Rule?

MS. SEE: I'm sorry. Things that were new then, potentially there could be some sources that would have been rebuilt after the ACE rule that would now be existing. So that is the way that it could work. Once you build it at a particular snapshot in time, once you have a new source --

JUDGE MILLETT: Okay.

MS. SEE: -- (indiscernible) modification, then the new source rules would apply. But once you, once it is existing, then a new new source rule comes out at that point, it wouldn't retroactively apply to that.

JUDGE MILLETT: I'm sorry. I cut off Judge Pillard. She had a question.

JUDGE PILLARD: I was just looking at your brief, Ms. See. And I'm trying to sort of clarify in my own mind the interaction between your federalism argument that the

Clean Power Plan and the interpretation of the statute that's reflected in the Clean Power Plan was an intrusion into the state's traditional authority over regulation of utilities. And that, and how that interacts with the argument that you make that, that we should interpret the statute to prohibit the states from using, from choosing their own means to implement whatever the federal guideline is, that we should interpret the statute to prohibit generation shifting or emission trading, that seems like the opposite of federalism argument, the opposite of an argument for maximum flexibility on the part of the states.

And I guess I have two questions. One is, really the decisive question is where do you find authority for that latter position in the statute? Why would you be foreclosing, you know, arguing that the statute forecloses compliance choices?

MS. SEE: If I may, Your Honor, I'd like to be very clear about what the coalition I'm representing is and is not arguing on that compliance point. The primary argument we made in our second brief on the ACE Rule is that this issue is not ripe for judicial consideration. The question of what might be included in a hypothetical state plan and whether EPA would or would not approve it, those are contingent events that may or may not happen, and this Court should resolve that question in the context of any

challenge that might be brought to a decision to reject a state plan that included trading. So is the primary position of the coalition. And to be candid, there is --

JUDGE PILLARD: And I appreciate that. But I was really looking at the merits argument that you made that just seems extraordinary to me for a state arguing, you know, maybe we're preempted, but in any event, we can't, we can't meet the standards with this, the full suite of possibilities. I'm just not sure where that's coming from as a matter of statute or federalism.

MS. SEE: Certainly, Your Honor. And let me be clear. There are two points that we made in our brief where the whole coalition agrees. I will be candid, there is some disagreement among members of our state and industry coalition on this issue. The first is that that argument is premised on 116, which is a states' rights savings clause. And what 116 means is nothing in the Clean Air Act says that the state can't have a more, a more aggressive standard as long as it doesn't conflict with or is preempted by federal law. And in fact, the petitioners acknowledge that this happens. In the Consolidated Edison brief at page 15, they acknowledge that they engage, although they're subject to generation shifting routines because of California state-specific requirements.

So 116 is simply serving a separate purpose. It

says that nothing stops states from having separate compliance, sorry, separate standards under their own laws. The second point the coalition argued in our brief is that this Court should not hold that EPA is always required to accept every plan that has trading. And the rationale behind that is once a plan is approved by EPA, it becomes federally enforceable. And there's something odd about saying that if EPA lacked the authority to mandate generation shifting and trading in its own right, that that can indirectly become a matter of federal law if a state includes it in their plan.

JUDGE PILLARD: The point is that it would it be, I mean, I thought you were saying it should not be free, states should not be free to do that. But I'm just flagging that that's, that that's not, not entirely clear. And I asked you about cost and what the unit of assessment is. And your understanding under the statute of how EPA is supposed to look when it's designing their best system of emission reduction, they're supposed to take costs into account. And it also needs to take energy needs into account. And is it your understanding that it does that on a, on a national basis, or a grid-wide basis, or a state basis? You know, does EPA look at the state of West Virginia and assume that West Virginia is being energy self-sufficient or not?

MS. SEE: Your Honor, that's not part of EPA's mandate at all. The Supreme Court is very clear when it comes to supply for a state and costs about reliability and cost-effectiveness. That belongs to the states. That's not something for EPA to set to say how many coal-fired plants West Virginia needs to stay afloat. That's a different sort of decision, and that was --

JUDGE PILLARD: I'm just referring to, and maybe I'm misreading this. Probably I am. In 111(a)(1) where in setting the best system of emission reduction, EPA is supposed to take into account the costs of achieving reductions, not air quality, health, and environmental impact, and energy requirements. Is that just the requirements of implementing the changes, not the national energy requirements that might be impaired. For example, they shut down some facilities.

MS. SEE: Your Honor, it's certainly the cost to actually implement them. But to your question of the effects it would have on the grid, when it comes to considering the incidental effects that a regulation may have, that may be an appropriate consideration. But that doesn't mean that because EPA has to use that to limit its very clear authority to set environmental regulations that it can just jump to setting those grid reliability concerns in the first instance.

And that's what we had in CPP. This isn't a regulatory statute that has some consequences for the electricity grid. This is a statute that is specifically trying to change that grid. And that's the important difference, especially from the federalism standpoint. We can see that --

JUDGE PILLARD: You misspoke. You don't mean a statute, you mean the plan.

MS. SEE: Yes. I apologize, Your Honor. Correct. And so because we have a vast system under EPA that presumes what the result would be in terms of which plants continue to exist and how much they operate, this is different from the traditional energy regulation that had downstream effect.

JUDGE PILLARD: So you mentioned reliability, and you mentioned the potential energy requirements of the actual implanting the BSER, but it's not for EPA to consider the sufficiency of energy production nationwide at all. That's up to the states?

MS. SEE: Well, let me clarify my position. My position is when EPA has a rule and there are going to be broad consequences on reliability, that's certainly a factor that they have to take into account. That can be part of the broader understanding of what costs are. But that does not mean that EPA gets to have a rule that is predominantly

focused on those type of decisions.

That's the difference we have here. EPA has to focus on predominantly environmental regulations and then consider the consequences. What it can't do is enact an energy planning statute and then reverse engineer a standard to make it seem like this is actually in its lane as an environmental regulator. Even in the context of federal agencies like FERC that do have an impact (indiscernible), the Supreme Court is extremely careful to keep the line between what appropriate downstream consequences are and infringing the states' authority. The decision --

JUDGE PILLARD: We're on the same page. We're on the same page. Great. That's helpful. Thank you.

MS. SEE: Okay, thank you, Your Honor.

JUDGE WALKER: Can I, know we're over time with Ms. See, but I would like to take a step back, if I could, Ms. See. Assume that, and I know you may not agree, but assume that the Clean Power Plan would have come at the expense of, as it predicted, 12,000 coal miners' jobs and at the expense of 20,000 other jobs in the coal industry, and at a cost of possibly up to $80 billion over 10 years. And assume also that the world is warming, and that the warming is man-made, and that the consequences are far costlier than the costs of this plan. None of that is relevant to how we interpret this statute. What do you think this case is

about?

MS. SEE: I think this case is about what type of authority did Congress give the EPA in Section 111. Did it give it authority to make changes in the composition of the nation's energy grid? That is different authority that belongs to states. And so when EPA is regulating that way, it's intruding beyond where Congress is delegated. The costs of course are other considerations that would go into that factor, but the Court doesn't even need to get that far because there's not a clear expression that Congress intended to give EPA that authority in the first place.

JUDGE WALKER: And so what, if I understand you correctly, one of the things this case is about is both the relationship of Congress to the Executive Branch and the relationship of the federal government to the states, correct?

MS. SEE: Certainly. Certainly.

JUDGE WALKER: What state do you represent?

MS. SEE: West Virginia, specifically, but I also represent a coalition --

JUDGE WALKER: The coalition, 21 states. And then the other coalition of 23 states that's against you, what state is the lead state in that coalition?

MS. SEE: Mr. Wu from New York. And one of the reasons that we can see that states who have divided under

this, not to ascribe any motivation on the other side, if we look at the distinctions that CPP made, it falls predominantly on states in our coalition. West Virginia was required to make a 37 percent reduction in emissions across the board.

JUDGE MILLETT: I'm sorry. I apologize. Just, it falls, I'm having, I didn't quite hear you. It falls mainly on states that have, did you say coal production?

MS. SEE: Predominantly on coal production states, and you see that reflected in the composition of --

JUDGE MILLETT: I'm sorry.

MS. SEE: -- our coalition as well, yes. And so you see the contrast of the 37 percent reduction versus an 11 or 13 or 19 percent reduction from states like California and New York and Maine. That's how we see the disproportionate effects between the states. So a state like West Virginia, that because of our geography and our access to natural resources is predominantly coal-dependent, is going to be in a much different situation than a state that has the ability already within that state to shift back --

JUDGE PILLARD: You're not saying that that either bears on the statutory interpretation, right? I mean, the question is about the statutory language. And again, lots of policy arguments one way or the other. But is there any

indication anywhere in the Clean Air Act that Congress did not intend to impose more or less stringent obligations on industry where the industry might be clustered in a subset of states?

MS. SEE: There is, Your Honor, in the preamble, which says that Congress recognized that it's the primary responsibility of the states to engage on these issues. And we also see that of course in 111(d) itself, where this, where the EPA accepts a procedure, but it's the states who have to substitute standards of performance for each of their sources. And then the end of that provision is very important too because when we do that job at states, we shall consider (indiscernible) the other source-specific factors.

So we know that source-specific factors, they can turn on things such as where that source is located, what resources we have access to, how costly it would be, for instance, to put in a gas line to engage in co-firing. Those are source-specific factors that belong to the state, and --

JUDGE PILLARD: Right. So the implementation with respect to sources is, we all agree, undeniably on the states. But there is a federal rule on setting standards. And in setting those standards, I'm not aware of anything in the Act that says we can't, the federal government should

not set a standard that would end up costing sources in some states more than sources in other states. Indeed, it would seem that every, single environmental, nationwide environmental law and/or regulation would have different effects in different states. Is that not right?

MS. SEE: Your Honor, it is true there's no express limitation on that. But I think we can see in effect the statute allows for those sort of considerations because when we're looking at a standard of performance, it has to be achievable. And if we look again to the textual argument there, achievable applies in --

JUDGE WALKER: Ms. See -- no, finish your sentence. I'm sorry.

MS. SEE: Oh, no. Of course, Your Honor.

JUDGE MILLETT: I'd like to hear what you mean by achievable.

MS. SEE: Okay, certainly. So, the argument is the actual standard of performance has to be achievable. And the only way to give effect to the way that this appears in both subsection (b) and (d) is to say it's achievable by an actual, particular source. There's a lot of focus that's been made on the fact that subjection (b) talked about sources, but it also talked about --

JUDGE MILLETT: What about if it has to, maybe it has to be achievable by the state in setting it --

MS. SEE: Well, Your Honor --

JUDGE MILLETT: -- for facilities.

MS. SEE: Your Honor, even --

JUDGE MILLETT: Would that change anything, if you read it that way, as to your argument in that regard?

MS. SEE: Well, it certainly wouldn't change anything in terms of whether the CPP repeal was required because the emission standards were not achievable by most states. And so that would simply not be enough to salvage the CPP. But there's also not a textual argument that would allow that resolve. Even Mr. Wu admitted when Your Honor had this conversation with him that it must be achievable by the source. And the question is, is it source or sources more as a whole. We're not looking at the state level or the whole national grid level.

So when we're looking at something whether it's achievable by a source, there has to be an understanding that makes sense of both (b) and (d). And (b) talks about (indiscernible) standards of performance for sources. But it's very clear that (d) talks about a standard that can apply to a particular source. And so there has to be an understanding that works for both of them. And the interpretation that petitioners are advancing only makes sense for subjection (b) and not for (d).

JUDGE PILLARD: And it doesn't --

JUDGE WALKER: Ms. See, is this the -- okay.

JUDGE PILLARD: Go ahead.

JUDGE WALKER: No, Judge Pillard, please.

JUDGE PILLARD: You were trying to speak before. Go ahead.

JUDGE WALKER: Ms. See, is this the Clean Power Plan, is this the first time that anyone in the Government has contemplated a generation shifting or a cap and trade or a significant carbon reduction program?

MS. SEE: Under 111(b), Your Honor?

JUDGE WALKER: Just in general. I mean, I guess to be more specific, in 2009 and '10, did Congress consider doing this?

MS. SEE: Oh, of course. I understand, Your Honor. And yes, this is one of the --

JUDGE WALKER: And the time Congress did that, was, did West Virginia have as much power in the House of Representatives as New York and California do?

MS. SEE: Your Honor, Congress has actually looked at this a number of times in the past decade-and-a-half. And the reality is --

JUDGE WALKER: I'm just trying to walk through some thoughts on this and get your thoughts. It's obvious, West Virginia did not have as much power as California in the House of Representatives, correct?

MS. SEE: Right, certainly, as a matter of population.

JUDGE WALKER: West Virginia -- right, because of population.

JUDGE MILLETT: They have --

JUDGE WALKER: And West Virginia doesn't have as much power as California --

JUDGE MILLETT: They have as much power in the Senate, right?

JUDGE WALKER: Right, right. And so I guess that's my question, Ms. See, is just how this, this law, this program, this policy that we are stuck adjudicating today and that the EPA promulgated was debated in Congress. And it passed the House, correct?

MS. SEE: Correct, Your Honor. Yes.

JUDGE WALKER: And it did not pass, as Judge Millett pointed out, it did not pass the Senate, correct?

MS. SEE: Correct.

JUDGE WALKER: And it's in the Senate that West Virginia has just as many votes as California, correct?

MS. SEE: Yes, Your Honor.

JUDGE WALKER: And it was supported by the President, who is chosen by an Electoral College where California has a lot more votes than West Virginia, correct?

MS. SEE: Yes, Your Honor.

JUDGE WALKER: So if I'm following, in the House and in the Electoral College where West Virginia doesn't have much power, doesn't have much, it doesn't have a lot of money as a state. It doesn't have a lot of people as a state, at least not relative to California. West Virginia lost. And in the Senate, where West Virginia does have as much power as California, West Virginia won. Am I right so far?

MS. SEE: Yes, Your Honor. You are.

JUDGE WALKER: Yes. And so do you think that this is an accident of history that a policy with broad support in let's say the 23 states opposed against you but not broad support in the 21 states allied with you, made it through the House but didn't make it through the Senate? Do you think it's an accident of history, or do you think it's by design?

MS. SEE: I don't think it's an accident of history, and I think one of the reasons we know that is because there's multiple times that Congress has considered similar measures that would have given this sort of authority expressly to EPA. And Congress has never adopted that, even though this is an issue of earnest and profound debate, in the wording --

JUDGE WALKER: And one of the whole points of federalism, if I'm right, Ms. See, is that states that are

small and poor don't get trampled on, at least not all the time, by states that are highly populated and rich, correct?

MS. SEE: It is true, Your Honor, that the equal dignity of the states is critically important, and that's one of the rationales behind requiring this less-clear language before inferring that Congress meant to delegate this sort of important power to EPA.

JUDGE WALKER: And Ms. See, one of the reasons that courts traditionally have not been too aggressive in enforcing federalism principles is because courts have said in cases like Garcia that states have built-in structural protections in places like the Senate. And the people of those states are represented in the halls of Congress. Are the people of West Virginia represented in the halls of the EPA?

MS. SEE: Not directly, Your Honor, of course. And certainly that is our argument that these federalism protections are critically important. When we have a power of this nature, we do require that Congress, both branches, both houses speak clearly to this issue, and that did not happen in this case. And the fact that, this issue about the gravity of climate change has taken nobody by surprise. I don't mean to downgrade the importance of those concerns at all. But there has been repeated and continuous debate in Congress about the best way to deal with that.

And Congress has considered options like what the agency tried to take in CPP and has never authorized that (indiscernible). That's also strong indication that we shouldn't implicitly read that authority into the language in 111(b), which is specifically focused on the ability of states to set specific standards based on their fleet and the particular needs of their (indiscernible). Those decisions, when it comes to the cost of electricity and reliability for all citizens belong to us, the state regulator.

And there's no indication that Congress intended to displace that within the Clean Air Act. And there's certainly not unmistakably clear language, which is what the Supreme Court said as recently as the (indiscernible) decision this summer is necessary to make that kind of transformative change. So whether we look specifically on the federalism clear statement canon, or if we look at this as a way to determine the gravity of the issue, the broader, major questions issue, either way we get to the same result.

Congress didn't clearly delegate this type of power to the agency, and there's no room to find an implicit delegation.

JUDGE WALKER: And they're all connected in that last question, right? You're talking about if there's a federalism canon and the non-delegation canon, and a major

questions canon, but you can't create policy unless you get it through the Senate. The states are equally represented in the Senate. And you can't get around that obstacle by delegating major policy decisions to an administrative agency, right?

MS. SEE: Yes, Your Honor. One of the triggers that can show that is a major issue is because it has such important constitutional implications when it comes to the relationship between co-sovereigns in our federal system. That's part of what makes this such an incredibly important issue, in addition to the broader consequences that the CPP had.

JUDGE PILLARD: Ms. See, can you just tick off for me what, in your view, about this case makes it subject to the Supreme Court's major questions clear statement rule?

MS. SEE: Certainly, Your Honor. The important question is this Court's language in the Loving v. IRS decision is what is the nature and scope of the power at play. And here we have the nature of the power is the ability to act as an energy regulator. And that type of power belongs to the states. That type of power has incredibly broad consequences that go beyond just the environment.

In the Brown & Williamson case, for instance, one of the reasons that the Supreme Court found that the FDA

would not have authority to regulate tobacco is because they had a very focused mission and mandate that said that if they applied their statute, they would have actually had to ban it all together in one, nuanced approach. So the Court was really concerned when we have implicit delegation to an agency that doesn't have expertise over these issues. We have the same thing here. We have EPA that is of course focused on the important issues of the environment, but it doesn't have the tools in order to look at all of the consequences that come from matters of regulated energy policy. So that's another reason why this is a type of power that triggers (indiscernible).

JUDGE PILLARD: EPA needs to focus on environmental harms and emissions and not on energy policy. And as long as it's focusing on environmental harms and emissions, there's not a major question?

MS. SEE: It has to be primarily what they're doing. And again, if we can look at the EPSA case, that case is helpful --

JUDGE WALKER: But Ms. See, I think isn't your answer inconsistent with Utility Air which was, you know, they were, EPA was regulating pollution in Utility Air, and the Supreme Court still called it a major question, right?

MS. SEE: Yes, Your Honor. And there, it was a different sort of issue. It had to do with the amount of

sources there, so that the primary focus there on the nature or scope of the power, that was more of a scope of the power was where the Supreme Court was focusing. So this is a, it's certainly not inconsistent. It's another way of applying the same standard because here we're focusing specifically on the nature of the power that's at issue.

JUDGE PILLARD: That's helpful. Thank you.

JUDGE MILLETT: Are there more questions? Because we're getting way over and way behind here on time, but I certainly, these are really important questions, and there's a lot of questions, so I don't want to, I want to make sure everyone has a chance to ask everything that they need to.

JUDGE WALKER: No. Thank you for being patient with my questions. I'm good.

JUDGE MILLETT: Well, you know, we've all had, they're great questions and we all have lots of questions because this is very complicated, so. I want to make sure we give everyone a chance to talk.

All right, thank you, Ms. See. Very helpful to hear from you.

So I think now we're going to have some rebuttal from Mr. Wu. Is that correct?

MR. WU: Yes. Thank you, Your Honor. Just a quick point of --

JUDGE MILLETT: Sorry. Hang on one second. For

the clerk, would that be, let's give them three minutes, please. Okay.

ORAL REBUTTAL OF STEVEN C. WU, ESQ.

ON BEHALF OF THE STATE AND MUNICIPAL PETITIONERS

MR. WU: A quick answer to something before I launch into my main rebuttal points. The Clean Power Plan did contemplate interstate trading as a method of compliance, in part because states were already engaged in that. So that was something that was considered in that plan.

I want to start with some of the criticisms that Mr. Brightbill and Ms. See have made about the Clean Power Plan, which I think can be fairly characterized as concerns about the feasibility of some of the standards that were actually set there. And what's missing, though, is the recognition that that isn't the basis on which this EPA decided to repeal the Clean Power Plan. What it said was it was repealing it based upon a statutory interpretation that handcuffs the agency into considering only certain types of system, of emission reduction measures, not others.

And EPA actually acknowledged in the repeal rule that it would reach this interpretation about what it cannot do even if it were a workable policy to adopt generation shifting, even if it were feasible and achievable by sources and by states. So that's the interpretation that we are

challenging here. And if this Court disagrees that it's an unambiguous interpretation, the repeal rule has to be remanded on that basis alone.

The reason that that interpretation does not follow from the statute here, our principal argument is that (a)(1) can be understood by itself. And when it refers to the application of the best system of emission reduction, nothing in that statue forecloses EPA from considering methods that might involve more than once source or that take into consideration the indisputable fact that sources on the electric grid are interconnected and engage in generation shifting as a matter of course.

Now, EPA's response to that has both textual and conceptual problems. The textual problems are from its insertion of the (a)(1) definition into (d)(1), and then using the language in (d)(1) to restrict its own authority. And at the peril of trying to make a textual argument verbally here, I think the two features of that textual argument that are the most puzzling are, one, what EPA does with the language that says which the Administrator determines has been adequately demonstrated. Because if you actually do insert that into the statute, it incorrectly suggests the Administrator is determining whether the, whether for any existing source some sort of emission reduction is adequately demonstrated, and they don't do

that. They absolutely do not do that.

And the second textual problem is that nothing in the statute says that a system of emission reduction is applied to or at a source. It says for sources. And that preposition, if we're going to be engaging of this level of analysis, provides much broader and more flexible understanding of what it means for a system to apply for a source instead of to or at a source.

But the broader conceptual problem I want to get to is this misconception that an individual source's performance standards can't reflect available methods that might involve other sources. And it absolutely can. Just to put in concrete terms, if a performance standard says a source must meet a certain numerical limit for its emissions, what the Clean Power Plan did was basically acknowledge the full panoply of tools that were available to sources which involve not just tools that a source could implement on its own, but also tools that were already available and then involved things like emissions trading where a source would essentially account for emissions reductions elsewhere in the grid that would accomplish the same purpose as its own emission reductions.

And I think what this argument boils down to is whether the statute prohibits EPA from doing so when those sort of generation shifting models accomplish the same

results already used by the industry and were in fact cheaper ways of accomplishing emission reductions than technologies or processes applied at the source itself, and nothing in the statute prohibits that.

And then finally, I know I'm over my time --

JUDGE WALKER: Mr. Wu --

MR. WU: -- but I want to address very, very quickly the, sort of the major questions issue that Ms. See talked about. This is not a case that triggers that doctrine, and I can say that for a couple of reasons. This is a, the Clean Power Plan regulated power plants, which are sources that have always been subject to Section 111. So this is not a situation like UARG where EPA had an interpretation of a statute that reached small sources like schools and others that were never before covered by the agency.

It's also talking about a pollutant, carbon dioxide, which Massachusetts and AEP already recognized was covered by the Act and required for EPA to regulate. So this is not like Brown & Williamson, which dealt with tobacco, a substance that the FDA had not regulated before and was outside the scope of that statute.

And what we're debating here is a method of emission reduction that EPA adopted from existing industry trends. So it wasn't even as though EPA were adopting or

mandating some measure that was extraordinary or innovative in this industry. It was doing something that industry was already doing, and in fact had asked EPA to do if they were going to impose emission reduction goals.

And then finally --

JUDGE WALKER: Mr. Wu, if I could interrupt. Do you think that the CPP raises a question of vast economic and political significance? That's the Supreme Court's phrase, a question of vast economic and political significance.

MR. WU: Not for purposes of the major questions doctrine. I mean, obviously climate -- and let me explain it this way. Obviously climate change is a matter of important, a very important policy matter. But what the Supreme Court said in Massachusetts was the fact that it was important, it's an important policy question did not mean that it fell outside the scope of the statute there. That's the case that recognized carbon dioxide emissions had to be regulated by EPA. And again, the fact that it's beyond question that the statute unambiguously covers these sources and these pollutants is what places it already squarely within EPA's delegated authority. And the final point I was going to make --

JUDGE WALKER: Do you think that the federal government can accomplish a Clean Power Plan regulatory,

make it work, if the states opted out?

MR. WU: It could under 111 because if a state refuses to do a plan under 111(d), then EPA comes in and imposes a federal plan --

JUDGE WALKER: How would generation shifting on one of these grids that depends on ISOs and RTOs and the things that I was, I'm just learning about in the last two weeks and have learned more about this morning and hope to continue learning more about still. How would regulation of the grid and generation shifting and the ISOs, how would that all work if the EPA said to the states, well, you've chosen not to cooperate, so we're going to do it ourselves, how would that work?

MR. WU: Well, I suppose EPA would then set up a market if it had to. And, and I should say that it's not unusual for that to happen. I mean, there have been programs, like CSAPR and others where if the states won't do it, there can be set up a trading program that operates either within a state or across states to accomplish emission reduction goals.

And this gets to the --

JUDGE WALKER: What would the states lose if that happened?

MR. WU: Excuse me?

JUDGE WALKER: What would the downside of that be

to the states?

MR. WU: Oh, the downside to the states is --

JUDGE WALKER: If that happened?

MR. WU: The downside is the states would not have the flexibility that they have under 111(d) which is to make judgments for themselves about how to basically allocate something like an emissions budget across the sources within a state. The statute quite appropriately give states in the first instance the discretion and flexibility to make that determination. That's a flexibility we're trying to preserve in the --

JUDGE WALKER: So the choice the states have under the CPP is either cooperate and use the machinery of the state to implement a vast federal program that's historic and groundbreaking and critically needed and all the things that petitioners have called it. Or, don't cooperate and surrender the autonomy and control that they exercised as energy regulators for the past decades, are we up to 100 years? Is that the choice states face?

MR. WU: No, it is not. And I think it's because what EPA is doing here is not directly regulating energy or telling states what to do with energy mixes, but is trying to reduce emissions of pollutants. And where the statute appropriately recognizes these distinct roles is understanding that after EPA sets these guidelines that are

entirely involved with reductions, then a state can certainly have the discretion to come in and exercise its existing sovereign authority to make decisions about how to allocate those emissions limitations across the sources within a state.

And I should say a state that declines to do so, far from preserving its sovereignty at that point, is actually declining to exercise this historical power here. It's simply exiting from an energy market and saying, and saying, as the statute makes clear, that we don't want to care about what happens with the industries in our states. And that is a choice a state is, of course, free to make. But that option does not mean that EPA is therefore disabled from addressing emissions.

And I think this is the key objection that the petitioning states here have with the arguments from the states on the other side, which is, of course emissions from power plants have a relationship to energy production for the simple reason that energy production by these sources are the reason that we have these pollutants in the first place. But that connection is not by itself enough to mean that EPA is unable to regulate emissions because there's going to be some downstream effect on power plants.

And the EPSA case forecloses that argument. That was a case that said EPA could regulate wholesale prices in

an energy market even if it affected retail prices that were within the state's control.

JUDGE PILLARD: FERC. FERC, not EPA.

MR. WU: I'm sorry. For FERC. There's too many, too many agencies. And I think, my very final point on this is, I think this highlights sort of our --

JUDGE MILLETT: Wait. Can I ask just one question in that regard? I don't mean to interrupt your thought here. The authority of the federal government to come in and establish a standard of performance for emissions within a state, was that part of the 1970 legislation or was that added later?

MR. WU: I confess, I do not remember the answer to that question, Judge Millett. I'm sorry. But I --

JUDGE MILLETT: (Indiscernible) provision was passed by the states and the Senate and the House?

MR. WU: Well, that's absolutely correct. And it's not a process that is specific to this statute either. It's part of, as you're well aware, the cross-state air pollution rule, which specifically involves relationships between the states. It's a very familiar model. But the --

JUDGE MILLETT: But that surrender of sovereignty has been around a long time in the Clean Air Act, applied in many, many contexts and many provisions and was authorized and passed by the states.

MR. WU: That is correct. Repeatedly over the years. And I should say also repeatedly authorized by the states repeatedly over the years has been the dedication to EPA of the authority and the obligation to regulate harmful pollutants from these types of sources. That's the authority we're talking about here.

JUDGE MILLETT: In fact, it was unanimous --

JUDGE WALKER: Mr. Wu, what was the House and Senate doing in 2009 and '10 when they spent hours and days and months debating a climate change bill? If that bill had already been passed in 1970, why were they debating it and trying to pass one in 2009 and '10?

MR. WU: Well, what they were debating, and I apologize --

JUDGE WALKER: I mean, I know Congress doesn't always act sensibly, but that seems extreme.

MR. WU: What they were debating was a more aggressive program than even the Clean Power Plan here addresses. They were debating, and I apologize if I'm getting the details wrong, but what they were debating was, for instance, a nationwide cap and trade scheme that would cut across different industries and not be limited to power plants. And so the fact that Congress did not enact a far more aggressive program for dealing with climate change does not mean that EPA is foreclosed from exercising statutory

authority it already holds when, as I said, it is only to sources --

JUDGE WALKER: There's no category of sources that emit more carbon than power plants. Is that correct?

MR. WU: I forget if automobiles might actually emit more.

JUDGE PILLARD: Automobiles are --

JUDGE MILLETT: They're less.

JUDGE PILLARD: -- one. And then it's, and then it's the power sector. And not all power, obviously, but fossil fuels.

MR. WU: That's right. So, it's not, so yes. So power plants are major, but maybe not always the most major one. But again, what EPA is doing here is not simply implementing the program that Congress was debating in 2009. And so the fact that they rejected that is not --

JUDGE MILLETT: Did the Senate even debate that legislation? Did they even take it up?

MR. WU: I don't recall that. They may not have.

JUDGE MILLETT: I don't think they did.

MR. WU: They may not have. But again, I think some of these questions go to the perils of relying on congressional inaction to infer what is already extant in a statute. And so we just don't think that is relevant to the question here. But if I could end with this point is, I

think the broader, big-picture problem here is one where ostensibly in service of a statute here, EPA has adopted interpretation that requires it to turn a blind eye to a meaningful and available way of reducing emissions from a pollutant that it doesn't dispute is extremely harmful.

And that, at the end of the day, is the core statutory violation here when you get beyond these textual arguments and arguments about the indirect object. And again, nothing in the statute and Congress's dedication to EPA to deal with the harmful effects of air pollution from regulated sources suggests that it meant to shackle the agency in this way. Thank you.

JUDGE MILLETT: Are there any more questions from Judge Walker or Judge Pillard?

JUDGE PILLARD: No.

JUDGE WALKER: None from me.

JUDGE MILLETT: All right. I'm going to have a change of plans, courtroom deputy. I think we, it's been almost three hours now, so I think we're going to take, unless there's strong objection from anybody, a 10-minute break. Okay?

THE CLERK: This Honorable Court is now taking a brief recess.

(Whereupon, a brief recess was taken.)

THE CLERK: This Honorable Court is now again in

session.

JUDGE MILLETT: I think we're ready now to start with the second issue in the case, EPA's authority to promulgate its replacement rule. And as I understand it the first person to argue is going to Mr. DeLaquil. Did I say that correctly? Please correct me if I'm wrong.

MR. DELAQUIL: DeLaquil, Your Honor.

JUDGE MILLETT: DeLaquil. I apologize.

ORAL ARGUMENT OF MARK W. DELAQUIL, ESQ.

ON BEHALF OF THE COAL INDUSTRY PETITIONERS

MR. DELAQUIL: And I am the first up, and I am arguing on behalf of the coal industry petitioners. And I have two points to make here today.

JUDGE MILLETT: Okay. I'm having a little trouble hearing you. Can you increase the volume?

MR. DELAQUIL: Is this better?

JUDGE MILLETT: A little better, yes.

MR. DELAQUIL: Okay. The first point is that EPA failed to make a reasoned endangerment determination that greenhouse gas emissions from the fossil fuel-fired power sector significantly contributes to air pollution that may be reasonably anticipated to a danger of public health or welfare. And the second is an issue this Court has heard before, and it was the foremost statutory interpretation issue raised in the Supreme Court's stay of the Clean Power

Plan that the Section 112 exclusion does not allow EPA to require states to establish standards of performance for sources that are regulated under Section 112.

With regard to the first issue, EPA's fundamental error is that it failed to establish a standard or a set of criteria that provided a reasoned explanation for determining why greenhouse gas emissions in the fossil fuel power sector contributes significantly to dangerous air pollution.

It's not a simple question whether emissions from a particular sector contribute to dangerous air pollution. It requires EPA to consider issues like whether contributions should be considered on a global basis or domestic basis, whether these direct emissions from the sector are what matter or whether indirect emissions from the sector are what matter, whether EPA should be looking at historic emissions, current emissions, or projected emissions.

JUDGE PILLARD: When you refer to indirect emissions, what are you referring to?

MR. DELAQUIL: I'm referring to downstream emissions. And so an example would be emissions from the coal-fired power sector could be just the direct emissions from the tailpipe or from the smokestack, or they could consider emissions that are associated with the production

of coal or associated with the usage --

JUDGE PILLARD: Right, so this is like, that's like the biofuels sector brief saying if we just look at the pipe, at the smokestack, then we're just as bad if not worse than fossil fuels. But if you look at the whole life cycle, we're better. And we would say, well, right, should we look at the extraction, the extractive industry aspect as well as the use or not? Should we look at the building of the windmills and the solar cells or not?

MR. DELAQUIL: That's right. And that just all goes to the issue that this is a complicated problem, and just looking at one metric, such as the fossil-fuel fired power plants are the largest stationary source category of greenhouse gas emissions isn't sufficient to provide a reasoned explanation for why there is a significant contribution. And another metric that is worth consideration and that EPA ought to have considered are the contribution of the sector to the actual harmful effects of the air pollution.

As we noted in our brief, in our reply brief at page 8, eliminating all coal-fired power plant emissions in the United States over 30 years was modeled and was estimated to result in one-tenth of one degree reduction of global temperatures over 30 years. And this is a position, Your Honors, that EPA has itself recently adopted in the

context of the oil and gas methane new source performance standards.

Now, we provided a 28(j) letter on that standard on August 17th. And in there, EPA gives an example of a situation where it would need to exercise its judgment to determine whether a significant contribution to harmful air pollution occurred, and that was where U.S. methane emissions were 7 percent of global methane emissions. And in this case, using 2013 numbers, fossil fuel fired power plant emissions were less than 5 percent of global carbon dioxide equivalent emissions, and that number has declined substantially since --

JUDGE MILLETT: Are they allowed to look at the contribution to domestic greenhouse gas?

MR. DELAQUIL: I think they are. I think --

JUDGE MILLETT: And so domestically, what percentage are coal-powered power plants --

MR. DELAQUIL: Percentage of stationary source emissions, percentage of total emissions?

JUDGE MILLETT: Okay, give me both.

MR. DELAQUIL: It's around 20 percent for total emissions. I don't have the figure for stationary source emissions off the top --

JUDGE MILLETT: It would be a lot higher, though?

MR. DELAQUIL: It would be higher.

JUDGE MILLETT: A lot higher, okay. One question I have for you is, why is the 2015 determination, as part of the new source rule, where they, they didn't just say it in passing. They spent multiple columns talking about that they would also find it, they don't think they have to, but they also find a significant, they make the significant endangerment finding, and that they cause or contribute significantly to, that coal-fired power plants contribute significantly to greenhouse gases. Why isn't that sufficient? Do they have to make it again each time they do a new regulation? Is that your theory? And they can't, that can't be right (indiscernible) regulate somewhere else.

MR. DELAQUIL: No, that's not our theory.

JUDGE MILLETT: Yes.

MR. DELAQUIL: Our theory is that the 2015 new source regulation endangerment finding was necessarily raised by the existing source rule under the text of Section 111(d), and in particular we're referring to Section 111(d)(1)(ii), which uses the phrase to which a standard of performance under this section would apply if such existing source were a new source. And so we believe that that is, that statutory provision necessarily raises the new source standard, and that it's not reasoned for the reasons I described. And it may be that as EPA looked at this issue, and while EPA spent maybe a column and a half suggesting

that there would be a significant contribution from this industry, what it didn't do --

JUDGE MILLETT: Not just suggesting, saying you have to find it. It's here, and here's why. It's not just suggesting. I mean, they lay it out with a lot of detail and evidence.

MR. DELAQUIL: I think what you're referring to here is on the third column of 80 Federal Register 64530.

JUDGE MILLETT: Well, the third column there and the next two columns on the next page.

MR. DELAQUIL: It does --

JUDGE MILLETT: Okay.

MR. DELAQUIL: -- in some sense do that.

JUDGE MILLETT: That's more than a suggestion.

MR. DELAQUIL: But most --

JUDGE MILLETT: That's more than a suggestion.

MR. DELAQUIL: Well, most of this language is directed to the second part of the endangerment determination. And that is the question of whether greenhouse gases themselves may reasonably be anticipated to endanger public health or welfare. That's not an issue that we contest in this case.

JUDGE MILLETT: Yes, yes.

MR. DELAQUIL: Our argument is directed to the first aspect of that test, which is whether there is a

significant contribution from this industry.

JUDGE MILLETT: Yes.

MR. DELAQUIL: That is where there is a lack of reasoned explanation --

JUDGE MILLETT: Well, that's where we have another column, likewise, we are required to find a cause or contribute significantly finding for emissions from fossil fuel-fired EGUs. The same facts that support a rational basis determination would support such a finding. And then they go through with a lot of details about one-third of all greenhouse gas emissions, as much as the next 10 stationary sources added together. Is that, if they didn't have the we don't think we have to but we're doing it, if they said we have to and here's what we have, would this be insufficient?

MR. DELAQUIL: I do think that would be insufficient, Your Honor.

JUDGE MILLETT: On what basis?

MR. DELAQUIL: On the basis that it doesn't grasp, it doesn't tackle the important issues that you have to consider, such as what the, whether you should be looking at historic projections or current emissions. As you heard this morning --

JUDGE PILLARD: Say a little bit more, Mr. DeLaquil, so I understand your position is that you need to know what the metric is --

MR. DELAQUIL: That's right.

JUDGE PILLARD: -- for a significant contribution finding. And there are lots of different ways to sort of add things up and make the relative assessment of significance and contribution, and so then there's a question also about the timeliness of your challenge. And I gather that industry groups of which your clients are members challenged the new source rules findings, correct?

MR. DELAQUIL: That's correct.

JUDGE PILLARD: And is there anywhere in the record that identifies your relationship with those entities?

MR. DELAQUIL: There is a footnote in our reply brief, and I can represent to this Court today that the North American Coal Corporation, one of the coal industry petitioners, is a member of the National Mining Association --

JUDGE PILLARD: That's not in the declaration, but you've, I mean, is it in, it might be in the parties statements in the briefs in the earlier case maybe? So that's a question. But then there's a question whether it's adequate to have raised it then, but you also raised it in comments on the ACE Rule?

MR. DELAQUIL: That's right. It was raised in comments on the ACE Rule.

JUDGE PILLARD: And the objection was spelled out in terms of the kinds of criteria that you're talking about now, you know, we really need to know not just, hey, a lot, 6-point-whatever percent, or 4-point-whatever percent, we need to know what you're assessing, you the agency, we the industry. Is that right?

MR. DELAQUIL: That's right. And I believe that the specific comments that raised those points were on footnotes on page 8 of our reply brief.

JUDGE PILLARD: Cited there, yes, right. Right.

MR. DELAQUIL: And the issue of waiver was not raised by EPA --

JUDGE PILLARD: The issue of waiver, yes.

MR. DELAQUIL: Of waiver through failure to present in the comments was not raised by EPA in this case.

JUDGE PILLARD: Failure to preserve, right.

MR. DELAQUIL: And again -- I'm sorry, Your Honor. I didn't mean to interrupt you.

JUDGE PILLARD: Is that jurisdictional, untimely challenge?

MR. DELAQUIL: Untimely challenge is jurisdictional. The jurisdictional provision for this statute is Clean Air Act Section 307(b).

JUDGE PILLARD: Yes.

MR. DELAQUIL: And 307(b) has two jurisdictional

aspects. First, that the challenge be raised within 60 days. And this challenge was raised of the ACE Rule within 60 days. And second, that it not, that a regulation not be collaterally attacked in a civil or criminal enforcement proceeding. And this is not a civil or criminal enforcement proceeding. So given the presumption in favor of judicial review, the fact that we did raise this issue within 60 days in the petition and the statutory language of Section 111(d)(1)(ii), which refers to the new source rule, that we believe it is properly presented in this case.

JUDGE PILLARD: Thanks. That's helpful.

MR. DELAQUIL: And I'd like to turn now to my second issue, which is the Section 112 exclusion. And that is that the plain language of Section 111(d)(1) bars EPA from requiring states to establish standards of performance for sources that are regulated under Section 112. And this is a plain language argument that derives primarily from the text of Section 111(d)(1) and the phrase which is not omitted from a source category which is regulated under Section 7412 of this title.

JUDGE MILLETT: But I'm sure you know what the issue here is, and it's, whether you're talking about the plain language as codified or the plain language of the public law, and, you know, we've got a problem. The public law has two different versions --

MR. DELAQUIL: Absolutely, and so --

JUDGE MILLETT: -- of its section, and I mean, we went around this, around this issue four years ago. And so I think rather than just sort of talking about the plain language of the statute, we can just sort of talk about what do we do with what the, when you've got a conflict in the public law.

MR. DELAQUIL: Sure.

JUDGE MILLETT: And I guess for me, rather than sort of labeling things as having different status, it would just be helpful if you could explain to me what rule we're supposed to apply when you have two public law amendments, one of which, both of which would have significant operative force here, and the operative force would be very different. And one would be to maintain the status quo, look at the list of the pollution. Like all the other which clauses there, look at the pollution, whether it's listed as a pollution, a form of pollution. Or do we go with the least common denominator? Do we go with, I think as EPA did here, the, well let's just get something that covers both of them? What is the rule? What cases and what rule can you help me in analyzing this?

MR. DELAQUIL: Well, this is, that's the $10,000 question, isn't it? So let me tell you our view. First, we believe that this is an issue of law that the Court needs to

decide de novo. Chevron has its time and place, but it's based on a delegation of authority to the agency, and we don't believe that there's any delegation of authority to the agency to decide how to reconcile Sections 108(g) of the Clean Air Act Amendments of 1990, which led to the language I just read, and Section 302(a) conforming amendment that updated a cross-reference in a previous bill.

Second, we believe --

JUDGE MILLETT: Just before you go to second, do you have case authority that tells us? I mean, at the end of the day, this is part of the text of a statutory provision that EPA otherwise has interpretive authority, Chevron interpretive authority over. But you're right, this one's starting at a, it's not sure that, it's not your usual ambiguity that's delegated into a specific --

MR. DELAQUIL: I think here you have to work --

JUDGE MILLETT: So what case do we have --

MR. DELAQUIL: I don't have a perfect case on this point, and there's been a lot of ink shed on this topic, and I don't think anyone has ever come up with a perfect case on this point, so I think on that question --

JUDGE MILLETT: Do you have a less-than-perfect but helpful case?

MR. DELAQUIL: Your Honor, I don't have a specific case that I can point you to on the Chevron point. What I

can is --

JUDGE WALKER: Mr. DeLaquil, can I ask you if this is a perfect, or at least an analogy if it's not a case that makes any sense, and you can tell me if you think it doesn't. The House amendment said you can't regulate a source if the source is regulated under 112. The Senate amendment said you can't regulate pollutants that are regulated under 112. Here's my analogy. Tell me what you think.

There's a law like 111 that says you can pick any numbers from a lottery ball, you know, from 1 to 100, they're all in there. You can pick any numbers except you can't pick prime numbers. And then there's a second amendment that says except you can't pick odd numbers.

MR. DELAQUIL: That's right.

JUDGE WALKER: Now, if we read both of these in, if we read them as not conflicting, if we put them both into the statute, do you think that I could pick the number 9 --

MR. DELAQUIL: Absolutely not. That's an odd number --

JUDGE WALKER: Absolutely not. Right. Even though it's not a prime number, it's an odd number. And so then analogizing to this and the House amendment, why wouldn't we say 111(d) allows EPA to regulate, big universe there, but there is an exception. 111(d) does not allow the

EPA to regulate if the pollutant is regulated under 112, and it does not allow the EPA to regulate if the source is regulated under 112.

MR. DELAQUIL: And Your Honor, I think that is the right way to read this statute, if you believe that Section 302(a) is not a scrivener's error. And there is strong --

JUDGE MILLETT: Well, hang on. But I think it depends on, the problem is if they said, if you understood the you can pick any number but a prime to mean you may not pick prime numbers, but you may and we expect you to continue to include odd numbers. Those are still in. Only prime is out. And that the other one was, only odd is out, prime, non-odd prime numbers are still in, then you're not giving effect to both amendments. And I think that's the problem here, isn't it? It's not quite that simple.

MR. DELAQUIL: I think that that, and I believe you've raised a similar question to that the last time this was argued. And I think that that example sort of proceeds from a flawed premise. It proceeds from the idea that there is a Senate version of the bill that has a positive aspect, which is that you cannot regulate listed Section 112 pollutants under Section 111(d), and then it has a negative aspect which is that you should continue to regulate pollutants that are not listed under Section 111, or under Section 112, under Section 111(d). But we're talking --

JUDGE MILLETT: I know, but hang on. I know you've got your reasons for that, and I want to hear them. But I just want to say if, if the two amendments were understood in Judge Walker's hypothetical as operative in the sense you just described, as in no primes but definitely keep odds in, as they've always been there. And the other one was no odds, but definitely keep prime numbers in there, then you would agree that we couldn't just have the solution of ignoring them both. It's got to turn on --

MR. DELAQUIL: I agree.

JUDGE MILLETT: It's got to turn on what you're about to tell me now? Okay.

MR. DELAQUIL: That's right. And if you believe that the other section wasn't a scrivener's error, then I do think that's right, Judge Millett. But your question I think proceeds from a premise that there's a Senate version of the bill with this --

JUDGE MILLETT: I'm not proceeding from any premise. I'm just asking questions.

MR. DELAQUIL: Well, and I'm telling you how I understand that question. It sort of proceeds from the idea that there are two, that there's a positive and a negative intent to the 302(a) and to the 108(g). But there was part of the same bill --

JUDGE MILLETT: Right.

MR. DELAQUIL: -- whatever negative implications you read into things that are not directly addressed by Section 302(a), which are pollutants that are not regulated under Section 112 are addressed by the Act. They are addressed, at least in part, by Section 108(g). So you don't have two ships that are passing in the night. They are both part of the Act. And the negative, what I call the negative implication of Section 108 or subsection 302(a), that a pollutant that is not regulated under Section 112 should be regulated under Section, or at least subject to regulation under Section 111(d) is qualified by the House Bill, Section 108(g) which says that you should not regulate pollutants, regulate under Section 111(d) sources in a source category that are subject to regulation under Section 112.

And so read in that way, and this is the way to reconcile the bills that Judge Walker suggested a few moments earlier and that we've argued --

JUDGE MILLETT: And how do I know that 302 is not saying, it's the conforming amendment, which would mean I'm just adjusting this so we don't change the substantive operation of the statute the way it was before, preserving status quo, just fixing the cite to maintain the status quo because we wish that status quo to continue, which would mean you would only apply, it would only apply to listed

pollutants. And so what evidence do I have, when you've got this contradiction here, that it gave way to the 108(g) amendment, and maybe the 108(g) amendment gives way to 302.

MR. DELAQUIL: Except that what little legislative history there is in this bill suggests that it was the Senate that gave way, not the House.

JUDGE MILLETT: Well, the Senate gave way to that, but with an amendment. And then --

MR. DELAQUIL: But the amendment had to do with judicial review of House reports.

JUDGE MILLETT: How do we know that?

JUDGE PILLARD: They didn't receive once the House amendment was in. It was a different point. But let me ask you. You make an effort, which I appreciate to sort of say why this, why your reading would make sense. And you argue in your brief that Congress basically didn't envision as of the 1990 amendments that there would be any non-criteria pollutants that would be, that would remain unregulated. They would just regulate everything under the HAP standard under 112. And if that's the premise of your argument, I wonder how you explain, so Congress also amended Section 112(c)(1) to say that to the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories under 111. It just seems like if they're getting into how the two

overlap, and Congress is seeing as expansion of Section 112 as displacing any role for 111(d), then why wouldn't it have just said so?

MR. DELAQUIL: Well, I mean, I think --

JUDGE PILLARD: Try to explain how the two survive together.

MR. DELAQUIL: I certainly think that Congress in enacting the Section 108(g) with the source category exclusion certainly didn't see a large role for Section 111(d)(1) to play following the 1990 amendments. And frankly, that's consistent with --

JUDGE PILLARD: You argue it has no role, actually, no role?

MR. DELAQUIL: Well, I think that our argument might have been more qualified than that as to the 112 point. We also note that greenhouse gases are an uncomfortable fit within Section 112 of the Act, so.

JUDGE WALKER: Can you expand on that? I get, I certainly get that impression from your briefing and others that, you know, at least from your perspective it will be terrible to regulate carbon dioxide under 112. Can you kind of spell that out a bit more?

MR. DELAQUIL: I think that you have the (indiscernible) problem even worse under Section 112 than you have under the PSD program.

JUDGE PILLARD: So you're saying they should have regulated it only under 112, but they can't realistically regulate it under 112.

MR. DELAQUIL: I think our brief speaks more generally to what we believe Congress's expectation would be for many source categories and many pollutants. And to the extent that it was drafted inartfully to suggest that we believe that greenhouses gases should be regulated under Section 112, and that is not our position.

JUDGE WALKER: Could you --

JUDGE PILLARD: So your interpretation --

JUDGE WALKER: I'm sorry. Please go ahead.

JUDGE PILLARD: If your interpretation of 111(d) is right, how would the EPA respond to a situation where an existing source category, like landfills that emits HAPs, like, it might be emitting mercury. It might be emitting a criteria pollutant like sulfur dioxide and other dangerous pollutants that don't fall into either of those categories, like landfill gases, what's EPA empowered to do with regard to the landfill gases?

MR. DELAQUIL: So you're asking what if there is a source category and a substance that threads the needle between the criteria for being listed under Section 112 and being listed under Section 108 as a NAAQS pollutant, something that is not so dangerous that EPA can reasonably

regulate it under Section 112 --

JUDGE PILLARD: But the source category has mercury coming out of it, so it is being regulated.

MR. DELAQUIL: Sure. That's right. But you would have to be referring in your hypothetical to a very specific substance of which I think CO2 is the only one I can think of that may not fit the criteria of a 112 pollutant, which tend to be more dangerous than your pollutants that are regulated under the NAAQS program --

JUDGE PILLARD: So you're saying like landfill gases in that situation, they would have to either be regulated under 112 or Congress would have to act.

MR. DELAQUIL: Well, I think that's right. Or they could be regulated as a NAAQS pollutant potentially. But there are a lot of landfills, and it may be that if EPA looked at that issue, that they would look and say, well, that is appropriate to list that pollutant under Section 107, promulgate air quality criteria, and then regulate it that way. So --

JUDGE PILLARD: So, but there's something odd about your interpretation, too, which is the sequencing. You know, and I know we talked about this last time we had argument on this case that if Congress wanted to avoid what you refer to as double-regulation, why would it have created a loophole whereby EPA could regulate a source category

under Section 111 and under Section 112, so long as it does so first under Section 111, and then under Section 112.

MR. DELAQUIL: Well, I think that infers to the Section 112(d)(7) of the Act, and we believe that that provision is a little more limited than you're suggesting. And we address this one at length I believe on page 14 and 15 of our reply brief. But Section 112(d)(7) primarily operates as a saving provision. You already had five Section 111(d) standards at the time of the Clean Air Act Amendments of 1990, and consistent with the Act's general approach to saving and anti-backsliding, Congress clearly did not want to displace those existing standards. And that's apparent, we believe, from the text of 112(d)(7) and the phrase promulgated under this section, which is a past-tense phrase, as well as from certain specific references in that section, such as the reference to Part C or D, which was something else that was carved out of the Section 112 programs as part of the 1990 amendments and would therefore not arise in the future.

And the final operative phrase in Section 112(d)(7) is other applicable requirement established pursuant to Section 7411. And in our view, the Section 112 exclusion is an applicable requirement that prevents a Section 111(d) standard. And reading that specific language to, as a carve-out begs the question about whether these are

or are not applicable requirements.

JUDGE MILLETT: Are there more questions from Judge Pillard or Judge Walker on this?

JUDGE WALKER: I'll pass.

JUDGE MILLETT: No, no, please. I want all the questions you have.

JUDGE WALKER: I am curious, if you don't regulate carbon under 712 and you don't regulate it under -- sorry, under 112, and you don't regulate it under 111, where do you think the EPA can regulate it?

MR. DELAQUIL: I think there are plenty of places to regulate carbon even under our reading. And Section 111 goes only to 111(d). The Section 112 exclusion doesn't go to 111(b) new source standards, which still potentially could be made for carbon, including from this sector, and --

JUDGE MILLETT: Well, there's not going to be any, we're told there's no new coal power plants coming.

MR. DELAQUIL: No, but there are new gas-fired power plants. And --

JUDGE MILLETT: But no new coal or oil ones, I assume.

MR. DELAQUIL: Well, I think my clients certainly might hope that someday there would be, but I think if we all knew for certain what energy sources would be used in the future, we should all be in the financial world, not the

law world. As well --

JUDGE WALKER: Well, but let me see if I just understand, let me see if I understand you correctly. You're saying that for a currently existing, unmodified power plant that emit carbon, there is a way for EPA to regulate them or there is not?

MR. DELAQUIL: There is a way for them to be regulated consistent with the tailoring (indiscernible) and what you are allowed after the UARG case for large, stationary sources if they are modified within the meaning of that program. Then there is, if there's --

JUDGE MILLETT: If they're modified, but if they're not modified, I thought --

MR. DELAQUIL: If they're not modified --

JUDGE MILLETT: -- (indiscernible) not modified, but I don't mean to step on Judge Walker's questioning.

MR. DELAQUIL: EPA could potentially de-list under Section 112. And this goes back to, I think if you go back to the time of the AEP case, there was a fork in the road. EPA could have chosen to pursue the 112 path and live with the 112 exclusion, which was noted in footnote 7 of the AEP decision, or EPA could have gone the route of Section 111(d), and for its own reasons, it went the 112 route.

JUDGE MILLETT: Do they list the pollutants with the source --

JUDGE WALKER: I guess I --

JUDGE MILLETT: Oh, I'm sorry, Judge Walker. It's your question.

MR. DELAQUIL: We de-list the --

JUDGE WALKER: No, please. Please, Judge Millett.

MR. DELAQUIL: We de-list the source. Greenhouse gases aren't listed pollutants under Section 112.

JUDGE MILLETT: Right. So then, your clients wouldn't get regulated at all as under HAP for any hazardous air pollutant they emit, any hazardous air pollutant they emit if they delisted?

MR. DELAQUIL: I think that's right. Well, the power plants wouldn't be. The coal fire, I actually represent the coal industry producers who want --

JUDGE MILLETT: Yes.

MR. DELAQUIL: -- (indiscernible) subject to regulation under this section.

JUDGE MILLETT: Okay.

MR. DELAQUIL: EPA --

JUDGE MILLETT: Sorry, Judge Walker.

MR. DELAQUIL: But getting back to Judge Walker's question --

JUDGE WALKER: Well this, no, Judge Millett's question was my question too. And then my follow-up is, a few moments ago you were talking about 7412(d) and the way

that that fits into the kind of, the sequencing. But am I now understanding your answers to me and Judge Millett to be that if EPA wanted to regulate existing power plants that emit carbon, the EPA could de-list them on let's say Monday as sources under 7412, they could regulate them on Tuesday under 7411(b), and then they could list them again on Wednesday under, as sources under 7412. I guess, number one, and I know it wouldn't really be Monday, Tuesday, Wednesday, but you get the point. Number one, is that what you're saying? And number two, if that is what you're saying, how is that sensible at all when you could just cut out some of those steps and get the same result?

MR. DELAQUIL: Two points. First, I think that hypothetical is a little bit unrealistic in that it would, I think it would be difficult to support a recent decision to de-list and then list in that manner given some symmetry between the criteria for listing and de-listing. But there are other programs that potentially could be applied to just in coal-fired power plants, potentially, if greenhouse gases fit the criteria for a NAAQS pollutant under Section 107, they potentially could be applied to existing coal-fired power plants. And so --

JUDGE MILLETT: Is that a lot of --

JUDGE WALKER: What about --

JUDGE MILLETT: Go ahead.

JUDGE WALKER: What about 115? Do you have any thoughts on whether the EPA could regulate existing power plants that emit carbon under the international regulatory regime that's allowed in Section 115?

MR. DELAQUIL: 115 raises a host of other issues, and I'm generally familiar with it and the Her Majesty case from the Sixth Circuit, which I think is the primary case interpreting that provision. I think that that probably requires the type of one-to-one symmetry in reductions that we haven't seen under the current international agreements but subject to a more careful review of that specific section, it is possible that an appropriate international agreement that had parallel reductions from signatory countries could qualify. And that would also involve the political branches in the process in a way that would be salutary.

So Judge Millett --

JUDGE WALKER: I'll stop. Judge Millett, I know you had --

JUDGE MILLETT: No, I just think you had a lot of potentiallys, potentially. In fact, you seemed to be quite clearly saying potentially at every, in every clause. And so what I would just like to know, does your client have a view, a position now on whether, without a potentially on whether you could be regulated under an Act, 115, or

something else? Or is the position that, no. It's fine to say it. The Court's going to agree or disagree. I just would like to know your client's position because you all deal with all these statutes more often than I do.

MR. DELAQUIL: I'm arguing on behalf of multiple petitioners in this case, and as a result of that, I don't think that I can give you that answer, Judge Millett, because I haven't had those specific discussions (indiscernible) and I'm not trying to be evasive.

JUDGE MILLETT: No, I understand that. Thank you. Okay, I apologize, Judge Walker. I jumped in a couple times. Do you have more questions?

JUDGE WALKER: No. I appreciated it. It was helpful to me, and I have no more questions.

JUDGE MILLETT: Judge Pillard, do you have more questions?

JUDGE PILLARD: No, thank you.

JUDGE MILLETT: Okay. Thank you very much, Mr. DeLaquil. DeLaquil? Did I get it right that time?

MR. DELAQUIL: You did. Thank you, Judge Millett.

JUDGE MILLETT: The second time. I apologize. And now we're going to hear from Mr. Hadzi-Antich. Did I say that correctly?

MR. HADZI-ANTICH: Yes, you did, Your Honor.

JUDGE MILLETT: Okay.

ORAL ARGUMENT OF THEODORE HADZI-ANTICH, ESQ.

ON BEHALF OF THE ROBINSON PETITIONERS

MR. HADZI-ANTICH: Good morning. Theodore Hadzi-Antich for petitioners Robinson, et al. I reserve two minutes for rebuttal. May it please this Court.

In 2009 and again in 2015, EPA made formal findings that carbon dioxide in the ambient air endangers human health and is emitted from numerous and diverse mobile and stationary sources. Having made those findings, EPA is not permitted to circumvent NAAQS by first regulating under the supplemental source category program of Section 111.

JUDGE MILLETT: Could you start, I apologize, but could you start, before you get to your very interesting legal arguments with the standing question that's been raised in this case?

MR. HADZI-ANTICH: Certainly.

JUDGE MILLETT: Because otherwise we're just not allowed to entertain those questions.

MR. HADZI-ANTICH: So the Sindelar declaration goes through numerous examples of TPPF standing and Competitive Enterprise Institute standing. And I'll focus on one, specific example with regard to TPPF. Long before the ACE Rule was promulgated, Texas Public Policy Foundation provided counseling, advocacy, and litigation services to its existing clients who favor the full use of fossil fuels.

The ACE Rule seeks to limit the use of fossil fuels specifically in the context of electricity generation. The rule caused existing pro-fossil fuel clients to seek greater help from the foundation to further their efforts to encourage more rather than less use of fossil fuels throughout the economy. This required the Foundation to spend more time and more resources providing services to those existing clients. So --

JUDGE MILLETT: What kind of services? Did you submit any affidavits or declarations to support your standing argument?

MR. HADZI-ANTICH: Yes. The declaration of Greg Sindelar --

JUDGE MILLETT: Okay.

MR. HADZI-ANTICH: Who is the Chief Operating Officer of Texas Public Policy Foundation. So, in terms of what kinds of existing clients, the very clients --

JUDGE MILLETT: Not clients, services. Sorry. I don't want to (indiscernible).

MR. HADZI-ANTICH: Oh, okay. Well, as I said, counseling, litigation, and advocacy services for those who favor more rather than less use of --

JUDGE MILLETT: What do you mean, excuse me, by counseling? Do you mean counseling them how to undertake litigation or advocacy efforts, or is there some sort of

distinct counseling separate from litigation advocacy?

MR. HADZI-ANTICH: Well, as the Sindelar declaration sets forth, TPPF has a major client-oriented program, Life:Powered, that basically provides clients with advice, litigation services as well as public advocacy services in terms of expanding rather than contracting the use of fossil fuels. These are existing, long-term clients.

JUDGE PILLARD: And this is sort of legal advocacy, policy advocacy, trying to make the terrain more hospitable to the use of fossil fuels over time, as a legal matter and a policy matter?

MR. HADZI-ANTICH: Well, it is that, but it also is with regard to advocating on behalf of specific clients, some of which are on our Robinson Petitioners client list now with regard to how fossil fuels may be used more with regard to their specific businesses. In comes the CPP first, followed by the ACE rule.

JUDGE PILLARD: But the difficulty, Mr. Hadzi-Antich, is under our Circuit's precedent, advocacy activities and litigation activities, as you know, are generally, you know, effects on those are generally not considered to be a basis for standing. So I think we're just really trying to get at, you know, is there some service provision like what was recognized to support standing in Havens or is there only advocacy in the sense

that our Circuit precedents would say don't give a basis for standing?

MR. HADZI-ANTICH: Well, there is service at least in connection with litigation. We --

JUDGE PILLARD: But that's not something that our Circuit recognizes. That's what I'm saying, and that's why we keep probing so that you can tell us which services do survive.

MR. HADZI-ANTICH: I do believe that the Circuit has recognized litigation. And let me just, give me one moment to turn to that. Haitian Refugee Center v. Gracey, D.C. Circuit 1987, found injury in fact for an organization providing litigation services in connection with deportation proceedings. The challenged agency action was an interdiction order that impaired its daily litigation work. So here, we have ongoing litigation for a number of clients who encourage the use of fossil fuels, not only generally as a matter of policy, but with regard to their specific business interests. Some of those clients are clients in this case, and there are others as well.

And so as the CPP came down the pike, these clients turned to us and said, hey, wait a minute. We want more rather than less fossil fuel (indiscernible), and this CPP is going to impact our business because it's, it requires less fossil fuels. So we --

JUDGE MILLETT: Can I go back again? You just cited a case. And I'm sorry, is that, which case was, can you give me the citation again?

JUDGE PILLARD: Gracey. Gracey from 1987.

JUDGE MILLETT: Grayson is that? Sorry.

MR. HADZI-ANTICH: Okay. Thank you, Your Honor. So they came to us basically, what are we going to do about the CPP and an increased federal incursion into the lesser use of fossil fuels? We were forced to counsel them on how they could deal with the CPP. We were forced to counsel them on how other aspects of their efforts to increase fossil fuel use would be impacted by this, and that increased our costs and increased the level of difficulty and effort by which the Foundation was required to service its existing clients. So it's not a situation of choosing to shift resources to deal with new issues. It's a situation of increasing resources to deal with clients existing issues exacerbated first by CPP and now by ACE.

JUDGE WALKER: If you were in the business of consulting, advising on OSHA compliance, and then Congress passed a new law that increased workplace safety rules, so then as a result, you'd have more, you now have more things you need to advise your advisees about, do you think you would have standing there to challenge Congress's Occupational Safety and Health workplace new legislation?

MR. HADZI-ANTICH: Yes, to the extent that we had existing clients for which we were providing OSHA services, and these existing clients were impacted subject to these, this new OSHA law, certainly. Our level of effort would be increased as a result of the new law for the existing clients. We're not going to tell these clients --

JUDGE WALKER: Why wouldn't --

MR. HADZI-ANTICH: -- we're not going to deal with that.

JUDGE WALKER: Why wouldn't we, at least as a legal matter, define you as an advisor for, let's say the new laws were passed in 2019. We would define you as an advisor of pre-2019 workplace safety rules. And so long as you stayed an advisor pre-2019 workplace safety rules, you wouldn't have anything extra to do after 2019. Now, if you decide to become a different advisory group, if you decide to change and become a pre- and post-2019 workplace safety rules advisory group, then yes, you've got more to do. But that's a choice you made. It's not an injury that's inflicted on you by the statute.

MR. HADZI-ANTICH: I understand your point, Your Honor. But our situation is different. Our situation is we have existing clients that don't only rely on us for compliance, if you will with existing fossil fuel energy requires. We have clients that rely on us to advise them on

how they can increase the use of fossil fuels across the board.

For example, let me give you a specific example. Liberty Packing Company is a manufacturer of tomato paste from raw tomatoes. And they use natural gas to fire their boilers. And they are seeking in California, which is a very difficult thing to do, to increase the availability of natural gas, a fossil fuel, for their facility. Without the ability to use fossil fuels, they're out of business. But they're looking for us to make sure that we advise them to take steps to increase the world, the potential of their use of fossil fuels. It wasn't, they say, here's a --

JUDGE MILLETT: What kind of steps? Litigation, lobbying?

MR. HADZI-ANTICH: Yes.

JUDGE MILLETT: Lobbying?

MR. HADZI-ANTICH: Well, we don't lobby, per se.

JUDGE MILLETT: No. Do you advise them? Do you advise them to --

MR. HADZI-ANTICH: We do advise them.

JUDGE MILLETT: Engage in advocacy and litigation?

MR. HADZI-ANTICH: Yes, we do.

JUDGE MILLETT: What else? And what else? What other kind of -- but I don't want details as to a particular client. I'm just really trying to get the categories. What

else?

MR. HADZI-ANTICH: Sure. We refer them to engineers, scientists with whom we work on a steady basis, which we've also done in the context of the CPP. And, I mean, it's a, basically we're a one-stop shop for these clients. They're basically small businesses. We're not talking about large entities, but small businesses that feel the crush of regulating fossil fuels, which they've been using for decades. And here comes the CPP --

JUDGE WALKER: Do your clients pay you?

MR. HADZI-ANTICH: We're a not-for-profit organization. We are not paid by our clients, no.

JUDGE MILLETT: Can I ask you to look at paragraph 5 of Greg Sindelar's declaration?

MR. HADZI-ANTICH: Yes. I wish I had it in front of me, but --

JUDGE MILLETT: Okay. (Indiscernible). Among other things, the foundation's mission is to promote, defend, and ensure liberty, personal responsibility, property rights, criminal justice reform, greater educational opportunities, balance environmental regulation, free speech, states' rights, energy sufficiency, free enterprise. That's a long list. I'm trying to imagine a regulation you couldn't challenge.

MR. HADZI-ANTICH: Well, as Mr. Sindelar's

declaration also says, and I think he's got an entire paragraph or maybe two or more on our Life:Powered division.

JUDGE MILLETT: I'm just asking if that's what you're, if that's what you do, and that's among other things. So that list is not comprehensive, apparently. What regulation isn't going to affect free enterprise, liberty, personal responsibility, property rights?

MR. HADZI-ANTICH: I think it's a matter of degree, Your Honor. So, we concentrate to a very large degree on energy issues. That's --

JUDGE MILLETT: So this description is not accurate?

MR. HADZI-ANTICH: Well, no, it's accurate. It's just a question of degree.

JUDGE MILLETT: Well, I don't know how much degree you have to have for standing. If it makes you do more, the fact that, the whole argument would be we'd rather concentrate on environmental laws, but you passed a regulation over here that affects, it's a, you know, net neutrality that affects someone's free speech, so now we're having to spend more time on net neutrality than we did this, so you could intervene there, you could not intervene --

MR. HADZI-ANTICH: Many of those are one-offs, but our services --

JUDGE MILLETT: Can you imagine a regulation that wouldn't fall within this paragraph, at least a business regulation?

MR. HADZI-ANTICH: No. I mean, it's broadly defined. But what I'm saying is that our services for our existing clients substantially take up a tremendous amount of our time with regard to fossil fuels and the --

JUDGE PILLARD: And you're referring to --

MR. HADZI-ANTICH: -- (indiscernible) fossil fuels.

JUDGE PILLARD: You say in the, or as Mr. Sindelar says in his declaration, you're referring to services like legal counseling referral and advocacy, testifying before Congress, submitting comments to EPA, combatting federal regulation of carbon dioxide. That's, when you talk about services that are relevant to this case, that's the kind of thing you're talking about?

MR. HADZI-ANTICH: Yes.

JUDGE PILLARD: Okay.

MR. HADZI-ANTICH: Those are included among the kinds of things that we're talking about, as well as litigation. I didn't hear whether you listed litigation, but --

JUDGE PILLARD: Yes. Okay.

MR. HADZI-ANTICH: -- certain litigation is a

major component of that.

JUDGE PILLARD: I'm done.

MR. HADZI-ANTICH: If I may, I'd just like to spend one moment with regard to Petitioner Competitive Enterprise Institute and their standing.

JUDGE MILLETT: What we're going to do, you can have one quick minute on that, and then if you want to, we'll give you like one minute on, one or two minutes on the merits, but then we're going to need to move on.

MR. HADZI-ANTICH: Okay. Thank you. This Court's decision on August 14th in a case called Competitive Enterprise Institute v. FCC reaffirmed a long line of cases by finding that the Institute was injured in fact by regulations that would affect the market actions of third parties. Here, that very petitioner has shown that the ACE Rule will increase the cost of retail electricity alleged as an injury to itself.

So I'd like to go back to the merits arguments, and frankly, I'm not sure how much of this I went through, but I'll be very quick. I'm not sure how much of this you heard. But in 2009, and again in 2015, EPA made formal findings that carbon dioxide in the ambient air endangers human health and is emitted from numerous and diverse mobile and stationary sources.

Having made those findings, EPA is not permitted

to circumvent NAAQS by first regulating under the supplemental source category program of Section 111. That was explained by the Second Circuit in Train (phonetic sp.), by the Ninth Circuit in National Audubon Society, and by district court in this Circuit in Zook (phonetic sp.), which was affirmed by this Court in a one-page summary opinion in 2014. Earlier, this Court took a similar approach in Kennecott. Those decisions are consistent with the Supreme Court's instructions in Whitman regarding the relative functions of Sections 108 and 111.

Now, EPA asserts in Section 111(d)'s prohibition against regulating NAAQS pollutants is the same as permission to regulate non-NAAQS pollutants. That's a classic example of the logical fallacy of denying the antecedent, which was rejected by this Court twice in New England Power and in Agricross (phonetic sp.) and by Justice Scalia in his concurring opinion in the Supreme Court's Canning (phonetic sp.) case in 2014.

And here, EPA falls for that same, logical trap. Consider this. A law prohibiting you from painting your one-story house white is not the same as permitting you to paint it green where the law also says that only two-story houses may be painted green. And that's what we have here, prohibiting one type of action under Section 111(d) is not the same as permitting another type of action that's

foreclosed by the antecedent provision, Section 108. Thank you.

JUDGE MILLETT: Okay. Any more questions from Judge Pillard or Judge Walker?

JUDGE PILLARD: You mentioned, Mr. Hadzi-Antich, another CEI case that you said just recently was decided. Did you file that with us under 28(j)? Was that --

MR. HADZI-ANTICH: I was not counsel for CEI in that case, no.

JUDGE MILLETT: No, but you say it supports your standing here.

MR. HADZI-ANTICH: Yes, it does.

JUDGE PILLARD: You give it to us as a supplemental authority.

MR. HADZI-ANTICH: I'm sorry, Your Honor --

JUDGE PILLARD: Did you cite it in your brief? Did you cite it in your brief?

MR. HADZI-ANTICH: No, it's a case that was just decided on August 14th of this year.

JUDGE PILLARD: Okay, right. And our procedure is that if there is an authority that you want to bring to our attention that comes out after the briefing, that you submit it to us as a supplemental authority with a letter under Rule 28(j), and that's what I was asking is whether you had done that. But was that a case that --

MR. HADZI-ANTICH: I have not, no.

JUDGE PILLARD: -- judgment decided without argument?

MR. HADZI-ANTICH: I'm sorry?

JUDGE PILLARD: That was a judgment rather than a precedential opinion? I've just not seen this case. I'm trying to get a sense from you where to find it. Do you have a citation or anything?

MR. HADZI-ANTICH: I do believe I have a citation. One moment, please.

JUDGE PILLARD: Ah, here we go. My clerks have found it.

MR. HADZI-ANTICH: Yes, it's a Lexis citation.

JUDGE PILLARD: I have it.

MR. HADZI-ANTICH: Okay.

JUDGE PILLARD: Yes, go ahead. The other Judges might want it. Go ahead.

MR. HADZI-ANTICH: Yes. 2020 U.S. App. Lexis 2587 D.C. Circuit August 14th, 2020. And I apologize for not following the rule of a supplemental authority, but it is a case that was decided by this Court.

JUDGE WALKER: If I could ask one question. Do you think that the arguments that you are making about the validity of what the EPA did are arguments that were forfeited by all of the other parties, and therefore are

considerations that we are not allowed to consider if we decide you don't have standing?

MR. HADZI-ANTICH: Okay. I apologize. I'm going to repeat the question just to make sure I understand it. So the question --

JUDGE WALKER: Maybe this is a simpler way. Sorry. I'll make it even simpler. Could you have accomplished everything you want to accomplish by just filing an amicus brief?

MR. HADZI-ANTICH: We decided in this case that the answer to that is no. We wanted actually a seat at the table, which we have today. We did file an amicus brief arguing the same issues in connection with the Clean Power Plan, but that amicus brief I think received zero attention, which led us to file this case so that we would get more than zero attention. If there are further questions on standing, I actually would be very happy to discuss those. We do think we have standing. We know that our resources and expenditures and costs increase dramatically for our existing clients, and not because of something new that came down the pike that we weren't involved in. And I think that the --

JUDGE WALKER: I'm good.

MR. HADZI-ANTICH: The cases --

JUDGE WALKER: I'm good on standing. If you have

answers for Judge Pillard or Judge Millett, I'm getting out of the way on this one.

JUDGE MILLETT: Judge Pillard, do you have any more questions?

JUDGE PILLARD: No, thanks.

JUDGE MILLETT: Okay. Then I think we're going to, it's time for the EPA, and that's Meghan Greenfield, I believe.

MS. GREENFIELD: Good afternoon.

JUDGE MILLETT: You've been patient and waiting a long time.

MS. GREENFIELD: May it please the --

JUDGE MILLETT: There's more to come.

MS. GREENFIELD: Sorry.

JUDGE MILLETT: No, go ahead.

ORAL ARGUMENT OF MEGHAN E. GREENFIELD, ESQ.

ON BEHALF OF RESPONDENTS

MS. GREENFIELD: May it please the Court, my name is Meghan Greenfield, and I'm here on behalf of EPA. I'd like to begin with petitioners' argument that EPA Section 111(b) significant contribution endangerment finding can be challenged in this case. It cannot.

Section 111 is clear that EPA is obligated to make a significant contribution endangerment finding only when issuing new rules of new sources under Section 111(b).

There is no parallel requirement under Section 111(d). Petitioners nevertheless argue that the endangerment issue is properly raised here. That's wrong for two reasons.

First, the petitioners concede in their reply that their own trade groups challenged the 2015 111(b) rule. In that case, those petitioners made the same argument that the petitioners made here, namely that a significant contribution endangerment finding that was pollutant-specific was required before regulating under Section 111(b). Petitioners can't claim that they had no opportunity to challenge that earlier rule when they actually did so. Moreover --

JUDGE MILLETT: Can I back you up? This is a confusing area of law for me. And that is, if a trade association sues, and some trade associations, like the Chamber of Commerce, have lots and lots and lots of members. Does that mean that every, single member is necessarily on notice and participating in that challenge?

MS. GREENFIELD: Not --

JUDGE MILLETT: Because that's saying that the new source rule didn't affect them because they're never going to be a new source.

MS. GREENFIELD: Right. Not necessarily. I think it's true that sometimes a trade association can represent both individual -- organizations with standing and

organizations without. But here it's clear that these coal companies did have standing. And that's clear from the petitioners' brief in the 111(b) rule itself. There, those petitioners claim that they have standing to challenge the 111(b) rule because it was the legal predicate for regulation under 111(d).

And they said if the (b) rule falls, then the (d) rule will go with it. So we have standing to challenge that because of our interest in existing sources. EPA did not contest that standing there.

JUDGE PILLARD: So the question is whether it's too late for them to challenge now? There's a challenge in the context of the new source rule, but that's been held in abeyance. So, these petitioners have challenged at the time of the new source rule and also challenged when it became clear under a very different rule, the ACE Rule, that's an entirely different, you know, that affected them in an entirely different way. They might have been unharmed by the 2015 rule, and now they're challenging because the ACE Rule uses that finding in a very different way. So, I guess the question is why, what's untimely about that challenge given those distinctive circumstances?

MS. GREENFIELD: So I have two answers because I think that there are two questions there, so the first about the abeyance. It's true that the 2015 rule challenge is in

abeyance, but the petitioners in that case supported the abeyance and then have never sought to lift it. So the fact that it's remained in abeyance I don't think is really, works one way or another.

And second, the petitioners are claiming that this rule affects them in a different way, but that's simply untrue because the (b) rule is the legal predicate for the (d) rule, and that's always been clear. And it's particularly clear here because the 2015 new source rule under 111(b) was released the very same day as the existing source rule, 111(d). That's the Clean Power Plan. And so the linkage between the two, that the (b) was the legal predicate for the (d) was obvious at that time. And so petitioners can't come in now and say there's some sort of new legal consequence that they were unaware of.

JUDGE PILLARD: I'm not sure that either the objection then or the objection now before the agency was quite as eloquent as Mr. DeLaquil has been in his briefing to us about what they're objecting to. And I don't know if you have taken a position on it.

It seems like they are saying, you know, it really matters, not just are we a big player in carbon dioxide emissions, but how are you measuring it? And I don't remember seeing those kinds of details in their objection before the agency.

And maybe this is more a question for him, but is that part of your claim that it hasn't been timely raised, that you were not put on notice of a potential inadequacy that might even affect the adequacy of the new source rule's significant contribution finding as such?

MS. GREENFIELD: We aren't claiming that they have somehow waived their objection. So the answer to that question is no. But we do think that even assuming that petitioners are right, that the significant contribution finding that EPA has to apply criteria to the specific pollutant at issue, that that happened here in 2015.

JUDGE PILLARD: How so? I mean, they're saying we don't know. Is it global? Is it domestic? Is it, do we look at the past and the future as well as the current situation? You know, are you looking at, you know, I guess there's different ways to measure volume and rate and whatever. Has EPA made those things clear?

MS. GREENFIELD: EPA hasn't made the specifics of those claims clear, but it need not do so in this context, and that's, in the 2015 rule, what EPA said about the contribution here was that the contribution of greenhouse gases from fossil fuel-fired power plants was one-third of domestic greenhouse gas emissions, that the source category emitted three times the next ten highest emitting source categories combined, and that under any reasonable threshold

or definition that this is a significant contribution.

And I note that petitioners also argue in their reply that they're not saying that EPA has to consider a certain set of criteria or another. They're not saying that the statute requires standard X. But they're saying that EPA didn't grapple with the significant, this significance question at all, and that's simply incorrect based on the record for the 2015 --

JUDGE PILLARD: And you're saying this is not the case in which to worry about that because under, as you just said, under any reasonable definition or threshold, this is clearly a significant contribution.

MS. GREENFIELD: Yes, that's correct. And --

JUDGE MILLETT: Do you mean by the flipside of that that there's no reasonable record on which, or given what's in the record, there's no reasonable basis on which EPA could have concluded otherwise as a matter of law?

MS. GREENFIELD: So the issue was not reopened in this case, and so the record on that particular issue is not here. It's in the (b) rule. And so that's why we think that the challenge --

JUDGE MILLETT: I'm talking about from the new source, from the new source rule itself, that --

JUDGE PILLARD: Assuming that that challenge carries over, or the fact that they challenged it there is

enough for them to raise it now, looking at that record as the relevant record, which I think --

MS. GREENFIELD: Exactly. That's correct.

JUDGE PILLARD: Looking at that record as the relevant record, I think the question was are you saying that --

JUDGE MILLETT: On that record, yes, under the current law.

JUDGE PILLARD: -- on that record, EPA really couldn't have held that it wasn't a significant factor?

MS. GREENFIELD: That's correct. It would be, there is no evidence on that record that --

JUDGE PILLARD: (Indiscernible.)

MS. GREENFIELD: No, it's not --

JUDGE MILLETT: Sorry. I'm sorry. I just want to make crystal clear. As a matter of law, it would have been unreasonable for the agency on that record to conclude that they are not significant. That's your point.

MS. GREENFIELD: Right. And that's what the agency said on that record under any reasonable threshold of significance, however we describe it.

JUDGE MILLETT: Well that's not quite, I'm asking the flipside for a reason. That's not quite the same as saying it's, we would, as a matter of law, would have had no discretion to conclude otherwise.

MS. GREENFIELD: It would have been irrational on that record.

JUDGE MILLETT: Okay.

MS. GREENFIELD: Yes.

JUDGE MILLETT: Thank you.

MS. GREENFIELD: So next I'd like to address the other point that petitioners are making, and that's that EPA has reopened the challenge to the 2015 finding in this proceeding. And that's not true. The reopening doctrine is exceedingly narrow, and that applies only where the agency has explicitly or implicitly reopened an issue by reexamining the choice made. And here in the ACE Rule, the agency made clear that it was not reopening this issue and that it did not reexamine the underlying facts of that endangerment finding.

And one additional point on this petitioner's claim is that petitioners argue that EPA's position is unreasonable because they could have never known, or it puts them in the untenable position of forecasting how EPA will act in the future. But on the facts here, that's just abundantly untrue because, as I said earlier, that the (b) rule and the (d) rule were released on the same day, and so the linkage between the two was obvious.

JUDGE WALKER: Can I ask you about whether the EPA can regulate sources through 111(d) that are already

regulated by 112?

MS. GREENFIELD: Absolutely. We can turn to that issue. Yes, so --

JUDGE WALKER: Judge Millett and Judge Pillard, did you have follow-ups on the previous topic?

JUDGE PILLARD: No.

JUDGE WALKER: I don't want to jump the gun.

JUDGE MILLETT: No, no. It's whatever you're interested in.

JUDGE WALKER: I guess my first question is, is the EPA saying that it's ambiguous whether the agency can regulate sources through 111(d) that are already regulated under 112, or is the EPA saying that it's unambiguous that the EPA can do that?

MS. GREENFIELD: We're saying that this aspect of Section 111(d) is ambiguous and that it requires interpretation, and that EPA's construction of the ambiguity in the codified version of 111(d) is reasonable.

JUDGE PILLARD: And that's the consistent position of the agency ever since 1990?

MS. GREENFIELD: It's been the consistent position of the agency, yes. And petitioners --

JUDGE WALKER: Can I ask you, the petitioner and the panel have talked about my prime number odd number analogy maybe beyond the point that we should. But I wonder

if you can tell me why you think the analogy is off, which I assume you do.

MS. GREENFIELD: So, and to be --

JUDGE WALKER: I can remind you of it quickly --

MS. GREENFIELD: Would you mind going through it again? Because I had a little bit of trouble. I'm sorry.

JUDGE WALKER: No, no problem.

MS. GREENFIELD: Why don't we go through it, and then I can try.

JUDGE WALKER: At the risk of subjecting everyone to it again. Imagine a bill that says you can pick any lottery number you want. There are 100 lottery numbers on the ball. But the bill has two amendments. One amendment says you can't pick an odd number. One amendment says you can't pick a prime number. I think I would read that to mean that you can't pick an odd number. And all prime numbers are odd numbers. So it's just you can't pick an odd number.

Likewise, I read the House and the Senate amendments to be you can regulate under 111(d), but there are two exceptions. You can't regulate air pollutants that are covered in 112, and you can't regulate sources that are regulated under 112. So regardless of whether or not the air pollutants are a subset of the sources or whether they are, there's some kind of a Venn diagram thing going on, at

the very least, you know, you can't regulate the sources that are already regulated under 112. So in my analogy, the sources are like the odd numbers. The pollutants are like the prime numbers.

MS. GREENFIELD: Right. So, I think that, you know, I have two answers to that. The first is, in your hypothetical, the first instruction is clear on its face, right? It's, you can't, I think you can't regulate odd numbers is the first one, and you can't regulate prime numbers is the second. So, it's clear what you can't regulate odd numbers means. And here, my point is that if we look at the statutory language, and I can walk through it, it doesn't have one plain or literal meaning that makes any sense at all. And so that's my response to that.

And petitioners' reading, which I'd like to address, is completely unreasonable because as they conceded at the CPP oral argument, if you really read the text as they want you to read it, what it prohibits is EPA regulating under 111(d) any pollutants that are emitted from any 112 regulated source, even as to other source categories entirely. And because 112 regulates some 140 different sources that emit every stripe of air pollutant, 111(d) would have no continuing relevance at all because EPA would be prohibited from regulating any of those pollutants that come out of a 112 source even as to other categories.

And --

JUDGE WALKER: There's a theory that it would have allowed EPA to regulate in the two, three-year window after the 1990 amendments before they had finished applying the 112 regulations to power plants, stationary sources. And even beyond that, there was some doubt at the time of 1990 whether or not stationary power plants would be regulated under 112.

And as I think we were discussing a few minutes ago, the question of, I think the question of whether or not EPA can or should include stationary power plants under 112 has been litigated quite a bit, and it's still somewhat up in the air. My impression is that this EPA has said such a regulation is not necessary or appropriate. But they have also said we're going to continue regulation. So I don't quite understand that either. But I'll stop. I'll stop now.

MS. GREENFIELD: Yes, so those are two issues. One is that there would be a gap where EPA, or where 111(d) would have some continuing relevance for a short period of time. But the problems with that are that if the real purpose of this prohibition was to prevent EPA from double-regulating sources, that doesn't accomplish it because it still allows for double-regulation. And there's also no legislative history indicating that that was the purpose.

So that's on the first point.

On the second point, this is the issue of whether or not power plants would be listed at all under 112. And petitioner says, well, EPA could still regulate power plants under 111(d) as long as they de-listed them under 112. But if petitioners are right that what 111(d) prohibits EPA from regulating anything under that provision, any pollutant that's emitted from a 112 regulated source, that extends to power plants regardless of whether or not they're regulated under 112 at all. Because in their view, and at least as they conceded at CPP oral argument, the prohibition extends to all pollutants from all 112 regulated sources as to any other category of sources. And so --

JUDGE WALKER: Well, it says, just to make, just to (indiscernible) it says emitted from a source category which is regulated under Section 112. So it seems like the 111(d) exception doesn't cover source categories that emit pollutants that are regulated under 112. It only has an exception from regulation for a source category which is regulated under 112. Is that a distinction without a difference --

MS. GREENFIELD: Well, I think that that's leaving off the first part, or what's really the middle of the provision. So looking at 7411(d), which I have reprinted on 175 of the red brief. Or, I'm sorry, you have it --

JUDGE WALKER: I'm good. I've got it.

MS. GREENFIELD: I figured you do. I figured --

JUDGE WALKER: I've got a little computer screen of more statutes than I can keep track of.

MS. GREENFIELD: Right. So the way this reads is it says states have to establish standards for any air pollutant, and then it has a list of prohibitions. And in their view, to get to their, quote, literal reading, you have to pick up the which is not from the middle of the paragraph, and then you skip to the end and say emitted from a source category which is regulated under Section 112. And so that would prohibit EPA from regulating any air pollutant which is emitted from a source category which is regulated under 112.

And that means, in another way, it prohibits EPA from regulating all air pollutants that are emitted from 112 regulated sources. And that's the reading at the CPP oral argument petitioners conceded is correct. And so that basically renders 7411(d) entirely devoid of meaning.

And if Congress really wanted that, they probably would have just deleted the provision in the statute entirely. We wouldn't have this issue of the competing amendments, and it would just be gone if it was supposed to have no continuing effect. And that's what petitioners suggest is really they wanted EPA to handle all of this

under 112.

But that can't be right for two reasons. First, EPA had a choice whether or not to invoke 112 for power plants. And second, like, if they really wanted to write it out of the statute, this is the same point again, they would have just deleted it, and they didn't do that. And there's no legislative history on this point at all, as I'm sure you've all --

JUDGE WALKER: I mean, there is and there isn't. It's somewhat, to the extent we're going to look at legislative history, which, you know, maybe scrivener's error is an exception to the general rule finding legislative history dispositive, the House amendment language about the sources was in the President's original proposal.

MS. GREENFIELD: Right.

JUDGE WALKER: And so it, you know, it suggests something other than an accident.

MS. GREENFIELD: You're correct that there is some ability to track how these provisions moved through the legislative process. My point was more that there was nothing in the legislative history exhibiting a congressional intent to effectively delete 111(d) from the statute, which is what petitioners' reading would do.

JUDGE MILLETT: Can I ask in that regard --

JUDGE WALKER: Yes, I get that.

JUDGE MILLETT: I'm sorry. Go ahead.

JUDGE WALKER: No, I agree. I was just saying I agree.

JUDGE MILLETT: Right. This is all in a very unwieldy-written, little Romanette i. Is that Romanette i meant to modify air pollutant?

MS. GREENFIELD: Yes.

JUDGE WALKER: I'm thinking the same thing.

JUDGE MILLETT: Right.

MS. GREENFIELD: Yes.

JUDGE MILLETT: And so, I mean, that's the thing that I'm wondering. It's not the normal use of which, but there's three whiches there, and the other two whiches all modify air pollutant and just describe which air pollutants.

MS. GREENFIELD: Right.

JUDGE MILLETT: And so that, and if you were to read, my English teacher wouldn't like it, but she would yell at me for not using commas with my whiches anyhow. Can you read the which as regulator in Section 4112 as actually a really ham-handed way of describing yet another list of pollutants that aren't to be regulated under 7411(d), which is how what had been happening before, that's the correction, that's what the Senate amendment would accomplish.

MS. GREENFIELD: Yes.

JUDGE MILLETT: And it's not completely -- well, you can tell me. Maybe it's completely unreasonable, but it's not a completely untenable reading of what that provision means, so at which point you wouldn't even have to really have a conflict other than grammarians would be very angry.

MS. GREENFIELD: Right.

JUDGE MILLETT: But (indiscernible) conflict with that because the whole i is meant to modify types of pollutants --

MS. GREENFIELD: Exactly, exactly right.

JUDGE MILLETT: (Indiscernible) here, so it's not the normal use of which, but.

MS. GREENFIELD: No.

JUDGE MILLETT: But if you do that, then it's really accomplishing the same thing. The Senate amendment, which is conforming and trying to just clean it up and maintain the status quo. Otherwise, as you said, this little thing is doing an awful lot substantively --

MS. GREENFIELD: Right. That's exactly my point.

JUDGE MILLETT: (Indiscernible) the other way. So can we read all three as just modifying which air pollutant is pollution?

MS. GREENFIELD: Yes. Yes, I think we can. I

think that that is EPA's construction here, and that's a reasonable reading of the statute. Is it the only reading? No. This provision is obviously ambiguous. This aspect of this provision is ambiguous and not very well written. But then, if we read it that way, which is reasonable because it ascribes some meaning to this prohibition. It has continued meaning. It has a parallel significance as the prohibition that applies to NAAQS, and it's also consistent with the Senate amendment. And so then we don't have to go through the muddy waters of what we do if there are conflicting amendments that are in the, like, statutes at large, but only one codified version.

None of those tricky questions are presented. If we just read this as ambiguous, EPA has interpreted that ambiguity, and it receives Chevron deference because that interpretation is reasonable.

JUDGE WALKER: Ms. Greenfield, let's assume that there will be some EPA regulation that's imaginable that depends on the interpretation that you're asserting. And that regulation will be very minor. Everyone will agree, it's just not a particularly major regulation. And then let's assume that in this instance with whether it's ACE, assume that it's major. You may not think that it is, but assume that it is. Does that mean, under the major questions doctrine, that we would afford EPA deference under

Chevron when they're interpreting this ambiguous language in the case where we consider the relatively unimportant rule, that we would not afford the agency deference with regard to the same statutory language when it is involved in a major rule?

MS. GREENFIELD: I don't think that the deference EPA would receive as to this aspect of 7411 would change depending on the type of regulation that's issued. Because the question here is not the scope of the regulation that EPA is allowed to promulgate, but whether or not EPA has any authority under this aspect of the statute at all. End point as to everything. And so I don't think that the major questions doctrine does any work in this aspect of 7411(d).

JUDGE WALKER: Okay. So even if your interpretation, you know, opens the door to a major rule, we still should not apply the major rule doctrine, the major questions doctrine to the question of how to interpret this language. And I --

MS. GREENFIELD: Yes. No, that's correct. (Indiscernible).

JUDGE WALKER: If that's where you are, then that's the answer to my question.

MS. GREENFIELD: Yes.

JUDGE WALKER: Okay.

MS. GREENFIELD: I would also note that EPA's

reading here is consistent with the Supreme Court's decision in AEP. And as we all know, in that case, the Supreme Court held that 7411(d) speaks directly to the issue of regulating carbon dioxide from power plants. And it's hard to say that a provision speaks directly to regulating the issue of carbon dioxide if it has no role whatsoever.

JUDGE PILLARD: Well, they're waiting for the 112 regulation of carbon dioxide to happen, right? I mean, because there's that footnote 7 that says 111(d) doesn't apply, quote, if existing stationary sources of the pollutant in question are regulated under the National Ambient Air Quality Standard Program or the Hazardous Air Pollutants Program.

MS. GREENFIELD: So two notes on that. One, at the time EPA, or AEP -- lots of acronyms here -- was published, the NAAQS regulation of power plants under 112 was in the works. You know, power plants had been, EPA had made the necessary and appropriate finding more than a decade before, and a proposed rule had already been published. So it's not as though, it was unknowable whether or not EPA would invoke 112 for power plants at that time.

I'd also note, and this came up again at the CPP oral argument, that footnote is dicta, and it's at least half-wrong because at the time of -- that footnote indicates that EPA has no authority to regulate CO2 from power plants

if power plants are either regulated under the NAAQS program or under 112. And we all know at the time of AEP and for a long time before, power plants were regulated under the NAAQS program. So that's why we don't rely on dicta. That's (indiscernible) that footnote.

JUDGE PILLARD: Well, and I mean, for all we know, some Supreme Court clerk was looking at the U.S. Code which rarely has the kind of complication behind it --

MS. GREENFIELD: Right.

JUDGE PILLARD: -- (indiscernible) well there it is, and nobody's, nobody just, because it wasn't essential to the holding, it wasn't really delved into possibly. But it's a little troubling.

MS. GREENFIELD: I agree, but. I agree that it isn't, that it requires some thought. But because it's at least half-wrong because power plants were definitely regulated under the NAAQS program at the time of AEP. If we were to take that footnote seriously, it would mean that EPA had no authority to regulate under 111(d) at all, and that would be in conflict with the Supreme Court's holding there that it did have authority.

JUDGE PILLARD: Thank you.

JUDGE WALKER: Do you think it's a scrivener's error?

MS. GREENFIELD: Yes.

JUDGE WALKER: I'm just kidding.

MS. GREENFIELD: I think that that's --

JUDGE WALKER: I know it's been a long --

MS. GREENFIELD: I can say with some confidence --

JUDGE WALKER: It's been a long day.

MS. GREENFIELD: -- that I believe that that is scrivener's error.

JUDGE WALKER: Well, let me ask a question then on the possibility that it helps us with this case. I'm not convinced that it does, but how does, how is it possible for EPA to de-list power plants under 112 -- sorry. How is it possible for them to find the power plants under 112, their regulation is not necessary and appropriate but to not de-list them as regulated? How does that work?

MS. GREENFIELD: So I think you're referring to a recent EPA decision where EPA found that it's not necessary and appropriate to regulate power plants, but nevertheless held the NAAQS regulation in place. They kept it in place. And --

JUDGE WALKER: Correct.

MS. GREENFIELD: -- for petitions for review filed for that, I'm actual counsel of record in that case as well.

JUDGE WALKER: Then you're the right person to ask.

MS. GREENFIELD: So I am the right person to ask.

But I haven't totally delved into the merits of that case. This one has kept me a little bit busy. But the EPA's interpretation there turns on this New Jersey v. EPA case. And I'm happy to provide further information in a 28(j) letter or something like that if you'd like to address it. But I'm not really prepared to discuss (indiscernible) right now. At a later time, Judge Walker.

JUDGE WALKER: That's fine. I appreciate it. I appreciate it.

MS. GREENFIELD: I'm happy to answer any questions on the Robin Enterprises petition for review, but I see that I'm about 20 minutes over my time, so I'll --

JUDGE MILLETT: That's par for the course today, so. My apologies. These are complicated and a lot of, it took a full en banc court nine hours just to do one of the issues in this case, so we're doing great.

JUDGE WALKER: Really?

JUDGE MILLETT: We're doing great at this point. Yes, so. Do my colleagues have any further questions, or Ms. Greenfield, do you feel like you got to say the merit sentences that you needed to? Is there anything --

MS. GREENFIELD: I feel like these issues are well presented in our briefs, so I'm happy to rest on the briefs.

JUDGE MILLETT: Bless you. Okay. All right. Okay, we will go on. I guess we have Mr. Duffy now --

ORAL ARGUMENT OF JAMES P. DUFFY, ESQ.

ON BEHALF OF RESPONDENT-INTERVENORS

MR. DUFFY: Good afternoon. May it please the Court, James Duffy on behalf of 13 public health environmental respondent-intervenors. At the peril of getting back into the -- sorry about my voice. Getting back into the lottery issue, I think our position --

JUDGE MILLETT: Lottery? Oh, we're not doing prime and odd. Can we try something else? Can we try (indiscernible). I can't keep my primes and my odds (indiscernible).

JUDGE WALKER: I'm sorry.

JUDGE MILLETT: (Indiscernible) than I am. I'm older and have less brain cells than him, so.

MR. DUFFY: I'll be very brief on this one. We think that the mandate is what EPA shall regulate there, not exclude. So a cumulative reading would allow EPA to regulate pursuant to either grant of authority, and petitioners' approach would render the Senate amendment a nullity. So I think the prior clause that Judge Walker stated doesn't match what we have here, which is a requirement to regulate. So I think that's how we --

JUDGE WALKER: This question has nothing to do with math. Can you give me a case, and I suspect there's one out there, that says what you just said that says you

read an exception to a regulatory authority as narrowly as possible, rather than as broadly as possible.

MR. DUFFY: I don't think there's a case. I just, the language or the text of the statute, which is a mandate to regulate using the word shall is, should be the focus here and the exclusions, if they are to be read cumulatively, would grant either authority.

JUDGE PILLARD: (Indiscernible) shall prescribe regulations, da, da, da, da, for, which do this or this or this. So if it's under any of them, then the prescription is required.

MR. DUFFY: Correct. That's our reading. I'll move on from 111 and 112. I think the way that Judge Millett laid it out is very similar to how respondent-intervenors placed it in their briefs. We're looking at air pollutants, and we're looking at, you know, which is being regulated. That clause, we are thinking about the regulation as far as what is being regulated there. And what's being regulated there is sources and air pollutants under the 112 program. So I think that the focus on air pollutants is the correct means of looking at this.

I'll spend the remainder of my two moments on the significance threshold. We don't think a significant threshold needs to be identified. We agree with EPA that the 2015 significant contribution finding is not before this

Court. But if the Court determines that it is, that finding was sufficient. And, in fact, any other finding would have been arbitrary and capricious.

There's a robust record here before the Court, but petitioners find that the facts in that record are insufficient because EPA didn't pick a precise threshold. We think that in Coalition for Responsible Regulation, the Court found that an endangerment finding doesn't require the agency to set a precise, numerical value. And that Center for Auto Safety said that identifying a significant risk is not a mathematical straitjacket. We need to look at the facts in this case. And in this case, you have the largest stationary source category, and without mitigating pollution from power plants, no plausible pathway would exist to avoid the worst consequences. So under any scenario, power plant emissions significantly contribute.

JUDGE MILLETT: Do you know, just in practice generally in deciding significance, do we look at significance within the United States, or do we actually look at, we have to be significant globally? I mean, normally, I would assume the statute would be focused on domestic operations. Maybe I'm wrong on this one. I know greenhouse gases are international, but the statute, this significance finding covers lots of, lots of different types of pollutants. So, is it (indiscernible) significance?

MR. DUFFY: I think it depends on the, on the particular cases. And here, the particular case is --

JUDGE MILLETT: I'm sorry, depends on what?

MR. DUFFY: The particular case, the facts on the ground. I think it's a case-by-case analysis. And in the context of climate change and power plants, I think that we have, we are an outsize contributor to a global problem. And so the largest stationary source within our country is certainly significant. As I said, if we don't reduce pollution from power plants domestically, there's no pathway to combatting climate change. So, I think this is a (indiscernible) national basis test, and I think that EPA's record is sufficient to support a finding that --

JUDGE WALKER: I wouldn't --

MR. DUFFY: Pardon?

JUDGE WALKER: I would have thought you wanted the opposite, that since American power plants produce, let's call it, let's just say 33 percent of carbon that comes from the United States, that sounds pretty significant. Let's say they produce 2 percent of the carbon in the world, that starts to sound less significant. And you're I think on the side of the, I think you represent the public health environmental respondent-intervenors, so why wouldn't you say that we should base our inquiry into what's significant with regard to a, base it on a national inquiry rather than

an international one?

MR. DUFFY: I think you can look at both and have it be significance, you know, in the context of climate change --

JUDGE MILLETT: Can I ask what do you think Congress was regulating here? Maybe you're thinking of something I'm not. Is there something that's a significant global source but not a significant domestic source? They've got a big fan blowing everything into Canada or something? I can't imagine. Is there someone that you're trying to save some regulation here that's someone significant globally? Because the background presumption is, is Congress intends domestic operation of the statute, and this is not a greenhouse gas statute. Right? It includes greenhouse gas as a pollutant to be regulated, but it covers all kinds. And I would think Congress would have been looking, its reference point would have been looking, its reference point would have been domestic significance. Isn't that what it's going to care most about?

MR. DUFFY: Certainly, certainly. I mean, that might be what it cares most about. I don't think it's irrelevant to think about a global problem in a global way. But I think that the domestic significance is certainly relevant. I don't think you can just throw --

JUDGE MILLETT: Well, the difficulty is, if you

start there, and you think about global significance, then they're going to go we're 2, like Judge Walker said, we're 2 percent globally. We're nothing. We are nothing. And that's not significant.

JUDGE PILLARD: It seems like either or both. I mean, because we may be a big emitter of other things as well, and if we are, you know, if this is only one of among many big emitters within the U.S., but the U.S. is, you know, overwhelming the rest of the world, like, those are two different but also very important facts for something that is a global --

MR. DUFFY: Right, right. Yes, that's exactly what I'm trying to say. And you --

JUDGE MILLETT: Yet I still can't imagine a scenario in which they are significant domestically and you need somehow to say and this also has some global role under the statute.

MR. DUFFY: Sure. I mean, I think just with a global problem, it's worth considering significance on a global scale. I think that power plants meet the criteria on both accounts in the context of (indiscernible) a source category or country contribution as a problem might seem small or its ability to solve them might seem small in comparison to total emissions of a solution. But they can still be a very important contributor, and that's kind of

the logic that EPA set out in the endangerment finding, which it builds upon when it made its significant contribution finding in the alternative in 2015. So we think we can, you know, no matter where you look at it, the United States is an enormous and outsized contributor, this source category is an outsize contributor both in the domestic, in the United States, as well as globally. And so EPA's facts on the record support a rational basis and should be upheld.

JUDGE MILLETT: Okay. Any more questions from my colleagues? Okay.

MR. DUFFY: Thank you all so much.

JUDGE MILLETT: Thank you, Mr. Duffy. And then we have rebuttal. I take it you both want to do some rebuttal, so I'm going to give you each, because it's getting really late here, I'm going to give you each one minute. Okay, Mr. DeLaquil.

ORAL REBUTTAL OF MARK W. DELAQUIL, ESQ.

ON BEHALF OF THE COAL INDUSTRY PETITIONERS

MR. DELAQUIL: Three quick points, Your Honor. First on the issue of endangerment. We aren't arguing that there has to be a numeric threshold. I direct you to page 74 of the methane rule that we submitted as supplemental authority which says that it's arbitrary and capricious where EPA doesn't provide a way to distinguish a

contribution from a significant contribution. That's seems to be the case here.

Second, Judge Millett, you posed an alternative interpretation of the U.S. Code that I think even you suggested was agrammatical where it read HAPS --

JUDGE MILLETT: There is nothing grammatical about 7411(d) period. Can we all just take judicial notice of that? The whole darn thing is not grammatical.

MR. DELAQUIL: Well, the best reading of it is Congress's decision not to use list, which it used in conjunction with the 108 pollutants in conjunction with the 112 pollutants give an exclusio inclusio canon interpretation that Congress wasn't just referring to listed HAPS when it said any air pollutant.

And finally, there was a suggestion of a concession made in this case that our interpretation was broader than I suggested, but we didn't make that concession. The industry petitioners in the CPP argument very clearly did not make that concession either, and I'm not convinced that the state petitioners made it. I find the record in response to Judge Srinivasan's questions in that argument to be (indiscernible). Thank you.

JUDGE MILLETT: Thank you very much. Okay. Now we have Mr. Hadzi-Antich. You need to unmute. Can the courtroom deputy unmute Mr. Antich? Hadzi-Antich, excuse

me.

THE CLERK: Sir, I have just sent you a request. Please click on okay.

MR. HADZI-ANTICH: Can you hear me?

JUDGE MILLETT: Now we can. Thank you.

ORAL REBUTTAL OF THEODORE HADZI-ANTICH, ESQ.

ON BEHALF OF THE ROBINSON PETITIONERS

MR. HADZI-ANTICH: Okay, thank you. Just very quickly, two points. First American Electric Power doesn't change the result advocated by Robinson petitioners. The issue of whether EPA could circumvent NAAQS after formally finding twice that carbon dioxide in the ambient air endangers health and is emitted from numerous and diverse sources. That issue was not raised by the parties, not addressed by the Court, and hence, the issue was never analyzed by the Supreme Court in American Electric Power. But that's the issue that we, Robinson petitioners, are raising as an issue of first impression in this Court. And that is the issue to be addressed by this Court.

The only other point is, EPA admits that it failed to use NAAQS because of the perceived difficulty in regulating carbon dioxide emissions under NAAQS. EPA says in the briefing that the main problem with carbon dioxide is, quote, its uniform atmospheric concentration. That's in EPA brief 195, note 55. If EPA chooses to regulate carbon

dioxide, then it can't reject the sole solution provided by Congress to that main problem, namely a rule limiting uniform atmospheric concentration, which is only provided under the NAAQS program. Thank you.

JUDGE MILLETT: Okay, thank you. Any questions from my colleagues? No? Okay. I'm just going to ask my colleagues, do you want to do a break now, or do you want to go, plow ahead? Do my colleagues have a preference?

JUDGE WALKER: I vote for a three-minute break if that's okay with the two of you.

JUDGE MILLETT: Okay. Let's try five minutes, okay? Courtroom deputy?

JUDGE WALKER: Okay, thank you.

JUDGE MILLETT: And then hopefully we can get through the next two without another break. And we appreciate counsel's patience very much.

THE CLERK: This Honorable Court will now take a brief recess.

(Whereupon, a brief recess was taken.)

THE CLERK: This Honorable Court is now again in session.

JUDGE MILLETT: Okay. I just want to make a quick inquiry if the attorneys are all okay. I hope you were able to grab something to eat very fast. If anyone's feeling like you're having blood sugar problems, then feel free to

throw some trail mix in your mouth or something while we're here because I don't want anybody fainting on me. So, okay? All right.

We're ready for Mr. Donahue. Now we're on the legality of the other statute, another central attack. The last ones were as well.

JUDGE PILLARD: And the rule. And the rule.

ORAL ARGUMENT OF SEAN H. DONAHUE, ESQ.

ON BEHALF OF THE HEALTH AND ENVIRONMENTAL PETITIONERS

MR. DONAHUE: Thank you, Your Honor. May it please the Court, Sean Donahue for the health and environmental petitioners. I'd like to reserve three minutes for rebuttal, please.

The ACE Rule's combination of extreme inefficacy at reducing pollution and rigid restrictions on implementation are further evidence that EPA's underlying interpretation of the statute is wrong and certainly not compulsory. But the errors I'm going to discuss would require vacatur of ACE even if the repeal of the Clean Power Plan were lawful. I'd like to highlight four central flaws.

First, EPA ignored the act's pollution reduction objective and the benefits of pollution control. Second, ACE violates the statute and EPA's own regulations by failing to establish any emissions limit that state standards of performance must satisfy. Third, EPA

arbitrarily rejected systems of emission reduction far more effective than minor improvements and coal plant efficiency. And finally, ACE unlawfully deregulates natural gas and oil-fired plants entirely.

Mr. Myers will then address the practical implications for states of the rule's lack of emissions limits and its prohibition on emissions trading.

In 2015, EPA identified urgent and severe threats to public health and welfare and found that minor heat rate improvements alone would not satisfy the statutory requirements, particularly with regard to emission reduction. Since then, the National Climate Assessment and multiple other reports, many of which EPA has contributed to, have reaffirmed that the dangers are even more urgent, and in particular the need for achieving large emissions reductions in the very near term is ever more vital.

In ACE, EPA didn't disavow any of this, any of these findings, but EPA nonetheless adopted an extremely weak rule that by its own accounting will achieve less than 1 percent reductions in emissions that is likely to increase emissions in many states due to the emissions rebound effect that leaves the entire natural gas category unregulated. It's like choosing a squirt gun to put out a five-alarm fire. EPA provides no reasoned explanation of how such a paltry remedy is appropriate given a record showing such an

urgent problem.

Now, to be sure, EPA has to stay within the bounds of the statute. But the statute talks about emissions control and risks to public health and welfare.

JUDGE MILLETT: May I ask, in that regard, because one of the things the EPA points out is that the market on its own is already accomplishing a lot, and in fact has gone faster than even the Clean Power Plan anticipated. Is that a legitimate thing for them to factor in when addressing the concern that you're raising or not?

MR. DONAHUE: So first of all, of course, that was no part of the repeal of the Clean Power Plan.

JUDGE MILLETT: Right.

MR. DONAHUE: And even the ACE Rule, the ACE Rule remarkably is actually designed sort of in contradiction to the powerful market trends toward cleaner generation, toward more extensive use of shifting of dirty sources to clean sources. It actually seeks to, you know, require investment in the dirtier sources. That's where we get the rebound effect. We, you know, it remains the fact that even though there have been --

JUDGE MILLETT: I think I wasn't, my question wasn't very clear. What I'm asking is, though, to the extent you're saying, look, this is, as you said, a five-alarm fire and they brought a squirt gun. Is it

permissible, is it rational or reasonable for the agency to say it turns out we only need a squirt gun because the market has already brought in, you know, six fire engines with the big hoses?

MR. DONAHUE: Right. So I think there's a Chenery problem when they actually come to identifying the best system of emission reduction. That's not the basis they use when they reject the more effective systems. But it's also, I think it would be arbitrary even if they had because it remains the case that EPA's own projections, this will remain a huge, the largest stationary source contributors for years to come, including during this short period of time that we have to get our arms around this problem.

So I don't think that that, in fact, is the rationale of that, ACE. It's kind of, it's window dressing. But it's also, it wouldn't be a reasoned basis for just kind of saying, oh, let's just leave it entirely up to the market. Congress, you know, required EPA to regulate when there's a danger like this, as there will continue to be. And that's not, we think that the trends that have driven those reductions show that there are readily available cheap and easy means of achieving much deeper reductions, and that's where EPA should be going instead of --

JUDGE MILLETT: But imagine instead of, you have concerns about this rule actually being, you know, actually

increasing you said the rebound effect. Should EPA say we've looked at this problem, and the markets are doing fantastically. And we're afraid that if we interfere it's, you know, the government comes in, it'll muck things up. And so we are declining to regulate greenhouse gases under 7411(d) at this time. Would that be allowed under, say, Chevron step 2, not a Chevron step 1?

MR. DONAHUE: Right. I don't think on the record that we have, which is that there are readily available, adequately demonstrated means of reducing pollution that all agree. EPA has not said that the risk is somehow being adequately addressed by other, you know, we're at a point where we really need, and EPA hasn't made any attempt to kind of contradict the studies I point the Court to the, I'm sorry, to the climate change mitigation experts' brief that just emphasizes that it's widely understood we have to achieve emissions reduction. So it's an interesting hypothetical. Whether if there were a pollution problem that is rapidly being really taken care of by market operation --

JUDGE MILLETT: Or states --

MR. DONAHUE: -- that would be a different case.

JUDGE MILLETT: Okay.

MR. DONAHUE: That's not what we have here. I'd just like to point out that when EPA evaluates other systems

of emission reduction in this rule, for example co-firing or partial carbon capture and sequestration, and deemed them too expensive, it has nothing to compare that to. You can't decide whether something's too costly without some sense of its value, and EPA assigned no value to reducing greenhouse gas emissions. It used a, in the regulatory impact analysis, it used a social cost of carbon, a sort of revised interim social cost of carbon that we think is clearly sort of indefensible, and there's an amicus brief on this.

But it's clear in the brief and the rule, they said we actually didn't rely on this in setting standards. And we think there's a total void. They didn't rely on any kind of reasoned assessment of the value of pollution reduction or reasoned analysis of the amount of pollution reduction, as this Court emphasized in the Sierra Club case and is plain on the face of the statute that emissions reduction is at least a central factor in applying the statute.

JUDGE PILLARD: It's sort of like a Michigan v. EPA problem. I mean --

MR. DONAHUE: It is a Michigan v. EPA problem where, in that case, Justice Scalia was insisting that it's almost always the case that you have to think about cost as well as benefits in making a reasoned regulation. Here, we have the same problem. It's just the other side of that

comparison that's been ignored.

JUDGE MILLETT: Can I ask in that regard --

MR. DONAHUE: Another --

JUDGE MILLETT: I'm sorry.

MR. DONAHUE: I'm sorry.

JUDGE MILLETT: I've been waiting all morning to ask you the question that Mr. Poloncarz punted to you, and that is, as co-firing, I just need a little more information because, you know, there was a lot of talk four years ago about the large percentage --

MR. DONAHUE: Right.

JUDGE MILLETT: -- of EGUs that have either own or, either have on site or else own or co-own folks that are, say natural gas just to be, simplify what we're burning here. And I didn't hear that in the briefs this time.

MR. DONAHUE: Right.

JUDGE MILLETT: I'm wondering what the percentages are. Because their argument was it's only 35 percent, that they can do this, and they're just using it to, you know, to warm the coffee pot in the morning and then start the fire. But this is different, seems a little different to me.

MR. DONAHUE: Right, right. So I think --

JUDGE MILLETT: About that, what's wrong? What am I misunderstanding?

MR. DONAHUE: So I think we may be talking about

different things. I think what in the Clean Power Plan argument we were talking about companies that own both coal generation and gas are renewables. And I think that was a 77 percent number. And that's at page 64796 of the Clean Power Plan at 40 Federal Register.

JUDGE MILLETT: Yes.

MR. DONAHUE: I have endeavored while being glued to the screen all morning to try to get some information on that. Of course, you know, this rule wasn't really based on this, you know. The rule is not very, it doesn't sort of flow out of the facts, and so EPA didn't emphasize this very much. But the regulatory impact assessment for the ACE Rule at JA-1658 and 59 talks about the continuing, and indeed, accelerating shifts in the power sector toward natural gas and renewable generation. I'm going to cite a few other things which are not, I don't know that they're --

JUDGE MILLETT: I would have thought some part of that, now maybe this is the 35 percent, but I would have thought some part of that 77 percent would have been sort of maybe physically within a plant or something. But maybe that's wrong --

MR. DONAHUE: So I think the 35 percent is coal plants that use some natural gas.

JUDGE MILLETT: Right.

MR. DONAHUE: I have been, I thought that we were

talking about companies that own both, so that --

JUDGE MILLETT: Well, I guess I'm not clear in my question. I was trying to understand, I was trying to put the two numbers together. So we have the 35 percent that are using natural gas, but we're told some percentage of that, and I'm not sure if I recall exactly what it is, are really only using the natural gas for a tiny amount. But I was wondering, so that 77 percent, is it really, is it that everybody, these things are far enough apart, or are there any that are sort of within the same plant facility --

MR. DONAHUE: Right.

JUDGE MILLETT: -- that it would make, even if you have to build a little bit of pipeline, it wouldn't be that much. It would make co-firing more feasible.

MR. DONAHUE: Right.

JUDGE MILLETT: And that this wasn't addressed, but maybe it is apples and oranges.

MR. DONAHUE: So, right. I think they're slightly different, although the fact that a company owns both, it's likely to have a little more facility working with both kinds of fuel if it owns both.

JUDGE MILLETT: No, I'm talking about the infrastructure for them co-firing, which is not --

MR. DONAHUE: Right. So on that --

JUDGE MILLETT: Would something --

MR. DONAHUE: -- I would point the Court to the studies that the environmental groups put in the record about the capacity of plants that already co-fire with natural gas to increase the amount of gas, and then the ability of plants that do not now but readily could. And we think EPA, you know, did not, you know, adequately address that as a far more effective system of emission reduction, although only one of several.

JUDGE MILLETT: And in that regard, can I ask you, so you had two categories there. So let's talk about this 35 percent, I think, that already are using natural gas to some extent, even if it's just to start things up in the morning. What I don't understand is why couldn't they just use the natural gas more? Would the problem be that they just have too small a pipe or too small a supply? Or once you've got the natural gas in, can you --

MR. DONAHUE: Right.

JUDGE MILLETT: How much infrastructure or construction or expenditure would it take to use more?

MR. DONAHUE: Right. So I think we think they could, and we think that our records submissions demonstrate that there is a lot of room for improvement, and the emissions reductions that come with that are substantial. We also think that the entire way that EPA looked at this, which was to kind of say, well, there are places where this

is really infeasible or very costly and therefore it's not sort of widely available across the entire source category, therefore it's not the BSER, conflicts in a kind of obvious way with how they treated heat rate, which is they listed seven different things that a plant could do to increase a coal plant's efficiency, and then they said, well, some of them aren't available at all, and some plants maybe can't do any of them, so we're going to turn it over to the states to look plant by plant. If that approach is --

JUDGE PILLARD: (Indiscernible) I'm sorry to interrupt you. That's very striking, and I, I mean, I was thinking that, and I guess you wrote it in your brief which is why I had that idea. But it doesn't make sense if they're taking heat rate improvement that are not universally applicable and saying well find where they are, why don't do they do the same thing with co-firing?

MR. DONAHUE: Right, right. And we think that applies to carbon capture as well, the same problem. I think another thing said was, while the most efficient use of natural gas is to use it in a natural gas plant that was designed for that purpose rather than, you know, co-firing in a boiler that was designed to burn coal, but they didn't show that there is an adequate supply, and again, in making all of these judgments, they --

JUDGE MILLETT: Let me ask you about, sorry, I'm

just, more about, because at this point we're assuming the Clean Power Plan, the interpretation of the statute is out and things have to happen sort of on the ground at the plants and facilities. And they said, oh, it's $1 million for a mile of pipeline or something like that. But what I, that's what I was trying to figure out. Are there not, beyond the 35 percent that are reusing it some, is there information you all put in the record or someone put in the record that says, that responds to that point by going, I mean, one response is, well, that's worth it for the human health effect. But I'm actually asking more of an operational question. Is it, you know, if you only have to do one mile of pipeline, then it might pay for itself within a year or two. Or if I was, tried starting out but I guess I'm wrong, if you have, if your sister plant facility is only half a mile down the road and it's a gas one and you can get pipeline in easily, or, I just don't, I didn't, I'm trying to understand if there is an operational response to that argument.

MR. DONAHUE: Right. I mean, I think we, we put in studies including both NRDC and the Environmental Defense Fund. I point the Court, although this is by no means all that's in the record, Joint Appendix 1015 and 16 and 1126 and 27, we think there is extensive evidence that shows that co-firing could be, you know, is widely available. And EPA

would have to make a judgment about, you know, whether there are subcategories that could be used, or whether it can be the basis or a component of the BSER. But for some plants at least, particularly those that already burn natural gas, it seems clear that it's every bit as valid and far more effective as the measures that EPA actually --

JUDGE MILLETT: I get that as the 35 percent. I'm just trying to deal with the 65 percent. Do we have any sense of how many, what that percentage would be that might be doable?

MR. DONAHUE: Right. I mean, I'm going to have to --

JUDGE MILLETT: And what would be really, really, incredibly expensive?

MR. DONAHUE: I'm going to have to point the Court to the studies we did. We submitted an analysis by M.J. Bradley & Company and that we basically cited in our brief, the record submissions. But we think they're pretty extensive, and we think EPA didn't, you know, give them reasoned consideration.

JUDGE PILLARD: I'm sorry. Which one are you talking about?

MR. DONAHUE: This is Natural Gas Co-Firing.

JUDGE PILLARD: Right.

MR. DONAHUE: Yes, and I was --

JUDGE PILLARD: Which is (indiscernible) that I think they're pretty expensive.

MR. DONAHUE: I'm sorry. Natural gas co-firing?

JUDGE PILLARD: They is the natural gas co-firing.

MR. DONAHUE: Yes. I mean, there is a capital expenditure, and there may be instances where it's expensive, I mean, but it's, it's also a lot more effective and as an ingredient in a best system that is based at the source. Of course, the cheapest, most effective, and most realistic completely at the source measure is emission-reducing utilization, which totally fits within EPA's construct of to or at the source. It is what EPA itself said sources would do if EPA allowed them to comply even with the ACE rule. That's just turning down the amount of utilization and allowing that same amount of electricity to be produced by a, an already online, clear source, and --

JUDGE PILLARD: What about the continuous objection?

MR. DONAHUE: Yes. We'll happily address that. But, so, there are two provisions, 7602, these are Clean Air Act definitions, (k) and (l) in 7602 that require slightly different wording, continuous emission reductions. Those, neither of them prohibits a standard such as an annual standard where emissions are tracked over some period of time, and then, but emissions can fluctuate during that

time. Indeed, the ACE rule itself at page 32552 says it'll be okay for states to use annual or even multiannual tests to comply with ACE. And that's because a standard like that is continuous. In fact, the Clean Air Act uses the term emission limitation to describe the Title 4 cap and trade acid rain program --

JUDGE MILLETT: Just hang on a second. You said, hang on, because you said it's well-established or something like that that when it says continuous emission, that means, that can still be measured sort of over time rather than meaning continuous in my --

MR. DONAHUE: Any emission standard, whether it's an hourly, monthly, or yearly is going to have a period of time. And then typically, the test is whether the amount of emissions during that period of time exceeds the number that the regulator has prescribed.

JUDGE PILLARD: Well, what is continuous about? Is this about pollutants that are, where the location of them matters and you don't want big bursts of them?

MR. DONAHUE: I think it was partly designed to respond to things like standards that would allow polluters to rely on the wind to blow away instead of actually controlling their pollution, just disbursing your pollution and not being subject to any limit at all. But if there is a standard that imposes a limit on pollution, the continuous

requirement in the statute does not prescribe, proscribe the agency from using an annual test or a monthly test, and I note that the ACE rule itself says that --

JUDGE MILLETT: Okay, apart from the ACE rule, what can you point me to? Case law recognizes, is there case law discussing this, or --

MR. DONAHUE: I point that the statute uses the term emission limitation in Title 4, which is the acid rain program which is annual emission allowances, which of course famously allow for fluctuations at individual plants. So we don't think the, the continuous argument is --

JUDGE MILLETT: But fluctuations are, I guess what I'm trying to figure out is if someone just said, okay, coal plant, you will run on Monday, Wednesday, Friday, but not Tuesday, Thursday. So that's not, that's one option. And the other is, coal plant, you can go 100 percent Monday, Wednesday, Friday, and 50 percent Tuesday, Thursday, Saturday.

MR. DONAHUE: Right.

JUDGE MILLETT: All right, that's continuous. It's just a lower level. Are you saying continuous also includes don't run at all on Tuesday, Thursday?

MR. DONAHUE: A standard could impose a limit, 10 tons of pollution a week. The source could decide whether to, you know, emit in an amount that if it operated 100

percent of the time and every hour of the week would not exceed 10, or it could operate at full throttle three days and then shut off. And that's common. There's nothing in the --

JUDGE MILLETT: (Indiscernible) I'm trying to figure out how it's continuous.

MR. DONAHUE: The standard is continuous. It doesn't stop working. This Court in the Sierra Club, a case under 112 dealt with a situation --

JUDGE MILLETT: The standard has to be continuous, not the generation that has to be continuous.

MR. DONAHUE: Yes. And I would say that --

JUDGE MILLETT: And the standard is continuous if somebody waits until the day that the wind is all blowing east to operate.

MR. DONAHUE: Right. Or I think that that, that would be a standard that would be very dubious if it didn't actually limit pollution. I mean the thing --

JUDGE MILLETT: No, no, no. I'm saying if someone sets a legitimate standard, you said that this continuous emission was meant to prevent someone from saying I'm operating when there's a strong wind east because I'm on the border of whatever state you want to pick.

MR. DONAHUE: Right.

JUDGE MILLETT: I'm on Michigan's border, and so

then all the emission is going to go into Michigan and count for their pollutants, not ours. Or it will be disbursed so much, it won't be measured as that much. But the standard, it's a perfectly legitimate standard because I don't see how the standard --

MR. DONAHUE: Right.

JUDGE MILLETT: If the standard has to be continuous, I don't see how it stops that problem.

MR. DONAHUE: Well, we have one data point, and that is this Court's decision in the Sierra Club case, which was under 112, but it's also subject to this --

JUDGE MILLETT: Yes.

MR. DONAHUE: -- for the same provision.

JUDGE PILLARD: You're talking about (indiscernible) --

MR. DONAHUE: versus Johnson.

JUDGE PILLARD: Johnson.

MR. DONAHUE: 551 F.3d 1019. And that was a case where the Court concluded that the regulation to stop operating during, I think it was start-up and shut-down, and EPA said, well, there's this other standard. And the Court said, no, there has to be a Section 112 compliant one. So that's an example. Whatever the outer limit of the continuous prohibition is, an annual standard that would allow for EPA to consider emission reducing utilization as a

component of the best system, which is incredibly common. It eliminates the trading component, if that's, if that were to trouble the Court, and it operates within the bounds of each source. It has to be considered, it's what sources.

In fact, EPA used it as a basis for exempting sources. If they want to cut their utilization, they can be exempted from the ACE rules, we pointed out in our brief.

JUDGE PILLARD: Right. Back on the co-firing. If, I mean, we're in the world where we're assuming that the statute forecloses the approach used in the Clean Power Plan, and that the EPA's interpretation that the measures have to be used at the source, would that encompass building pipeline to get to a plant to allow natural gas co-firing if it isn't already so-equipped?

MR. DONAHUE: I don't understand EPA to say that their construct of BSER would preclude co-firing as a sort of legal matter. I think they acknowledge that it could, but they rejected it on sort of more particular grounds that there's not enough gas or it's too expensive. So --

JUDGE PILLARD: You also were going to talk about, you had four different topics.

MR. DONAHUE: I do, and I'm aware that everybody's tired, but I'm also desperate to get to a couple of them at least.

JUDGE MILLETT: No, no. We'll be completely fair

to you. We want to be fair to everybody, wherever you fall in the day.

MR. DONAHUE: Okay. Thank you so much. Much appreciated.

JUDGE WALKER: Mr. Donahue, let me ask about continuous just before you move totally off of it.

MR. DONAHUE: Sure.

JUDGE WALKER: If a factory is emitting 100 units of a pollutant a day, and we know that when it does that, everyone within a 10-mile radius can't breathe when they jog. And we also know that if they could reduce that to 50 units a day, then, you know, people would be able to jog and still breathe. And so we say, you know, you have to reduce by 50 percent. And the factory were to say, all right, fine, every other day we're going to emit 100, and every other day, we're going to emit zero, so problem solved. It definitely wouldn't solve the problem for the people who want to go for a jog when they want to go for a jog. How does your theory of continuous fit with that problem?

MR. DONAHUE: Right. I think it would be an arbitrary and capricious regulation because it wouldn't, you'd be dealing with a locally harmful pollutant and not taking care of the problem at all, so that there would be other problems with it. But I think the continuous, it's hardly the only restriction in the statute, and so I think

my answer would be provided that in your hypothetical, the standard limited the company to 100 tons per week, that would not violate the continuousness requirement. It would just be a terribly designed regulation that ought to be struck down on --

JUDGE WALKER: And I agree it would be arbitrary and capricious. If the arbitrary and capricious review would take care of the problem in that situation, help me understand why arbitrary and capricious review wouldn't always take care of the problem. Why was the word continuous necessary to be added to the statute?

MR. DONAHUE: Right. Well, I think it was, and I should say in the real world, there would probably be some substantive provisions that would say, you know, you have to have a standard that protects health or whatever in addition to sort of general, reasoned decision-making requirements. The best I can say on continuousness, and there is some discussion of the legislative history in the Sierra Club case that I just discussed that it was concern about standards that just sort of stopped operating or only operated when weather conditions were one way or another. And Congress was interested in reducing aggregate --

JUDGE WALKER: Okay, okay.

MR. DONAHUE: -- over overall pollution, not just shifting it.

JUDGE WALKER: And I think that would be, I think that probably --

MR. DONAHUE: I'm sorry?

JUDGE WALKER: I think that approach would probably also be arbitrary and capricious, but I'd rather let it go for now. I know you have other points, so.

MR. DONAHUE: Okay.

JUDGE WALKER: Please, please.

MR. DONAHUE: Okay, thank you. So, one of the most fundamental problems with this rule is it fails to execute EPA's central duty under Section 111(d), which is to establish an emission limit that then governs and provides a basis for reviewing state plans that substantive criterion for state plans, that's why there's federal regulation here at all. It is central to the regime. It has been since the first regulations were adopted in 1975 the EPA actually re-promulgated here, which make clear that EPA has to identify a degree of emission limitation based on the best system.

And that then state standards of performance must be no less stringent then that emission guideline, and that latter one is 60.24a(c). And the ACE rule just fails to do that. It just includes a menu of measures that states are told to consider, possible heat rate improvement measures. It's about heat rate. It's not about emissions. And those are actually often at odds because increasing efficiency can

also increate pollution. And --

JUDGE WALKER: Can I ask about that, Mr. Donahue? I think that's the rebound effect, if I'm understanding.

MR. DONAHUE: Right.

JUDGE WALKER: And so in trying to wrap my head around it, you know, I am, again, I'm going to go back to small, round numbers. There's a factory that's emitting 100 tons of carbon per 100 units of electricity. And EPA comes along and says, well, we have a way for you to reduce that rate so that you'll emit 90 tons of carbon for every 100 units of electricity. And the factory implements that and, you know, it's going about its business. It's emitting 90 tons of carbon per 100 units of electricity. But then it doubles its production, and it's now producing 200 units of electricity with 180 tons of carbon. That seems to me like the EPA has done what it's supposed to do, what the Clean Air Act requires it to do. The Clean Air Act I don't think has been interpreted in the past as a requirement that the country produce less energy.

And so I guess I just don't see in my hypothetical, yes, let's say that the increase in productivity was caused because of an efficiency improvement, and yes, as a result, there are now 180 tons of carbon being emitted where once there were only 100. But absent the regulation, if there were 200 units of electricity being created, there would have

been 200 tons of carbon. And now, because of the regulations, there are only 180 tons of carbon. So you compare it, I guess, isn't that how the Clean Air Act is supposed to work?

MR. DONAHUE: So first of all, in the context of the power sector, if you are increasing the amount of generation with relatively high emissions, that means you're going to be decreasing some other, like the whole, we're working in a world where we have the same amount of the product. And so, you're talking about increasing harmful pollution, and decreasing generation of pollution that's less harmful. And that's, I think, what's problematic about it. And just in general, adopting a regulation where the known effect is to cause more pollution and more, because we're also talking about other kinds of pollution that cause local --

JUDGE WALKER: But that's question-begging, Mr. Donahue, I think, because you're saying it causes more pollution, but it causes less pollution relative to the amount of energy being produced.

MR. DONAHUE: Well --

JUDGE WALKER: Am I understanding the rebound effect right? Or maybe I'm just, maybe I don't understand how the rebound effect --

MR. DONAHUE: Right. I mean, I'm noting that if

the source that's regulated increases its generation in the context of the power sector some other source, so you're going to have the same amount of product. So you're not limiting, you're not increasing the amount of widgets and improving human welfare by having more stuff to buy. So that's, I think that's a big problem.

The other thing is the Clean Air Act doesn't require EPA to use an hourly rate standard, and it, in fact, you know, as EPA emphasized in the Clean Power Plan, it authorized and requires the agency to think about the real world health effects and the characteristics of the pollutants, so that's why we think, and of course, EPA did use efficiency upgrades as part of the Clean Power Plan, but it combined that with other measures to limit the impact of the rebound effect.

JUDGE PILLARD: But what is the measure, you just mentioned, you said that the Clean Air Act doesn't require the EPA to use --

MR. DONAHUE: Right, an hourly rate, so --

JUDGE PILLARD: An hourly rate, so --

MR. DONAHUE: So EPA --

JUDGE PILLARD: So what is the metric, what was the metric under the Clean Power Plan? What's the typical metric? What's the metric under ACE in terms of, as you say, setting a guideline that's communicated? I mean, I gather

there's a really major shift, but it's a little bit opaque to those of us who are not steeped in the energy sector and emissions regulation.

MR. DONAHUE: Right. So the Clean Power Plan used a rate-based standard, an hourly rate-based standard, but it also gave states the option of using a so-called mass-based standard that would have allowed, you know, different kinds of compliance approaches that Section 111 doesn't require either of those, but it does require the agency to make a reasonable, that plus APA requires the agency to make sort of a reasonable choice. And so to say, as EPA does here, well, you know, the emission rate of coal plants is going to go down, and therefore we've done our job, you know, under a statute that refers to danger to public health and welfare we think is not, they haven't fully done their job. We don't think that --

JUDGE PILLARD: So where is the requirement in the statute of EPA, or the authorization for EPA to, I mean, I don't think EPA contests this, that it has an obligation to give guidance, but it is, tell me where the best pedigree is for that obligation?

MR. DONAHUE: The obligation to set --

JUDGE PILLARD: (Indiscernible) case law.

MR. DONAHUE: -- to set a limit more than guidance in the sense of like help or advice.

JUDGE PILLARD: Right.

MR. DONAHUE: So it's, we think the text of Section 111(a) that requires the administrator to identify the best system because that is based on a degree of emission limitation achievable through the application of that system, and that EPA has consistently read the statute since 1975, and indeed re-promulgated regulatory language that makes very clear that EPA's job is to specify the limit itself, not just kind of say here's how you, the states, might do it. And that's, of course, really familiar under cooperative federalism --

JUDGE PILLARD: You mean re-promulgated just now in its new rules?

MR. DONAHUE: Yes, in the framework rules that were promulgated, together with ACE. And that I, I cited those earlier. I cited one of them, but they require that EPA specify the degree of limitation in the guideline, and then that EPA, in reviewing plans, ensure that the state standard of performance is no less stringent than the limit EPA has prescribed. And that's just what is just lacking in this rule.

I want to point out two features of the rule that, or two little provisions of their approach that kind of I think are one of many tells about this rule, and that is that of the seven heat rate improvement measures on the menu, by

far the two most, those that appear to be most effective, which are turbine path upgrades and economizer replacements, they're kind of outsized in terms of their potential benefit in improving efficiency. But EPA concluded that they would increase emissions and thereby trigger other Clean Air Act requirements for sources under the new source review program. And then states would then, permissibly, choose never to require them under ACE. And then, and EPA's modeling said they will never be adopted anywhere. And so I think that's kind of, you know, problematic --

JUDGE PILLARD: Why is it not permissible if they are supposed to take into account energy requirements or other health and environmental impacts if these are going to increase emissions?

MR. DONAHUE: So, I mean, I think, I'm fine with these not being used. The problem is that they are trotted out as being, you know, the lynchpins of a rule based on improved efficiency, and they are in service of my argument that there's no limit here. There's no serious effort to control pollution. These are two measures that if there were significant deregulation under the new source review program might be more attractive, even though they pollute more. But that hasn't been done even though EPA proposed it. So, you know, I think that's, the fact that those two sort of lead measures of the menu are projected never to be implemented is

typical of how kind of non-serious this rule is. EPA --

JUDGE PILLARD: I mean, the reason they didn't come up, I gather, for purpose of reason or just a description of them not coming up with an actual limit, like a verifiable, numerical limit is, they said, well, you know, we can't do anything categorical. It's all going to depend on what each, individual source can accomplish. We don't know that until the states sort of go around and work with the individual sources. And so, it's just a toss-up. What's the response to that?

MR. DONAHUE: So, they're not fulfilling their obligation under the statute or their own regulations. And I also think, you know, first of all, we think they should be looking at a bunch of other, far more effective systems. The factual premise that it's not possible to come up with a limit is not consistent with the record. And it also just fundamentally deprives the regime --

JUDGE MILLETT: Explain the former to me. How does the record show that it's not possible to come up with a limit?

MR. DONAHUE: Well, so I mean, just within the heat rate category, or?

JUDGE MILLETT: Yes.

MR. DONAHUE: So I mean, I think EPA, for example in the Clean Power Plan, EPA looked broadly across the source

category and said here's what we think heat rate potential is.

JUDGE MILLETT: Yes.

MR. DONAHUE: There have been historic reviews. I mean, typically, plants do differ, but we set standards based on what plants can achieve, and then EPA relies on the remaining useful life language in Section 111(d), but that actually cuts against what they've done here. That language provides that when applying a standard of performance to a particular source, the state shall be allowed to take into account the remaining useful life, the age of the plant, and then other factors. But that presupposes that there be a standard in the first place. And EPA here has kind of turned that around and made it a basis for not --

JUDGE MILLETT: (Indiscernible) standard is a single number as opposed to they did a range here. And put aside your disagreement with the range they did here. Is it really, what is your best citation for the fact that they have to come up with a number? Because the statute says the degree of emission limitation achievable.

MR. DONAHUE: Right.

JUDGE MILLETT: Why could that not be, how do we know that can't be arranged?

MR. DONAHUE: So two things. One is, even if it were arranged, there's no binding limit here. If you could

say, you know, you can do 2 to 4, but you've got to be in that range. That would at least have some binding, would be a binding basis, especially if EPA said we think that bigger plants can do 4 or something, some other. But there's nothing, there's nothing binding here. And so we think that's the central problem.

JUDGE PILLARD: They point to Table 1, and the problem is that they don't say that every plant in this size category or this size category or this size category has to meet this, has to fall within the specified range. They say states will tell us --

MR. DONAHUE: Right.

JUDGE PILLARD: -- which heat rate improvements the plants are planning to use. And so it's this sort of, it's the sort of, it rolls from the bottom up, right? And there's --

MR. DONAHUE: It's like what Congress might have done before the modern Clean Air Act was enacted by a nearly unanimous, a unanimous Senate and one vote against in the House in 1970, and put the federal government in the business of providing these protections on a nationwide basis. But prior to that, there was often in many areas a sort of model of providing guidance and information for state governance. And that's just not what's going on here. This is a cooperative federalism regime where EPA sets the minimum and

then states have substantial room to, if they choose, implement that federal minimum. But the minimum is set to protect the country as a whole, and EPA has sort of failed to do that central thing here.

JUDGE PILLARD: I have a couple of questions, and they really sure betray my ignorance. But what is the cost and energy requirements language, I mean, at some level, if the, if something is so costly that it's going to be untenable for a source as a business matter --

MR. DONAHUE: Right.

JUDGE PILLARD: But if the cost, I mean, if we're talking about a release of, you know, something that's going to kill everybody tomorrow, is cost relative to that? I mean, which is the metric? Because it feels like people are talking about very different things, and we, you know, we are worried about, we look at the language of the statute and look at EPA's authority, but cost is listed among its concerns, and I just wonder how that --

MR. DONAHUE: Right. So cost is explicitly required to be considered. We think that, as I mentioned earlier, one of the problems is there's no sort of comparison between what the costs and the benefit of regulation, so it's kind of in that --

JUDGE PILLARD: Well, that's relevant. It's the cost nationwide and the benefit of regulation nationwide as

opposed to the, I mean, there's some implication if it's the cost to a particular unit or business.

MR. DONAHUE: So, I think historically, EPA has tended to look at the source category and has said, you know, is this unreasonable and excessive for the source category given what we know about it and, and has been willing to adopt standards that impose significant cost and don't always give a break to the sources that are the dirtiest or the most marginal. They have tried to sort of push things forward and, and on the other hand, the statute allows for this consideration at the source-specific level under the remaining useful life, so that if there is a plan that the state concludes, you know, it's going to retire in a couple years anyway, or it's physically configured in a way that makes it extremely difficult to meet the limit, the state has some discretion to build that in.

I don't know if I answered your question.

JUDGE PILLARD: Well, I think nobody wants to go there because there's a lot of jobs and a lot of, you know, productive capacity and a lot of expectation built into all kinds of energy production as it stands today. But just to understand the limits statutory as opposed to kind of political and policy and economic that the statute puts on EPA.

If EPA said, look, we recognize that these plants

were built and invested in and people have put their careers into them, and a lot of people. But now we know things about the externalities of these ways of generating energy. What in the statute constrains, controls, and guides how severely EPA can impose, assuming that the net overall national costs are worth it.

MR. DONAHUE: Right.

JUDGE PILLARD: Is there anything that sort of speaks to this more like distributional question?

MR. DONAHUE: Right. So I think, you know, the agency would have to act reasonably in applying the cost factor to a particular record. And, you know, I think there's some guidance in the Michigan decision. I think it would also be appropriate to take into account the fact that there's this second level of remaining useful life that can, you know, kind of dampen impacts on particular sources.

But beyond that, the Clean Air Act is a serious statute. It was intended to secure major economic benefits to the country. I mean, you don't have to live in California or Oregon to realize how extreme this now annual experience of having schools shut down for smoke days is to understand that this is affecting the economy in a really significant way. So I think, and that's one of the problems with thinking about this as only on the side of, you know, costs to a regulated industry. And of course, the Clean Power Plan

was designed to minimize that.

And there are lots of ways that you could design a rule to build on these very powerful trends that are already in play. But I think, you know, you kind of have to think about the other side of it too. And leaving this problem that the record shows, unrebutted record shows is a super serious problem, really imminent, leaving that kind of unaddressed also has very significant costs. And so --

JUDGE PILLARD: I'm not sure that I'm, I mean maybe there isn't really an answer. But is there anything in the statute or the regs that addresses sort of bumpy imposition of costs, assuming that the net costs are really worth it, and that, and the costs of the other side or the benefits of the regulation are very exigent. You know, is there anything in the statute that says, you know, you can't go there --

MR. DONAHUE: Right.

JUDGE PILLARD: -- to sort of, to curtail production by these legacy technologies, or is there nothing, and then Congress just has to turn around and figure out how to, how to smooth those bumps and help those communities, sort of like when you have global trade, and it messes, I mean seriously messes with people's lives. But there's a sense, oh, it's a net benefit.

MR. DONAHUE: So, I mean, I think EPA has a lot of tools, like the ability to subcategorize a source category to

take --

JUDGE PILLARD: But see, that's the thing I'm wondering about. So cost can mean that they can make those choices?

MR. DONAHUE: In making a subcategorization decision?

JUDGE PILLARD: Yes.

MR. DONAHUE: I think so. You know, if some category of sources, it's a lot harder to get natural gas to them or some other pollution control, you know, measure, that would be a basis for EPA to make that. And, you know, and I think the agency has to act reasonably, and then, and explain itself. And that's a significant, you know, restraint. And then also, you know, the agency has the ability to design rules that take account of reality, including, in this case, you know, trends that are operating very powerfully in the sector that can be used to relatively cheaply achieve both major benefits for public health and welfare, and also much less bumpiness economically by allowing for flexibility.

And that's what's, one of the things that's so remarkable about the ACE rule is that EPA says no, you can't use emission reducing utilization or trading or some of these things that virtually everyone would use if they could and that are cheaper. And it just seems really surprising to find anything in the statute that prevents that kind of

common sense.

JUDGE MILLETT: Okay, Mr. Donahue. Oh, go ahead, Judge Pillard.

JUDGE PILLARD: (Indiscernible) your four questions? We were, I know we were hijacking your time quite a bit.

JUDGE WALKER: And I have more hijacking to do.

JUDGE MILLETT: Okay, let's go.

JUDGE WALKER: I don't want to interrupt.

JUDGE PILLARD: Did you get to cover your four --

MR. DONAHUE: Oh, so number four was just the --

JUDGE PILLARD: (Indiscernible).

MR. DONAHUE: -- repeal of the gas standards which we don't think EPA has given a reasoned response to the evidence that was put in on its proposal to repeal with no replacement any standards for natural gas and oil. But natural gas is the really big one. Our brief cites studies that show that there are even sort of to and at the source approaches that can work for natural gas. And like with, as has already been mentioned, there's this disconnect between their rationale for rejecting that and their heat rate approach to coal, which is, oh, you know, there's not enough specificity about unit level potential, et cetera, which EPA didn't find necessary for coal. So we think that that was unlawful as well. And I'm happy to be --

JUDGE MILLETT: Okay, Judge Walker.

MR. DONAHUE: -- to be grilled with Judge Walker's questions.

JUDGE WALKER: I'll ask just one question, although I can't promise that the answer will be short. It will be up to you, but. And I know your topic is the ACE rule, but I have a question about the CPP, and I want to exploit your knowledge of environmental law and energy law if I can.

The way that generation shifting works that I have in my head, what the CPP would have done is there's a power company called Acme Power, and they have nothing but a coal plant. And the CPP says, or their state says, for every 100 units of electricity, you used to produce 100 tons of carbon. But now for every 100 units of electricity produced, you can only produce 50 tons of carbon.

And one thing that that Acme Energy Company can do is they can buy a wind, a wind energy place that does no carbon, and it will start doing 100 units of electricity from the coal and 100 from the wind, and now it's doing 200 total with 100 tons of carbon, and it's now made that 2-to-1 ratio requirement. Instead of buying a wind plant, they could buy credits from another company that does wind energy or solar energy.

Am I understanding how generation shifting works? Because I would hate to get back to chambers and try to, you

know, write an opinion and not have my basic understanding of the Clean Power Plan correct.

MR. DONAHUE: Right. And I think it may be a term that there's a little bit of slippage between different well-informed users. But I think basically one quibble I would have with I think the hypothetical is that the Clean Power Plan, which of course was a sort of framework, it was a guideline then states had some significant discretion about how to implement it.

But I think the hypothetical was, or the sort of situation was that the coal plant has to reduce its emissions, and that isn't how the Clean Power Plan would work. The plant would have had the ability to reduce its emissions. It could have done something like a partial carbon capture and reduce out of its smokestack to comply. But that, of course, wasn't the best system that EPA identified there. It could also purchase a credit from a renewables or a gas company that would then average in on one variant of the Clean Power Plan in to reduce its rate. And that's how a lot of these, you know, programs work is getting credits that then serve to reduce the rate that is attributed to a particular source. The source could also, you know, choose to, you know, whatever level of production that it wanted to and use credits to achieve the limit.

I don't know if that answered your question.

JUDGE WALKER: I mean, the only reason why I'm worried it didn't is because aside from the carbon capture option, I thought I had said what you just said. So do you see daylight -- did I say something wrong?

MR. DONAHUE: I thought that --

JUDGE WALKER: If so, what was it?

MR. DONAHUE: I thought you said the CPP said the coal plant has to ratchet down its production, and that's not right. Okay.

JUDGE WALKER: Okay.

JUDGE PILLARD: So as a result of the CPP, the state is coming to the coal plant and saying we think, right? Because it's all mediated through the state saying how are we going to allocate the limitations that we have to, the belt-tightening that we have to do.

MR. DONAHUE: Right. Right, and it --

JUDGE PILLARD: The state under it came to the plant and said it looks like your share, folks, is going to be this. Then how can you meet it? Is that right?

MR. DONAHUE: I think I understood. One point I would just like to make about this is that there's a lot of sort of policy variance here. But we have before us a rule that repeals the Clean Power Plan on a legal theory that's really sweeping that would, rule that would allow --

JUDGE WALKER: I know, I know. I get that.

MR. DONAHUE: So.

JUDGE PILLARD: All right.

JUDGE WALKER: Okay.

MR. DONAHUE: So --

JUDGE PILLARD: So one of the points I know that the EPA has made here is well we, you know, we threw out carbon capture and co-firing, but so did the Clean Power Plan. And maybe this is an argument that you all made, but it seems like that doesn't necessarily carry over because if you think the statute puts off the table a lot of the things that the Clean Power Plan thought were cheaper and more efficient methods of reduction, then the costs, the unchanged costs in terms of environmental costs might bring those back into focus is actually not only reasonable but required. What's your position on that?

MR. DONAHUE: We think that the word best in best system is necessarily sort of a comparative term. If you think that the CPP approach is off the table, you have to figure out something else that's best. EPA didn't say co-firing is infeasible or unreasonably expensive. It said the opposite. It said this is the approach we could use, and that, you know, was in line with other Clean Air Act rules, but that the Clean Power Plan's more flexible, cost-effective approach is better.

And they also say, EPA says incorrectly in its

brief that the Clean Power Plan rejected emissions-reducing utilization as, it's not clear since the current EPA does not appear to have a lot of, hold the Clean Power Plan in lots of esteem, so it's not clear what it would have meant if the Clean Power Plan had come out differently. But it's not true.

I direct the Court to, or I suggest the Court look at page 64782, note 602 of the Clean Power Plan where the agency said emission-reducing utilization is, meets the BSER statutory factors. What EPA is pointing to is a different thing, which is EPA's rejection in the final Clean Power Plan of reliance on energy efficiency, which would have reduced the overall amount of the electricity product available to customers, and EPA said that's different from what we've done before. We're not doing that. But they certainly didn't categorically say emission-reducing utilization where you're basing that on the availability of replacement generation in an equal amount that's clear can't be part of the best system.

JUDGE PILLARD: You mean energy efficiency by like people and their appliances?

MR. DONAHUE: Right. So the proposed Clean Power Plan, since we've fully understood the final Clean Power Plan, now we're going to go in the proposal --

JUDGE PILLARD: Yes.

MR. DONAHUE: -- had four building blocks, one of which --

JUDGE PILLARD: (Indiscernible).

MR. DONAHUE: -- was energy efficiency, which actually is a very effective, cost-effective, as you know, from the EPSA decision, it's widely used. But EPA ultimately decided that as a matter of discretion made a policy choice to leave that out. And it's in connection with that that EPA's --

JUDGE PILLARD: Got it. Yes.

JUDGE MILLETT: I have one last question. Is emission reduction utilization a very fancy way of saying simply reducing your hours of production, or does it include, or I'm sorry, yes, reducing your hours of production or does it include stopping production?

MR. DONAHUE: Both.

JUDGE MILLETT: Both, both.

MR. DONAHUE: It can be both.

JUDGE MILLETT: Okay.

MR. DONAHUE: And I direct, suggest the Court look at the discussion in the trade association petitioners' brief which talks about using it in connection with, you know, a judgment that --

JUDGE MILLETT: Okay.

MR. DONAHUE: Yes.

JUDGE PILLARD: You mean Con Edison, is it that brief?

MR. DONAHUE: No, that's the power companies. This would be American Wind Energy Association, et al.

JUDGE PILLARD: Okay.

JUDGE MILLETT: Okay.

JUDGE PILLARD: So -- go ahead.

JUDGE MILLETT: No, no. I was just going to say, I was going to try and wind it up, but go ahead. If you have another question, we'll keep going.

JUDGE PILLARD: So just thinking about kind of the decision tree for the panel, if the panel were to decide that the, were to reject EPA's statutory argument for the invalidity of the Clean Power Plan, are any of the issues that we've been discussing in this third segment of the argument still alive?

MR. DONAHUE: So I think that it would require vacating the ACE rule, and the, because it's predicated on that construct being legally mandated by the Clean Air Act, so EPA didn't consider all kinds of things. Their response to comments over and over says, even with respect to should we think about climate change, they say, oh, no, the statute, we're limited by the statute. So it requires vacating ACE.

Whether the Court, as we've suggested in our brief, we think the proper remedy would be vacate ACE and then

remand the whole thing. We don't think putting the Clean Power Plan in effect now with deadlines past, the power sector is a very different place, makes any sense. So that's the remedy we're seeking. Should the Court reach other issues, I mean, the other issues in the ACE case certainly are, you know, important to how EPA would consider the range of options. They could, on remand, they could do something, you know, totally different, but I don't think the Court would have to reach any of those issues because I think --

JUDGE PILLARD: But could we reach any of them? And like, one thing that I think that relates to your point about them not having considered the environmental risks, that goes to the framework regulations, changing of the time frame.

MR. DONAHUE: Right.

JUDGE PILLARD: Like, if that's something, if we were to invalidate the ACE rule, there's still the issue of the framework regulations which seems closely --

MR. DONAHUE: Right.

JUDGE PILLARD: -- together with the question of the ACE rule, but it isn't technically the ACE rule. So are there parts of that that fall, parts of that that stay? How does one think about that?

MR. DONAHUE: So what we've challenged are those extensions of deadlines, which we think are just kind of not

justified with reasoned decision-making. And so you're right, Your Honor, that wasn't something we proposed to argue, but we do argue in our brief that those deadlines are, I think those changes are arbitrary and capricious, and we would ask the Court to at a minimum send those back, even if it relied in general on the proposition that the ACE rule was predicated on the assumption that EPA's repeal was valid. And, you know, it seems to me courts often make kind of pragmatic judgments on these, if the Court were to conclude that the repeal is unlawful. There may be issues that make sense to address and others not. And I'm not sure I have a really crisp answer except I don't think the Court would be sort of obligated to address the issues of regulatory design, and obviously the record issues in the ACE case.

JUDGE PILLARD: (Indiscernible) hear from others about that too, sort of what's the prudential and what are the hard stop, you know, questions about what we could or couldn't, should or shouldn't --

MR. DONAHUE: I mean, to me it would be helpful. I mean, I think the failure to look at the pollution control, pollution reduction factor and the benefits and the record on risk, and then the failure to set a binding limit are sort of issues that, if it's okay to do what they did here, then that would, you know, very significantly change what they could do in a new rule. If the Court were considering addressing some

issues, those are sort of high-level, cross-cutting ones that I think it would be helpful to address. But certainly not necessary to address details of, you know, that the record on how extensive the natural gas distribution system is or whatever.

JUDGE MILLETT: Any questions for my colleagues? Okay, well, you got a little extra time there, Mr. Donahue. Thank you, though, for very, very informative and being very responsive to the questions.

Mr. Myers.

ORAL ARGUMENT OF MICHAEL J. MYERS, ESQ.

ON BEHALF OF STATE AND MUNICIPAL PETITIONERS

MR. MYERS: May it please the Court, Michael Myers for state and municipal petitioners. Mr. Donahue will be dealing with (indiscernible) segment for both of us, so I won't be requesting separate rebuttal time, Your Honors will be happy to hear. I'm going to discuss two areas, the implications for a state --

JUDGE PILLARD: Mr. Myers, this is for us. This is how we have fun.

JUDGE MILLETT: It's a pandemic. We don't get to see anybody.

MR. MYERS: I'm going to focus on two areas, Your Honor. The implications for state plans will be ACE rule's lack of minimum degree of emission limitation and how ACE's

prohibition on emissions trading and averaging is unlawful.

Before I go to those two areas, I just wanted to quickly follow up on a question that Judge Pillard raised, and that is in terms of, you know, once EPA ruled best generation shifting type measures out of the equation, didn't it still have an obligation to look at the emission reductions that are available under the systems it does think are lawful.

Mr. Donahue talked about how EPA failed to weigh emission reductions when it made its best system choice. I just want to make a quick call-up on that, and that is under FCC v. Fox, EPA found in the Clean Power Plan that heat rate improvements alone could not be the best system because they had, quote, a critical flaw, and that critical flaw, and I'm referring to 80 Fed. Reg. at 64727, was the quantity of emission reductions. So not only did EPA fail to weigh the different systems it did think were lawful, it did not explain how heat rate improvements now had fixed what it referred to previously as a critical flaw.

JUDGE WALKER: Is that the rebound effect, the critical flaw was the rebound effect, or are those different things?

MR. MYERS: Well, that's related to it, Your Honor. It's both the heat rate improvements do not get substantial emission reductions, and it's also whatever

emission reductions they may get you can be offset by the rebound effect.

JUDGE PILLARD: Isn't their position, this is where they cite Mexi-Cal (phonetic sp.), their position is, yes, this could be a huge problem. And these may be really inadequate measures. And in fact, I don't think they deny that these are, you know, pretty small when measured against the magnitude of the CO2 greenhouse gas problem. But they're saying this is all we can do under the statute. So get, you know, get another statute.

MR. MYERS: Well, that is what they say, Your Honor, but my more limited point is when it comes to even the systems under their constrained reading that they said we're allowed to consider, like co-firing, carbon capture and sequestration, they did not weigh emission reduction and explain how they could choose heat rate improvements despite what they themselves found was a critical flaw just a few years earlier.

Moving to the two main areas I wanted to quickly cover. First of all, EPA's failure in ACE to include a minimum degree of emission limitation for state plans --

JUDGE MILLETT: I apologize. May I back you up to your last point? Could they have said that, or they did say the market states are already taking care of this, they're making great progress on climate production, or protection.

So, we don't understand that as being their balanced consideration of climate impact? If you understood it as them saying we can do less because the market's already doing more at this level, that wouldn't be sufficient?

MR. MYERS: Well, Your Honor, we cover this in our reply brief. I actually think there are two problems with this. First, there's a Chenery problem because they did not actually say in the rulemaking here's what the market is getting us, so therefore we only need to get X-plus with the ACE rule. They did not do that. And in addition to that, it's their obligation to consider what level of reduction may be necessary with respect to the endangerment that they found, and they just did not do that analysis here.

So in terms of the unworkable nature of ACE, by failing to provide a minimum level of reduction, EPA has discarded its longstanding criterion for determining whether state plans are satisfactory under the statute, and also whether under EPA's regulations that Mr. Donahue cited, the performance standards and state plans are no less stringent than EPA's emission guideline unless the state can demonstrate to EPA that a specific source cannot meet that limit. But with no baseline at all, there's no basis to make that comparison.

Second, and this is the second reason why ACE is unworkable. States have no minimum or default emission limit

to work from when setting standards for specific sources. As the Association of State Air Pollution Control Agencies told EPA in its rulemaking comments, this is at Joint Appendix 1098, this creates problems for states lacking expertise and/or resources to translate these vaguely defined heat rate improvements into emission standards.

And on that point, I wanted to go back to something that Judge Pillard said about the table and the ranges. The main case that EPA relies upon for support that it could adopt a range is the Sierra Club v. Costle case. But that case, as the NGOs explain in their brief at page 15, was a much different situation. There, EPA created the subcategories that, Judge Pillard, you were talking about with Mr. Donahue, and set specific limits that applied to each of those categories. They did not just sort of, you know, spout out this table and say to the states, hey, you know, essentially good luck in coming up with an emissions standard.

ACE is also inequitable, in addition to being --

JUDGE PILLARD: So when you talk about this having to have like a quantifiable or substantive degree of emissions limitation achievable, again, it's somewhat striking that it doesn't seem to really be spelled out in the statute. And the best authority you have, like, so here's another way of putting it more concretely. EPA says, look,

this, you know, cooperative federalism, we actually think the states really are more knowledgeable. And what we're going to do is we're going to throw these heat rate suggestions out, and the states are going to tell us, you know, they're going to survey all their sources, and they're going to tell us what they think is, you know, really the most ambitious they can do. We're going to have some dialogue with them. We're going to push back a little bit, maybe, you know, ask them to do a little bit more.

But then they're going to come back to EPA with something specific, and that's going to be in their SIP, and we're going to say okay. We're going to accept that, and then you go forward and meet that. So that, it's not something that ex ante based on the BSER in the way that the Clean Power Plan comes up with a limitation, but it is sort of saying, like, we think BSER is this more episodic or more informational exercise. But we are going to have something that's verifiable. It's just going to be something that's served up from the states, and that we're going to bless. What about the law or the statute or anything forbids that?

MR. MYERS: Well, Your Honor, I would point you to EPA's regulations, 60.21a(e), the definition of emission guideline, which provides that an emission guideline shall reflect the degree of emission limitation achievable through the application of the best system. And --

JUDGE PILLARD: But why isn't this what I'm describing, which is the state coming up with something that reflects the degree of emissions limitation achievable, and the feds say, okay, we're on board with that.

MR. MYERS: Well, EPA is saying in that regulatory provision, we're going to define the emission limitation that is achievable through the best system.

JUDGE PILLARD: Right.

MR. MYERS: And states take that information, and they figure out on a specific, individual unit basis if that works, if they have to vary from it. If they have to vary from it, then they have to demonstrate why.

JUDGE PILLARD: So, right. I understand that's how you'd like it to work, but I'm just wondering if there's something legal that prevents it from working effectively the way it does under the ACE rule. And I have a reason that's really ascribing something to Congress, and then Mr. Donahue mentioned the history, and he said that, you know, it used to be that that kind of was how EPA functioned before 1970. They'd go around and say, hey, you might consider this and that. I guess one problem is that if you're a national pollution regulator, if you do that, then the states have a really strong incentive, especially when the grid is integrated to race to the bottom.

MR. MYERS: Well, that actually was going to be my

second point, so.

JUDGE PILLARD: Okay, go ahead.

MR. MYERS: I was going to say, that was going to be my second point in terms of why ACE is inequitable because without a minimum required level of reduction, EPA does open the door for states to set very lenient standards contradicting the statutory design that all states must do their share to limit pollution that's endangering public health and welfare.

JUDGE PILLARD: I mean, is there anything more general in the Clean Air Act or environmental law that tells us if you don't have a kind of, you know, uniform or somehow nationally-disciplined standard, it's just, I mean, if I were a state regulator, and I'm thinking if my sources are cleaner, they're also going to be more expensive. And with the kind of generation shifting that happens as a matter of just the bare function of, you know, the transmission, what's it called, least cost dispatch, or, that my sources are going to be disadvantaged.

I mean, even if you care a lot about the environment, what state would, so I just wonder if there's anything in the EPA that kind of, I mean in the Clean Air Act that tells us of course that's not what is meant or permitted because the whole system would fall to the ground. I don't see it in the language of 111, quite frankly.

MR. MYERS: Well, Your Honor, I guess I would just fall back on the response that this is the way that EPA has been, you know, administering this program since its outset in 1975. It comes up with an emission limit that serves as the substantive criteria by which it judges state plans to be satisfactory. And within that is do the performance standards, are they no less stringent than what's in the emission guideline? And if the answer is yes, then a state has to specifically demonstrate why, you know, a specific source requires different treatment.

JUDGE PILLARD: Amy I right that, here it seems like on the one hand they sort of walk back on the framework regulations, and they say, okay, okay, we're going to keep that. But then, as they, as ACE instantiates them or applies them, they don't.

MR. MYERS: That's absolutely right, Your Honor. That is a disconnect.

Moving to the second area that I was going to cover, the ACE rule's prohibition of emissions trading and averaging as compliance measures is unlawful. Trading emissions credit is part of a program to reduce overall pollution has longstanding roots in the Clean Air Act, including under Section 111(d). Here, the record demonstrates, and EPA does not dispute, that emissions trading programs successfully reduce power plant CO2

emissions.

Our brief cited, for example, to the success of the 10-state Regional Greenhouse Gas Initiative, or RGGI. Despite this proven track record, ACE precludes trading because sources would comply through increasing the use of lower or zero-carbon generation, not upgrading coal plants. And according to EPA, that would undermine their best system.

Now, before turning to the legal problem --

JUDGE WALKER: Mr. Myers, does ACE prevent states from doing generation-shifting, or does it just prevent them from using generation-shifting to satisfy the ACE standard?

MR. MYERS: You mean as a matter of state law, could --

JUDGE WALKER: Right.

MR. MYERS: -- clients in our states continue to use generation shifting for other reasons?

JUDGE WALKER: Right.

MR. MYERS: Yes, they could, Your Honor.

JUDGE WALKER: If you couldn't regulate under 7411, if you couldn't regulate under 111(d), I should say, but you still wanted to regulate power plants and their carbon emissions, where in the Clean Air Act would you go to to do that? I know you think you can under 111(d), but assume that you can't, assume you're the EPA administrator, you can't do it under 111(d). What are the other ways you can do it?

MR. MYERS: Well, Your Honor, under the Prevention of Significant Deterioration program, that was the program that was at issue in the UARG case, power plants and other major stationary sources regulated under that provision provided that they trigger the statute for reasons other than simply their quantity of emitting greenhouse gas emissions. So that's one of the programs. There are other potentials --

JUDGE PILLARD: They need to be backsliding to trigger that, or, provided they meet the criteria which would be significant deterioration?

MR. MYERS: Well, Your Honor, the way it would work is either if building a new stationary source or modifying an existing --

JUDGE WALKER: But assume it's just existing, it's an existing stationary source because 111(b) covers new and modified. So, I'm saying we, you, want to regulate carbon emissions from existing sources. Assume you can't use 111(d). What would you use? What are some of the possibilities that you would use?

MR. MYERS: Well, I think they would be the possibilities that you were discussing in some of the earlier arguments, Your Honor. NAAQS program, Section 112, Section 115, those are all possibilities the EPA has --

JUDGE WALKER: I just wanted to see if you had a fourth or a fifth to add to that list, but it's totally fine.

I'm good.

MR. MYERS: Thank you, Your Honor. So --

JUDGE MILLETT: Can I ask a question? If someone objects to, under a scheme like this where the states have so much discretion, if someone objects to the state plan, not the EPA guideline, sorry, I just don't know this, how are those challenged? Are those challenged inside the state, or are they also challenged under the --

MR. MYERS: Those would be challenged, each state plan could be challenged under state law, Your Honor.

JUDGE MILLETT: Or they can also, I guess you could always challenge, I guess, the Secretary's or the Administrator's approval of a particular state plan. But if the Administrator has approved a state plan, it can still be struck down under state law?

MR. MYERS: Well, typically the works, typically the way it works, Your Honor, is the state law and act, as a matter of state law or state regulation whatever provisions will go into a federal plan for submission. So challenges usually come first at the state level, and then, you know, a state will propose, here are the regulations that we have enacted that will fulfill our obligations under this EPA plan. We'll submit those to EPA. If EPA disapproves them, then, you know, that could be challenged. Or if EPA approves, that could also be challenged as well.

JUDGE MILLETT: So, I'm sorry, the state law challenges come before it's approved by the administrator?

MR. MYERS: Typically.

JUDGE MILLETT: Okay, all right. Thank you. Are there any more questions from Judge Pillard or Judge Walker?

MR. MYERS: If I might. Sorry, Your Honor, if I might just finish up this point on trading?

JUDGE MILLETT: One minute. One minute.

MR. MYERS: I heard Your Honor wrap this up. So, two quick points on this. First, the ban on trading is inconsistent with the flexibility recognized in Section 111(a)(1) and EPA's implementing regulations. Those provisions don't mandate using EPA's best, or EPA's preferred systems. They say the standards in state plans are to reflect the degree of emission limitation achievable through the application of the best system. And that is consistent with Congress's notion of cooperative federalism that it's the results, the performance that matters here. It's not the specific methods the states choose.

The second legal problem is, many of our states intend to use emissions trading programs going forward, yet EPA's prohibition on using trading to comply with ACE means that we'll need to devise a different plan to get reductions of the same pollutant from the same sources. And for the reasons we cited in our brief, we think both Section 116 of

the Act and the Supreme Court's decision in Union Electric go against that result.

JUDGE MILLETT: Okay.

MR. MYERS: Let me just --

JUDGE MILLETT: Thank you.

MR. MYERS: Sorry. I was just going to very quickly conclude, if I may.

JUDGE MILLETT: Go ahead.

MR. MYERS: It's been 15 years since New York and other states sued EPA in this Court for failing to use Section 111 to limit power plant CO2 emissions causing climate change harms. Today, our residents are struggling to breathe from wildfire smoke, and our communities are being inundated by severe storms and rising seas. EPA has the authority to meaningfully address those harms. We ask the Court to grant our petition for review and order EPA to promptly fulfill its obligation under the statute to provide that relief. Thank you, Your Honor.

JUDGE MILLETT: Thank you, Mr. Myers.

All right, Mr. Brightbill, your turn again.

ORAL ARGUMENT OF JONATHAN D. BRIGHTBILL, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. BRIGHTBILL: Thank you very much, Your Honor. Jonathan Brightbill again for the Justice Department. So I'm going to try and move through it quickly, but I've

accumulated a list of 15 points over the course of the hour-and-a-half on the first part of this that I'm going to try and get through very quickly and not take as long.

But before I do that, I want to start now by just clarifying and nailing down the standard of review now for the ACE rule, right? For the CPP, under the MERC cases where you had a fundamental change in the regulatory structure and the regulatory paradigm from a technology technique, bottoms-up standard, to an aggregate area-planning and incentives-based, you know, coming down, impacting states. That triggers the major question doctrine. We think you don't even get there, Chevron step 1. But what we have here now is unquestionably in the realm of agency discretion. And so statutory issues like degree, what does BSER mean, those types of things, we're clearly in the wheelhouse of Chevron step 2, and no one is disputing that.

Now, with respect to the, first of all, point one here was the suggestion that because there is a modest reduction in the ACE, there must be a problem. And actually, that logic is exactly to the contrary when you look at Section 111(d), which is one of the if not the most modest emission reduction provisions in all of the Clean Air Act, Your Honor.

You're talking about adequately demonstrated,

based on cost, based on energy requirements, and the like. And the fact that you had effectively, you contrast that to MACT, maximum achievable control technology in 112, LAER, lowest achievable emission rate for non-attainment areas for new source review, Your Honor. You have one of the most modest provisions in the Act, and the fact that you, of course, from this mouse hole used five times successfully prior to the Clean Power Plan, you spring from that the elephant of the Clean Power Plan with its dramatically different form of regulation, it's actually to the contrary, Your Honor. The results that you see or that were claimed under the Clean Power Plan as --

JUDGE MILLETT: I'm sorry, Mr. Brightbill. I guess, I understand the point you're making, but we really need to focus on the ACE rule now. I understand your arguments on the Clean Power Plan. So I guess you're, I think you're setting up the point that this is supposed to be modest regulation, and that's where you want to land, so.

MR. BRIGHTBILL: And that is the point, Your Honor, thank you, that ultimately the fact that you see a modest result from the ACE rule is not inconsistent with this statute or its history or its place.

JUDGE PILLARD: Well, no, you were talking about maximum, and here it says best. So that has a -- does that not have a (indiscernible)?

MR. BRIGHTBILL: It does not, Your Honor. This is not actually a technology forcing provision because it requires that best system of emissions reduction to be adequately demonstrated. And this Court's case law has talked a lot about what that means over the course of the year. And in particular, for example, in the Essex Chemical case, talks about it being without becoming exorbitantly costly in an economic or environmental way. In Portland Cement, it talks about it needing to be a national standard. In National Lime Association that this is a standard that you consider the representativeness from the industry as a whole.

So these are all background principles that when you layer it into adequately demonstrated, achievable, taking into account costs, energy factors, right? To the contrary, these are actually what the EPA called the guiding principles of how it went about formulating the ACE rule. And this is a very important, critical argument that none of the petitioners have actually wrestled with. And we actually called them out specifically on this in our brief at page 211, which is that the first act of EPA in formulating the ACE rule was to look at what BSER means and to interpret that, the statutory provision in a Chevron step 2 manner considering what all these other case laws are, and to come up with an articulated legal standard for how it was

going to go about conducting its review.

JUDGE MILLETT: Was this the best system of emission regulation include, do you just look at costs and technology, or do you have to balance in deciding what is best not just cost, but also whether it is, in fact, making a material change, materially addressing the environmental problem at hand, one which, as we discussed earlier, the EPA has, it's so dramatic that the EPA has (indiscernible) finding for?

MR. BRIGHTBILL: It does not, Your Honor, require that. It requires --

JUDGE MILLETT: You don't have to consider whether it makes, moves the needle at all on emission control in any material way?

MR. BRIGHTBILL: No. And in fact, this Court's prior precedent in the Essex Chemical case represents that for purposes of Section 111, EPA may not be able to set a BSER that moves the needle at all. Now, the petitioners give on reply --

JUDGE MILLETT: So they're not allowed to factor in -- I'm saying it for a specific reason, because they are, the EPA is forbidden to consider in deciding what is the best system, whether it in fact makes any material reduction in emissions? That's EPA's position?

MR. BRIGHTBILL: EPA's position is that under the

Essex Chemical case, it may be the case that the best system of emissions reduction is one that once you consider all of the statutory factors, that there actually is not a best system of emissions reduction that for a particular category of sources may actually move the needle. And this Court already held that --

JUDGE WALKER: I'm sorry, Mr. Brightbill. I don't think you answered Judge Millett's question.

MR. BRIGHTBILL: I apologize, Your Honor, because then maybe I didn't understand what she's trying to get to.

JUDGE MILLETT: The first is whether best system of emission reduction forbids you from considering amongst those statutory factors whether the technique at hand or the system at hand will make any material difference in emission reduction.

MR. BRIGHTBILL: In that, to that narrow question, I would say it doesn't forbid it, but that consideration cannot overcome, ultimately --

JUDGE WALKER: Does it require it?

MR. BRIGHTBILL: -- whether or not specific factors -- what's that?

JUDGE WALKER: Does it require the EPA to consider it?

MR. BRIGHTBILL: No. No, it does not --

JUDGE WALKER: I'm not saying it would be

dispositive, but --

MR. BRIGHTBILL: No, it does not, Your Honor. The statute doesn't use that. What the statute says --

JUDGE WALKER: I mean, I think that's, so, I think that's --

JUDGE PILLARD: It doesn't?

JUDGE WALKER: -- really hard to grapple, I mean to wrap my head around. We're talking about a program to reduce air pollution, and it doesn't even require you to consider how much -- it's been a long day -- pollution you're reducing.

MR. BRIGHTBILL: Well, Your Honor --

JUDGE WALKER: That's what you're saying?

MR. BRIGHTBILL: Okay, no. Let me clarify that. So of course it requires you to consider the amount of pollution that the system is reducing when you're looking at it. But I understood Judge Millett's question to be broader, I guess, in some sense, in terms of reaching all the way to whether there are health and environmental benefits from the system of emissions reduction. And I would say no, it does not require that. In 111(d), actually, 111(d) is actually triggered by 111(b). And that kind of, what I will call high-level determination of whether regulation of the pollutant is beneficial from a Michigan v. EPA perspective, from a cost benefit

perspective, that occurs in 111(b) in the context of --

JUDGE MILLETT: But in doing the cost benefit -- I'm sorry. I'm hearing a ringing. Is one of you trying to ask a question? No, okay. You have to balance both the cost and the benefits, correct?

MR. BRIGHTBILL: In 111(d), when you are doing a determination of whether you are going to regulate a particular substance under the Section 111, then yes, you need to weigh the cost and the benefits under Michigan v. EPA. Once you're through that gate and into 111(b), the statutory inquiry is different. Now, when we're talking about existing sources and whether or not there is something more that the existing sources can do, we're now conducting a technological review of whether there is a best system of emission --

JUDGE MILLETT: I'm sorry. Are you saying 111, B as in boy or D as dog? Maybe I'm not hearing you right because I'm getting a little confused about the argument.

MR. BRIGHTBILL: So in boy, in 111-boy is when you do kind of a broad, Michigan v. EPA style weighing of cost benefits to determine whether --

JUDGE MILLETT: But (b) is new and modified sources. So let's just confine the argument, at least, unless my colleagues prefer otherwise, to 111(d), existing sources.

MR. BRIGHTBILL: Correct. So --

JUDGE MILLETT: (Indiscernible) that cost benefit I assume is happening under 111(a).

MR. BRIGHTBILL: No. Once you get to (d), there's a statutory inquiry. The statutory inquiry that Congress sets forth is whether there is a system that is adequately demonstrated --

JUDGE MILLETT: That's in (a).

MR. BRIGHTBILL: Well, (a), but (a), again, you have to read in the context of (d) because you're, because, again, one of the problems is that there's been kind of a conflation --

JUDGE MILLETT: There's no balancing under (a), just to be clear, that's your position?

MR. BRIGHTBILL: When EPA is doing the determination of what the BSER is in the context of (d) because it is doing a BSER for the (d) rule, then the statutory inquiry is not, or is a balancing of the factors that are in that statute.

JUDGE PILLARD: And I thought I heard you say, Mr. Brightbill, that it doesn't look at the extent to which the system reduces emissions. So best is not the system in your view that is best at reducing emissions? It's the system that is best at taking into account the cost and non-air quality, health and environmental impact, and energy

requirements but not the best at reducing emission?

MR. BRIGHTBILL: No, no, no. I think you misunderstood.

JUDGE MILLETT: That's (indiscernible) emission reduction.

MR. BRIGHTBILL: I think you misunderstood what I was talking about with respect to Section (b) for boy versus (d) for dog. So for dog, for Section (d), you are trying to -- thank you, Your Honor -- you're trying to determine what is the best system of emissions reduction that is, and then there's a statutory analysis. What is adequately demonstrated, of course --

JUDGE PILLARD: Right.

MR. BRIGHTBILL: You know, of course, in the contest of that, you will be looking at whether there are emissions reductions. But in addition to whether there are emissions reductions, you also have to determine that it is adequately demonstrated, and this is the gating exercise that the petitioners hit. You have to determine if it's adequately demonstrated and broadly achievable for the source category across the country. That is how, as a Chevron step 2 matter, to begin their analysis --

JUDGE MILLETT: The statute doesn't say broadly achievable. The statute just says achievable. But go ahead.

MR. BRIGHTBILL: That's right, Your Honor. And again, if you read, if you refer back to the preamble, the ACE rule where they lay this out, Joint Appendix 0015, that's really where it starts. These are the guiding principles. And that additional, that gloss that you just referred to there, broadly achievable across the country, that, again, comes from this Circuit's case law interpreting 111(a)(1). Now, that was in the context of new sources, but EPA interpreted this Court's case law to require a similar analysis for BSER when it comes to existing sources.

So the very, very first thing that EPA did then was, okay, what does it mean to have a BSER in the first instance when you, in light of the case law, and they established this standard.

Now, the petitioners never attack that interpretation, never call it wrong. They were called out for it in our brief. And the only response was, well, there's case law that reflects that a BSER doesn't have to be in widespread use. But that sidesteps the question, Your Honor, because that's not what EPA is saying in it either. All the analysis asks is, is this broadly achievable for the source category across the country. It's not dependent upon the sole response that they had on this issue, Your Honor.

So, now, once you've established what is a BSER, EPA's practice at that point was to go through the candidate

systems of emissions reduction against this standard. Again, the standard is ultimately articulated in Joint Appendix at 16, 84 Fed. Reg. 32535, column 2, and then consider each of them. And so when it did so, only heat rate improvement met the statutory standard to qualify, to kind of get through the door, to get through the gate in the first instance to be a BSER, Your Honor.

Now, so that was actually points 1, 2, and 3, Your Honor. So point 4. Mr. Donahue then makes reference to the rebound effect. And with respect to the rebound effect, Your Honor, it's interesting that you ultimately, that petitioners are of two minds and kind of working at cross-purposes.

For one thing, I just want to point out that there seems to be a criticism of the ACE rule as compared to the Clean Power Plan and the benefits. But at the end of the day, the scientific study that the petitioners themselves, and Mr. Donahue I think was referring to this, earlier put into the record, submitted in comments to the Environmental Protection Agency. And they included an excerpt at Joint Appendix 1452 to 53, calls the difference between the ACE rule and the Clean Power Plan in terms of its net cumulative emissions slight. And I'll read it to you. Cumulative CO2 emissions from 2021 to 2050 are slightly lower under all three ACE scenarios compared to new policy and slightly

higher compared to the CPP.

Now, the EPA's own data is to the contrary, and they disagree with that. But with respect to the assertions of a Chenery problem or otherwise that they've established in this record that there's a material difference or a significant difference between the ACE rule and the Clean Power Plan, the record that they've established is to the contrary. But now this study also goes on and addresses this issue of the rebound effect, which again is --

JUDGE MILLETT: (Indiscernible) slightly different in the amount of emissions, and that's just measurably different. The amount of emissions reduction is, just the numbers are not slightly different.

MR. BRIGHTBILL: Well, they have a table, and the difference between the two --

JUDGE MILLETT: I'm just asking you, just look at me and just talk to me about it. Maybe you just say that, that maybe that expert's all wrong or confused or we're talking about something else. But I think we can all agree that the number is the amounts of reduction unless you're talking about what the market would bring in on its own. But if we're just talking about what ACE alone would accomplish --

MR. BRIGHTBILL: Well the Clean Power Plan --

JUDGE MILLETT: -- or what the Clean Power Plan

would have accomplished in the percentile of emission reductions, there's not a slight difference between them.

MR. BRIGHTBILL: Well, the Clean Power Plan itself in its preamble was premised on the idea that the market was going to do many things on its own --

JUDGE MILLETT: Right. You're relying on the market --

MR. BRIGHTBILL: -- (indiscernible) Your Honor.

JUDGE MILLETT: That's --

MR. BRIGHTBILL: So, but --

JUDGE MILLETT: So you're talking about ACE plan, plus the market keeps going and doing what it does.

MR. BRIGHTBILL: So the difference between the market and ACE at the end of the day is about a percent overall, Your Honor. But the difference between the ACE plan and the CPP, as compared to their own data, is, depending on the scenario, 2.2 to 2.7 percent in cumulative emissions over the next 30 years, Your Honor. But, more broadly, in defending the Clean Power Plan, Mr. Wu --

JUDGE MILLETT: Is that including on the assumption that people are going to use the, I'm not going to have the language right here, but the blade changing, and the, oh, what is the other one called? Where do I have it here? It's the blade, and then, sorry. I am not technological. The blade path upgrade and the economizer --

MR. BRIGHTBILL: Yes, Your Honor. Your Honor --

JUDGE MILLETT: Are you including those or not including those in your number?

MR. BRIGHTBILL: I am including those, and I'm sorry, I just want to double-check.

JUDGE MILLETT: Okay. You include those, but you said we don't think anyone's going to do it. So that seems to gild the lily a little bit.

MR. BRIGHTBILL: Well, let me clarify, Your Honor. No, it doesn't, because that's why I gave you a range. And I should have said 2.3 percent to 2.9 percent, according to their tables, Your Honor. But that's why there is a range, because they do do different scenarios. And one of the scenarios is the one you're referring to with the --

JUDGE MILLETT: Well, how can you count something that, I mean, it is on the table. It looks like the most productive one. But you all said we don't expect anyone to do it, and you, I think you didn't even model it. So you can't include those, any projections about those emission reductions. Can you reasonably do that?

MR. BRIGHTBILL: Your Honor, when assessing the overall rationality of the policy, it is reasonable to assess the various outcomes. And on the whole --

JUDGE MILLETT: Wait, wait, wait. That's a nice, general rule. Is it rational to assess an outcome where, in

fact, probably your most significant outcome is under a, including in that a scenario that you have said we don't think that will happen. That is your position, that is a rational thing to do?

MR. BRIGHTBILL: It is rational to do that, Your Honor, because part of rational policymaking is to model various different scenarios. And that's what they did in their studies. That's what EPA did when it did its analysis of what the emissions output would be.

JUDGE MILLETT: But can you defend your scenario on the ground of options that you expect, that do move the needle more than the other options on the list when you have said, made a finding or a determination or a prediction, an informed expert prediction from the agency that it will never happen.

MR. BRIGHTBILL: Well, Your Honor --

JUDGE MILLETT: That feels like gilding the lily to me. You count it, but you don't expect it to happen.

MR. BRIGHTBILL: Well, Your Honor, again, that's only one of the modeling scenarios, of course.

JUDGE MILLETT: Yes.

MR. BRIGHTBILL: And the total record, the total --

JUDGE MILLETT: I'm just responding to you saying it's rational to do that.

MR. BRIGHTBILL: Well, it is rational to do it as a standalone. I'm not saying it could be the only scenario that you could do it. But your question was is that rational. I interpreted that to mean is that rational to do it all ever? And it is if you're doing a range of different assessments, and that is what they did ultimately. It's a series of modeling, and ultimately, the expert agency to which Congress has delegated on this issue had substantial evidence which this Court owes an extreme degree of deference to since this is a technical judgment, that the net benefits of the ACE rule would be positive overall.

Now, with respect to the rebound effect, then, Your Honor, here again the petitioners want their cake and to have it too because when they are defending the Clean Power Plan, one of the things that Mr. Wu said in his discussion was that it doesn't matter. And actually, I believe it was in response to your question, Judge Millett, and you said is it possible that you could have a state that could do nothing, and they could run full power gangbusters, and then all the credits could come from another place. And his answer to that was, that's okay, Your Honor, because the total, because of the unique nature of this pollutant and the total amount of greenhouse gas emissions is going to come down, then the Clean Power Plan is rational, and that type of hypothetical scenario is true.

That same logic is why the rebound effect is not a criticism, a legitimate criticism of the ACE rule, Your Honor. Yes, it may be the case that in some places, some states, there will be more emissions. But on the net, across the entirety of the United States for this unique form of pollutant, which all emissions across the country ultimately mix evenly in the atmosphere, as Mr. Wu noted. The rebound effect is not a legitimate criticism since the regional isolation that they are engaging in doesn't answer what this particular pollutant (indiscernible).

So with respect to the rebound effect and the other issues that they raised against it, of course, the statute, 302(k), does permit EPA to establish or to base things on a rate and to have standards based on rates. The net emissions are going down. And one additional justification for why EPA's response was rational, and why the rebound effect, its response to that was not arbitrary, is at Joint Appendix page 24, EPA noted that states would be able to take account of the putative prospect of rebound when they're formulating their own state plans. And of course, we're dealing with a period of emissions over the next 30 years, and to the extent the rebound effect actually develops, that that is something that EPA can watch --

JUDGE MILLETT: Does EPA expect -- I don't know why we're getting feedback. I apologize. Does EPA expect

rebound effect?

MR. BRIGHTBILL: EPA expects, when it does its cumulative analysis across the country, EPA does expect that in some places, some states there could be higher emissions, but that the total overall CO2 emission profile --

JUDGE MILLETT: I just want to ask, I'm going to try this one more time. Does EPA expect rebound effect?

MR. BRIGHTBILL: Not net rebound effect in any except the worst-case scenario modeling that it conducted in conjunction with its RIA. But in total, its conclusion is, no, there will not be a rebound effect.

JUDGE MILLETT: What do you mean by net rebound effect? Do you mean just within coal power emissions, or are you throwing in all the market reductions in the process?

MR. BRIGHTBILL: In total for the country --

JUDGE MILLETT: Oh, that includes market, less use of coal, trading systems, whatever it is, all that. I'm just trying to -- if the only thing we're going to look at is what happens with coal.

MR. BRIGHTBILL: Right.

JUDGE MILLETT: All we're going to look at is what happens with coal. We're not going to look at trading. We're not going to look at generation shifting. You don't want us looking at that stuff anyhow. Would this lead to a

rebound effect --

MR. BRIGHTBILL: What the record reflects --

JUDGE MILLETT: -- just the coal system itself.

MR. BRIGHTBILL: What the record reflects and what EPA's finding is, is that there will not be a rebound effect that will outweigh the benefits of heat rate improvements at the coal-fired power plants, Your Honor. That was their finding.

Now, with respect to point 6 that Mr. Donahue made about the lack of emissions limit. As Your Honor already noted that that argument was premised on the, avoiding the word degree in the analysis for the, for what is a BSER. The statute does not require EPA to set a specific limit. Instead, it is to provide guidelines that reflect the degree of emissions reduction which can occur by virtue of the application of the best system of emissions reduction.

JUDGE MILLETT: Has the EPA ever set a range like this before? It sounds like it's not, it sounds like it's more a suggested range. It's not even a mandatory range.

MR. BRIGHTBILL: No, it's an actual range, Your Honor, in the following sense. The way that EPA's regulations work is that the states will now take the emissions guidelines. They will now take the table, and the regulations and the process each state to go through each of the seven heat rate improvement technologies at each of the

coal-fired power plants that they have in their jurisdiction. And using that HRI information, determine whether that HRI can be deployed at that facility. And again, one of the reasons why EPA took this approach and nothing in the statute --

JUDGE MILLETT: Okay. I don't want to hear that. I want to hear you finish and tell me how this is an actual, these up and down, the top or bottoms here are actual, hard limits for them.

MR. BRIGHTBILL: Yes. So the EPA needs to take the, or they take the information. Excuse me, Your Honor. The states take the information. They have to go through each of the heat rate improvement candidates, and then they need to do an analysis of whether or not the heat rate improvement technologies will have the effects.

To the extent that a state determines that, hey, for our particular facility, because they've already done equipment upgrades of this kind, or this plant is unique in its nature and therefore this HRI is not going to have the expected results, there could be geographically-driven results because of ambient temperatures and other things, depending on where in the country a particular power plant is. There's also many other idiosyncratic factors that relate to remaining useful life. The state will have to take those factors into account and justify and explain

variation from the emission guidelines that EPA has provided through the Table 1, through the expected heat rate improvements. And --

JUDGE PILLARD: So, Mr. Brightbill, I just have a question about what you've said so far. You were saying that states are the backstop on the rebound effect. But does that mean that states can use averaging or trading to account for rebound effects? I mean, how are they a backstop on that?

MR. BRIGHTBILL: Well, they can, they set the standards of emission reduction, Your Honor. And they are empowered as states to make judgments as they are reviewing these technologies and applying these technologies, Your Honor. And --

JUDGE PILLARD: So what is the federal, the federal guidelines, is it correct as Mr. Donahue was suggesting, this is sort of going back to the pre-1970 EPA where EPA is coming up with some information that might be useful to the states, but really the only actual, you know, verifiable, numerical metrics are, as an initial matter, at least, served up by the states in their SIPs?

MR. BRIGHTBILL: I'm sorry, Your Honor. I don't quite understand your question.

JUDGE PILLARD: So when EPA under its new framework regulations, it reaffirmed the requirement that

EPA have a guideline that it communicates as part of its BSER. But I gather from the ACE, and you can correct me if I'm wrong, that they don't actually specify for states or for categories of services, degrees, numerical degrees of emission limitation.

MR. BRIGHTBILL: So what they don't do is they do not provide a standard in, you know, which would be relevant for a coal power plant of pounds of, you know, million tons of CO2 per megawatt --

JUDGE PILLARD: Or even a rate. Or even a rate.

MR. BRIGHTBILL: Right. They do not provide --

JUDGE PILLARD: No numbers. Okay. So how is it verified whether they're complying or not?

MR. BRIGHTBILL: What they provide is information about the expected heat rate improvement --

JUDGE PILLARD: Right, Table 1. You're talking about Table 1.

MR. BRIGHTBILL: Table 1, Your Honor, yes. If --

JUDGE PILLARD: Right. And if a state says, you know, we are going to meet Table 1, we're going to be at the low end of everything, or we just can't meet Table 1, but here's what we can do.

MR. BRIGHTBILL: Right.

JUDGE PILLARD: And they come back. Then what happens?

MR. BRIGHTBILL: So if they say they cannot meet Table 1, they will need to justify that and explain what the factors are that, at the power plants and the places where they imposed a standard of performance that was late, that was less than and derived less heat rate improvement, and then ultimately a lesser standard than Table 1. They'll have to explain and justify that.

JUDGE PILLARD: Okay.

MR. BRIGHTBILL: If they do not, and that will be subject --

JUDGE PILLARD: And they justify that according to what standard?

MR. BRIGHTBILL: They will justify that according to the standards in the regulations, in the new implementation regulations, Your Honor.

JUDGE PILLARD: Which section numbers are you thinking about?

MR. BRIGHTBILL: So, in the new implementing regulations, 60.24a and Joint Appendix 57, and this in general applies the standards of performance and compliance schedules. And you can see, there are a number of various criteria that are being imposed on the states in particular in doing the heat rate improvement analysis. This provides, the regulations provide except as provided in paragraph E of this section, standards of performance shall be no less

stringent than the corresponding emission guidelines specified in subpart C of this part, and final compliance shall be required --

JUDGE PILLARD: Are there emission guidelines in subpart C of this part? I didn't see those.

MR. BRIGHTBILL: The emissions guidelines, then, are the, is the Table 1, Your Honor. That was the emissions guidelines for this class of sources, Your Honor.

JUDGE PILLARD: Oh.

MR. BRIGHTBILL: So, and then they use those --

JUDGE MILLETT: But suppose the company comes in or state comes in and says we went and talked to coal plant A, and we said let's see if we can, let's see if it makes any sense to have you do the blade path. They go, oh, no. Nobody's going to do that. Nobody's going to do that, just as the EPA predicted. All right, how about the economizer? No, we can't do that, just as the EPA said we can't. And then they go through the other things, and they go, look, we are really old, and the economies in coal production are so bad, we can't make any of the changes on this table because we are hanging on by a shoe string, and any extra expense, we're already, it's already hard for us to compete on the grid. Our bids are always coming in on the bottom of the pile. And if you put more expense on us, we're just going to go even deeper, so we just can't do any of this. And the

state says, well, makes sense to me. If you spend, you're hanging on by a shoestring, you're on that verge of bankruptcy. If you do anything more, you're going to become even less competitive on the grid.

State it comes back and says that to EPA. What happens?

MR. BRIGHTBILL: So, if a state says that, they'll have to write up the technical and other cost justifications for that, and ultimately, that will be subject to review by EPA who will determine if the reasons that have been provided --

JUDGE MILLETT: Well, let's assume it's truthful. It's truthful. Clean power plants are old. They're already having a tough time competing on the grid. They're already financially struggling. Then what happens?

MR. BRIGHTBILL: Well, Your Honor, they would need to articulate how the remaining useful life and other factors that are set forth in that way, they would provide that argument to EPA. EPA would determine if that argument is satisfactory. I'm not --

JUDGE MILLETT: Yes, I'm going to give you 10 pages of this, and it's all going to be truthful, and I'm going to give you the economic information you need, the financials that you need, the studies that you need, and it's going to show you exactly what I just told you. So I'm

going to back it up with some data and facts, and so EPA goes, okay. So then they just don't have to meet, do they just not have to meet an emission limit then?

MR. BRIGHTBILL: Yes. Let me answer your penultimate question, Your Honor, because I'm not EPA, so I can't make the technical judgments in the weighing of all the economic factors in your hypo. But --

JUDGE MILLETT: You're not the EPA?

MR. BRIGHTBILL: -- to answer your penultimate question --

JUDGE MILLETT: I'm sorry. Wait. I'm sorry. Aren't you representing the EPA?

MR. BRIGHTBILL: I am. I am, but I'm not a technical expert as to how all those factors would ultimately come together --

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: -- in any particular scenario to determine if --

JUDGE MILLETT: Surely your client could have told you how this was going to work.

MR. BRIGHTBILL: If the plan is going to be deemed satisfactory or not, but --

JUDGE MILLETT: But what choice would they have? There's no real standard here to violate, and they would have explained their way why they couldn't do any of those

things. What happens?

MR. BRIGHTBILL: Well, again, they would need to explain. And if they explain and provide sufficient technical justification --

JUDGE MILLETT: That's my hypothetical to you.

MR. BRIGHTBILL: Yes, that's your penultimate --

JUDGE MILLETT: It's true. You look at --

MR. BRIGHTBILL: -- hypothetical, then that's right. Then there may not be an improvement that can be applied to that particular plant, a standard of performance that requires anything more from that plant. That's consistent with the Essex Chemical case --

JUDGE MILLETT: Is it hard to imagine that every coal plant will be, or almost, that a large percentage of the coal plants will be able to make that same showing? They're old. There aren't new ones.

MR. BRIGHTBILL: EPA doesn't think so.

JUDGE MILLETT: They're all competing, and as we all said earlier, they tend to come out low on the, low on the grid competition. It's just more expensive. Getting coal is more expensive than getting a beam of sun or natural gas, which is in abundance. Right? They're just always coming out on the bottom of that. And anything you install, money is money. It's going to cost more. It's going to be, our bids are going to have to go up a penny, two pennies, in

a system like this that might make all the difference, right?

MR. BRIGHTBILL: Your Honor, EPA's technical assessment, ultimately, after going through the heat rate technologies and the data that was collected and comments was that ultimately there will be heat rate improvements that will be able to be made that across the entirety of the plate will achieve emissions reduction. It is the case that with respect to particular facilities that states review, in light of remaining useful life, which Congress directed them to be able to account for. When setting that standard of performance and other factors --

JUDGE PILLARD: No, they directed the states to account for that in determining how the standard applies, not EPA in setting the standard. That's pretty clear.

JUDGE MILLETT: Right.

MR. BRIGHTBILL: Yes, that's exactly right, Your Honor. And the state --

JUDGE PILLARD: But under your, the ACE rule, I realize you're the Department of Justice, not EPA, but under the rule that you're defending, the reference in 60.24a, sub-(c) to federal guidance that requires standards of performance on the part of facilities to be no less stringent than the corresponding emission guidelines specified in Table 1. So that's the floor, right? That's

the stringency requirement, is that it has to be at least as stringent as Table 1.

MR. BRIGHTBILL: They have to use that as their emission guidelines. They cannot use anything less than Table 1 --

JUDGE PILLARD: Right.

MR. BRIGHTBILL: -- to start their analysis.

JUDGE PILLARD: But, and this is just summing up, I think, what your interaction with Judge Millett has sort of walked through, it's up to the plant and the state to decide which of the heat rate improvements in the suite of BSER --

JUDGE MILLETT: If any.

JUDGE PILLARD: -- the facility is going to take on. And so the state and the facility are going to make those determinations. And if they decide none of them, then there's no stringency requirement.

MR. BRIGHTBILL: No. If they decide that there's none of them --

JUDGE PILLARD: Yes.

MR. BRIGHTBILL: -- it may be that Congress's purpose in 111(d) is fulfilled.

JUDGE PILLARD: Exactly. That's your position. That's right. Congress's purpose is fulfilled because they've looked at the remaining useful life, and they've

thought about the possible emissions control, and they've said it's nothing, nothing to gain here.

MR. BRIGHTBILL: They'll say nothing to gain here. Now, that'll be subject to judicial review whether, when EPA determines that a state plan is satisfactory or not satisfactory, when it approves or disapproves the plan, that'll be subject to judicial review in the regional circuit in which the Administrator takes that action to either approve or disapprove the plan. So, if that action has been arbitrary and capricious, the state has basically just kind of waved their hands and winked and nodded --

JUDGE MILLETT: No, that's not the hypotheticals we're giving you. The hypotheticals are not. That it's true, that they send in this documentation about age and financial condition and competitiveness. So don't say wave your hand. That's not the hypothetical here. That's too easy. I'm trying to figure out now how it's going to be arbitrary and capricious --

MR. BRIGHTBILL: I think that --

JUDGE MILLETT: -- under this table on judicial review.

MR. BRIGHTBILL: So, you know, it will not be arbitrary and capricious if they ultimately conclude because of the remaining useful life and other factors, after reviewing the heat rate improvements, that there are no,

there are no HRI technologies that for a particular source can be applied appropriately. They will have to justify that. If they have justified it, then the result may be that for that particular source there is not, there aren't additional technologies that can be --

JUDGE PILLARD: And Mr. Brightbill, under Judge Millett's hypothetical, she was saying that the justification is we are, this is an old plant. It's a coal plant. The competition out here is fierce. We are going to be not able to provide any power in a system that runs on least cost dispatch if we take on even one of these methods, so we're not going to do it. And you're the state regulator in West Virginia. And you're going to say, you know what? You're right. And then that plant comes to EPA and/or the court. What is the standard that we use to evaluate whether that is arbitrary and capricious or whether that meets the minimum level of stringency of the corresponding mission guideline?

MR. BRIGHTBILL: It would be an arbitrary and capricious standard of review at that point. That's --

JUDGE PILLARD: How do we tell? What are we comparing it to?

MR. BRIGHTBILL: You're comparing, first of all, Table 1, the expected heat rate improvements to the explanation and the justification for whether or not there

is a reason to depart downward from those heat rate improvements at that particular plant, Your Honor. It's very similar to --

JUDGE PILLARD: What does remaining useful life mean? Like, the concept that that's trying to capture, is that like we're not going to upgrade because we're going to retire this thing in two years anyway, or, is that what it means?

MR. BRIGHTBILL: It means a variety of what I will call related factors, Your Honor, but certainly cost is a major part of that when you look at what the Congress itself said, which is considering other factors, including remaining useful life. And so it would be, you know, any of a whole breadth of unbounded, right? I mean, that's, other factors is a highly discretionary grant of authority to states, Your Honor. So other factors, not completely unbounded other factors because it's being used in the context of remaining useful life.

But clearly, that is a very broad discretionary grant of authority to states, Your Honor. I would agree with that. And that was Congress's policy choice.

Now, with respect --

JUDGE MILLETT: What's the average age, what would you say the average age of coal plants is in this country?

MR. BRIGHTBILL: I do not know the answer to that

factual question, Your Honor. We could submit --

JUDGE MILLETT: Wouldn't that have been important to know in setting up a scheme like this?

MR. BRIGHTBILL: I'm sure that EPA does know that. Off the top of my head, I apologize, Your Honor, I don't know the answer to that particular factual question. So with respect --

JUDGE PILLARD: Let me just ask you, Mr. Brightbill. If a plant had been sort of, you know, scheduled to last or amortized to last for 40 years, and if it, you know, it's still going along, and they're expensive, and so you want to get everything you can out of it, and it's in the fiftieth year, then how does one project remaining useful life in that situation?

MR. BRIGHTBILL: And to make sure I understand your hypothetical, Your Honor, you're suggesting that the plant is about to shut down. It's 50 years in, or it's --

JUDGE PILLARD: It's 50 years in, but it's actually running fine. But sort of as a matter of amortization, it was only intended to last 40 years. So it's, you know, it's gravy now.

MR. BRIGHTBILL: Right. I think it would be an engineering, technical judgment ultimately by those who are reviewing that plant, by the states acting pursuant to the broad discretion that the Congress has granted them. So, I

think it's, as you say, if it's all running along fine, it probably has a more extended remaining useful life ultimately, Your Honor. So --

JUDGE MILLETT: I would like, you said EPA knows what the average age of coal plants is in this country. If you could send in a letter after argument, that would be helpful.

MR. BRIGHTBILL: I'd be happy to do that, Your Honor. Yes, I'd be happy to do that.

JUDGE MILLETT: All right. And we are, we're really getting up on our time limit here again. I can't remember if you, you had a list of, did I hear you said 15 points?

MR. BRIGHTBILL: Yes, so let me --

JUDGE MILLETT: Are you close to 15? What number are you on?

MR. BRIGHTBILL: I was up to six at that point, Your Honor. And in particular, because Judge --

JUDGE MILLETT: You're going to have to do some triage here.

MR. BRIGHTBILL: I think that I will. I can take the hint, Your Honor. But one of the things that, there was a reference to was, by Mr. Donahue, was the statutory authorization for generation shifting. And one of the things I wanted to be clear about is that where Congress has

authorized generation shifting, including in the SIP provisions, Section 110 provisions, there is specific language in the statute that has authorized that. So 42 U.S.C. 7410(a)(2)(A) talks of techniques, including marketable permits and auctions of emissions rights in the acid rain cap and trade program. Section 7651, Congress specifically provided for alternate methods of compliance provided by an emission allocation and transfer system, Your Honor.

JUDGE MILLETT: Is trading a technique for obtaining, I'm not wanting to give the clean power plant argument about where you have to do that, but is it a mechanism for obtaining emission reduction?

MR. BRIGHTBILL: No, Your Honor, not under 111(d)(1).

JUDGE MILLETT: I'm just asking you is it a mechanism for reducing emissions.

MR. BRIGHTBILL: It has been --

JUDGE MILLETT: In the real world.

MR. BRIGHTBILL: It has been utilized as a compliance mechanism, Your Honor, yes.

JUDGE MILLETT: Well, it can't be utilized as a compliance one if it doesn't actually accomplish emission reductions. Is that --

MR. BRIGHTBILL: EPA claimed in the Clean Power

Plan that it was, it could be used --

JUDGE MILLETT: I'm not asking for claims. I'm asking what your position. I'm just asking you, is trading part of the market system that has accomplished the reduction in emissions in this country?

MR. BRIGHTBILL: My position on that, and EPA's position on that, Your Honor, is show us the statute. Right? If the statute has authorized --

JUDGE MILLETT: I'm not asking statutory authority. I'm asking an empirical question here. All right? And you all say, and this is how you all, you know, you say your system plus these market forces make the delta between you and the Clean Power Plan not all that big. Is part of that market force system that you're referring to, does that include trading or credit systems?

MR. BRIGHTBILL: If Congress has provided for it in the statute --

JUDGE MILLETT: I'm not asking what Congress did. I'm asking you empirically in the world of market systems, not the congressional system. What they're doing out there on their own because there hasn't been a system in place. Is that part of the market forces that have gotten levels down faster than the Clean Power Plan?

MR. BRIGHTBILL: If you use as your baseline the grid, and generation shifting is a system that can achieve

market or emissions reductions for the grid in a kind of empirical, generalized sense, Your Honor, yes. It is not a continuous system of reducing --

JUDGE MILLETT: When you say generation shifting, are you including with that trading systems?

MR. BRIGHTBILL: Yes, I was, Your Honor.

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: Yes. As an empirical, top level. But it is not actually a system that is applied at a source, Your Honor. I mean, one of the things --

JUDGE MILLETT: (Indiscernible) I don't want to go back to go back to the Clean Power Plan argument. I understand your argument in that regard. But I'm just, you're talking about statutory authorization, and so it certainly could be part of the system. You just say it's not a system, you don't dispute that it could be part of a system for emission reduction. It's just not a, in a, not looking at the statutory language, that it is descriptively in part of a system for emission reduction. It's just not, I think, under your argument, a system for emission reduction that's applied at a particular facility. Is that where we are?

MR. BRIGHTBILL: That's right.

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: It's not applied at a particular

authority --

JUDGE MILLETT: But you don't dispute that it's part of, it could be part of a system for emission reduction. It just, in your mind, that's not the language problem. The language problem is it has to be putting 111(d), 111(a) and 111(d) together, it has to be at a facility.

MR. BRIGHTBILL: Right. EPA identifies a BSER for a source. It does not identify BSERs for owners of sources, Your Honor. And there's a conflation of two steps there, Your Honor.

JUDGE MILLETT: No, no, no. I want --

JUDGE WALKER: We've got it. We've got that.

JUDGE MILLETT: Yes, we've got that, I think.

MR. BRIGHTBILL: Okay, all right.

JUDGE WALKER: Let me ask a follow-up to Judge Millett's question. There are 10 states, I think, that have done some version of cap and trade generation shifting. There's the northeastern ones and there's California. Is it true that there are fewer, there is less carbon being released into the air from existing power plants because those 10 states are doing cap and trade or some version of cap and trade?

MR. BRIGHTBILL: I believe that, I don't know the specific answer to that question, Judge Walker. I believe

that in the Clean Power Plan preamble, that is addressed at some point. And I believe that the answer to that is yes. But that's a factual detail relating back to findings that, again, you know, we could follow up and provide the answer to that question.

JUDGE MILLETT: So, I'm sorry, just to be clear, was it yes, they have resulted in emission reductions?

MR. BRIGHTBILL: I believe that the answer to that is yes, Your Honor. But --

JUDGE MILLETT: It's kind of undeniable.

MR. BRIGHTBILL: -- relative to a baseline of if there was not a regional group in New England, I believe the answer to that would be yes. That was one of the things that EPA concluded in the Clean Power Plan. But, you know, off the top of my head, I don't know the answer to that.

JUDGE WALKER: Under your approach, everything that you said, you were talking with Judge Millett about that the coal company says this, the state says this. The state says, okay, you have to do this, you don't have to do that. It goes to the EPA. The EPA has to approve that or not approve that state plan. And it would be arbitrary and capricious for the state to make the wrong call on that based on, I think, and here's my question for you, all of these factors I'm about to list, and you tell me if I'm missing any. EPA would have to consider the benefits of

reduced air pollution, the benefits of improved health, the benefits of improved non-air environmental impact, the costs of possibly reduced energy, and the costs of possibly more expensive energy.

Now, is that list over-inclusive, under-inclusive when it comes to figuring out whether the EPA's approval or disapproval of a state plan is arbitrary and capricious?

MR. BRIGHTBILL: So I'd have to go through each of the factors step-by-step, Your Honor, but I believe that ultimately your list would be over-inclusive in all likelihood in what would be required of states, but that your list includes factors, I believe. You'd have to go through them again with me one-by-one but are certainly factors that states could account for within the broad breadth of their discretion.

JUDGE WALKER: Well, there's five, and I know we're late, but I think this is important. The state comes to EPA with a plan, and EPA chooses not to consider the increased cost of energy that would result from that plan. The EPA chooses not to consider that factor. Arbitrary and capricious or not arbitrary and capricious?

MR. BRIGHTBILL: In the context of the state plan, Your Honor?

JUDGE WALKER: Yes.

MR. BRIGHTBILL: So the increased cost of energy

is definitely a factor in the BSER consideration, Your Honor.

JUDGE WALKER: Okay, what about --

MR. BRIGHTBILL: (Indiscernible) regulations here, Your Honor.

JUDGE WALKER: I mean, because it's not like highly technical factors I'm giving, I don't think.

MR. BRIGHTBILL: Well --

JUDGE WALKER: I think I understood you to just say EPA would have to consider the increased cost of energy from the plan. EPA would have to consider the possibility that the plan will reduce the amount of energy available. Do you agree with that?

MR. BRIGHTBILL: Would have to increase the amount, reduce --

JUDGE WALKER: The state says part of this plan means doing something expensive, and so as a result, some companies are going to not be able to do it, and so they're going to shut down. Now there's less energy produced. That would be a factor the EPA would consider, right, in approving or disapproving the plan. It's in the statute, it's --

MR. BRIGHTBILL: No, I don't think so, Your Honor, because ultimately what we're --

JUDGE WALKER: In terms of the best system, the

best system takes into account, quote, the cost of achieving such reduction, and any non-air quality health and environmental impact --

MR. BRIGHTBILL: Okay.

JUDGE WALKER: -- and energy requirements.

MR. BRIGHTBILL: I see. I see, Your Honor. So what you're, you're looking at the factors that EPA itself considered when establishing and identifying the best system of emissions reduction in the first instance. That is distinct, then, from the factors that the state considers.

JUDGE WALKER: Okay. So, that's helpful. I get it. I get it. And that is very helpful to know, and I was confused on that.

I think now I'm even more worried, though, and I'm going to leave it at this, because at first I thought we were going to do arbitrary and capricious review based on five factors, which seems to me mushy. And now you're telling me, we don't even know exactly what the factors are. I don't even know that those are the five factors.

And so I guess what's going to happen is, EPA's going to approve or disapprove a state plan, and it's going to be, the EPA is going to have enormous discretion to do that, which is a lot of power for this Court to vest in the EPA to just say thumbs up or thumbs down kind of because we woke up on one side of the bed that day. And then it's

going to get sued. It's going to get taken to court, as it always does, and the court is going to be highly deferential to the EPA. And so, and we're not even going to exactly know as a court what standard we're supposed to apply in terms of figuring out what's arbitrary and what's not, so we're not going to be able to say it was arbitrary.

This is, I mean, I think this is a, maybe this approach is defensible, but I haven't, I haven't heard the defense.

MR. BRIGHTBILL: So, Your Honor, I'm just looking here because the EPA did address this in the preamble to the ACE rule. And I am going to get you the citation so that you can look at this. It's Joint Appendix 39 here, according to my notes, provides the -- sorry. We've got a lot of paper moving around along, in all of this, Your Honor. And, but in Joint Appendix 39, I have every other appendix here except for that first one, that's -- oh, here it is. Okay.

So if you look on Joint Appendix 39, EPA describes, column 3, how they're going to analyze these plans. To the extent that state plans consider an existing source's remaining useful life --

JUDGE MILLETT: Are you quoting now? I'm sorry. If you could tell me, if you're quoting now, if you could give me --

MR. BRIGHTBILL: Sure.

JUDGE MILLETT: My eyes can't go down column 3 that fast. Are you in the second paragraph, the third paragraph, the beginning?

MR. BRIGHTBILL: Column 3, Your Honor.

JUDGE MILLETT: Which paragraph in column 3?

MR. BRIGHTBILL: It starts about halfway down the page, to the extent. So Joint Appendix 39 --

JUDGE MILLETT: Got it, okay.

MR. BRIGHTBILL: Okay.

JUDGE MILLETT: In the paragraph starting the second. Okay.

MR. BRIGHTBILL: Yes. To the extent that state plans consider an existing source's remaining useful life in establishing a standard of performance for that source, the state plan must specify the exact date by which the source's remaining useful life will be zero. In other words, the state must establish a standard of performance that specifies the designated facility will retire by a future date certain, i.e., the date by which the EGU will no longer supply electricity to the grid. It is important to note that as with all aspects of a state plan, the standard of performance and associated retirement date will be federally enforceable upon approval by the EPA. In the event --

JUDGE MILLETT: That's interesting, but it doesn't

deal with my hypothetical, which is not its useful life. It's like really old, really living on the financial edge, very hard to compete. And because we're really old, any upgrade's going to be expensive.

MR. BRIGHTBILL: Well, Your Honor, I think it does in the following sense.

JUDGE MILLETT: Now, this is a very precise thing about one factor, and that is useful life. And I am giving you a combination of concerns that a state could rightfully note about its coal plants. And so, yes, okay, so you've got like a deadline. If all they're relying on is useful life, you're putting a deadline in. But that's, I don't think that's --

MR. BRIGHTBILL: Well, both --

JUDGE MILLETT: Now, I looked over this stuff, and it made me even more nervous that there's no there there on how someone's supposed to review if a state were to come, if the EPA approved a state plan that said what my hypothetical did.

MR. BRIGHTBILL: Well, Your Honor, I guess what I would ask you to do is take a look at starting that whole section under submission of state plans.

JUDGE MILLETT: No, I'm telling, that's what I'm just telling you. It didn't help. That's what I'm trying to tell you. I'm looking at more than just that line, those

lines that you're telling me about a narrow topic. I'm telling you, it didn't give me, and if I didn't understand some of the language or missed it, and it could be I missed it. We've done a lot of reading in the last few weeks. I just don't see where the standard is for finding, reviewing the APA's -- excuse me. We do that statute a lot too. The EPA's approval of a state plan that says this power plant can't do anything on the grounds that I have recited to you.

MR. BRIGHTBILL: So I guess what I would say to you, Your Honor, is this whole Section 3, submission of state plans, and starting, there's a setoff, a set-up paragraph in column 2, and the continuing from there, generally the plans by the states must be adequately documented. And just continuing down through this entire section, Your Honor, provides EPA's analysis of how it's going to go about reviewing state plans that are submitted.

JUDGE MILLETT: That's all about providing documentation, which my hypothetical did. I mean, it may just be, as I think you said at one point, maybe in response to Judge Walker, that if a state comes in and says what I proposed as to its coal plant, and it gives you the documentation, then EPA's going to sign off, and there's not anything arbitrary and capricious about that.

MR. BRIGHTBILL: I don't think I've said that your hypothetical, in fact, I think my answer to your question

was, Your Honor, that as to your specific hypothetical, that I wouldn't be able to answer how EPA would weigh those factors and all those things together --

JUDGE MILLETT: My question is does this rule provide. I mean, if you're telling me you can't answer it because the rule doesn't address it, and so nobody knows, and there is no standard in this rule, then that's your answer.

MR. BRIGHTBILL: No. What my answer is, is to the extent that the economics are playing in and weighing, there being, they'll be analyzed consistent with what's described at length here across the various columns of Joint Appendix 39 and 40, Your Honor. And as to the remaining useful life element that you noted as if there is an adjustment that's made, a variance that's authorized. Or a consideration. I shouldn't say variance. It's not a variance. It's a setting of the standard.

But if the standard is set at a point in consideration of remaining useful life, it'll become a binding determination under federal law that they will be committed to ultimately if they --

JUDGE MILLETT: Okay, all right.

MR. BRIGHTBILL: -- want to use remaining useful life to secure an adjustment.

JUDGE MILLETT: Okay. All right. Are there more

questions from my colleagues?

JUDGE PILLARD: So just going, so that I absorb what you've just been talking about. It's basically a procedural requirement in terms of documentation and explanation.

MR. BRIGHTBILL: Yes but anchored by the substantive requirements of Table 1 in that they must document and explain substantively why they're burying from that and letting something occur that is contrary to what those expected heat rates. So that is substantive.

JUDGE PILLARD: Or just not using them.

MR. BRIGHTBILL: No, they have to use them. They have to --

JUDGE PILLARD: Right, they don't have to use them.

MR. BRIGHTBILL: Well, they have to use them as the anchor, as the baseline from which --

JUDGE PILLARD: No, no. But, I mean, they don't have to use the heat rate improvements. They don't have to adopt them if they can explain why they're not.

MR. BRIGHTBILL: That's right, Your Honor. They don't --

JUDGE PILLARD: You said if HRIs are not feasible to apply, states must provide a rationale.

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

JUDGE PILLARD: Yes.

MR. BRIGHTBILL: So they don't have to apply them per se, but they are an anchor from which, a substantive anchor from which the analysis must then justify departure, Your Honor if the state wants to have its plan reviewed and approved as satisfactory.

I know there is a lot of questions about co-firing, and I didn't know if folks wanted to have those kind of record-based questions addressed with respect to co-firing because ultimately, EPA determined not to do co-firing because it failed the gating requirement of the BSER in that it was not determined to be adequately available on a consistent, nationwide basis. So there was some questions about --

JUDGE PILLARD: Yes, that's (indiscernible) because the very decision to include a kind of table of options rather than uniform heat rate improvements that were expected of all facilities, it seems like you've already accounted for the notion that some of these things might not be widely available. So, and then the question arises, why not add to that list the co-firing and the partial carbon capture rather than just put them off the table?

MR. BRIGHTBILL: And the answer is that it doesn't fit with heat rate improvements because, as they explain that the co-firing is actually, it increases heat rate. It

doesn't decrease it, so it's not --

JUDGE MILLETT: Well, but wait. There's nothing sacrosanct about heat reduction. It's supposed to be emission reduction. And you want emission reductions whether at the facility. And it turns out the heat ones are. But as it turns out, so is co-firing. Now, if I've misunderstood your rule, if your rule was even if there are other available technologies at the facility, that at least 35 percent of the plants in this country -- I'm just throwing that out. I don't want to get into the details. I know there's some question about that. But my hypothetical is 35 percent of the plants in this country could meet. You go, we don't care; we care only about heat reduction?

MR. BRIGHTBILL: No. Co-firing was not accepted as a BSER because it fails to meet the availability criteria and be a representative technology consistent with the prior D.C. Circuit case law that can be generally applied to like sources in the category across the country.

JUDGE MILLETT: What case is it that says generally, broadly applicable? Can you tell me again?

MR. BRIGHTBILL: So, Portland Cement at 486 F.2d at 330 talks about it being a national standard with long-term effects. National Lime Association, 527 F.2d 432 to 33 looks at that, considering the representative for the industry as a whole of the tested plants on which it relies.

And EPA then laid out its interpretation, including this, these case law in addition to the statutory provisions at Joint Appendix page 15 and Joint Appendix page 16 to ultimately culminate in the interpretation of BSER that they applied of adequately demonstrated and broadly achievable for a source category across the country.

And so applying that standard, again, a Chevron step 2 interpretation of the statute to the various facts that relate to the candidates, so co-firing for one, EPA determined that co-firing actually washed out for a number of reasons. One was insufficient nationwide availability, another was the cost of co-firing, another was the environmental --

JUDGE MILLETT: Okay, that's okay. I thought your first response to me was, well, that doesn't address heat.

MR. BRIGHTBILL: Yes, I was responding directly to your question about why not put it on a list with heat rate improvements, Your Honor, and --

JUDGE MILLETT: A list of options to reduce of emissions with the heat ones, yes.

MR. BRIGHTBILL: Right. And because it's not a, it is actually a heat rate increasing, not a heat rate reducing. So, in terms of subcategorizing or including that on the list, technologically, the EPA finding was it doesn't fit on the list. It doesn't belong on a list with those

other things. And again, that's a technical judgment --

JUDGE MILLETT: But if you re-caption that list emission reduction technology applicable at the facility, and you listed your heat stuff, and then you added co-firing, that would take care of that problem.

MR. BRIGHTBILL: Yes. EPA's finding after review of the facts and the technologies available, they said you can't add co-firing on a list of generally applicable, generally available technologies for sources in the category because of, again, the cost, because it is not generally available. Their evidence reflected that about --

JUDGE MILLETT: You mean generally available, like the technology's available, or just generally affordable, like reasonably implemented?

MR. BRIGHTBILL: Yes, exactly, reasonably implemented, generally available in the --

JUDGE MILLETT: Then why is the blade path there, which you said no one's going to do?

MR. BRIGHTBILL: The finding wasn't that nobody was necessarily going to do it because, but in part, that was, that is because of the legal requirements of new source review, Your Honor. But it is a generally-available --

JUDGE MILLETT: What is that answer to me? So the answer is people will do it? Because I had thought you said people won't do it.

MR. BRIGHTBILL: It is anticipated, given the current legal regime, that it is unlikely that people will do the blade --

JUDGE MILLETT: Well, why is it there on a list of things that have to be broadly available, and you said available means reasonably likely to be implemented --

MR. BRIGHTBILL: Well --

JUDGE MILLETT: Reasonably implementable.

MR. BRIGHTBILL: No, no, no. What I said was that it's, it's that it's reasonably available for implementation across the source category. So they could do it. Technologically, it is, but to the extent they don't do it and won't do it is because of the legal requirements that would come along with new source review in order to implement that, Your Honor. But with respect to the co-firing, again, it washed out on, you know, four different considerations.

JUDGE MILLETT: Okay. Yes, I think --

MR. BRIGHTBILL: Energy requirements, environmental, the waste of the gases, the inefficient use of gas in the co-firing as opposed to in a burner that is actually designed to efficiently make use of --

JUDGE MILLETT: Okay. I think we have those arguments. I think we have those arguments from the brief. Are there any other questions from my colleagues? We gave

you plenty of extra, equal time Mr. Brightbill.

JUDGE PILLARD: I have one question, which is do you have any view on what we could or should or couldn't decide of these issues if we rejected your statutory argument under the first section of argument?

MR. BRIGHTBILL: You mean under the Clean Power Plan?

JUDGE PILLARD: Yes.

MR. BRIGHTBILL: If you determine that the --

JUDGE PILLARD: Yes.

MR. BRIGHTBILL: So at that point, the appropriate remedy would be to remand back to the agency to consider what its policy choice would be in light of the determination that generation shifting is an acceptable BSER. One of the things I would want to emphasize, of course, is that the ACE rule is one that has begun to be implemented by states. The Clean Power Plan, of course, was based on data and findings that are now five years old, Your Honor, and was specifically put in place with a long, multiyear timeline as to implementation. I called it, you know, it was eight years, you know, from --

JUDGE PILLARD: So if this rule were to be vacated and we remanded to the agency, there's nothing, there's no regulation in place?

MR. BRIGHTBILL: No. I think that, what I would

suggest, Your Honor, is based on what I've heard during the argument is a lot of the questions have come in the context of why more stuff isn't on the list. And so there would be no reason to vacate the rule simply because the panel and the Court is of the view that there may be more things that can be done that EPA should go back and look at. The rule can remain in place, and EPA can begin to implement what's there now without vacating the rule in total, Your Honor.

JUDGE MILLETT: I just want to follow up. You said states are beginning to comply? I thought they had three years. What are the states doing? Has anyone submitted a plan to you yet?

MR. BRIGHTBILL: I don't believe I said the word comply. I believe I said the word implement. And --

JUDGE MILLETT: Okay. Who's doing the implementing, and what are they doing?

MR. BRIGHTBILL: So I know that EPA has been doing workshops with the states, with the state environmental agencies where they have been talking about the formulation of the plans --

JUDGE MILLETT: Oh, so this is informational steps is all that's been going on so far.

MR. BRIGHTBILL: That is my understanding, Your Honor, and my understanding is that states are getting to the point where they're preparing to submit plans --

JUDGE MILLETT: Okay. Maybe Ms. See will be able to address that for us on behalf of the states, so. So that's helpful for you to explain that.

MR. BRIGHTBILL: Okay.

JUDGE MILLETT: I'm sorry --

MR. BRIGHTBILL: Any more questions on remedy, Your Honor?

JUDGE MILLETT: I'm sorry to cut you off. We're just really, we really need to move on. Some people have been waiting all day to speak even once yet, so.

MR. BRIGHTBILL: I appreciate that, Your Honor. I appreciate your patience, all of you, today. This has obviously been going a really long time. I just want to make sure I answer any questions that you have on your issues before --

JUDGE MILLETT: I'm grateful for that. We're wearing you all down, I'm afraid, so thank you. We done? All right.

Ms. See, welcome back.

ORAL ARGUMENT OF LINDSAY SEE, ESQ.

ON BEHALF OF THE INTERVENORS

MS. SEE: Thank you, Your Honor. It's good to be back. But I will answer the question, Judge Millett, that you ended with about my understanding of where at least our state plans are. My understanding is no state has submitted

a plan to EPA at this point, but I know that our state agencies and regulators are working very hard on that and are close to a point, that they're far beyond the mere informational stage and close to the point where they can submit --

JUDGE MILLETT: All right. So if the plans aren't due for probably, I've lost track of the exact date, but maybe two more years, I don't, I'm sure this plan process isn't something you whip up in a week or anything. But sort of how far in advance of deadlines do plans usually get submitted? Like, when would you anticipate plans being submitted?

MS. SEE: I don't have the information to say when a plan for every power plant in West Virginia will be submitted. But I know because this is a detailed undertaking --

JUDGE MILLETT: Well, you're going to do a plan for each? You're not going to do a state plan for each plant?

MS. SEE: I can't make any specific representations about what our state's environmental agency will do, but I know some of the discussions have been at the level of looking at specific plans. Because, again, that's what 111(d) tasks --

JUDGE MILLETT: Well, I guess you can do that.

But I thought the state would put it all together in one plan that goes to the EPA. Otherwise, the EPA is sort of piecemealing this and doesn't get a big picture of what the state's doing until at least halfway through that process.

MS. SEE: EPA has certain accepted both options. It would be the discretion of the agency to decide how to respond if a state were to have a partial plan like this.

JUDGE MILLETT: EPA has in the past accepted just plant-by-plant plans?

MS. SEE: There have been partial plans under other portions of the Clean Air Act, and there would be similar provisions here. But again --

JUDGE MILLETT: What's a partial plan?

MS. SEE: It would be what the situation we're talking about here, a plan that sets the standard of performance for some but not all of the units in the particular state. And so, again, I'm not able to speak to the specifics of where a state agency is, but what I can say is because this is a detailed and data-specific process, it is well underway. I am not suggesting that there will be a plan for every unit in the state (indiscernible). So certainly this is a plan that the state takes seriously and collects data from all of the sources and interested parties. And this is a process that takes time.

JUDGE MILLETT: Do you know the average age of

coal plants in West Virginia?

MS. SEE: I can't tell you West Virginia specifically. I know, and I don't know if we have that in the record, but my colleague did look up for us during the argument then the average age nationally for coal plants is 39 years. So --

JUDGE MILLETT: Is how many?

MS. SEE: Thirty-nine.

JUDGE MILLETT: Thirty-nine. And what's the average life? Is that -- I'm old enough now that 39 sounds young. But I don't know what that, is that, is there an average life range generally for coal plants? I'm sure it depends on a thousand factors. I'm averaging.

MS. SEE: It does. It applies in a number of factors. I don't have a number that I can give for an average age. I know we're happy to work with EPA. I now Your Honor requested supplemental briefing on that.

JUDGE MILLETT: Yes, that would be helpful.

MS. SEE: We're happy to help on that point.

JUDGE MILLETT: Okay.

MS. SEE: So --

JUDGE WALKER: Ms. See, let me ask about Mr. Brightbill's discussion with the panel about what standards the EPA is supposed to apply when it's deciding whether or not to accept a state plan. He directed us to JA-39, and in

particular column 3. I can say in looking at that page, my excellent law clerk has color coded that with about eight different colors, and we have both dug into this, you know, at least as deep as I'm able to. And I don't see a standard. It talks about how the state plan must be satisfactory, that's not a particularly intelligible principle, to borrow a phrase from a different area of the law. It's big on documentation, so that's good. I'm all for documentation.

But assuming that the documentation is thorough, and everything is honest, I mean, I don't know how the EPA would, I don't know how we would know whether the EPA arbitrarily accepted or denied the plan. And let me just add, I think it's by design. I don't know that for sure, but it seems like it's possible this, it is a standardless standard by design. And you're defending it. West Virginia is defending it.

And I see the short-term benefit of a standardless standard. But I actually wonder, from West Virginia's perspective and the perspective of the 21 total states that are with you, if it's not actually very dangerous because, sure, it's possible West Virginia could submit a plan that is too lenient with regard to environmental regulation. And because this is a standardless standard, it gets approved. But West Virginia, you know, from West Virginia's

perspective, maybe so far so good.

But then maybe down the road, a different EPA, West Virginia submits a perfectly legitimate plan that's not too lenient about regulation, and the EPA denies that state plan because they want something that's way, way, way more, way, way, way stricter. And so then West Virginia goes to the appellate court, and they petition, and they say the rejection of our plan was arbitrary and capricious. And that court is going to have no standard to apply, and it's going to be bad news for West Virginia. Thoughts?

MS. SEE: Your Honor, respectfully, I do disagree because I think it is a feature of the statute that gives a role for EPA and a role for the states. This is not the sort of statute that operates where EPA tells us what to do and that we just check the box and send in a plan. It would minimize the role that the state would have in that process. But essentially, what the state does is it works hand-in-hand with EPA, and that's the design of the Clean Air Act as a whole and specifically at Section 111(d).

And I think when we look at the standards here, it's important to distinguish the standards for when we as the state exercise our authority to consider factors such as remaining useful life and the standards to determine whether we productively satisfy the BSER and have come up with an achievable standard. When we look at --

JUDGE WALKER: Ms. See, tell me why this is wrong. It seems like the standard that you, or the process you've just articulated puts enormous, unchecked power in the hands of EPA because now, under this standard, 11(d), and the states' compliance with it means whatever the EPA says it means.

MS. SEE: Well, that's not true, Your Honor, because if we have a situation like that where a state submits a plan and it's rejected out of hand, one of the arguments that a state would likely make is this, EPA did not allow the state to fill its statutory mandate to consider remaining useful life and other factors.

Now, I will agree that the statute does not give a precise list of what those factors are. But again, that --

JUDGE WALKER: What do you think are the statutory factors? I understand you to have just said they are not enumerated. Fair enough. But what do you glean from the statute that you see as the factors that the statute would require EPA to consider?

MS. SEE: Certainly what those other factors in (d) have to refer to are other source-specific factors like their location restriction, how recently they have made other related upgrades, you know, their operational design differences from others in the fleet. Those would be the sort of source-specific things that can make applications

different in one circumstance or another.

But I think it's important to emphasize that this concern about what these factors are and how to justify remaining useful life, that's not just an issue with this particular rule. That could be an issue that could come up any time there's a state plan under any 111(d) standard --

JUDGE MILLETT: Well, except you have here a rule that doesn't impose any emissions standard as a baseline. And, in fact, seems to be a sort of here's some suggestions. States, you go look at your plants and tell us what will work. That's how it seems to me, that seems to me, I didn't hear Mr. Brightbill say otherwise, unprecedented under the statutory provision for the 111(a). And so we're starting with here's some thoughts, how does it work on your end, as sort of a standard from EPA, some thoughts and ideas, some suggestions, two of which we already know you're not going to want to do.

And then, a rule that doesn't respond to the nature of what they've formulated as their emission limitation when it puts this rule, by the nature of what they've done under 111(a) puts even more weight, and it seems designedly, when you look at how it's explained in the brief, it deliberately shifts the weight of compliance to this sort of generalized analysis under (d), and not even under meeting a standard under (d), but under the age of the

plant and among other considerations. That seems to be where all the action is going to be now under this rule. Am I wrong about that?

MS. SEE: I don't know, Your Honor. I think that there are other factors here. And first I would, I would disagree that I think these are thoughts and suggestions. And I know that that's the phrase used here. I agree with Mr. Brightbill that there is more specific guidance, for the state to look at seven specific technologies, they have to look at presumptive application range --

JUDGE MILLETT: Well, they say potential application. Potential application. And they want it all to be, all the work to be done when the state goes plant by plant and says what will work here.

MS. SEE: But to some --

JUDGE MILLETT: And we'll still allow that plant, 39-year-old plant to stay competitive. Because if it doesn't stay competitive, I assume it's going under. And that's going to affect energy production.

MS. SEE: Of course. But to some extent, that's always the rule for the states under 111(d). The states always have to have source-specific standards of performance, and they always have to determine remaining useful life and other factors like that. So that's always going to be the result of a statute where Congress --

JUDGE MILLETT: Well, that's different if you have, look, here's the standard. Here's a hard-and-fast standard. Here's our best system, and here's the standard it produces. States, figure out how to meet it. And then you look at the rest of 111(d), and it's like an exceptional, you know, if you meet an exception, it'll opt out. And my understanding is that it was an exception.

And yet, now, under this rule, that's where all the work is done. We're going to give you this range for some potentially applicable technologies, but we don't even think they're all applicable. And we want you to go plant-by-plant and look at these things and tell us what works. That is not the same system as you had, certainly the Clean Power Plan. And it's my understanding you had under other, the Clean Mercury Rule, and how this thing would apply.

MS. SEE: It is true that in other contexts, EPA has given a more specific emissions limitation.

JUDGE MILLETT: So these all become exceptional. These back-outs become exceptional, right?

MS. SEE: I would take issue with the term exceptional, Your Honor. There may be circumstances in states where source-specific factors may apply to many of the sources. And again, that may turn on geography and age of fleet. So, some states may be relying on these exceptions of remaining useful life and source-specific

factors much more often than others. So I don't think there's support --

JUDGE MILLETT: (Indiscernible) under other rules that's been what's happened, that some state has been able to come in and get a large percentage out?

MS. SEE: Well, we have very different rules. Again, what we're dealing with is a circumstance where 111(d) has been used only a handful of times, so we don't have --

JUDGE MILLETT: No. You know more about how it worked in those times than I do.

MS. SEE: I don't have the specifics of for instance the West Virginia plan under any of those rules, so I can't say the percentage of times that states have considered remaining useful life. But here, what we're talking about, stationary sources and fossil fuel-fired plants and others, some of these factors are going to be, it could be more than just incidental because of some of these factors we've been talking --

JUDGE MILLETT: No, that's exactly the point of this rule, right? Yes. It's only --

MS. SEE: (Indiscernible.)

JUDGE MILLETT: It's only coal power plants, all of which, my bet, and I didn't quite hear an answer, but my bet is that 39 is not as young for coal power plants as it

is for people in my book. And so that's going to be where all the action is, that and the other factors that --

MS. SEE: But that's a quarrel with Congress and the terminology that Congress used.

JUDGE MILLETT: Well, that begs the question, I know that begs the question of the design here, of whether what Congress wrote here was there will be an emission limit, a hard emission limit that will be there, and only if you, you know, and that the exception is the opt-out. And now it seems to be, the whole point is you have to sort of prove your way into any obligations.

MS. SEE: Your Honor, that's not how I read the statute. If we look at what (d)(1) says, it says EPA's responsibility is to establish a procedure for states to submit these plans, which, and then the plans for each source set the standards of performance. So EPA has done that here. It has set a procedure that has given guidelines and guidance to the states when the states are setting a standard of performance for each existing source. So --

JUDGE MILLETT: So any particular source, which makes it sound like, look, they're going to have it going statewide, but if we run into somebody and it's just not working for them --

MS. SEE: Your Honor, there's two portions where (d)(1) references source. I was referring specifically to

(d)(1)(A) which says that the procedure that the EPA sets out has to allow a state to submit a plan which establishes standards of performance for any existing source. So that is the first, the first step that the state does, that the state has to go source by source to --

JUDGE MILLETT: So under your theory, they're doing all this under that first sentence, and you're never going to get to, I don't know. It's really written badly. Maybe it's the second sentence, but it's the regulations have to allow to sort of opt out for useful life or other factors. But you're saying all that's already being done in the first sentence under this rule, or under the statute?

MS. SEE: I don't believe that all of it is being done. It is true that the --

JUDGE MILLETT: Why wouldn't it be done? Why wouldn't you look at useful life under your, in your view under the first sentence?

MS. SEE: I'm sorry. Why wouldn't we look at useful life under the first -- so we're, we're submitting --

JUDGE MILLETT: (Indiscernible) I'm saying your view of, you look at the standard of performance for each, individual existing source --

MS. SEE: Yes.

JUDGE MILLETT: -- under that first sentence, of course you're going to look at every factor there that you

would look at down in the opt-out.

MS. SEE: Your Honor, I think the way I was looking at it, so what does it mean to establish a standard of performance for an existing source, that's where we get this question of what is achievable when we apply the BSERs. And that's the first step of what the state's doing for each source is to say we have the BSER the EPA has given us. What's achievable for this source? And then, once we have that default --

JUDGE MILLETT: But you don't take the BSER, you don't take the system and apply it to the source. You're supposed to take the emission limit. That's the standard of performance. That has to reflect the emission limit. It doesn't have to reflect the BSER. So that emission limit is what you're going to go take to Company A.

MS. SEE: Well, Your Honor, I know we've been looking at the definitions a lot today, but we look at what the standard of performance is. At heart, what the standard of performance is what the state is saying here, that's an emissions limit, and how does the state know what that limit is, it's what's achievable for that source when applying the BSER. So that is the process --

JUDGE MILLETT: That's how the EPA comes to a number. When they give you all an emission limit, yes, they back it up and they document and share with, I assume they

share with you what they used in their BSER so if you want to do it, you can do it. But I thought it was pretty well-established, and I'd be surprised if a state disagreed, you don't go to each plant and say you've got to do every element of this BSER. What your standard of performance is, you plant have to meet this number. Isn't that what your standard of performance is?

MS. SEE: Well, the standard of performance will often be a number. But how it works in this case is for --

JUDGE MILLETT: I'm not talking about under this rule. I'm just talking about under the statute. Your general understanding of the statute is that what you go to the plant with, you've got to figure out a number for each plant.

MS. SEE: Yes. We have to figure out what is achievable when applying the BSER --

JUDGE MILLETT: And that is, you said, what they can do to get to that number.

MS. SEE: The number is what is achievable when the BSER is applied. That is our view of the statute.

JUDGE MILLETT: Oh, okay. So your view is that a state could not get to that number using anything other than the BSER?

MS. SEE: The BSER and what EPA could give us could include some default numbers. But the question would

still be what's achievable when we apply the system that EPA has given us. So there's always going to be room for the source-specific adjustment here. And again, that's a feature that Congress put into this statute by giving states this role to apply the guidelines that EPA has given. There's nowhere in the statute that says EPA (indiscernible) emissions limit for each standard. There's always roles for (indiscernible) whether it's applied under (A) or (B) or both, which is how it would work (indiscernible).

JUDGE MILLETT: Okay. Do my colleagues have questions?

JUDGE WALKER: No. None for me.

JUDGE MILLETT: Does Judge Pillard have any?

JUDGE PILLARD: No, no. I'm sorry. I shook my head.

JUDGE MILLETT: Okay. I'm sorry. I didn't see that. I'm sorry, Ms. See. Did you have a key point or something that I didn't give you a chance yet to make?

MS. SEE: No, Your Honor. I believe we talked about the specific considerations. And in the interest of time, I will allow us to go into the next area.

JUDGE MILLETT: Well, you were very effective getting it all in in response to questions, so thank you. Okay.

ORAL ARGUMENT OF JONATHAN D. BRIGHTBILL, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. BRIGHTBILL: Your Honor, may I beg the Court's forgiveness to give one last, clarifying cite on all of this?

JUDGE MILLETT: Sure.

MR. BRIGHTBILL: 60.24a(e) in Joint Appendix 58. If you continue reading the implementing regulations --

JUDGE MILLETT: Sorry. I need to go slow again. I'm sorry. What are you giving us? Are you giving us a regulatory cite, or Federal Register cite, or a case cite?

MR. BRIGHTBILL: A regulatory cite, Your Honor.

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: That's in the Joint Appendix. It's the new implementing regulations.

JUDGE MILLETT: Yes.

MR. BRIGHTBILL: And I was reading them, and then you asked me a question. I never got back to finishing that (e), which is --

JUDGE MILLETT: I'm sorry. Give me that cite again, 60.2?

MR. BRIGHTBILL: 60.24, little a, sub-E in Joint Appendix 58. That is the regulatory articulation of the remaining useful life standard.

JUDGE MILLETT: Okay.

MR. BRIGHTBILL: So.

JUDGE MILLETT: Great.

MR. BRIGHTBILL: Thank you, Your Honor.

JUDGE MILLETT: Thank you very much.

MR. BRIGHTBILL: Thank you again for the privilege.

JUDGE MILLETT: Thank you. All right. Mr. Donahue, I hope you can go fast. And I think your time is now up, but we'll give you three minutes. But you're going to have to unmute. Sorry.

ORAL REBUTTAL OF SEAN H. DONAHUE, ESQ.

ON BEHALF OF THE HEALTH AND ENVIRONMENTAL PETITIONERS

MR. DONAHUE: I'm trying to figure out how to --

JUDGE MILLETT: You're unmuted.

MR. DONAHUE: Can you hear me now?

JUDGE MILLETT: Yes.

MR. DONAHUE: Okay, great. So I'm going to largely just supply some citations. So, I'd really highlight the 1975, the preamble to the regulations that still sort of supply the Court of how EPA thinks 111(d) is supposed to work at 40 Federal Register 53342 and 43, which really explains why it's central to the way the statute's meant to work for EPA to set out a substantive requirement to evaluate state plans.

Secondly, the Clean Power Plan noted that one of Section 111's purposes is promoting the advancement of

pollution control technology. That's 80 Federal Register 64775. And this Court in Portland Cement of 1973 noted that as well, that Section 111 looks ahead beyond existing technology to what will be available. That's 486 F.2d 391.

Just, this is slightly more than a citation, but just, we should recall the statute is about emissions, not about heat rate. Heat rate may sometimes be a way of getting at emissions, but I feel like in this rule it's kind of jumped the guardrail, and it's become an end in itself. And indeed, a basis for turning down more effective measures. And on the point of heat rate, I would strongly commend the amicus brief of the energy modelers, that's Bertram and Keys (phonetic sp.), et al., which talks a lot about rebound and different scenarios with respect to the more aggressive heat rate measures and how they will produce more emissions.

And then I think I would just say, you know, on the question of remedy has come up a few times. It's not uncommon for environmental groups, even when we think a rule is not as strong as it should be to ask the Court to leave it in place because it gives some protection in the interim. That's Allied Signal and related cases. We do not take that position here. We think this rule really doesn't provide appreciable benefit. And we ask that it be vacated rather than maintained while EPA goes back to do a lawful rule.

And with that, I'm happy to take any questions, but --

JUDGE MILLETT: Why would you want to vacate it, which means there's going to be nothing there. And these rules tend to take a little while to get put together.

MR. DONAHUE: Right. I mean, I think that's a testament to how we feel about the rule's public benefits that they really aren't there. We did ask in our opening brief that the Court admonish EPA that there is a time factor here. And as Mr. Myers noted, it's been well over a decade that we've been trying to get a rule in place because this is highly time sensitive. But a rule that won't do anything good is not a rule that we think would be helpful.

JUDGE MILLETT: Thank you. Do my colleagues have any questions?

JUDGE PILLARD: No. I'm fine.

JUDGE WALKER: If the rebound effect happens because the heat efficiency improvements make it possible for a consumer to buy more energy at less cost, or make it less costly for the producer of the energy to produce the energy, why haven't all of these heat rate improvements already been made? Just because the coal factories are interested in producing the same product at less cost?

MR. DONAHUE: Right. I mean, I think, first of all, it's not likely to benefit consumers to spend more

money to make, to prolong the operation of a coal plant. And so I think EPA is talking about using regulation to push companies to do it.

JUDGE WALKER: But I thought the rebound effect happens because the coal company can produce the same amount of energy at less cost?

MR. DONAHUE: After it has engaged in a capital expenditure required by regulation. And that's --

JUDGE WALKER: Oh, and so that expenditure doesn't get pumped back into the price that consumers are charged, or that the grid considers?

MR. DONAHUE: I'm --

JUDGE WALKER: (Indiscernible.)

MR. DONAHUE: I'm going to have to point to the energy modelers' briefs, and, because I --

JUDGE WALKER: All right. That's fine. Next time.

MR. DONAHUE: -- I've exceeded my --

JUDGE WALKER: I'm good. I'm good. Thank you though.

MR. DONAHUE: Okay. Thank you, Your Honor.

JUDGE MILLETT: Okay. Judge Pillard, did you say you were done? Okay, all right.

MR. DONAHUE: Thank you very much, Your Honor.

JUDGE MILLETT: All right, thank you, again for

your patience everybody. I hate to do it, but I think we've been waiting, saving the best for last, biogenics. With deep apologies to Mr. Williamson and Mr. Carlisle and Mr. Duffy, I'm going to have to call a five-minute break. Is that okay? But then I promise it's all your floor for the rest. Okay?

Madam Deputy, can we have a break, please?

THE CLERK: This Honorable Court will now take a brief recess.

(Whereupon, a brief recess was taken.)

MR. WILLIAMSON: Good afternoon, now, and I'm mindful that it's almost good evening, so I'm going to try to condense this. I can't promise --

JUDGE MILLETT: It's only fair I feel like you should do what you need to do for your client because --

MR. WILLIAMSON: Oh, okay.

JUDGE MILLETT: It's only fair to you.

ORAL ARGUMENT OF DAVID M. WILLIAMSON, ESQ.

ON BEHALF OF THE BIOGENIC PETITIONERS

MR. WILLIAMSON: Well, let me start with a hypothetical, and if I can, I'll adopt Judge Walker's Acme Power Plant name.

JUDGE WALKER: Just as long as there are no prime numbers.

MR. WILLIAMSON: No math at all, hopefully, in

this. So if a state were to require Acme Power to reduce its greenhouse gas emissions by 5 percent, and instead of replacing expensive equipment like an economizer, the power plant prefers to comply by using five percent biofuels. The question is, did Congress unambiguously prevent it from doing so?

EPA says the biofuels are disqualified, importantly not because of a science or a policy determination, but because Congress used the word application, EPA says, in 111(d), which limits the types of compliance measures. But EPA never explains why Congress would have intended to foreclose using low-carbon biofuels when addressing greenhouse gases.

So EPA's interpretation is impermissible in two ways, either of which requires remand. First, there's no indication in the text or structure of the statute that Congress actually did constrain compliance measures. EPA misapprehends a limit that simply doesn't exist.

Second, even if the definition of application extends to compliance measures, it's our position that EPA's disqualification of biofuels is impermissible and arbitrary because biomass fuels actually do meet the criteria that the agency derived in the final rule. In fact, EPA acknowledges --

JUDGE MILLETT: That's your first argument. That

sort of rises and falls with the arguments about the Clean Power Plan, the Chevron step 1 argument against the Clean Power Plan.

MR. WILLIAMSON: Well, we did not argue, we don't have a dog in that fight, and I've tried to keep out of those issues. But as we did mention in our reply brief, I believe, that yes, if the definition of application that EPA has derived for the BSER selection context, if that falls, that also crumbles the foundation of, well, of EPA's position on the --

JUDGE MILLETT: Because your second argument about you meet the at the facility, then, probably maybe the more important one for you?

MR. WILLIAMSON: Well, we think the simpler resolution is that compliance measures are simply not addressed in the statute at all. EPA has to find, in order to limit compliance measures, EPA has to find some hook in the statute. And the only thing, and this is a Chenery issue, the only thing that EPA has identified, it's not the science. It's not a balancing of policy considerations. EPA has said that the word application in the statute means for BSER also means that compliance measures have to correspond with the BSER in the same way. So that if biomass co-firing is not, has been, Mr. Brightbill said, has been screened out in the screening, that compliance measures

must be screened out as well.

And so, as a matter of statutory interpretation of not arbitrary and capricious review, applying the role to a situation, our position is that there's simply not statutory basis in 111 and certainly not in that single word application. And it occurred to me that --

JUDGE MILLETT: Do you think 111(a) talks about compliance measures at all? 111(a).

MR. WILLIAMSON: No, Your Honor. I'm pausing because I don't want to wade into the grammatical debate about whether, how 111(a) and 111 -- we're accepting for this purpose the EPA's position that the 111(a) definition of standard of performance is just inserted into 111(d).

JUDGE MILLETT: Yes, and I'm not raising that question. I'm just asking --

MR. WILLIAMSON: Okay, all right.

JUDGE MILLETT: -- were compliance measures. So not how --

MR. WILLIAMSON: Yes. Yes.

JUDGE MILLETT: Not how the BSER is calculated, and not how the standards are calculated --

MR. WILLIAMSON: That's right, Your Honor. They are different animals. BSER is different than compliance measures because --

JUDGE MILLETT: Right. That's what I'm asking.

So, 111(a), you would say, is just not relevant to compliance measures. It's --

MR. WILLIAMSON: No --

JUDGE MILLETT: 111(d) is where we get to states coming up with standards of performance, which is where compliance measures would be.

MR. WILLIAMSON: I agree, Your Honor, but I would also say that 111(d) doesn't address compliance measures. And it occurred to me, it wasn't really briefed because I don't think it was a point of contention, but I thought I would make sure the Court understands what the default here is in terms of compliance measures.

And the default is very well expressed by EPA itself in an earlier part of the preamble to the rule, not the section discussing compliance measures, but. This is at Joint Appendix 2. And if I could read. EPA says that after the emissions limits are set, each regulated source then must meet those standards using the measures they believe appropriate. So that's EPA's conception of how compliance measures work.

And we've cited an article by Professor Nordhaus, and that's included in the JA at 2009, which discusses sort of the default, what the starting point is. And our argument is that if EPA wants to alter the starting point of the power plant gets to decide how to meet the emissions

limit that's set by the state, the 5 percent reduction in the hypothetical, that there has to be something in the statute that allows EPA to restrict the types of compliance measures.

EPA had made a point earlier in the argument that it was following a precedent in BSER setting, 30, 40 years of precedent. Well, we've also cited Judge Wald's fairly extensive 150-page opinion in Sierra Club v. Causal. But that opinion, this issue was not specifically raised in that opinion, but it does acknowledge or recognize that the power plant gets to choose the measure to comply with the emissions standard. So that at least back to the 1970s was the default. And I wanted to emphasize that point.

JUDGE WALKER: Mr. Williamson, can you help me try to understand the science of how it works? Here's what I have in my head. You tell me if I got it right or wrong. There's a coal plant right now. It's burning coal for 100 percent of its fuel. It then switches to 5 percent biomass, so now it's burning 95 percent coal, 5 percent wood. It actually emits just as much carbon as it was before, but that wood that it's burning consumed carbon when it was grown in a forest, whereas, of course, mining coal does not consume carbon.

So if you look at how much carbon is emitted from the beginning of the process, either grown in a forest or

mining the coal, through the end of the energy production when the carbon is emitted through the smokestack, biogenic actually means that there's less carbon emitted from the beginning of that process to the end. Do I have it even close to correct?

MR. WILLIAMSON: You have it absolutely correct, Judge Walker. It's the scientific principle that exists, and I'm not going to say that we rely on it because it simply exists, and it's not denied by EPA, is that there is a method for accounting for the net emissions reduction when dealing with greenhouse gases, which are an unusual or atypical pollutant, and the netting that we start in our opening brief with a collection of the scientific literature that acknowledges that this type of netting is a scientific principle that would otherwise be applied.

The rule that we're challenging is the basis of EPA's rule is not that it rejects the scientific principle. It's that EPA fancies itself because of the word application to be unable to apply that science. EPA says that because it defined application as a technology only being used at a facility or put into operation at a facility at and to the facility, that that BSER definition also then has to be transferred to compliance measures and becomes a restriction on the type of compliance measures.

So EPA says, essentially, we would otherwise

recognize the netting principle here, but because all of the facets of the co-firing technology have to occur within the facility fence line, we, EPA, are unable to credit or look at the uptake of the carbon when the crops are, were primarily crops rather than wood, but it works either way. But when the crops are grown, even though the carbon is taken up by those crops, even though when the biofuels are brought into the facility (indiscernible) and used or put into operation in the facility boilers, EPA is saying because of the word application and the definition that we've given it in the BSER setting, we cannot look at the uptake of carbon from the crops. And we say we're making the word application do far more work even if it does apply to compliance measures. We're saying that is not, the rule itself doesn't even follow the BSER definition because it departs even further from BSER by requiring that every aspect of the technology.

So we're not, the biomass co-firing is not, and I'm not making a, taking a side in this debate, but we're not like wind and solar which EPA described as occurring wholly outside the fence line. We're a technology that's applied at the power plant because the fuel is actually fed into the boiler. The only question is whether EPA can recognize the scientific principle that otherwise would, would establish the calculation of the emissions. And, but

because of the word application, EPA can't acknowledge that scientific principle can't give effect to the netting of the carbon that's already been absorbed, and it's embedded into that biofuel when it's brought to the plant.

JUDGE PILLARD: I know this --

JUDGE MILLETT: Go ahead.

JUDGE PILLARD: -- isn't really part of your argument, but there is a way in which the netting would seem to invite a broader inquiry on a lot of other inputs into the process of power generation. And yet, I'm not aware of EPA having any tradition of doing that, you know, how the coal is shipped to the, you know, to the facility, is it by truck or by train. And if there's an emissions difference there, how it's mined, you know, maybe one ought to if one is doing a kind of environmental inventory. But there isn't any precedent really for looking at, more broadly at the kind of origins of what happens at the plant at the end of the day?

MR. WILLIAMSON: Well that, you will see that question of the life cycle analysis raised by some stakeholders, and the EPA, I think, doesn't necessarily take a position but they said they haven't decided how to do that calculation. But, I want to answer the question, but I want to emphasize that the basis that EPA identified from a Chenery perspective for the rule --

JUDGE PILLARD: Right, it --

MR. WILLIAMSON: -- was not that it was unable to make that --

JUDGE PILLARD: Right. It's a statutory interpretation question.

MR. WILLIAMSON: That's right. It's just simply based on the word application. But for context, there are different ways to do life cycle analyses. Our position, my client's position in this context is that it's not necessary to look at all the emissions from the production activity, from the mining of the coal or the diesel fuel that's used in the tractor to grow the crops. But that is, those are considered in a comparative life cycle analysis.

Now, if EPA disagreed and adopted a comparative life cycle analysis and had said we can't count biomass co-firing because of that analysis, that would have been a different role, and this would be a different case. But our position, to answer your question, Judge Pillard, is that our view of the life cycle analysis is that you look at the carbon itself. And the carbon is grown by the farmer in the spring. It's embedded into that fuel. The fuel is brought to the facility. It's released when it's used in the boilers. But because it had been stored, essentially, only months earlier that the net effect for greenhouse gas purposes is zero from the use of that biofuel.

But again, I guess I'm beating this horse, but that is context-only.

JUDGE PILLARD: Right.

MR. WILLIAMSON: That's not the basis for this rule.

JUDGE MILLETT: It's your position that compliance measures are not limited by the statutory text either 111(a) or 111(d) would also apply, then, to trading programs?

MR. WILLIAMSON: Well, I hesitate to wade into that battle, Your Honor.

JUDGE MILLETT: I mean either the text limits what can be used as a compliance measure or it doesn't, right?

MR. WILLIAMSON: Right, for a compliance measure. We don't see any restriction of any type in the compliance measures because that choice is left to the power plants by default. That's traditionally, then --

JUDGE MILLETT: Well, the states. First by the states would have to approve it, but.

MR. WILLIAMSON: Well, there's some question as to, right, whether the states in their selves could put some limits on compliance measures, but ultimately the states set, and I don't mean to argue this point, necessarily, but the states set an emissions limit that is the target to which the power plants have to comply. And conventionally, the power plants choose how to meet that target, whether by

being more efficient, whether putting a scrubber. In our case, we would argue by using biofuels.

JUDGE MILLETT: I had thought there was some at least interchange between the, or at least there's a vision here, some interchange between the state and the utility in even deciding -- not the utilities, between the plant, the facility in determining what limit gets set on each facility. Does that happen backwards, starting from the facility up, or? I had thought in my world that there was some back-and-forth on that.

MR. WILLIAMSON: Well, again, probably not our issue, Your Honor, but my understanding is that --

JUDGE MILLETT: I'm just asking the process, so --

MR. WILLIAMSON: Yes, well, the process, to my understanding, is that that emissions limit will be set by the state and put into a permit. And so that we're accepting for our issue, whatever emissions limit, whether that's a numerical limit, whether it's a percentage reduction, whatever limit results from that state facility interchange, we accept that, and we will meet that. Well, the power plant will meet that.

And what we're saying is if the power plant elects to use biofuel because it's an available technology, and because it can be accounted for and actually even can be applied at the facility, at least under the EPA's BSER

definition, that the power plant ought to have the option to utilize that (indiscernible).

I wondered if I might take a moment to address also how, in our brief we pointed to a number of examples of how we believe EPA's, particularly the criteria articulated in the rule, which are two, that the compliance measure be applied at the facility, and then that the emissions reductions be measurable, that EPA's disqualification of biomass co-firing on the grounds that it does not meet those two criteria breaks down from an arbitrary and capricious standpoint.

And the first is the example of biofuels. Again, I think I touched on this. But in our view, the biofuels satisfy the applied criteria because they are actually used at the plant, and EPA --

JUDGE MILLETT: Well, they aren't used to reduce emissions at the plant I think is what EPA would say.

MR. WILLIAMSON: Well --

JUDGE MILLETT: When they're used at the plant, emissions don't go down. It's all the, the emissions control is happening in the years that it takes before while these things are growing.

MR. WILLIAMSON: Yes, well, actually, Your Honor, EPA did not say that in the rule. They say that in the brief, interestingly. And there's a disconnect here.

JUDGE MILLETT: Yes.

MR. WILLIAMSON: The rule only requires that the technology be applied at the plant, and that the emissions reductions be measurable. Okay? And --

JUDGE PILLARD: Hmm.

MR. WILLIAMSON: Pardon? Yes?

JUDGE PILLARD: No, I just said --

MR. WILLIAMSON: Oh.

JUDGE PILLARD: Saying that was interesting.

MR. WILLIAMSON: Well, in EPA's, in the Government's brief, EPA morphs this somewhat, and we make a point of this in the reply brief that they then talk about, well, biofuels can be disqualified because they don't reduce the emissions at the stack. But the rule itself only says that the source actually reduce its emissions. And then one can ask, well, what does actually reduce mean? Well, we don't have to guess at that.

JUDGE PILLARD: Its emissions. After --

MR. WILLIAMSON: I'm sorry?

JUDGE PILLARD: Its emissions.

MR. WILLIAMSON: Its emissions rate, yes. So the power plants that the source, the power plant actually reduced its emissions rate.

JUDGE PILLARD: Right, so --

MR. WILLIAMSON: That's what the rule says and --

JUDGE PILLARD: (Indiscernible) leans on its emissions is the fact that the field in which the biomass was grown absorbs CO2, you know, I mean, it's just netted against the emissions at the stack, or is that not part of its net emissions?

MR. WILLIAMSON: Right. Well, I was about to address that, Your Honor, because that's critical. We don't have to guess at what actually means or its means because EPA tells us in the very next clause. You probably have the excerpt, but it's at JA-39. This is from the final rule. They say that --

JUDGE PILLARD: Look at which page? Because I'm dealing with it not the JA.

MR. WILLIAMSON: Yes. It's, in the final rule it's Federal Register 32558. And so this is at, in the first column --

JUDGE MILLETT: That's our favorite page.

MR. WILLIAMSON: Yes. It covers a lot of topics. So, this is the first column, let's say two-thirds of the way down. And you can see that there's a 1 and a 2.

JUDGE PILLARD: Yes.

MR. WILLIAMSON: These are the two factors. And the point I want to make sure that we understand is --

JUDGE PILLARD: Measurable, the point you made in your brief that it has to be measurable there.

MR. WILLIAMSON: Well, but the rule starts, Your Honor, by saying a compliance measure is eligible if it reduces an emissions rate. But then EPA doesn't leave that to guesswork. It tells us exactly how, what that means. It says in that, meaning this is what we mean, number 1 and number 2, that they, the measure, be applied to the source itself, and second, the measure be measurable at the source. There's no discussion here of the stack.

And again, that's consistent with that EPA was not rejecting the science of netting for looking outside the fence line to see what happened to create the biofuel in the first place. It was not rejecting that. But it was saying that what EPA says a little further down on JA-39 is that the biofuels don't satisfy the measurement because it relies on a counting, I'm reading now from the Federal Register, accounting for activities with an ellipsis, will not apply to, and not under the control of the source.

JUDGE PILLARD: It's interesting the not apply and not under the control. I mean, they do require, you know, coal, what is it, coal washing or, you know, certain things that are going to, and the outcome, it comes to fruition at the stack that it's less polluting, but it's a preparatory measure. And I wonder, like, I'm thinking about if, and you mentioned arbitrary and capricious and whether a rule that did not foreclose biomass as a compliance measure but

allowed it would then raise obligations to non-arbitrarily do things like require inventory of the methane gas released in the production of natural gas. I mean, I realize it's no longer regulating gas, but if EPA were to, you know, there are life cycle issues with other forms, the production of other forms of fuel as well. And presumably those would have to be taken into account.

MR. WILLIAMSON: Well, Your Honor, I think that an important point is that this concept of life cycle is standard. In fact, as I said, EPA is not disavowing that life cycle is used, and that's what it's trying to use application, the statutory term application as a hook to avoid acknowledging what it would normally do or usually do, which is to apply some sort of life cycle analysis.

And I think it's very instructive, Your Honor, and this is in the opening brief, that in the context of new facility permitting, and this is the BACT, the best available control technology, EPA applies this very life cycle. In fact, the record contains the biogenic bioenergy guidance. Now, EPA sort of backtracks from that in its brief and said, well, it's just guidance; we haven't decided. But I believe it's --

JUDGE PILLARD: Well, a little bit of a different system. The factors that there are on new sources are different from the factors on existing sources. In fact --

MR. WILLIAMSON: Yes.

JUDGE PILLARD: -- you rely, you do cross-reference in your brief, but the technological system terminology doesn't appear anywhere in 111(d), and it's defined independently of the best system, and it just seems like that's much more of a new source concept.

MR. WILLIAMSON: Well, Your Honor, part of the problem here is that we only get into this discussion if control measures are defined in part by the BSER definition. So the absence of language in the statute really sort of begs the question, well, what is the statutory hook in the first place to even, for EPA to even define this set of compliance measures. But on that, I want to be very clear. And if you have the appendix, it's at Supplemental Appendix 233, but it's under the statute. And 7479(a)(3) defines what BACT is.

If you need a minute to look for it, but to just jump to the point here, it's very similar language. Application of systems, and BACT actually says including clean fuels, right? But it's the application of a system. And that's the very same terminology that's used in 111(d). So there's an exact parallel here. And as we noted, in the BACT context, EPA has issued guidance at least that says we are going to look at how the biofuels are grown. And for purposes of the BACT standard, which is, yes, a different

standard that BSER, but said we're not going to be constrained by this fence line concept for BACT purposes.

And what our argument is, is it's arbitrary to then say, well, what's the difference in 111(d)? Why can't you look outside the fence line? Why can't you consider what the science would require you to consider how that carbon got into the biofuel. And EPA's only answer, the only basis upon which it founds the entire rule is, well, the word application in the BSER setting in 111 restricts compliance measures. And that has to fail.

And also I wanted just to highlight some of the other, what we call the stress test examples that, that the way EPA is applying even its own rule to biofuels breaks down because EPA applies it inconsistently to other situations. And I'll just take first that, I think we mentioned earlier today the carbon capture and storage.

So carbon capture and storage really is the converse of biofuels. So in that, and this is a system that EPA has determined is an eligible compliance measure. Right? But whereas biofuels capture the carbon, bring the biofuel into the fence line, and then it's used in the boiler, carbon capture and storage is the converse in this sense that the carbon dioxide is captured from the boiler, but then it's taken and piped outside of the fence line. So half of the relevant activities are occurring outside the

fence line, and referring back to that section of the rule, they are occurring outside of the control of the power plant operator because the CO2 is not --

JUDGE MILLETT: But to be fair, this is, you know, this is a program for emission reduction. And so why is it insensible to focus on the emissions that actually happen? And that is the difference between carbon capture and biofuels.

MR. WILLIAMSON: Well, so I guess there's two parts to that answer. Is that one, the reason that EPA disqualified biofuels, again, wasn't because there aren't any emissions reduction. It was because it said that the activity of growing the crops on the farm was outside the control of the Acme power plant owner. And the parallel I'm trying to draw is that in the CCS context, the storage or the recycling of the CO2 once it goes outside the power plant, that is equally outside of the control of the facility owner. So it can't be a rational reason to disqualify biofuels if it's not a rational reason to disqualify CCS. We're not trying to get CCS disqualified.

JUDGE MILLETT: I understand. Okay.

MR. WILLIAMSON: But also, Your Honor, again, I want to come back, because it's so critical, that EPA is not saying that there's not, excuse the double-negative, they're not saying that there's no emissions reduction. That's not,

unequivocally not what they're saying. What they're saying is we would otherwise recognize through a lifecycle analysis that the biofuels had this low-carbon rate. Now, whether it's 100 percent of half or some fraction, that's, we're not asking the Court to make a technical determination about how to apply a lifecycle analysis. But EPA never disavows that it would apply that lifecycle analysis except that the word application and the gloss that EPA has given it in the BSER context creates a constraint that doesn't constrain it in the BACT context, that doesn't constrain EPA in the, there's a whole program under the renewable fuel program under Section 211(o) that is predicated on the concept that biofuels are low carbon when they're used as a transportation fuel, and so we don't count that as additional greenhouse gases when it's used, when it comes from a tailpipe, which is the same as a smokestack for the source.

JUDGE MILLETT: All right. Do my colleagues have further questions?

JUDGE PILLARD: No, thank you.

JUDGE MILLETT: Okay, all right.

MR. WILLIAMSON: Thank you.

JUDGE MILLETT: Thank you very much.

MR. WILLIAMSON: I recognize the time is short.

JUDGE MILLETT: No, no. You've been very helpful

explanation. Appreciate it. Mr. Carlisle.

ORAL ARGUMENT OF BENJAMIN CARLISLE, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. CARLISLE: Thank you, Your Honor. Ben Carlisle from the Department of Justice on behalf of EPA.

I will just start very quickly with a point on which I think Mr. Williamson and I are largely in agreement, but just to clarify, and that is that the issues before the Court are indeed narrow, and they turn on a narrow statutory interpretation issue. The question of whether or not there is a scientific consensus on whether biogenic CO2 emissions are low carbon or are not contributing to climate change is not before the Court.

And I do just want to add one clarifying point onto what Mr. Williamson has said. EPA, because it was effectively not at issue in this rule, EPA has not represented, as I think Mr. Williamson suggested, that it would necessarily apply this lifecycle analysis absent its statutory interpretation. Again, our view is that's simply not a question before the Court, including the scientific issue.

JUDGE MILLETT: (Indiscernible) Chevron step 1 issue in front of us.

MR. CARLISLE: Exactly. That's right, Your Honor. And turning to that Chevron step 1 issue, EPA correctly

concluded that the statutory text prohibits biomass co-firing as a compliance measure. And here, I think Mr. Williamson doesn't quite engage with the argument or the statutory texts that EPA has advanced.

And the text that we focus on here, and it is related to the averaging and trading argument, but it's that when a state sets a standard of performance, that is defined in Section 7411(a)(1). And it is to be a standard for emissions of air pollutants. And that standard, what the state does must reflect the degree of emission limitation achievable through application of the best system of emission reduction.

So what we're talking right here is that while states can adjust the standards that they set for certain criteria, such as remaining useful life, and that has been talked about for some length. Once those adjustments are factored in, each source is to have its own particular standard of performance, which must itself reflect the degree of emission limitation achievable through the application of the best system. And if a standard allows for compliance --

JUDGE MILLETT: I want to make clear, and that's, so your position is each facility has to apply every component of the best system at that facility?

MR. CARLISLE: No, Your Honor, that's not quite

it. It's not that they must actually apply the best system itself.

JUDGE MILLETT: (Indiscernible.)

MR. CARLISLE: But rather, the standard must broad scale reflect the application of the best system of emission reduction.

JUDGE PILLARD: It has to reflect the degree of emission limitation.

JUDGE MILLETT: Right. That's --

MR. CARLISLE: That's right. I apologize. That language is actually very --

JUDGE PILLARD: That's Mr. Williamson's whole case, isn't it, that there is play in the joints between the actual activities on which EPA based the BSER and deracinated from that a standard of emissions of air pollution which reflects the degree of emissions limitation achievable through that BSER. So you take that from the BSER, give it to the states, and they are free to do it in some completely other way.

MR. CARLISLE: Your Honor, that --

JUDGE PILLARD: Isn't that written into the statute?

MR. CARLISLE: I think that is mostly right but with a critical difference. And I apologize for leaving out the degree of emission limitation because that's actually an

important aspect of the language here. And biomass is actually an example because if a standard allows for compliance measures that don't apply to the source to reduce the emissions from the source, then the standard that is actually being set may reflect a higher or lower level of emission than the application of the BSER would entail. So biomass is an example of this because it raises the emissions from the source.

So take, for example, if EPA were to set a particular standard or derive a particular numeric limitation, states then have to translate that into a standard performance that reflects that degree of emission limitation achievable through application of the BSER.

JUDGE PILLARD: But it's a standard for emissions of air pollutants. It doesn't say from the stack or at the plant. Right? A standard for emissions of air pollutants. And Mr. Williamson's point is I understand it is that you look at the lifecycle emissions of biofuels in determining the degree of emission limitation achieved by burning them.

MR. CARLISLE: That goes in part to EPA's interpretation of application that we are talking about the application of the best system of emission reduction to the source. That must --

JUDGE PILLARD: No, no, no, but that's a construct, right? So the point of the best system of

emission reduction, it doesn't ever, my understanding reading the statute, and you know much more about this than I do, but my understanding is that the best system of emission reduction is a hypothesis, and it's, I mean, it also has to be, you know, adequately demonstrated. But it's an idea about if we did this, what would be the degree of emission limitation achievable? EPA's studies have been saying these things that people could do out there, that the regulated sector could do. And then they say this is the degree of emission limitation achievable through that. And that is then given to the states, and the standard of performance that the states come up with has to reflect that but can be achieved through any number of other means. And what's wrong with that picture?

MR. CARLISLE: Your Honor, I think that that leaves out, and particularly as to biomass, leaves out the idea that the standard is to reflect the degree of emission limitation achievable through the application of the best system. And so the --

JUDGE PILLARD: Right. It's the degree of emissions achievable but not achieved. Right? It's achievable --

MR. CARLISLE: Right.

JUDGE PILLARD: -- as a sort of metric. So achievable through the application of the best system of

emission reduction, but I take it that that doesn't actually have to be applied. And I thought that the EPA has a position that, for example, partial carbon sequestration is permissible if states want to go there, even though it's not employed by EPA in coming up with the BSER for the ACE rule, right?

MR. CARLISLE: Your Honor, that's right, but carbon capture leads to emissions reductions at the stack. That means you actually meet that standard. And I think an example here may actually be illuminating. Which is if, imagine that a state sets a, imagine that the degree of emission limitation achievable through the application of the BSER, whatever that may be, is one ton of carbon dioxide per kilowatt hour. If a state then sets a standard of performance that allows biomass co-firing, then the standard will effectively allow for higher emissions than that one ton per kilowatt hour that actually reflects the application of the BSER. So while a state could --

JUDGE PILLARD: Well --

MR. CARLISLE: While other compliance measures that --

JUDGE PILLARD: It depends if you accept Mr. Williamson's view, which is actually wouldn't you, from the perspective of encouraging plants that are burning various kinds of fuels, you would, if your objective is to get rid

of CO2, you have them burn biofuels because you know for every unit of biofuels that you use, it's like a scientific fact that in order to bring that into existence, a certain amount of CO2 was absorbed. And so better to do that than to release it all from the ground.

MR. CARLISLE: So, Your Honor, just to reiterate, the scientific and technical questions are more complex.

JUDGE PILLARD: Right, right, right. But that's his theory, so.

MR. CARLISLE: But this is where we loop back to application to the source. And this is where the argument does, in fact, link to the argument related to the CPP.

JUDGE PILLARD: So EPA really has collapsed the inquiry about what would be achievable through an application of a best system of emission reduction, which is, as like I said, I think a sort of a hypothetical exercise, with then how the performance may actually achieve that. I mean, it just, so you've taken away that flexibility for the states in the way you interpret the statute.

MR. CARLISLE: Not quite, Your Honor. I think there is, the broad principle is that EPA views that language in Section 7411(a) as both a constraint on EPA's determination of the BSER and a positive restriction on the kids of standards that states can, in fact, impose. And any

compliance mechanism that does, in fact, get applied to the source, including carbon capture to reduce emissions or coal pretreatment which also, again, reduces emissions from the source, would qualify. It's a specific problem, you know, posed by biomass co-firing that it actually raises emissions at the stack above the level that in fact the --

JUDGE MILLETT: That might be a reason, which this isn't before us, but if EPA were to decide we don't like it. We just don't think it's effective. That would be sort of a Chevron step 2 type analysis. But we're dealing with Chevron step 1. And so when you look at 7411(a), the word achievable, what has to be achieved? A number. Am I right in thinking that a number?

MR. CARLISLE: Right, the degree of emissions limitation, et cetera.

JUDGE MILLETT: Well, it's a number, right. No, no, no. I don't want to do et cetera. That's the point because I'm not sure et ceteras end at the same place. The degree of limitation achievable means that there's a limitation, a number, whether it's, I guess, rate or mass, I'm not sure. Let's just go with rate because that's easier, right? This is what you're going to allow to emit per day. That's what the state is putting in its performance standard?

MR. CARLISLE: If it's a numeric standard, yes,

Your Honor. So, but our point --

JUDGE MILLETT: Okay, are they putting -- no, I'm just asking. Does their standard of performance say, plant, was it Amco plant? Amco Plant A will meet this emissions standard. Is that what the plan says?

MR. CARLISLE: Yes, Your Honor.

JUDGE MILLETT: Does the plan say how they're going to do it?

MR. CARLISLE: The plan doesn't necessarily say that, but EPA is --

JUDGE MILLETT: Does EPA require them to say how they're going to do it?

MR. CARLISLE: Generally no.

JUDGE MILLETT: Why is that?

MR. CARLISLE: No, Your Honor. EPA generally doesn't require particular systems. But the conclusion it drew here is that the statutory text does, in fact, prohibit certain kinds of compliance measures, particularly those that don't reflect the degree of emission limitation or would lead, rather, to a standard that does not reflect the degree of emission limitation achievable through application of the BSER.

JUDGE MILLETT: I don't understand what that means. Let's assume the BSER leads to a standard for emissions of 100 tons a month, a week. I don't know how

much. Right, 100 tons a month at Plant A. And the state says, you're good, 100 tons a month at Plant A. That's it. They've met the standard of performance, have they not?

MR. CARLISLE: But biomass co-firing would not, in fact, do that, Your Honor.

JUDGE MILLETT: I'm just asking a question about what the statute means.

MR. CARLISLE: In that case, the state has imposed a -- yes. The state has imposed a standard of performance reflected in that numeric limit.

JUDGE MILLETT: Okay. So if it's -- like, I get the, your contention that biomass exceeds coal. If biomass burned exactly the same as coal but also had the solitary benefit of absorbing carbon when it's made, but if it burned the same as coal, and so the state plan came back and said we got it, 100 tons a month, we're good to go, would that be consistent with the statutory text?

MR. CARLISLE: Your Honor, if it burned the same as coal, it would also not lead to any emissions reductions.

JUDGE MILLETT: No, that's, I'm sorry, the standard that's produced from the BSER is 100 a month. And so the state comes back and says, Plant A will do 100 tons a month.

MR. CARLISLE: Plant A will do, so I just want to make sure I understand the question.

JUDGE MILLETT: Yes.

MR. CARLISLE: The state comes back and says Plant A will do 100 tons a month, and your question is if biomass met that 100 tons a month standard at the stack, or only by virtue of its --

JUDGE MILLETT: No, no, no. I'm just saying, sorry, I'm not being clear. So the BSER computes through all kinds of whatever complexities, that the degree of emission limitation achievable is 100 tons a month. States, go figure out how your plants are going to do it. State A comes back and says Amco Plant will achieve 100, no more, 100 tons a month of emissions. Does that get, is that okay? Is there anything in the statute that bars that?

MR. CARLISLE: There is nothing in the statute that bars that, but --

JUDGE MILLETT: They don't have to explain how they're going to get to that. I mean, they have to do it. We're taking them at their word. They're honest people. The state's honest. They're going to do it.

MR. CARLISLE: EPA has concluded in this statute that they would not be allowed to do that by virtue of, for example, biomass co-firing.

JUDGE MILLETT: Even if it got to that exact number that you want?

MR. CARLISLE: If at the stack, they actually

emitted 100 tons of --

JUDGE MILLETT: You're not going to know. How are you going to know? They just, you told me the plan just says Plant Amco is going to get 100 tons a month, no more. How are you going to even know how they do it?

MR. CARLISLE: Because either they will be emitting that standard or above. And the use of biomass, absent another compliance measure would not meet that standard, Your Honor, because --

JUDGE MILLETT: I think you're making all kinds of assumptions. I haven't told you how Amco Plant is doing. I've just said, in my hypothetical, burning coal and burning biomass is the same. I know that EPA's position is that it's not true. But all I said is you have a state plan that comes back and says 100 tons a month for Amco. And you said that's all you require of plans. You don't require them to say how they're going to get to it.

MR. CARLISLE: Your Honor, the --

JUDGE MILLETT: Right? So that would be okay.

MR. CARLISLE: I think there --

JUDGE MILLETT: (Indiscernible) bar to a state plan that says we will meet your emission limit.

MR. CARLISLE: Except, Your Honor, that by virtue of allowing biomass co-firing, they would not, in fact, meet that limit --

JUDGE MILLETT: I am not telling you how they're meeting. I'm going to say this one more time. You're making assumptions about this. What the state has represented is that they will meet, this plant will meet 100 tons a month. They will meet that, and you don't ask how under the statutory scheme.

MR. CARLISLE: Your Honor --

JUDGE MILLETT: As long as they meet it. If they don't meet it, they're in trouble. But we're not assuming, that's not my hypothetical. They're going to meet it.

MR. CARLISLE: Your Honor, I think I see the disconnect, and that is that by virtue of the ACE rule's determination here, there is an inquiry into how they will meet that standard in that the --

JUDGE MILLETT: Okay. I thought I had asked you do they come in and say we're going to meet 100 tons a month, and here's how we're going to do it, and you said no, they just come back a standard of performance is that Plant A will emit this much. So now that's not true. So under the ACE rule, they're going to come back and say Plant Acme will meet this much and here's how? That's what the rule does?

MR. CARLISLE: I think the, by virtue of the ACE rule having disqualified this particular compliance measure, EPA would be reviewing the plans for whether that was how

they were, how they were proposing to meet the, how they were proposing to meet --

JUDGE MILLETT: Well, you don't know what anybody's doing, so every, single plant in this country for every single facility has to tell you not just the standard of performance on emissions but how they're doing it. Every jot and tittle of how they're doing it, that's your position?

MR. CARLISLE: It's not that they have to say every jot and tittle, but they can't adopt compliance measures that have been disqualified by the statute as part of --

JUDGE PILLARD: But they've been disqualified to play what function? If it disqualified by the statute, in your theory, to be considered as, as the best system of emission reduction, but they haven't been disqualified as the standard of performance that reflects that degree of emission limitation, and they certainly haven't been statutorily disqualified from being the compliance measures that a utility uses to meet a standard of performance that in its turn reflects the best system.

MR. CARLISLE: Reflects --

JUDGE PILLARD: Nothing in the statute talks about the compliance measure. In fact, it's all about flexibility.

MR. CARLISLE: Respectfully, Your Honor, we disagree, and we think the same language in Section 7411(a)(1) that we've been talking about in terms of determining the BSER is also a positive constraint on what states can do in terms of setting standards of performance, and that it goes to --

JUDGE MILLETT: Where does it say in your rule or (indiscernible) regulations that state plans must now not only say Plant A will meet this emission limit, which happens to be exactly the one that EPA set, and they either will explain how they did it or they will take an oath at the end that says we promise we're not doing this with biofuels.

MR. CARLISLE: I'm sorry, can you repeat the question, Your Honor?

JUDGE MILLETT: Where does it say in your rule that the state's standard of performance has to say not only that this plant will meet this emissions limit, which fully complies with what EPA has set, applying the BSER, EPA apply the BSER, and states must now, you can tell me either one, 1, option 1, tell us how the plant's doing it, or 2, promise with an oath at the end that however they're doing it, it's not with biomass? Is that in your rule?

MR. CARLISLE: Your Honor, it's in the disqualification of biomass co-firing as a compliance

measure. And again, it flows, in EPA's view, from the statutory text. So the discussion of that is at the same page that Mr. Williams --

JUDGE MILLETT: On what statutory basis, if they're meeting your limit, what do you care how they're doing it? I know you say they won't meet it with biomass, but my hypothetical is that they are. They are meeting your number. What language in the statute says that's a bad thing?

MR. CARLISLE: Your Honor, I think our point, of course, is that it's impossible to meet that standard at the stack using only biomass.

JUDGE PILLARD: Right. But the question is why does the standard have to be met at the stack if the whole question of compliance is not actually addressed by the statute, and in fact, the way the statute is structured is to give maximum flexibility to states. It would seem to me at least that it would be a question of state choice how it wanted to meet that because all the statute in 111(a)(10 requires is a standard of performance, that is a standard of emissions of air pollutions that reflects the degree of emission set by EPA through the BSER exercise. So, that's about the standard of performance, it's not about compliance with that standard, right?

I mean, why couldn't the state just say, we're

going to pay, you know, for, I know that this is just disallowed in the regulation, but this is part of what we're probing, that you can't use trading, but if a state said we want to use trading. We want to let our coal plants operate exactly as they always have been. And we're just going to buy a lot of credits, and we're going to, that's going to be the compliance. And the statute speaks to that?

MR. CARLISLE: EPA's view is that yes, it does, Your Honor. That bound up in the requirement that the standard of performance reflects the degree of emission limitation through application of the BSER, and again --

JUDGE PILLARD: Degree of emission limitation achievable, not achieved. I mean, we're going around in circles a little bit, but achievable through that application because nobody ever says, and in fact, the rule that I was just reading from acknowledges that it doesn't have to use BSER actually to meet the standard. Right? Free to meet the standard of performance using either BSER technologies or non-BSER technologies. So you understand that there's play in the joints between those two things, but then somehow it comes back in compliance as if it has to be BSER or have some close relationship to BSER.

MR. CARLISLE: Only insofar as it results in emission reductions through its application at the source, Your Honor. So the restriction here is not, I think, as

substantial as you may be suggesting. You know, the core restriction here is that the standard can't, in fact, authorize higher emissions than the BSER would entail. It can't, you can't have a standard that says we're going to turn a blind eye to the fact that this plant, notwithstanding that the BSER would result in one ton per kilowatt hour, is actually emitting 1.2 tons.

JUDGE PILLARD: Right.

MR. CARLISLE: And you're going to look offsite --

JUDGE MILLETT: But I think there your argument's about what emission limitation means, not application. If the emissions aren't limited?

JUDGE PILLARD: Standard for emissions of air pollutants, yes.

JUDGE MILLETT: If the air pollutants are still pouring out or even more is pouring out, I mean, that would be, but that's not the argument you make. You're pointed all on the word application, which seems --

MR. CARLISLE: Your Honor, it's in part because of the species of argument that biogenic petitioners are advancing, which is that really this is a reduction in emissions. They're saying this offsite activity, which is not occurring through firing of biomass, the actual application of biomass at the source is itself a form of emission limitation. And the EPA is saying no, what we look

to here is what happens when you essentially apply the compliance measure to the source.

JUDGE MILLETT: Yes.

MR. CARLISLE: You don't look to the offsite activity, and that's where the linkage to the application --

JUDGE PILLARD: That's really interesting because, I mean you're, for example with carbon capture and sequestration, there's emission going on, but something further happens with it. It's caught, and it's piped away. So, you know, it's coming out of the plant, but it's just not going into the air. And I guess the question is, I mean, there could be any number of lines that EPA could draw, that a state could draw in approving compliance. And the question is, what is non-arbitrary about this decision that's pulling something out of the BSER definition and importing it into the standard for emissions, and then further transferring it into the permissible compliance measures.

But I'm satisfied. I feel like we're just running you ragged, and so I'm satisfied that we, it's been really useful, anyway, to me, to hear your perspective and have you focus us on this issue in the vigorous way that you have.

MR. CARLISLE: All right, thank you.

JUDGE MILLETT: Well, I just want to try one more time. As long as the emission that comes out of the tower

is, meets the limit, what, then, is your textual basis for objecting to whatever compliance measure it was. I'm not telling you which one it was that caused them to meet that, that enabled them to meet that limit.

MR. CARLISLE: Your Honor, I think the difficulty there is that biomass cannot, as a --

JUDGE MILLETT: That's not, I'm just -- okay, never mind. You just don't want to answer this question. Okay.

MR. CARLISLE: Well, I apologize. I'm not trying to be evasive. But it's just as a matter of fact that it raises the --

JUDGE MILLETT: I said I'm not telling you how they did it. Once they meet it, isn't that all, isn't that the end of EPA's interest? Meet your number. That's the end of -- at the smokestack, that's the end of EPA's interest, is it not?

MR. CARLISLE: Your Honor, if the limit is being met, then compliance has occurred. But it is a physical impossibility for biomass to cause the limit to be met at the stack because it raises the emission.

JUDGE MILLETT: I understand that point. I understand your point on that front. Okay. Judge Walker, do you have any questions? Okay. Thank you very much. It's been very informative.

Okay, Mr. Duffy.

MR. DUFFY: Thank you. May it please the Court.

JUDGE MILLETT: Welcome back again.

ORAL ARGUMENT OF JAMES P. DUFFY, ESQ.

ON BEHALF OF THE RESPONDENT-INTERVENORS

MR. DUFFY: Yes. Well, our position is that EPA made a mistake of law in believing that it's plainly constrained in ways the statute doesn't support. Biogenic petitioners go too far in their claims regarding biogenic carbon dioxide. We agree with both parties here that EPA's basis for forbidding biomass compliance is not based on the science. But we'd like to just assert two points advanced in petitioners' briefs. Respond to two points advanced in petitioners' briefs.

First, there's no legal or scientific basis to assume that energy from biomass is carbon neutral. The impact of carbon dioxide on the atmosphere doesn't change depending on what source it comes from. The carbon impact, as we've discussed, depends on many factors, including its source and in a full lifecycle analysis.

Second, EPA has ample authority to regulate greenhouse gases from stationary sources that burn biomass. The endangerment finding, as well as the 2015 new source rule specifically cover carbon dioxide from steam generators regardless of the fuel, so the pollutant is covered here as

well. The endangerment finding included that the harmful air pollution is current levels of greenhouse gases which are elevated levels as compared to preindustrial levels. So that in the origin of the carbon dioxide is irrelevant.

Biomass emissions contribute to these elevated levels and are properly regulated under the Clean Air Act. So to the extent that biogenic petitioner seeks a requirement that EPA allow the use of biomass to be treated as carbon neutral compliance under ACE, we ask that you deny their petition.

If the Court has no further questions, I'm all set.

JUDGE PILLARD: The broader implications of any of this issue for just sort of the analytic points that we've been probing.

MR. DUFFY: I missed the first part of your question.

JUDGE PILLARD: Just it's sort of, this is an issue unto itself in terms of the biogenic petitioners interests and the nature of their fuel. But I'm trying to understand sort of more broadly what the implications are and whether you have any insight about that.

MR. DUFFY: How --

JUDGE PILLARD: How we think about, I mean, we just had I thought a very interesting conversation about it,

how we think about compliance methods and the flexibility bears a relationship to both the state standards and the BSER. Just any mapping that you would offer us to kind of, as we think about how this issue gets decided?

MR. DUFFY: Sure. The only thing I can bring up that might be relevant is, you know, we took a look back at the Clean Power Plan and how they treated biomass. And in the rule, it essentially said that if you want to use biomass, you need to provide a lifecycle analysis, and that that lifecycle analysis would be reviewed. So I think, you know, this is a unique, a unique source and a unique fuel, but it does require, you know, a full look at biomass type and the effects on land use, harvesting and combustion, soil, carbon loss rates, fate of the biomass had it not been combusted, and time required for regrowth.

So I think, you know, this, we obviously think that the rule should be remanded so that EPA can consider these different systems free from their mistake of law, thinking that they're restricted to systems that are applied to or at the source.

JUDGE MILLETT: Remanded, or vacated and remanded?

MR. DUFFY: Pardon?

JUDGE MILLETT: Just remanded, or vacated and remanded?

MR. DUFFY: ACE should be vacated. The repeal

should be remanded.

JUDGE MILLETT: That's why I thought you were just arguing for remand right now, so I was --

MR. DUFFY: No. I am well in line with Mr. Donahue's assertion of or request for remedy. So I think --

JUDGE MILLETT: The arguments you're making, though, seem to pertain, like you said, more to an arbitrary and capricious claim. But this, I had read EPA's decision here as a Chevron step 1.

MR. DUFFY: Right. I think that's right. I think, you know, EPA was mistaken, or our assertion --

JUDGE MILLETT: Okay, but then, so we don't have the arbitrary and capricious, those issues. Or it sounded to me, or maybe (indiscernible) it sounded to me like you're making arguments about it wouldn't make sense to allow this as a compliance measure, which would be a Chevron step 2 argument.

MR. DUFFY: That --

JUDGE MILLETT: But that's not in front of us.

MR. DUFFY: That is correct. That is entirely correct. This would need to be remanded. As I said at the end there, you know, to the extent that the petitioner is seeking either an exemption from the Clean Air Act or an assertion that biomass is carbon neutral, which I agree is not before the Court. We would just ask that that section

of --

JUDGE MILLETT: Right. Well, then we would just let EPA weigh in on this issue first if it were, I mean, one, they might be right on their statutory interpretation here. But if not, then I think we can all agree that the first call on, on what to do about biomass is for the EPA to make.

MR. DUFFY: Correct.

JUDGE MILLETT: I'm no expert on how much burns more, or I don't know that there's universal agreement on that, or, we don't have that record in front of us.

MR. DUFFY: I think that's right. And that was all we wanted to remind the Court of as we reviewed biomass petitioners' briefs.

JUDGE MILLETT: Okay. All right.

MR. DUFFY: Thank you.

JUDGE MILLETT: Anything from my colleagues? All right.

Mr. Williamson, you get the last word. I think you have, you used up all your time, but we'll give you two minutes for rebuttal.

ORAL REBUTTAL OF DAVID M. WILLIAMSON, ESQ.

ON BEHALF OF THE BIOGENIC PETITIONERS

MR. WILLIAMSON: Thank you, Your Honor. I hope to let us go even before then. I just want to emphasize that,

yes, this is a Chevron step 1. EPA takes the position spelled out at the brief at 248 that Congress barred consideration of the compliance measures. But I do want to remind the Court that we do have that secondary arbitrary and capricious argument that even if EPA's rule was valid, it arbitrarily disqualifies biofuels based on the two criteria that it identified. So I just wanted to remind the Court of that.

JUDGE MILLETT: Right. We got that. I'm just only talking about EPA's rationale here.

MR. WILLIAMSON: Yes.

JUDGE MILLETT: EPA's rationale was not the sort of factual argument --

MR. WILLIAMSON: Yes, Your Honor.

JUDGE MILLETT: -- that we had from Mr. Duffy. But your argument is arbitrary and capricious in a different way, if I understand it --

MR. WILLIAMSON: Yes, Your Honor.

JUDGE MILLETT: And even applying your (indiscernible) your application rule, applying the application rule, we would need it.

MR. WILLIAMSON: And it's very hard to avoid the term application (indiscernible) but yes, Your Honor, exactly right. The only other thing I'd say and then let us get some rest is to the extent that the Court is interested

on how this works, how the 111 program works, particularly in terms of compliance, there's very good discussion of, although 40 years old, but I think that's the point, in the 1979 Utility NSPS rule, that's at JA-1815, and the also as I mentioned in Judge Wald's very extensive opinion in Sierra Club v. Costle. I'm not saying that opinion has a legal point that is dispositive, but I'm just saying there's a lot of discussion about how EPA views the 111 standard-setting process and compliance measures.

JUDGE MILLETT: Okay.

MR. WILLIAMSON: Thank you very much for your time.

JUDGE MILLETT: Do my colleagues have any questions? All right. Go ahead.

JUDGE PILLARD: I was just going to ask Mr. Duffy whether he had two words to say about a deadline. I should have asked you before. Wasn't that your clients who are seeking a deadline on remand?

JUDGE MILLETT: Before we do that, do you have, does anyone have any questions for Mr. Williamson? No? Okay. Thank you very much, Mr. Williamson.

MR. WILLIAMSON: Thank you.

JUDGE MILLETT: Go ahead.

MR. DUFFY: I think, you know, we have obviously been waiting 15 years in seeking this rulemaking, and we

would want it as expeditious as possible. I don't know that we have a precise timeline in mind. We understand that these rules need notice and comment and need to get public input, but, you know, I think an expeditious timeline is warranted here given the long delay.

JUDGE MILLETT: Well, we have to calculate out some ratio. If it takes nine hours to argue it, it must take at least a month or two per hour of argument, so. I think we are now done, unless my colleagues have anything more. I do want to again apologize for the length, but I want to thank you all. You've been troopers, and I've found your comments and arguments exceedingly helpful and informative, as I've been thinking about this case.

And with that, the case is submitted.

(Whereupon, the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

_____ October 19, 2020

Mary Rettig Date

DEPOSITION SERVICES, INC.