

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

WEST VIRGINIA, ET AL.,)
)
) Petitioners,)
) v.) No. 20-1530
) ENVIRONMENTAL PROTECTION AGENCY,)
) ET AL.,)
) Respondents.)

THE NORTH AMERICAN COAL CORPORATION,)
)
) Petitioner,)
) v.) No. 20-1531
) ENVIRONMENTAL PROTECTION AGENCY,)
) ET AL.,)
) Respondents.)

WESTMORELAND MINING HOLDINGS LLC,)
)
) Petitioner,)
) v.) No. 20-1778
) ENVIRONMENTAL PROTECTION AGENCY,)
) ET AL.,)
) Respondents.)

NORTH DAKOTA,)
)
) Petitioner,)
) v.) No. 20-1780
) ENVIRONMENTAL PROTECTION AGENCY,)
) ET AL.,)
) Respondents.)

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23 Washington, D.C.
 24 Monday, February 28, 2022

25 The above-entitled matter came on for oral
 argument before the Supreme Court of the United States
 at 10:00 a.m.

1 APPEARANCES:
2 LINDSAY S. SEE, Solicitor General, Charleston, West
3 Virginia; on behalf of the State Petitioners.
4 JACOB M. ROTH, ESQUIRE, Washington, D.C.; on behalf of
5 the Private Petitioners.
6 GEN. ELIZABETH B. PRELOGAR, Solicitor General,
7 Department of Justice, Washington, D.C.; on behalf
8 of the Federal Respondents.
9 BETH S. BRINKMANN, ESQUIRE, Washington, D.C.; on
10 behalf of the Power Company Respondents.
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 20-1530, West Virginia versus the Environmental Protection Agency, and the consolidated cases.

Ms. See.

ORAL ARGUMENT OF LINDSAY S. SEE

ON BEHALF OF THE STATE PETITIONERS

MS. SEE: Mr. Chief Justice, and may it please the Court:

In Section 111 of the Clean Air Act, Congress directed EPA to partner with the states to regulate on a source-specific level, which means identifying measures particular buildings can take to reduce their own emissions.

The D.C. Circuit gave EPA much broader power, power to reshape the nation's energy sector, or most any other industry for that matter, by choosing which sources should exist at all and setting standards to make it happen.

No tools of statutory construction support that result. First, electricity generation is a pervasive and essential aspect of modern life and squarely within the states'

1 traditional zone. Yet, EPA can now regulate in
2 ways that cost billions of dollars, affect
3 thousands of businesses, and are designed to
4 address an issue with worldwide effect. This is
5 major policymaking power under any definition.

6 And though Respondents argue EPA can
7 resolve these questions unless clearly
8 forbidden, this Court's precedents are clear
9 that's backward. Unless Congress clearly
10 authorizes it, Section 111 does not stretch so
11 far, and Congress hasn't done so here.

12 Second, the words Congress did use in
13 the context where it placed them confirms
14 Section 111's traditional scope. Read together,
15 key statutory terms like "the requirement
16 standards before individual sources" and
17 "focused on their performance" show that
18 Congress did not green-light this transformative
19 power.

20 And, finally, standing is no reason to
21 avoid the merits. We're injured by a judgment
22 that brings back to life a rule that hurts us
23 and that takes off the books a rule that
24 benefits us. Respondents' arguments in sound
25 mootness, and it's their burden to show that

1 EPA's voluntary cessation and a -- and a stay
2 are enough to end the case. They're not. We're
3 asking for the classic appellate relief of
4 undoing what the court below did, and this Court
5 has full power to give it.

6 And the weighty issues at stake
7 confirm that it should. In contrast to EPA's
8 important but environmentally focused role,
9 Congress and the states are able to weigh all of
10 the competing factors and constituencies in
11 play. The lower court was wrong to
12 short-circuit that process here, and the Court
13 should reverse.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: You start your
16 argument with the major questions doctrine. Do
17 you need that to win?

18 MS. SEE: We do not, Your Honor. We
19 think that the text is clear. The Court can use
20 any of the tools of statutory construction. It
21 can focus on the particular words in context,
22 but major questions and the clear -- and the
23 federalism clear statement canon are also
24 textual tools of construction, and we think the
25 Court can and should use that as well.

1 JUSTICE THOMAS: So what is the
2 difference between clear statement and major
3 questions?

4 MS. SEE: So there are multiple
5 versions of the clear statement canon. Major
6 questions is one of them. The federalism canon
7 is a different version of the clear statement
8 canon. The clear statement part simply says
9 what we assume would be in the statute, how
10 clearly Congress would speak before courts are
11 willing to find this agency power. So major
12 questions is one version of the clear statement
13 canon.

14 JUSTICE THOMAS: So what -- what
15 factors would we take into account to determine
16 which canon or which approach we would use?

17 MS. SEE: I think it's important to
18 look at what the constitutional norms in
19 question are. Canons like major questions are
20 grounded in separation of powers. It's grounded
21 in commonsense presumptions about how
22 legislators would operate. It's the words that
23 we expect Congress would put in the statute.

24 When this Court deals with major
25 questions, it is focused on the nature of the

1 power at stake. Here, because there is
2 transformative power that crosses industries and
3 goes outside of EPA's core competency, this is
4 -- this is the area where this Court has been
5 willing to apply the major questions canon
6 before. And we argue that it should do so here.

7 JUSTICE THOMAS: No, I -- I -- I think
8 I was just trying to get a little bit more
9 specific. What is it about this case that
10 suggests we should use one or the other canon?

11 MS. SEE: Certainly. The power that
12 EPA was claiming -- and the Clean Power Plan is
13 one example of that power -- and the power the
14 D.C. Circuit gave it to go further would be a
15 new and transformative variety of agency power.
16 That is a -- a major policy question. And so
17 that is the sort of thing that courts are not
18 willing to assume that Congress implicitly
19 delegated those sort of questions.

20 JUSTICE THOMAS: So does a statute --
21 does the text of a statute change simply because
22 the problem is a big problem?

23 MS. SEE: No. No, Your Honor. It's
24 not a matter of the text of the statute
25 changing. The clear statement canon is a

1 text-based canon. It looks at the words that we
2 would expect to be in the statute.

3 Now, certainly, if the statute clearly
4 allows this power, we're not asking the Court to
5 ignore that because we would say that actually
6 satisfies the clear statement.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: I just want to
9 follow up a little bit because I'm not quite
10 clear what your position is.

11 So the major questions doctrine you
12 would categorize as simply a variety of the
13 clear statement doctrine?

14 MS. SEE: We would, Your Honor. We
15 would say the major questions doctrine is
16 satisfied when there is a clear statement in the
17 statute that said that Congress, in fact,
18 intended to give this power to the agency.

19 CHIEF JUSTICE ROBERTS: Some -- some
20 of the briefs talk about it as being -- I don't
21 quite know what the right word is -- being
22 informed by constitutional questions of -- of
23 non-delegation or delegation. Is that part of
24 your submission or not?

25 MS. SEE: We have argued

1 non-delegation under the constitutional
2 avoidance canon. We think that if Section 111
3 is read appropriately with the limits Congress
4 put in, there is not a delegation problem. But
5 we do recognize that there's significant overlap
6 between major questions and non-delegation.
7 They both get at the same constitutional norm of
8 separation of powers, of what Congress would and
9 would not be presumed to delegate to an agency.

10 Non-delegation is asking a slightly
11 different question of, can Congress delegate and
12 has it given sufficient guidance? Major
13 questions is asking the threshold question: In
14 fact, did Congress delegate?

15 And, here, no matter what the answer
16 is on the non-delegation question, Congress did
17 not actually delegate.

18 JUSTICE BREYER: The --

19 CHIEF JUSTICE ROBERTS: Go ahead.

20 JUSTICE BREYER: One problem that I
21 have is that there is a word in the statute
22 which I think is important. It talks about a
23 system. And so EPA has to have a system for
24 existing plans.

25 So what is that system? Now I -- I

1 tend to agree with you that normally, if it's --
2 if you interpret the word "system" so that it
3 totally, a hundred percent changes the
4 opposite -- the economic system of the United
5 States, that's a little far. It's hard to
6 believe that Congress delegated that.

7 But you want to jump from there to the
8 idea that it has to be plant by plant. Now
9 that's -- at that point, I said, but, gee, it's
10 easy for me to think of a system, that they
11 might choose EPA, that isn't plant by plant or
12 isn't within the fence, but isn't really a big
13 deal.

14 You want one? I mean, you know, it
15 used to be years ago that you have -- under the
16 PJM system, that you have computers and they
17 still do, they turn on, you know, they -- they
18 turn on the electricity plants, least cost order
19 --

20 MS. SEE: Right.

21 JUSTICE BREYER: -- across the day.
22 Okay. So many companies put in time-of-day
23 metering, and, therefore, it's cheaper if you
24 get your electricity at night and store it. And
25 so EPA might say: Hey, when you're doing that,

1 PJM -- or this isn't plant. This is the
2 computer for about a hundred plants.

3 When you do that, add a cent to your
4 presumed cost to reflect the fact that it's
5 coal-based. Or subtract a cent -- a cent when
6 it's L&G-based and subtract two cents if it's
7 solar-based. Eh, that's not a big deal. And if
8 you think two cents is a big deal, let's make it
9 a quarter of a cent, okay?

10 And so there we are. I have something
11 that's fairly minor, Congress might well have
12 delegated, and it is not within the fence.

13 MS. SEE: Your --

14 JUSTICE BREYER: So I got your basic
15 point, but it doesn't lead, it seems to me, to
16 your basic conclusion.

17 MS. SEE: Well, and, Your Honor, if I
18 could add to that point. The source-specific or
19 inside and outside the fence line shorthand,
20 that itself is not the major question here.
21 That's the limit that Congress put in the
22 statute.

23 If you remove that limit, that's what
24 shows how major the power at stake here is
25 because, once that limit is gone, EPA is not

1 limited to something that's simply two cents or
2 a quarter. EPA can make --

3 JUSTICE BREYER: Oh, not at all. You
4 can use your system. I mean, Walker -- what was
5 the case we -- I put -- I wrote all that, you
6 know, and the Court actually adopted it. I
7 mean, you look at the individual delegation and
8 you say: Well, do we really believe on the
9 basis of a number of factors, not just whether
10 it's a big deal, that Congress would have
11 delegated this power to this agency?

12 MS. SEE: And -- and --

13 JUSTICE BREYER: That's what judges
14 do, so let them do it.

15 MS. SEE: And it's certainly true that
16 the Court does look to a number of factors. The
17 Court's major questions cases have looked at
18 those. But, again, this isn't simply the matter
19 of the particular exercise of agency power in
20 this rule here. That's not how this Court has
21 proceeded.

22 If you look at the Brown & Williamson
23 case, for instance, this Court was faced with a
24 particular tobacco marketing rule, but, when
25 determining whether it was a major question, the

1 Court looked at how far the theory of statutory
2 interpretation --

3 JUSTICE KAGAN: But I think what
4 Justice Breyer is suggesting is that that works
5 against you rather than for you. In other
6 words, inside-the-fence reform can be very small
7 or it can be catastrophic.

8 And inside the fence, there are
9 inside-the-fence technological fixes that could
10 drive the entire coal industry out of business
11 tomorrow. And an outside-the-fence rule could
12 be very small or it could be very large.

13 So the rule that you're saying sort of
14 emerges from this statute, which is an
15 inside-the-fence/outside-the-fence rule, bears
16 no necessary relationship to whether a -- a rule
17 is major in your sense of expensive, costly,
18 destructive to the coal industry. It just bears
19 no necessary relationship to that at all.

20 MS. SEE: Your Honor, I don't think
21 that's true because there are, of course, limits
22 Congress put in the statute, and they make sense
23 with this source-specific limitation.

24 EPA has to focus on systems that are
25 achievable, lead to achievable emission

1 reductions that are adequately demonstrated.
2 Those are constraints that make sense for a
3 source-specific requirement.

4 They don't make sense when EPA is
5 regulated on a grid-wide or nation-wide level.
6 If EPA says we want to reduce coal plants
7 significantly, well, of course, that would
8 always be achievable in the sense it will reduce
9 emissions.

10 So -- so the actual limits Congress
11 wrote into the statute don't make sense without
12 reading all of the words that Congress put in,
13 which is this is a statute that's focused on
14 what particular sources can do to make their own
15 operations more environmentally efficient.

16 JUSTICE SOTOMAYOR: Counsel, I -- I
17 want to go back to a version of what Justice
18 Kagan and Justice Breyer are asking, which is,
19 when I look at the EPA as a whole, I see them,
20 Congress, using very specific terminology when
21 it's looking at an existing source and
22 technology for that source.

23 So, in a number of provisions, it says
24 very clearly an existing source that has
25 installed the best available control technology.

1 That's very much inside the fence. An existing
2 source that has installed the best available
3 technology. That's in at least two provisions.

4 But, here, we have something much
5 broader and very different words that say the
6 best system and doesn't use at the source, only
7 for the state, but not in its definition of what
8 the EPA has to do. So how do I give meaning to
9 those two different words?

10 And then, secondly, assuming that
11 answer, okay, Massachusetts versus EPA said that
12 carbon dioxide is a pollutant under the Clean
13 Air Act. So that's clear, right?

14 MS. SEE: We're not challenging that,
15 correct.

16 JUSTICE SOTOMAYOR: All right. You're
17 not challenging AEP Connecticut, where we said
18 that Congress clearly delegated to the EPA the
19 discretion about whether and how to regulate
20 carbon dioxide, correct?

21 MS. SEE: We are not disputing the
22 portion that said Congress spoke to whether and
23 how. We are disputing that how means that EPA
24 can do that --

25 JUSTICE SOTOMAYOR: I understand --

1 MS. SEE: -- by any means necessary.

2 JUSTICE SOTOMAYOR: -- what you're
3 saying, but this is really a step further than
4 anything we have said before. All of our other
5 cases, whether it's regulation of tobacco or
6 regulation of evictions under major questions
7 doctrine have not addressed the how.

8 Now we're going to the how, and you
9 want us to look at the how. Now Justice Kagan
10 said inside-the-fence-line requirements
11 themselves can lead to generation shifting
12 because some of those could be so expensive that
13 they force generation shifting.

14 So, if that's the case, how do we
15 define this major question? It can't be that
16 what Congress has chosen might lead in or
17 outside the fence because there's some
18 out-of-fence activities that don't necessarily
19 lead to generation system changing. Biomass,
20 which the ACE Rule precluded, only requires
21 certain plants to burn wood.

22 And so that won't force generation
23 shifting, so what's -- tease out for me more
24 precisely what this major question doctrine
25 involves --

1 MS. SEE: I think that --

2 JUSTICE SOTOMAYOR: -- because I can't
3 see it as being in and out of fencing for the
4 reasons Justice Kagan said --

5 MS. SEE: And -- and -- and --

6 JUSTICE SOTOMAYOR: -- and for the one
7 that I just pointed to.

8 So go back to two things. How do we
9 give meaning to the different use of words in
10 the statute? And, two, tease out for me what's
11 a major question here.

12 MS. SEE: Certainly. And -- and so I
13 think looking at how do we give meaning to those
14 words, "system" is a broad word. We don't
15 dispute that. But Congress paired it with
16 "limits." This Court always reads statutes as a
17 whole. It doesn't look at isolated words and
18 give them their hypertechnical meanings.

19 In the UR decision, which also
20 interpreted the Clean Air Act, this Court was
21 very clear that the particular words need a
22 narrower and context-focused interpretation.

23 So, if we look at the rest of the
24 words in the statute, that it be for an
25 individual source --

1 JUSTICE SOTOMAYOR: It doesn't use
2 "limit" there. It says "best system of emission
3 reduction." I don't read the word "limit"
4 there.

5 MS. SEE: Well, Your Honor, reduction
6 is different from elimination. We know that
7 Congress knows the difference between them
8 because, in Section 112, right next to 111,
9 Congress did use the terms "eliminate" and
10 "prohibit." This Court gives meaning to the
11 different words --

12 JUSTICE SOTOMAYOR: Well, I wish --

13 JUSTICE KAGAN: Well, this is a
14 system.

15 JUSTICE SOTOMAYOR: -- I really wish
16 there was any regulation that eliminated carbon
17 dioxide, but even this one might eliminate it
18 from some sources, but this regulation doesn't
19 eliminate the -- those emissions generally.

20 MS. SEE: The D.C. Circuit's
21 interpretation of this statute doesn't give EPA
22 anyplace where it has to stop. The fact that it
23 puts self-imposed handcuffs on in the Clean
24 Power Plan does not mean it would need to do
25 that in the next rule.

1 That's because the --

2 JUSTICE KAGAN: Well, it does give a
3 place to stop because the statute also says you
4 have to consider cost and you have to consider
5 various other factors, so this is not a kind of,
6 you know, regulate to the end of the world kind
7 of statute. It very clearly says that there are
8 other constraints that have to be considered to
9 impose reasonable limits.

10 MS. SEE: Well, Your Honor, and I
11 agree with you if we are talking about measures
12 that a particular source can take because then
13 you would be able to look at cost and make a
14 reasoned determination.

15 But, if EPA is looking at the national
16 or grid-wide level and if it's dealing with an
17 issue as massive as climate change, it's hard to
18 see what costs wouldn't be justified. So that
19 cost limit isn't really serving as a limiting
20 factor if you take away the source-specific
21 limitation that the rest of the words in the
22 statute clearly put on EPA.

23 JUSTICE GORSUCH: Count -- counsel,
24 one argument we haven't addressed yet and I just
25 want to make sure we do before your time expires

1 is the question of standing or mootness.

2 MS. SEE: Of course.

3 JUSTICE GORSUCH: And the solicitor
4 general makes a -- a strong argument that states
5 are not harmed here because, under the current
6 state of affairs, there is no rule in place.

7 And how could you be better off with
8 the ACE Rule in place?

9 MS. SEE: Your Honor, if I may answer
10 that question?

11 CHIEF JUSTICE ROBERTS: Certainly.

12 MS. SEE: The solicitor general agrees
13 the relevant Article III question is whether we
14 have injury traceable to the judgment and
15 whether the Court can redress that. And we do.
16 The effect of the judgment is that the Clean
17 Power Plan repeal is unwound and so that rule
18 would come back to life.

19 And that certainly injures the states.
20 Even though nationwide the initial levels have
21 been largely met for the Clean Power Plan, 20
22 states have not met them. So there's no real
23 question that we are not injured by the
24 judgment.

25 Anything that happens afterwards, a

1 temporary stay or voluntary cessation, is in
2 mootness, and Respondents have not met their
3 heavy burden to show it's impossible for the
4 Court to grant us any relief, and it's certain
5 that we will not be harmed in the future.

6 JUSTICE SOTOMAYOR: How are you --

7 CHIEF JUSTICE ROBERTS: Thank you --

8 JUSTICE SOTOMAYOR: -- different than
9 --

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 JUSTICE SOTOMAYOR: -- EPA -- oh, I'm
13 sorry.

14 CHIEF JUSTICE ROBERTS: We'll get to
15 you in a moment.

16 Justice Thomas, anything further?

17 Justice Breyer?

18 Justice Sotomayor?

19 JUSTICE SOTOMAYOR: How is this any
20 different than EPA versus Brown? There, the EPA
21 announced while the case was pending that it was
22 planning to modify a regulation that had been
23 challenged. The government asked, like you're
24 asking, that we offer guidance to the EPA, like
25 at various points in your brief, you talked

1 about guidance for the rulemaking that's taking
2 effect. And we strongly said that would be an
3 advisory opinion. The government has disavowed
4 that it's going to re-adopt the CWA, and it --
5 we said new regulation's coming.

6 How are you different from the EPA,
7 number one? And, number two, I'm not sure how
8 the ACE Rule, which has also been -- the vacatur
9 of it's been put on hold waiting for the new
10 rule -- how that hurts you either, because the
11 new rule is going to supersede both.

12 MS. SEE: Well, Your Honor, first, we
13 do not know what EPA will do at the end of the
14 rulemaking.

15 JUSTICE SOTOMAYOR: Oh, that's
16 absolutely true.

17 MS. SEE: But that's the standard this
18 Court uses. When we're dealing with voluntary
19 cessation, when the next rule is entirely in the
20 control of Respondents, this Court say the case
21 is not moot unless it is certain that we will
22 not be harmed.

23 JUSTICE SOTOMAYOR: This is not a
24 mootness question. This is an advisory opinion
25 question. That's how the EPA discussed it.

1 MS. SEE: Of course, Your Honor. And
2 in that case, we would look towards the
3 prudential factors. I think it's important to
4 note it is routine for this Court to rule on the
5 merits of agency cases when rulemaking is
6 ongoing. Even further in this case, we can look
7 to the Waters of the United States cases, the
8 2018 decision in National Association of
9 Manufacturers. There, the agency was even
10 further along here. There had been two NPRMs of
11 new proposed rules, and this Court still
12 proceeded to give an answer on the merits.

13 I think the prudential factors are
14 very similar here. That is another area where,
15 over multiple administrations, there had been
16 significant agency -- agency waffling on the
17 decision involved and what the standard would
18 be. And this Court found that it was not a
19 mootness question. In fact, this Court said the
20 parties did not argue it and for good reason.

21 And I think the same prudential
22 factors weigh strongly here. This is a clean
23 legal issue, and this is an area where the
24 parties need certainty. The states and
25 regulated parties make decisions decades in

1 advance. So there's no jurisdictional bar to
2 the Court giving the answer, and there are very
3 strong prudential reasons why it should.

4 JUSTICE SOTOMAYOR: How does it change
5 being an advisory opinion?

6 MS. SEE: It's not an advisory opinion
7 because the Court can still give us the relief
8 of undoing the actual judgment. The Clean Power
9 Plan repeal would, in fact, be final and the ACE
10 Rule would come back.

11 Your Honor asked about the ACE Rule,
12 how it helps us. That is a rule that is
13 respectful of the limits Congress wrote into the
14 statute. It's highly deferential to the states.
15 So that is a rule that helps us.

16 Even if EPA were later to change the
17 rule, they would still have to have the
18 additional burden of adjust -- of accounting for
19 the Fox factors and reliance interests. So it
20 would be harder for them to make a change than
21 simply regulate on a blank space. So that shows
22 how no matter what EPA may do at some point in
23 the future, that doesn't change the fact that
24 the Court can and should give us relief today
25 based on the particular rule before it.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: General, you were
3 responding to Justice Breyer's point that
4 "system" is a very broad rule by saying that
5 there are other phrases in the statutes that
6 point the other way. And I think you were
7 interrupted, might have been by me, but were you
8 going -- I -- I think what you were going to say
9 -- tell me if I'm wrong -- is to point to the
10 phrase "standard of performance for any existing
11 source." Is that -- is that right?

12 MS. SEE: That is certainly one of
13 them, Your Honor.

14 JUSTICE KAGAN: The major one, the big
15 one?

16 MS. SEE: We also think that Section
17 111(a)(1) has particular textual-based cues as
18 well. Yes.

19 JUSTICE KAGAN: Okay. Well, in the
20 absence of your telling me what they are, as you
21 say, the "for any existing source" comes from
22 (d)(1), not from (a)(1). And, of course, (d)(1)
23 applies to the states. So this is more a
24 clarification question than anything else. That
25 would suggest that a state, even if it wished

1 to, could not do what this rule does. Is that
2 -- is that right?

3 MS. SEE: We do agree that the states
4 are limited in setting a standard performance to
5 the -- in the same way that EPA is limited when
6 it sets the best system of emission reduction.

7 JUSTICE KAGAN: Yeah. So, I mean,
8 isn't that sort of odd? This is, like, supposed
9 to be this cooperative federalism system and --
10 and states are supposed to have a lot of
11 flexibility, and if a state decides this is what
12 we want to do, we think it's not very costly, we
13 actually think it's less costly than some of the
14 inside-the-fence alternatives, your reading
15 essentially says too bad.

16 MS. SEE: I think there's two reasons
17 why that's not a problem for federalism and
18 state flexibility.

19 The first is that states always retain
20 inherent discretion to impose more stringent
21 plans. So, if a state or a group of states
22 wants to have a trading program, they can do
23 that. Section 7416 expressly preserves that
24 right for the states.

25 But I think the second reason is it's

1 a false argument to say that more options for
2 EPA leads to more options for the state. And
3 the Clean Power Plan shows how that's true. The
4 Clean Power Plan set an aggressive system that
5 said that there were options for the state, but,
6 really, there weren't because states couldn't
7 actually have other options other than
8 generation shifting and reduced output and the
9 extremely aggressive measures that EPA set in
10 place.

11 So this idea that giving EPA more
12 flexibility helps the states is not true. We
13 think that alternative is worse for the states.
14 It is, in fact, important to give meaning to the
15 actual tailoring that Congress put in 111(d),
16 which is, when states have the emission
17 limitation from EPA, they are able to tailor
18 that to particular sources based on remaining
19 useful life and other source-specific factors.

20 That's written out of the statute if
21 EPA can set anything as a system and apply it at
22 any level.

23 JUSTICE KAGAN: That -- that's helpful
24 to me. Can I ask you a different question,
25 which is just this major question doctrine,

1 like, How -- how big does a question have to be
2 or how do you know when it's big enough?

3 MS. SEE: I think this Court has
4 certainly applied it in different ways. There's
5 sort of two lenses we can look at it on. It can
6 be big enough within that particular industry
7 where the statute operates. That's the MCI
8 decision, which talks about which particular
9 telecom companies are subject to rate-making or
10 not. That not be -- may not be as massive on an
11 economy-wide scale, but it had a major change in
12 that statute, and this Court found that it was
13 appropriate.

14 But we can also look at the broader
15 economic and social consequences --

16 JUSTICE KAGAN: And -- and do you look
17 at those now? I mean, I would think that if
18 this is a rule of statutory construction, and --
19 and I would think that whether or not it has any
20 kind of constitutional links, that the question
21 would be what the Congress at the time thought
22 and what the circumstances at the time were.

23 It seems to me quite irrelevant to
24 rules of statutory construction under the
25 theories that this Court has most frequently

1 used in recent years about, like, oh, if we look
2 around the world today, we see that this
3 particular rule has a big impact.

4 MS. SEE: I don't think that's true,
5 Your Honor, because we certainly look at the
6 words that the Congress of 1970 or 1990 put into
7 the Clean Air Act. But, when we have these
8 clear statement canons, this Court looks at
9 commonsense assumptions about what words we
10 would expect to see there if Congress was, in
11 fact, going to give broad delegation to allow
12 EPA to make decisions such as whether to engage
13 in nationwide cap-and-trade systems, how far to
14 go, and how to do it.

15 So I think those commonsense
16 assumptions are true for all Congresses. And,
17 again, what this Court is doing is looking at
18 the actual words that Congress put in.

19 JUSTICE KAGAN: Well, but the actual
20 words, you know, unfortunately for your
21 position, says "system" --

22 MS. SEE: Well, Your Honor --

23 JUSTICE KAGAN: -- which suggests, you
24 know, that what Congress wanted to do,
25 understanding that this was an area that was

1 going to move very fast, has lots of technical
2 components to it, that it wanted to give the
3 agency flexibility to regulate as times changed,
4 as circumstances changed, as economic impacts
5 changed, all things that they could not possibly
6 have known at the time.

7 MS. SEE: I think it is true that that
8 flexibility is important in the term "system."
9 Of course, Congress expected and hoped that
10 technology and work practices would change.

11 But Congress didn't just end with
12 "system." It also talked about a standard of
13 performance, and that's one of the terms in
14 Section 111(a). It also talked about something
15 that can be applied.

16 I think even in the Clean Power Plan,
17 at that point, the agency recognized that in
18 context, terms like "application" and
19 "achievable" meant that EPA was limited to
20 measures that could be "implementable by the
21 source." Now the way that the agency got around
22 it at that point is it redefined "source" to
23 mean owner and operator.

24 Now the agency, I don't believe, is
25 trying to justify that statutory sleight of hand

1 here, but it still wants to get away from the
2 restriction that application actually means
3 something a source can do. So it's not just
4 "system."

5 JUSTICE KAGAN: Thank you, General.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: What -- what
10 happens to this case if EPA issues a new rule
11 before we decide this case?

12 MS. SEE: I think it would depend on
13 what the new rule is. If there is a final rule
14 issued, this case very likely would be moot.
15 The coalition that I represent, it did move for
16 the D.C. Circuit to dismiss the challenge to the
17 Clean Power Plan after the rule was, in fact,
18 adopted.

19 That wouldn't necessarily be the
20 result. I think the City of Jacksonville case
21 is helpful for us on that point. That involved
22 an ordinance that had been repealed by the time
23 the case made it to this Court, and that
24 ordinance had actually been replaced by
25 something that was different in some significant

1 ways. And the Court found that the challenge to
2 the first ordinance was still not moot because
3 it injured the parties in "fundamentally the
4 same way."

5 So, if there is a new rule that is
6 based on the same legal error that hurts the
7 states in the same way, it wouldn't necessarily
8 be moot.

9 But we do think that a final rule
10 would be a significantly different situation
11 than here, where a year after the D.C. Circuit's
12 decision we still don't even have a notice of
13 proposed rulemaking to know what direction the
14 agency might go in.

15 And the agency hasn't even given us
16 any indication that a new rule might help us.
17 If anything, statements from the administration
18 suggest that the rule would only make our
19 injuries worse.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: General, what is the
24 daylight between the major questions doctrine
25 and the non-delegation doctrine?

1 So, at the beginning of your argument,
2 you talked about how the major questions
3 doctrine can be understood as, you know,
4 inspired by the separation of powers and you
5 talked about avoidance and non-delegation.

6 So, if the idea is that Congress
7 shouldn't delegate major questions to an agency,
8 is there any daylight between them?

9 MS. SEE: I -- I think, certainly,
10 that is a broad view of the non-delegation
11 doctrine. It's not necessary for the Court to
12 go that far to say whether Congress could
13 delegate these questions because, here, it's
14 clear Congress didn't.

15 So I think the daylight between the
16 two is really this question of, has Congress
17 purported to delegate? The major questions
18 clear statement canon is getting at that
19 question, what did Congress think it was doing,
20 what did Congress actually do with the words it
21 put in the statute.

22 And then it would be a separate
23 question to say, if Congress clearly said, EPA,
24 you may go forward and exercise this
25 transformative power, that might be a separate

1 non-delegation question.

2 JUSTICE BARRETT: Well, when you say
3 -- let me just push you a little bit on what you
4 mean by "clear statement." Are you using the
5 phrase "clear statement" to mean a linguistic
6 canon? In other words, we would expect Congress
7 to use a clear statement because one would, it
8 would be common sense for one to say something
9 like this very clearly and precisely?

10 MS. SEE: It would be common sense for
11 Congress to speak clearly because this is the
12 sort of issue that we assume Congress would
13 handle itself. And so, if Congress is not going
14 to handle this sort of major policymaking
15 question, at minimum, it would clearly direct it
16 to the agency.

17 JUSTICE BARRETT: So, when you say
18 clear statement canon or clear statement rule,
19 you're using that synonymously with, like, a
20 linguistic canon?

21 MS. SEE: It is similar in that sense.
22 If -- if what you mean by linguistics is that it
23 is text-based, that is true. We're not asking
24 the Court to change the text that's in the
25 statute. It's a question about what is the text

1 we would expect Congress to have put there. So
2 it's, in this particular class of cases,
3 Congress's silence is unambiguous that it did
4 not give that power to the agency.

5 JUSTICE BREYER: How does this work?
6 I mean, I had thought, which is only one way of
7 looking at it, that we have a whole U.S. code
8 filled with delegations to different agencies,
9 and many of those words are fairly technical.

10 But we're asking a question, when the
11 agency does something, would a Congress that
12 passed all those words really have intended that
13 agency to have the power to do this thing under
14 those words, which doesn't say so explicitly,
15 right?

16 MS. SEE: Your Honor, I --

17 JUSTICE BREYER: And there are many,
18 many things that might argue for or against
19 that. Is it an interstitial matter? Is it a
20 minor matter having to do with administration
21 that they're more familiar with? Is it
22 something that's going to change the whole
23 United States of America? That cuts the other
24 way. But a question is, how do we in the face
25 of silence determine what Congress would have

1 wanted to delegate, including this or not?

2 And a different question is, if
3 Congress did, is it specific enough to pass
4 non-delegation, the non-delegation requirement?
5 Those are two very different questions.

6 MS. SEE: They are, of course, Your
7 Honor.

8 JUSTICE BREYER: And so how -- how do
9 you see it?

10 MS. SEE: So I -- I -- I think, on
11 this first question, when we're looking at how
12 do we know, we can look at the language this
13 Court has used, is the interpretation the agency
14 is advancing something that would lead to
15 extraordinary authority in the words of
16 Gonzales, the Court looks at the breadth of
17 authority.

18 I think a simpler answer here about
19 what Congress actually meant, we can look at
20 1990, which is the last time the Clean Air Act
21 was amended. Congress made particular changes
22 to 111, but it also made changes to three other
23 portions of the statute where it specifically
24 wrote in trading and cap-and-trade language.
25 That's in the implementation standards for NAAQS

1 standards. It's in the stratospheric ozone
2 portion of the statute and also acid rain.

3 So we know Congress was thinking about
4 these nationwide cap-and-trade measures at the
5 exact same time it made changes to 111 and it
6 didn't put those words in there.

7 And I think going to the second
8 question of assuming Congress did, assuming we
9 had something that specific, I think then we
10 would have to look at the non-delegation
11 questions, and I think the way that the Court
12 has looked at it through the intelligible
13 principle, that's how we're arguing it here
14 under constitutional avoidance. We think that
15 the limits that Congress put in the statute make
16 sense if the agency is limited to things a
17 particular building can do.

18 But those limits have no meaning to
19 them if EPA is able to regulate at any level it
20 wants to. So we think that even under that
21 existing framework, there would be serious
22 non-delegation questions.

23 And, of course, there would be a
24 separate question if this Court would revisit --
25 would be inclined to revisit in a future case

1 whether or not Congress could delegate that.
2 But, again, Congress does not need to reach that
3 question here because it certainly did not
4 delegate that power.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Roth.

8 ORAL ARGUMENT OF JACOB M. ROTH
9 ON BEHALF OF THE PRIVATE PETITIONERS

10 MR. ROTH: Mr. Chief Justice, and may
11 it please the Court:

12 On our reading of Section 111(d), the
13 EPA's power is a bounded one. It takes an
14 existing pollution source as a given and asks
15 what emissions rate is achievable for that
16 source.

17 Respondents, however, want to divorce
18 the EPA's best system of emission reduction from
19 the particular source that's being regulated.
20 That would allow the agency to effectively
21 dictate not only the technical details of how a
22 coal plant operates but also the big-picture
23 policy of how the nation generates its
24 electricity.

25 What is the right mix of energy

1 sources for the nation and, for that matter
2 also, how the nation uses its electricity? And
3 the same would go for every other
4 carbon-emitting industry. That immense
5 authority cannot be reconciled with the
6 statutory text and structure, let alone with the
7 major questions doctrine.

8 With that, I welcome the Court's
9 questions.

10 JUSTICE THOMAS: Could you give us
11 just a walk-through, the statutory language that
12 makes the distinction that you're talking about?

13 MR. ROTH: Yes. Absolutely, Justice
14 Thomas. I think the key language in the statute
15 is in (d)(1), which talks about "establishing
16 standards of performance for any existing
17 source." And I think virtually every word in
18 that phrase confirms our interpretation. We're
19 looking at a source, and we're asking how can it
20 better perform from an emissions standpoint
21 while existing.

22 Respondents' interpretation doesn't
23 fit with any of those words because they're not
24 looking at a source. The source doesn't have to
25 be performing. It could be shut down. And the

1 source doesn't have to continue to exist.

2 So I -- I would say that the very idea
3 of a standard of performance confirms that we
4 need to be looking at measures that the source
5 can take to do better from an emissions
6 standpoint.

7 JUSTICE THOMAS: There's quite a bit
8 of talk about outside the fence and inside the
9 fence. I don't know how you can draw such clean
10 distinctions. It would seem that some of the
11 activity that you might think is based --
12 source-based is also outside the fence.

13 How do you make those distinctions?

14 MR. ROTH: Yeah. Justice Thomas, I
15 think that the -- I think it's shorthand that
16 isn't exactly precise. So the way I like to
17 think about it is, is this a measure that would
18 reduce the emissions rate from this source's
19 operations? If it is, then it's within the
20 scope of the statute.

21 JUSTICE THOMAS: But it would seem as
22 though that EPA could regulate the source in a
23 way that actually requires a change, for
24 example, in the mix of energy generation that --
25 for example, that the cost of running a facility

1 is so high that you begin to change your
2 generation sources, say, from coal to natural
3 gas or natural gas to solar.

4 MR. ROTH: So, Your Honor, there
5 absolutely could be incidental effects of a
6 regulation that is a valid regulation, right,
7 that have the effect of causing some generation
8 shifting. That's not what we're objecting to
9 here. I mean, there always could be incidental
10 effects of regulation.

11 Our objection is that the EPA's
12 objective, right, the whole design of the Clean
13 Power Plan and that reading of the statute is
14 that the agency can include in its best system
15 measures that are -- that are calling on the
16 plant to operate less or not at all.

17 JUSTICE THOMAS: But what's the
18 difference? If you can do it indirectly or
19 directly, isn't -- isn't it the same result?
20 You don't have to -- EPA doesn't have to say we
21 are doing this for the purpose of requiring you
22 to change your generation, energy generation
23 mix. But, by regulating the facility, it can
24 cause you to do that yourself.

25 So what's the difference?

1 MR. ROTH: Well, Your Honor, I think
2 one can be -- one can result in a standard of
3 performance the way we think of that term and
4 one can't. So, if there's a way for the source
5 to comply, right, I'm going to change my
6 technology, I'm going to change my work
7 practices, I'm going to do these things that are
8 going to cause my operations to emit less than
9 they otherwise would, then it's a standard of
10 performance. We're -- we're regulating how the
11 plant operates.

12 And if you choose to do something
13 else, if you choose -- if you decide, look, this
14 plant doesn't really -- it's not economical
15 anymore, I'm going to shut it down, well, that's
16 an incidental byproduct. I think that's very
17 different from the EPA saying our goal here, the
18 way we are going to reduce emissions, is not by
19 making the plant work better. It's by not using
20 the plant at all.

21 JUSTICE KAGAN: I -- I guess just
22 given the way the grid works, this distinction
23 between incidental and not incidental does not
24 strike me as very convincing because the way the
25 grid works is it -- it -- it prefers cheaper

1 methods. And so EPA could come out with a rule
2 that is very plant by plant but that makes coal
3 plants hugely more expensive. I mean, this is
4 essentially what the market is already doing,
5 but EPA could do it faster.

6 And the result would be that the grid
7 would choose less of its product and that there
8 -- and you can say that's incidental, but it's
9 like a necessary one-to-one relationship. It
10 will just happen.

11 And so there's no real difference,
12 going back to Justice Thomas's point, inside the
13 fence, outside the fence, it's all going to have
14 the same result.

15 MR. ROTH: Well, Your Honor, I think
16 the difference is in terms of what the statute
17 is asking the agency to do and -- and having the
18 agency perform that task.

19 So, if the agency is being honest and
20 says the best way to reduce emissions from this
21 plant is to buy this scrubber and install this
22 scrubber and, yes, that's going to increase its
23 costs and there's going to be some effect to
24 that, but the reason we are doing this is
25 because the best system for this plant is to get

1 that scrubber, look, it's doing what the statute
2 tells it to do. I don't think we would have an
3 objection to that. We could say maybe it's not
4 adequately demonstrated or isn't the best --

5 JUSTICE KAGAN: And here's what EPA
6 has said. EPA has said, you know, it's all
7 generation shifting, but this system, it's
8 actually going to cost less for everybody than
9 if we did something like what you're talking
10 about.

11 So why shouldn't EPA have that
12 ability? Why shouldn't the states have that
13 ability?

14 MR. ROTH: Well, Your Honor, I think
15 EPA doesn't have that ability because I don't
16 think that's what the statute is designed to do.
17 I think the statute is designed to set
18 performance standards for sources, which I think
19 necessarily is focused on how well is the plant
20 going to perform. And that --

21 JUSTICE BREYER: Although you have --
22 why isn't it a -- look, the administrator shall
23 prescribe regulations which shall establish a
24 procedure similar, dah, dah, dah, dah, which
25 establishes standards of performance, which

1 includes system, for any existing source, okay,
2 and which it would apply if such existing source
3 were a new source. All right? That's what
4 you're supposed to do.

5 MR. ROTH: Right.

6 JUSTICE BREYER: So what we do at EPA
7 is we say just what I said before. You know?
8 We're talking about the computer, which is
9 underground somewhere in New Jersey or it used
10 to be or -- or I don't know where it is now,
11 it's somewhere underground in Boston or
12 something, controls several states. And it's
13 going to affect, because it's going to affect
14 the prices of what comes online faster, of
15 sources all over the place.

16 Now what in this -- these words here
17 prevents them from doing that? And it has
18 nothing to do with in fence. It has to do with
19 totally without a fence, okay?

20 MR. ROTH: Right. So --

21 JUSTICE BREYER: So what are the words
22 that stop that?

23 MR. ROTH: -- so, Justice Breyer, I
24 don't think that could be called a standard of
25 performance for any existing source because, on

1 that hypothetical, Your Honor, I know the source
2 is --

3 JUSTICE BREYER: Why? It affects
4 every --

5 MR. ROTH: -- because --

6 JUSTICE BREYER: -- existing source
7 that happens to have a time-of-day meter.

8 MR. ROTH: But, Your Honor, none of
9 the sources are doing better from an emissions
10 standpoint. They are not performing better.

11 JUSTICE BREYER: Oh, yes, they are.
12 They are, in fact -- well, regardless of that --

13 MR. ROTH: I -- I -- I --

14 JUSTICE BREYER: -- what in the
15 language here says that that doesn't apply to
16 any -- to existing sources? Do you like any
17 fish at all? If you like any fish, namely,
18 every fish in the world, then you also like
19 salmon, which is any fish, okay? Got it?

20 MR. ROTH: Yes. Yes, Justice Breyer.

21 JUSTICE BREYER: Okay. So, here, we
22 have a -- a -- a rule because it applies to PJM
23 online outside the fence.

24 MR. ROTH: Right.

25 JUSTICE BREYER: And, of course, it

1 affects and thereby applies to all the -- all
2 the plants that have time-of-day metering, which
3 are, let's say, 50 percent of those in the
4 United States.

5 MR. ROTH: Justice Breyer, if I
6 understand the hypothetical, I don't think any
7 plant on that hypothetical is emitting less
8 other than by virtue of operating less. In
9 other words, it's not about --

10 JUSTICE BREYER: No. No. What it
11 does -- oh, yeah --

12 MR. ROTH: It's about --

13 JUSTICE BREYER: -- no, a different --
14 a different machine of generating is put online,
15 it's number 3 that comes after 1 --

16 MR. ROTH: Right.

17 JUSTICE BREYER: -- instead of number
18 2 --

19 MR. ROTH: Right.

20 JUSTICE BREYER: -- that comes after
21 1.

22 MR. ROTH: So the regulated source,
23 Justice Breyer --

24 JUSTICE BREYER: Yeah.

25 MR. ROTH: -- is just operating less.

1 It's not operating better. I don't think that's
2 a standard of performance.

3 JUSTICE BREYER: Okay. Where does it
4 say better?

5 MR. ROTH: Well, it says standard of
6 performance. So let me give you an example,
7 Justice Breyer.

8 We talk about standards of performance
9 all the time when we're talking about fuel, fuel
10 performance standards for cars, right? When we
11 use that phrase, what we mean is, you know, I
12 can get 30 miles a gallon, I can get 35 miles a
13 gallon. We don't mean I can take the bus. We
14 don't mean I could stay home. You know, yes,
15 you're using less fuel that way. That's not a
16 standard of performance.

17 I think the same is true here. Sure,
18 we can shut down the coal plant, and that'll --
19 it will emit less, but it is not performing
20 better. I don't think we can --

21 JUSTICE SOTOMAYOR: Counsel --

22 MR. ROTH: -- refer to that.

23 JUSTICE SOTOMAYOR: -- the problem I
24 have with your argument is that you're looking
25 at "system" as involving just the one plant, but

1 the entire structure of the EPA, if you look at
2 7410, which 711 -- 7411 says you look at, okay,
3 in looking at the structure of the plant, that
4 very directly says that the state's plan can
5 include incentives, such as fees, marketable
6 permits, and auctions of emission rights.

7 MR. ROTH: Right.

8 JUSTICE SOTOMAYOR: So I look at that
9 and that's generation. That -- that's all the
10 things that your state Petitioners' counsel says
11 states can't do. It's out of the fence, okay?

12 And so are you like her in saying the
13 states don't have the rights to do auctions or
14 credit systems, et cetera? I think not. From
15 your brief, it was very clear to me that you
16 said states have those inherent rights. And I
17 look at 7410 and it's clear that the statute --
18 all right?

19 MR. ROTH: Right.

20 JUSTICE SOTOMAYOR: So let's go that
21 far, and now we're going to go to what you were
22 answering for Justice Breyer. "System" can't
23 mean the reduction by one plant because that's
24 not going to meet the overall standard, which
25 says we don't want to reduce carbon monoxide or

1 carbon dioxide in one plant; we want to reduce
2 it across the system by 30 percent.

3 And across the system may be that
4 plant A is not going to reduce by 10 percent,
5 but it's going to go into the market and reduce
6 by 5 percent, but someone else is going to
7 reduce by 50 percent. And we're going to even
8 out so the system, the ozone layer has
9 30 percent less.

10 So assume that position. How can we
11 say that it is part of this plan to limit, part
12 of the statute to limit what the EPA or the
13 states are doing with respect to how to reach
14 the best system reduction that can be reached?

15 MR. ROTH: Okay. Thank you, Justice
16 Sotomayor. I think your question actually
17 perfectly tees up the distinction between
18 Section 7410 and Section 7411. I think they are
19 fundamentally different types of provisions.

20 Section 7410 is about getting to a
21 certain level of pollutant in the ambient air.
22 And so, if that is your goal, if that's what the
23 EPA is trying to do, it makes perfect sense to
24 say we're going to have the plants, you know,
25 trade and -- we just want to get to this level

1 in the ambient air for -- right, for the whole
2 area.

3 7411 is a different animal because it
4 is focused on the source. The frame of
5 regulations --

6 JUSTICE KAGAN: But doesn't 7411 say
7 that the states are to use a procedure similar
8 to that provided by Section 7410?

9 MR. ROTH: Sure, Justice Kagan. The
10 procedures are --

11 JUSTICE KAGAN: Wait. There -- there
12 is a -- I mean, the -- the text says go look at
13 7410.

14 MR. ROTH: For the procedures.

15 JUSTICE KAGAN: Now I'm ready.

16 MR. ROTH: For the procedures, Justice
17 Kagan, and the procedures are the state comes up
18 with a plan, submits it to EPA. I agree,
19 they're similar in that respect, but in terms of
20 the way they're designed and the substantive
21 goal of those two provisions, they're totally
22 different types of provisions. Again, one is
23 focused on the levels in the overall area, and
24 one is focused on making sure these sources
25 operate as best as they can. Just so --

1 JUSTICE KAGAN: But, again, Justice
2 Sotomayor is correct, right, that the necessary
3 consequence of your argument, as it is of
4 General See's argument, is that the states can't
5 do this either?

6 MR. ROTH: So -- so let me address
7 that separately. I think there are two
8 questions. I think the first question is, how
9 can we -- how do we set the standard of
10 performance? And I think, in that sense, yes,
11 absolutely, the states are on the same plane as
12 -- as the EPA in identifying the best system.
13 The states are governed by that as well.

14 I do think there's a second question
15 potentially -- it's not at issue here -- which
16 is the state also has the power over
17 implementation and enforcement of the standards.
18 And so you could have an argument that when it
19 comes to compliance, the state can treat certain
20 things as satisfying a standard, you know, by
21 looking at trading or other beyond-the-fence
22 measures.

23 JUSTICE KAGAN: Well, not if your
24 statutory interpretation is correct, you
25 couldn't.

1 MR. ROTH: I -- I -- I don't think
2 that's right, Your Honor, because I think it's
3 different text.

4 JUSTICE KAGAN: I mean, you keep on
5 telling us this is all about plant by plant by
6 plant and -- and, you know, just because it says
7 standard of performance for --

8 MR. ROTH: And, Your Honor, I think
9 that's how the standard gets set. But I think
10 there's a separate question of how the standard
11 gets satisfied, and there are lots of situations
12 in which we distinguish between those things.
13 They are different -- there's different
14 statutory language. They obviously implicate
15 different canons.

16 I mean, the question is not presented
17 here, so I don't -- I'm not staking out a firm
18 position. I'm just saying I think there is room
19 to argue about that because, again, our concern
20 is how is the EPA setting the bar. We're not
21 looking at how are you going to meet the bar. I
22 think those are separate questions.

23 JUSTICE KAGAN: I -- I would think
24 that, you know -- that the EPA setting the bar,
25 I mean, that's far less regulatory than the

1 state saying how are you going to meet the bar.
2 I mean, one of the oddities of this case is that
3 the way this works is the E -- EPA can say
4 something and then basically states can say we'd
5 like to do something else, that the EPA is not
6 directly regulatory when it says this.

7 MR. ROTH: That's right. I think the
8 EPA is setting the bar. The states are deciding
9 how you get there. And there's an argument that
10 they are entitled to give sources more
11 flexibility, more ways of getting there, right?
12 I think that's less regulatory because it's
13 giving them more flexibility. And I think it's
14 just -- again, it's a different question that I
15 don't think is presented by this case.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas?

18 Justice Breyer, anything further?

19 Justice Alito?

20 Justice Sotomayor?

21 JUSTICE SOTOMAYOR: Just one question.
22 In the petition below, you sought vacatur of the
23 ACE Rule, correct?

24 MR. ROTH: That is correct.

25 JUSTICE SOTOMAYOR: And the CWA is no

1 longer in effect. You got the ruling you
2 wanted, vacatur of the ACE Rule. That's been
3 put on hold.

4 So -- but how do you have standing?

5 MR. ROTH: Well, Your Honor, we -- we
6 asked for vacatur of the ACE Rule because we
7 took the position that the EPA couldn't regulate
8 this at all, and so we were asking for no rule
9 as opposed to the ACE Rule, yes, no rule is
10 better than the ACE Rule.

11 But the decision below didn't just
12 vacate the ACE Rule. It vacated the ACE Rule
13 and revived the Clean Power Plan. And I
14 understand the agency has said we're -- we're
15 going to -- we're going to --

16 JUSTICE SOTOMAYOR: Well, it didn't --

17 MR. ROTH: -- update the Clean Power
18 Plan --

19 JUSTICE SOTOMAYOR: -- quite do that.
20 It said that the CWA was vacated on an erroneous
21 premise, and it sent it back for the government
22 to figure out what it was doing.

23 MR. ROTH: Well, it -- it -- it --

24 JUSTICE SOTOMAYOR: It's now said we
25 have a new rule.

1 MR. ROTH: Well, Your Honor, it set
2 aside -- what the judgment technically did was
3 set aside the ACE Rule, including the embedded
4 repeal of the Clean Power Plan.

5 JUSTICE SOTOMAYOR: All right.

6 MR. ROTH: And the agency -- the
7 agency has now said, well, we're not -- we're
8 going to update it, right, it's out of date,
9 we've got to change some dates, we've got to
10 change some figures, but that -- I mean, that
11 doesn't moot the case. We still obviously --

12 JUSTICE SOTOMAYOR: All right.

13 MR. ROTH: -- have a dispute about
14 what -- what the statute means and what the
15 agency is allowed to do.

16 JUSTICE SOTOMAYOR: Thank you,
17 counsel.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: Mr. Roth, I'm -- I'm
20 going to give you sort of like what I take to be
21 the major questions doctrine as this Court has
22 stated it in prior cases, principally *Brown &*
23 *Williamson* and *UARG*. This is, like, my
24 understanding of these cases.

25 And I would like you to tell me

1 whether you think I have the right understanding
2 or the wrong understanding. If the right one,
3 why you fit into it, and if the wrong one, you
4 know, whatever.

5 So my understanding is there's
6 ambiguity in the statute. That's the first
7 condition. The second is that the agency has
8 stepped far outside of what we think of as its
9 appropriate lane, you know, the FDA regulating
10 tobacco, that sort of thing, just like something
11 that's like, what, the FDA regulates tobacco?
12 So that's the second. And the third is, even
13 though it would -- it is conceivable on the face
14 of the provision being most directly looked at,
15 that it kind of wreaks havoc on a lot of other
16 things in the statute.

17 So I would say it's those three things
18 that are the common points of UARG and of Brown
19 & Williamson. Do you agree with that?

20 MR. ROTH: Yes, Your Honor, I do
21 generally agree with that. I think -- I think
22 that certainly works for us in this case. I
23 mean, I think there are some stronger versions
24 of the major questions doctrine that some cases
25 might suggest, but I think that version is

1 perfectly consistent with what we're arguing
2 here.

3 In fact, again, I don't think we
4 actually need the major questions doctrine to
5 win this case. I think the text is pretty
6 clear. But I do think we fit directly within
7 that, and here's a way to think about it.

8 On our version of the statute, the
9 agency is basically solving an engineering
10 problem, right? We've got the source, it's
11 taking coal, it's turning it into electricity,
12 we want to minimize the amount of emissions.
13 When it's doing that, it's a classic
14 administrative technical type question that we
15 expect the agency to answer.

16 On the Respondents' interpretation,
17 the agency is asking questions like: Should we
18 phase out the coal industry? Should we phase
19 out coal? Should we build more solar farms in
20 this country? Should we restrict how consumers
21 use electricity in order to bring down
22 emissions? Those are not the types of questions
23 we expect the agency to be answering.

24 JUSTICE KAGAN: I feel like a little
25 bit of a broken record, but I'll just bat this

1 one back to you.

2 You can do that with source-by-source
3 regulations. You know, if that's what EPA
4 wanted to do, I have a basketful of
5 source-by-source regulations that would allow
6 them to get their way on all of those questions.

7 It just has no necessary relationship
8 to this fence/non-fence way of thinking of
9 things.

10 MR. ROTH: Your Honor, I -- I --
11 respectfully, I -- I don't -- I don't see it
12 that way. I think, if the agency is restricted
13 within the fence and to -- measures that the --
14 that the source can use to reduce its own
15 emissions, I think it's quite circumscribed of
16 an analysis.

17 And, yes, it can do things that are
18 going to be expensive and maybe there will be
19 some consequences to that, and if they do, we
20 may be having a different fight about whether
21 it's adequately demonstrated under the statutory
22 factors.

23 But it's just a fundamentally
24 different order of -- of question and order of
25 inquiry that the agency is engaged in. And I

1 think, when you get to that high level of how
2 should we generate electricity, how should
3 consumers use electricity, we have just gone so
4 far beyond what we would expect the agency to be
5 doing and what the agency has done for 40 years
6 under this provision.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 Justice Kavanaugh?

11 Justice Barrett?

12 JUSTICE BARRETT: Just one question.

13 I'm not sure that you quite answered Justice
14 Kagan when she was asking you about your
15 formulation of the major questions doctrine
16 because she described it as, you know, in Brown
17 & Williamson, you know, the FDA staying in its
18 lane, what, the FDA can regulate tobacco.

19 Or, if you think about the eviction
20 moratorium case from earlier this term, you
21 know, it was, what, the CDC can regulate the
22 landlord/tenant relationship.

23 Here, if we're thinking about EPA
24 regulating greenhouse-gases, well, there's a
25 match between the regulation and the agency's

1 wheelhouse, right?

2 So you're describing something a
3 little bit different than Justice Kagan was
4 asking you. You're saying, when you look at
5 this scheme, this is a really big deal.

6 How do we decide that? That -- that's
7 a little bit different than a mismatch between
8 the subject of the -- of the regulation and what
9 the agency does.

10 MR. ROTH: So, actually, Justice
11 Barrett, I think it is a mismatch and it's
12 pretty much the same way because I think, if you
13 look at the Clean Power Plan and that
14 interpretation of the statute, the agency really
15 isn't regulating emissions. It's regulating
16 industrial policy and energy policy, right, that
17 is going to have downstream emissions
18 consequences.

19 It's not actually saying here's how
20 you can reduce your emissions. It's saying,
21 well, we can do the market differently in a way
22 that we won't need you at all. And then, yeah,
23 sure, you won't have the emissions from the
24 plant. I think that is just taking it on up to
25 -- to, again, a fundamentally different level in

1 just the same way as -- as Brown & Williamson
2 and those precedents.

3 JUSTICE BARRETT: Thank you.

4 MR. ROTH: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 General Prelogar, we'll -- why don't
8 we take a five-minute break.

9 (Whereupon, a brief recess was taken.)

10 CHIEF JUSTICE ROBERTS: General
11 Prelogar.

12 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

13 ON BEHALF OF THE FEDERAL RESPONDENTS

14 GENERAL PRELOGAR: Mr. Chief Justice,
15 and may it please the Court:

16 This case is not justiciable, and
17 Petitioners are wrong on the merits in any
18 event.

19 On justiciability, the D.C. Circuit's
20 judgment leaves no EPA rule in effect. The
21 agency action challenged here wasn't the Clean
22 Power Plan; it was the decision to replace it
23 with the ACE Rule. The D.C. Circuit vacated ACE
24 but chose not to reinstate the CPP, so no
25 federal regulation will occur until EPA

1 completes its upcoming rulemaking.

2 Petitioners aren't harmed by the
3 status quo and can't establish Article III
4 injury from the D.C. Circuit's judgment.
5 Instead, what they seek from this Court is a
6 decision to constrain EPA's authority in the
7 upcoming rulemaking. That is the very
8 definition of an advisory opinion, which the
9 Court should decline to issue.

10 If the Court reaches the merits, it
11 should affirm. No one seriously defends the ACE
12 Rule's view that the statute restricts states
13 and power plants to inside-the-fence-line
14 measure. That restriction is unprecedented and
15 would threaten to disrupt an industry that has
16 long relied on measures like trading and
17 averaging to reduce emissions in the most
18 cost-effective way.

19 Nor does the statute limit EPA to
20 inside-the-fence-line measures in identifying
21 the best system of emission reduction.
22 Petitioners claim that interpretation is
23 necessary to prevent the EPA from restructuring
24 the entire industry or shutting down all coal
25 plants.

1 We agree that EPA cannot do those
2 things, but that's because of the express
3 constraints that Congress included in the
4 statute. Among other things, the system has to
5 be adequately demonstrated. It has to be of
6 reasonable cost. It can't threaten the
7 reliability of the energy grid. And,
8 critically, it must be focused on cleaner
9 production, not on reducing overall levels of
10 production.

11 Finally, Petitioners are wrong to say
12 that this case implicates a major question. For
13 all their criticisms of the CPP, we know that it
14 wouldn't have had major consequences. The
15 industry achieved the CPP's emission limits a
16 decade ahead of schedule and in the absence of
17 any federal regulation.

18 Given that reality, Petitioners ask
19 the Court to focus on the nature of the statute
20 in the abstract, not on the particular effects
21 of any particular regulation. But that is never
22 how this Court has looked at major questions,
23 and it just reinforces that Petitioners are
24 seeking an advisory opinion here.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Would you kindly say
2 a bit more about your statement that the Court
3 did not below -- the D.C. Circuit did not
4 reinstate the CCP?

5 GENERAL PRELOGAR: Yes, of course,
6 Justice --

7 JUSTICE THOMAS: Or CPP.

8 GENERAL PRELOGAR: Of course, Justice
9 Thomas. So, at the time that the case was
10 pending in the D.C. Circuit, I think there was a
11 live question about what EPA's rule would be.
12 Was it going to be the CPP, or was it going to
13 be ACE? But, when the D.C. Circuit issued its
14 judgment and vacated the ACE Rule, it did not
15 reinstate the CPP.

16 And I think that was for good reason.
17 There were really three key facts that had
18 changed on the ground that I think prompted the
19 D.C. Circuit to determine that that was the
20 appropriate remedy here.

21 The first thing I would emphasize is
22 that the CPP had never taken effect, so it had
23 never altered the status quo or subjected
24 Petitioners to any form of regulation.

25 And then, second, the industry had

1 very much undergone tremendous changes, and so
2 the CPP was totally obsolete. The emission
3 limits had been satisfied, and the compliance
4 deadlines for submitting state plans had come
5 and gone.

6 And then the third fact I would point
7 to is that EPA had made clear that if the ACE
8 Rule were invalid, it was going to go back to
9 the drawing board and it would do a new
10 rulemaking, which is what it's currently doing.
11 It did not seek to breathe new life into the
12 CPP. And I think, therefore, the D.C. Circuit
13 recognized that the CPP was -- was gone and it
14 wasn't coming back.

15 JUSTICE BREYER: Well, I don't
16 understand -- I mean, I must be wrong. So just
17 tell me I'm wrong. Look, I -- I thought that
18 the -- the agency, the EPA, said we're getting
19 rid of the CPP and the reason we're getting rid
20 of it is because our interpretation of the law
21 is ACE. Is that right?

22 GENERAL PRELOGAR: That's correct.
23 That's what the ACE Rule did.

24 JUSTICE BREYER: Okay. So then they
25 go to the D.C. Circuit, and the D.C. Circuit

1 says no, your interpretation of ACE is wrong.

2 Well, if their reason for getting rid
3 of the CPP is ACE, and if ACE is wrong, and then
4 you send it back to the EPA, why isn't CPP back?
5 Because they've never had any good reason for
6 getting rid of it.

7 GENERAL PRELOGAR: Because there's a
8 well-developed body of administrative law that
9 speaks precisely to that issue in the D.C.
10 Circuit about what the effects will be when a
11 rule is invalid and vacated.

12 And it's not the case that the prior
13 regulatory regime always and invariably springs
14 back into existence. Instead, the D.C. Circuit
15 has made clear that it resolves that on a
16 case-by-case basis, and sometimes it's
17 appropriate to put the prior rule back into
18 effect.

19 JUSTICE BREYER: Okay. And what did
20 they say here?

21 GENERAL PRELOGAR: And, here, we think
22 the D.C. Circuit's judgment --

23 JUSTICE BREYER: Did it say that?

24 GENERAL PRELOGAR: -- quite notably
25 did not put the CPP back into effect. It only

1 vacated ACE. And then the D.C. Circuit
2 confirmed that that was the best reading of its
3 judgment when it issued the partial stay of the
4 mandate to make clear that in the interim, until
5 EPA conducts its own rule --

6 JUSTICE BREYER: Okay. So -- so, in
7 other words, they said EPA, you're wrong about
8 ACE, but, EPA, even though that was the only
9 reason you gave for getting rid of CPP, CPP is
10 not back?

11 GENERAL PRELOGAR: Yes, that's how we
12 interpret the D.C. Circuit's judgment.

13 JUSTICE BREYER: If I read that
14 interpretation -- now, if I don't agree with
15 that, I don't know if I -- you know, I haven't
16 really read it, but -- but I'll go read that.

17 (Laughter.)

18 JUSTICE BREYER: And -- and -- and
19 then -- and then -- and then suppose I don't
20 agree with you. I think, oh, God, they're going
21 to send it back, CPP will go back. And you are
22 in the midst of a new rulemaking, so how do you
23 get rid of CPP? I mean, one, you have the power
24 not to prosecute. A pretty broad power. But
25 that's plant by plant.

1 Two, you have a power to suspend
2 things for good cause. You know, the good
3 cause, you don't have to go -- you -- you
4 wouldn't have to get rid of CPP via a rulemaking
5 because you can do it quickly through good
6 cause.

7 Is there anything else you have?

8 GENERAL PRELOGAR: Well, Justice
9 Breyer, I want to resist the premise in the
10 first place --

11 JUSTICE BREYER: Yeah, of course.

12 GENERAL PRELOGAR: -- that the CPP
13 could possibly come back into effect. Among
14 other things, all of the key compliance
15 deadlines for the submission of state plans have
16 come and gone --

17 JUSTICE BREYER: Yeah.

18 GENERAL PRELOGAR: -- so EPA would
19 need to do a rulemaking regardless, as your
20 question suggested --

21 JUSTICE BREYER: Yeah.

22 GENERAL PRELOGAR: -- in order to even
23 sensibly try to implement the CPP.

24 But it said just the opposite. It is
25 not seeking to reinstate CPP --

1 JUSTICE BREYER: Okay. I got that
2 point. I -- I just wonder, maybe I'm just
3 curious about it, what does -- what does the --
4 how can an agency get rid of a rule it doesn't
5 want if it doesn't want to go through a big
6 rulemaking in order to get rid of it because it
7 wants to do something else?

8 GENERAL PRELOGAR: Well, I think, to
9 the extent that you've put your finger on it,
10 that's a really good reason why the D.C. Circuit
11 didn't reinstate the CPP. And I should
12 emphasize no one was advocating to have the CPP
13 put -- put back into effect for all of the facts
14 that I -- I identified for Justice Thomas.
15 Here, when we filed the motion for a partial
16 stay, the other parties consented to that.

17 And we were on record, making clear in
18 the D.C. Circuit that if ACE were invalidated,
19 EPA was going to conduct a new rulemaking.
20 That's exactly what it's doing, and so no
21 federal regulation is in place.

22 JUSTICE SOTOMAYOR: General --

23 CHIEF JUSTICE ROBERTS: Well, before
24 -- before the D.C. Circuit ruled, ACE was on the
25 books, and they liked it. After they ruled, ACE

1 was off the books, and they don't like that. I
2 don't understand why that's not fully
3 justiciable.

4 GENERAL PRELOGAR: Well, it's
5 certainly true that they liked the legal
6 analysis in the ACE Rule, but I think the key
7 thing to recognize here is that they aren't
8 actually harmed in an Article III sense from the
9 absence of regulation. That's the lay of the
10 land now. The choice is, will there be no
11 federal regulation while the rulemaking is -- is
12 completed, or is ACE going to take effect?

13 And they can't say that they have any
14 concrete injury or harm from not having the
15 regulation of ACE, from not having to start
16 working on state plans that are just going to
17 become overtaken by events when EPA completes
18 that rulemaking. Instead, what they're focused
19 on is the effects of what's going to happen in
20 the future. They're very clearly --

21 CHIEF JUSTICE ROBERTS: Well, I guess,
22 I mean, I -- I gather the position would be it's
23 -- just because there's no regulation doesn't
24 mean we're happy. They would like regulation
25 according to their particular perspective.

1 They'd like good regulation, which they think
2 they had with ACE, and now they don't have it.

3 Again, why isn't that a justiciable
4 harm?

5 GENERAL PRELOGAR: Well, Mr. Chief
6 Justice, nothing prevents them right now from
7 regulating however they wish. If West Virginia
8 today wants to start regulating consistent with
9 what ACE contemplated, it can take whatever
10 actions it wants to take with respect to the
11 sources in its state. So there's no impingement
12 of its sovereign prerogatives. They right now
13 have full authority to undertake whatever kind
14 of regulation they'd like.

15 What they don't have an injury from is
16 the absence of having a federal regulation in
17 place that would impose additional regulatory
18 burdens on them in the meantime.

19 JUSTICE SOTOMAYOR: Counsel, Ms. See
20 said -- Counsel See said, General, that 20
21 states were not in compliance with the CPP.

22 What do we make of that? Because you
23 said the industry has reached the limits, but 20
24 states haven't. What do you make of that
25 statement by her? And why is that fact not

1 important?

2 GENERAL PRELOGAR: So I think that's
3 incorrect when you look at the analysis that EPA
4 conducted when it repealed the CPP, and in that
5 regulatory impact analysis, what EPA observed is
6 that taking into account delayed implementation,
7 which would be necessary, and looking at the
8 flexibilities that are offered by interstate
9 trading, there would be no difference between a
10 world where the CPP took effect and one where it
11 didn't.

12 On a nationwide level, the emissions
13 limits have been reached, and so, effectively,
14 there would be no cost to states to engage in
15 that interstate trading to get their limits
16 below the requisite levels.

17 And for that reason, in terms of costs
18 and benefits, what the repealed rule said is no
19 cost savings to states from repealing this
20 because it wouldn't impose any burdens on them
21 and also no further benefits with respect to
22 further emissions reductions because we don't
23 expect that there would be any further emissions
24 reductions under the CPP itself.

25 JUSTICE KAVANAUGH: What's the status

1 of the new rulemaking to the extent you can
2 share?

3 GENERAL PRELOGAR: EPA is still
4 undertaking preparatory activities. It expects
5 to issue a notice of proposed rulemaking by the
6 end of this year. In the past, it's taken about
7 a year after that to issue a final rule.

8 JUSTICE SOTOMAYOR: Counsel, there are
9 two parts --

10 JUSTICE KAGAN: This year, the
11 calendar year?

12 GENERAL PRELOGAR: This calendar year,
13 that's correct.

14 JUSTICE SOTOMAYOR: There are two
15 questions I have. At least one brief, I think
16 it might have been two, claims that the Clean
17 Power Plan placed more stringent emissions on
18 existing plants than it did on new sources which
19 seems -- I don't understand how that makes
20 sense.

21 And, Number 2, what I'm troubled by is
22 not generation shifting qua generation shifting
23 because, as very clear in the questioning,
24 and -- and I think biologic there could be some
25 plant source changes that could force generation

1 shifting anyway, so it's not generation shifting
2 qua.

3 But I think what the major issue that
4 might trouble me is the claim that the emissions
5 standards that you set force states to do
6 generation shifting, that you have not given
7 them options not to generation shift.

8 You list out a whole bunch of options,
9 but I thought one of their claims was that no
10 matter what they did, they still had to
11 generation shift.

12 So could you answer those two
13 questions? Old and new plants and whether there
14 is -- have you exceeded your authority by
15 forcing some -- forcing the states out of
16 choices?

17 GENERAL PRELOGAR: Yes. And I'll --
18 I'll take those questions in turn.

19 So first with respect to the argument
20 that the existing source standard under the CPP
21 was more stringent be the new source standard,
22 I -- I think that's incorrect. And it's really
23 trying to make an apples and oranges comparison.

24 The two standards operated quite
25 differently and critically had different time

1 frames. So the new source standard took effect
2 immediately; whereas under the CPP, the existing
3 sources wouldn't actually have to put into place
4 any kinds of emissions reductions until 2022 at
5 the earliest, or even 2023 in some cases.

6 That means for the first seven years
7 that both standards were contemplated to be in
8 effect, the new source standard was far more
9 stringent because the new sources were already
10 subject to that emission reduction.

11 And then the second thing I would
12 point to is that even after that initial period,
13 the phase-in period, EPA has a statutory
14 obligation to revisit the new source standard
15 every eight years to take account of any changed
16 circumstances. And so there was no guarantee
17 that that standard would remain unchanged and
18 would function as a less stringent standard as
19 compared to the existing source standard.

20 To turn to the second aspect of your
21 question, focused on whether the CPP effectively
22 would have required generation shifting, the
23 answer to that is no. The CPP itself emphasized
24 that there were other types of mechanisms that
25 sources could consider deploying; things like

1 carbon capture and sequestration, natural gas
2 co-firing. Those were not listed as components
3 of the best system in the CPP, but they were
4 available technologies.

5 And just as a matter of on-the-ground
6 realities, the coal plants in -- in some
7 instances have used those technologies to emit
8 at levels below what the CPP contemplated. So
9 it's just wrong to say that the standards
10 couldn't have been met through any other way
11 than generation shifting. But --

12 JUSTICE KAVANAUGH: I think the other
13 -- keep going, sorry.

14 GENERAL PRELOGAR: Well, if I could
15 make one final point in response to Justice
16 Sotomayor.

17 I do want to acknowledge that, of
18 course, EPA recognized that sources were most
19 likely to comply through generation shifting.
20 That would be most cost-effective for them.

21 But I don't think that there is any
22 anomaly between that kind of correspondence
23 between the best system of emission reduction
24 and how the sources actually choose to comply,
25 because of course part of EPA's task here is to

1 see what is adequately demonstrated, what is the
2 power sector already doing to control emissions.

3 And -- and that's the starting point
4 for identifying the best system, and they also
5 have to look at cost. So to the extent that EPA
6 is saying, here's what the power sector is doing
7 to reduce their emissions, it's -- it's just not
8 surprising to see that they would continue to
9 generation shift to satisfy that emission limit.

10 JUSTICE KAVANAUGH: The other side's
11 theory, I think, zooming out a bit, is that
12 Congress knows how to do cap-and-trade. They
13 did it with acid rain. There were bills pending
14 in Congress to do cap-and-trade for CO2
15 emissions. Ultimately those did not pass and
16 then what happened is the executive branch, as
17 executive branches are, unhappy with the pace of
18 what's going on in Congress, tried to do a
19 cap-and-trade regime through an old and somewhat
20 ill-fitting regulation.

21 So the cap-and-trade aspect of this, I
22 just want you to address, and kind of put that
23 in context of like UARG, squeezing it into a --
24 an old statute that wasn't necessarily designed
25 for something like this.

1 GENERAL PRELOGAR: So I think that
2 their reliance on that failed legislation in
3 Congress is -- is wholly misplaced. Those bills
4 looked very different from the CPP. It's --
5 it's not as though Congress considered something
6 like the CPP and rejected it and said those
7 bills would have applied to far more industry
8 participants, not just power plants, would have
9 governed far more pollutants and not just carbon
10 dioxide.

11 And I think as -- as this Court
12 recognized in Massachusetts versus EPA, when it
13 relied on or rejected a similar type of argument
14 pointing to failed legislation, I just don't
15 think there's anything to glean from that record
16 that would suggest that Congress had
17 specifically contemplated and disapproved of the
18 CPP itself.

19 And -- and just one final point on
20 that is to emphasize that, of course, the CPP
21 was not a -- a national cap-and-trade scheme.
22 EPA exercised its role as kind of intermediate
23 step of announcing the degree of emission
24 limitation achievable based on the system it had
25 identified, but then it was up to the states to

1 exercise their role in this cooperative
2 federalism scheme to identify the standards of
3 performance for their sources.

4 And as I mentioned to Justice
5 Sotomayor, nothing required that they actually
6 use the best system that EPA had identified to
7 any particular degree or -- or even at all.

8 CHIEF JUSTICE ROBERTS: General, do --
9 do I take from your opening comments that you
10 agree that there is such a thing as the major
11 questions doctrine?

12 GENERAL PRELOGAR: I certainly agree
13 that the Court has applied that interpretive
14 principle but not in a case that looks like this
15 one.

16 CHIEF JUSTICE ROBERTS: Well, okay --
17 okay.

18 GENERAL PRELOGAR: It's always done it
19 --

20 CHIEF JUSTICE ROBERTS: But what --

21 GENERAL PRELOGAR: -- with respect to
22 actual effects.

23 CHIEF JUSTICE ROBERTS: So -- right.
24 So how would you articulate what the major
25 questions doctrine is?

1 GENERAL PRELOGAR: As I understand the
2 way the Court has applied this interpretive
3 principle, it has at the outset always engaged
4 in a traditional interpret- -- interpretive
5 exercise, looking at the traditional tools of
6 text, context, and structure.

7 And then in cases like UARG or -- or
8 Brown & Williamson or Eviction Moratorium the
9 Court has said that if there were any doubt
10 about what it has already articulated as the
11 best interpretation of the statute, that
12 ambiguity would be resolved by the fact that the
13 particular agency action has sweeping
14 consequences based on its costs or the number of
15 people involved or the type of authority
16 claimed.

17 And that's just very different, I
18 think, down the line from how Petitioners are
19 asking the Court to rely on major questions
20 here.

21 First and foremost, there is no agency
22 regulation for the Court to review to evaluate
23 those kinds of effects.

24 CHIEF JUSTICE ROBERTS: Well, just
25 getting back to what we're -- we're talking

1 about, so you go through the whole analysis, you
2 come up with what you think the right answer is,
3 and then you ask whether that's consistent with
4 the major questions doctrine.

5 GENERAL PRELOGAR: That's how the
6 decisions are --

7 CHIEF JUSTICE ROBERTS: Sounds like --

8 GENERAL PRELOGAR: -- structured.

9 CHIEF JUSTICE ROBERTS: -- a Rule --
10 like a, Rule of Lenity.

11 GENERAL PRELOGAR: It's -- I -- I
12 think the Court has applied it as additional
13 confirmation of what it has understood to be the
14 best interpretation of a statute based on those
15 traditional tools.

16 CHIEF JUSTICE ROBERTS: Well, why --
17 why doesn't -- I think there's some disagreement
18 about how to apply it. Why -- why wouldn't you
19 look at it at the outset and say, as I think the
20 Court did in FDA, you know, why is the FDA
21 deciding whether, you know, cigarettes are
22 illegal or not, and then that's something that
23 you look at while you're reading the particular
24 statute or whatever other things you look at
25 when you're trying to interpret a statute and

1 see if it's reasonable to suppose that.

2 I -- I mean, i -- just thinking back
3 on Alabama Realtors or the OSHA vaccine case, I
4 don't know how you would read those as not
5 starting with the idea that this -- however you
6 want to phrase it, this is kind of surprising
7 that the CDC is, you know, regulating evictions
8 and all that and then look to see if there's
9 something in there, I guess, that suggests,
10 well, however surprised, you know, that's --
11 that's still what we think that type of
12 regulation was -- was appropriate.

13 GENERAL PRELOGAR: Well, I certainly
14 don't dispute that the Court in those cases has
15 looked at the actual effects of the agency
16 regulation and -- and found them to be
17 surprising and incredibly consequential.

18 But I do think that it wouldn't make
19 sense to try to ask this as an abstract question
20 at the outset because, among other things, we
21 agree with how Justice Kagan articulated the
22 principle, that this is really about filling in
23 or directing what to do when there's ambiguity
24 in a statute.

25 And so you can't sensibly apply a

1 major questions lens until you've determined
2 that there's some ambiguity to resolve. And to
3 --

4 CHIEF JUSTICE ROBERTS: I'm not sure I
5 --

6 GENERAL PRELOGAR: -- instead say --

7 CHIEF JUSTICE ROBERTS: -- understand
8 you. You described it as an abstract inquiry.
9 I don't know how abstract it is. It's just you
10 look at it and you say, why is this CDC
11 regulating evictions?

12 GENERAL PRELOGAR: Well, let me try
13 to make it --

14 CHIEF JUSTICE ROBERTS: That's a
15 pretty concrete question.

16 GENERAL PRELOGAR: And here, I think,
17 though it's -- it's not concrete at all because
18 there's not any agency action for the Court to
19 review. And instead, Petitioners have pressed
20 on this idea that the Court should adopt an
21 inside-the-fence-line limitation that is not at
22 all the dividing line between what kinds of
23 agency effects would be consequential or minor.

24 You can imagine a future regulation
25 that only uses biomass co-firing, for instance,

1 and I -- I think it would be hard to say, well
2 that's a major question, that's -- has vast --
3 has vast economic and political significance.
4 Your -- your average Joe on the street probably
5 hasn't even ever heard of biomass co-firing.

6 So here I think it's particularly
7 abstract because there's no agency action to
8 review to try to put that major questions gloss
9 on it.

10 JUSTICE KAGAN: I mean, just to put it
11 --

12 JUSTICE ALITO: You're shifting --
13 your -- your argument is shifting back and forth
14 between your mootness argument and your argument
15 on the merits.

16 As to the mootness argument, have we
17 ever held that the issuance of a stay can moot a
18 case?

19 GENERAL PRELOGAR: I'm not aware of a
20 precedent, but I want to be clear that we're not
21 arguing that it was the stay itself that mooted
22 the case. We think the stay just confirmed the
23 D.C. Circuit's judgment not to reinstate the
24 CPP.

25 JUSTICE ALITO: Has the D.C. Circuit

1 held that the reinstatement of the CPP is off
2 the board?

3 GENERAL PRELOGAR: I think that's the
4 only reasonable interpretation of this judgment.
5 And this was something that the parties had
6 touched on in the briefing before the D.C.
7 Circuit. It came up at the oral argument. No
8 one was pressing to have the CPP be reinstated
9 because it just couldn't sensibly apply now
10 given that it's been overtaken by events.

11 JUSTICE ALITO: Well, on to the merits
12 part of what you said just before I asked my
13 question, Mr. Roth made the argument that the
14 application of the major questions doctrine here
15 would be very similar to the application of that
16 doctrine in the tobacco case or in the eviction
17 moratorium case because, here, what your
18 interpretation of the statute claims for EPA is
19 not a technical matter, it is not a question of
20 how to reduce emissions from particular sources,
21 but you are claiming that the interpretation
22 gives you the authority to set industrial policy
23 and energy policy and balance such things as
24 jobs, economic impact, the potentially
25 catastrophic effects of climate change, as well

1 as costs.

2 Why isn't that correct?

3 GENERAL PRELOGAR: It's incorrect
4 here, and I think this just points up the
5 problem with trying to interpret the statute
6 outside the context of an actual agency
7 regulation because, although we agree with
8 Petitioners with respect to many of their
9 hypotheticals that EPA couldn't do those things,
10 it's because of any number of other limits in
11 the statute. There are -- there are six limits
12 that I'd love to go through if you're interested
13 in hearing them that we think address their
14 hypotheticals and are ones that Congress
15 expressly incorporated.

16 And what's missing is this
17 inside-the-fence-line limitation, which we don't
18 think tracks what will be major and what
19 wouldn't be and would deny much needed
20 flexibility to do commonsense and commonplace
21 and well-established limits in this industry for
22 things like averaging and trading.

23 JUSTICE ALITO: Well, this statute
24 requires EPA to take into account, just to take
25 into account, not even balance, take into

1 account several factors, and they are
2 incommensurable. You know, how do you balance
3 or take into account, what weight do you assign
4 to, the effects on climate change, which some
5 people believe is a matter of civilizational
6 survival, and the costs and the effect on jobs?

7 GENERAL PRELOGAR: So I think it's
8 important to distinguish between that type of
9 cost/benefit analysis, which EPA would conduct
10 in a regulatory impact analysis under an
11 executive order, and the separate statutory
12 constraints in Section 7411, which we think
13 wouldn't require that kind of balancing and very
14 much constrain EPA.

15 First, EPA has to determine that the
16 standard is adequately demonstrated or the
17 system is adequately demonstrated. And I think
18 that answers the concern about EPA just
19 restructuring the industry. Instead, it looks
20 at what the sector is already doing as the
21 baseline.

22 Second, of course, as we've noted, you
23 have to look at costs, and that means that it
24 cannot be of unreasonable costs on the industry
25 that cannot be balanced away by saying that

1 there are tremendous benefits.

2 It can't threaten the reliability of
3 the electricity grid, which means that, again,
4 EPA cannot undertake these kinds of substantial
5 transformations or restructuring that would
6 ultimately threaten our access to electricity in
7 this country.

8 And then there are additional limits
9 under the term "system of emission reduction"
10 that we think would further guard against things
11 like offsets or taxes or simply shutting down
12 plants. EPA can't do those things because they
13 wouldn't qualify as a system of emission
14 reduction.

15 JUSTICE ALITO: I really don't see
16 what the concrete limitations are in any of what
17 you said. When you take in -- if you take the
18 arguments about climate change seriously, and
19 this is a matter of survival, so long as the
20 system that you devise doesn't mean that there
21 isn't going to be -- there isn't going to be
22 electricity, and so long as the costs are not
23 absolutely crushing for the society, I don't
24 know why EPA can't go even a lot further than it
25 did in the CPP.

1 GENERAL PRELOGAR: Because the D.C.
2 Circuit, which has principally been responsible
3 for looking at these types of actions, has
4 interpreted those requirements to be real
5 constraints here. And EPA cannot undertake
6 action that would threaten the industry with
7 unreasonable costs.

8 So I think this just underscores why
9 it's -- it's problematic to try and think about
10 exercises of authority in an abstract way
11 without a currently applicable regulation before
12 you to actually measure these kinds of things.

13 JUSTICE ALITO: Well, under your
14 interpretation, is there any reason why EPA
15 couldn't force the adoption of a system for
16 single-family homes that is similar to what it
17 has done in -- what it is claiming it can do
18 with respect to existing power plants?

19 GENERAL PRELOGAR: The limit on that
20 is the fact that EPA has never listed homes as a
21 source category and couldn't do so because they
22 are far too diverse and differentiated. You
23 couldn't sensibly apply the statute to them
24 because you wouldn't have an adequately
25 demonstrated system that could be

1 cost-effectively installed at each and every
2 home given how different they are.

3 And I would just emphasize, Justice
4 Alito, that even their own example of homes,
5 which is that -- an idea that EPA would require
6 the installation of solar panels on homes, that
7 just shows the problem with their interpretation
8 because that is a quintessential
9 inside-the-fence-line measure. It's a
10 technological solution at the home that reduces
11 emissions at the home.

12 So the -- the interpretation they're
13 asking the Court to adopt doesn't address those
14 concerns. Instead, it's the express constraints
15 in the statute that we think prevent that.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Breyer?

20 JUSTICE BREYER: I -- I do have a
21 quick question because I -- I think it's
22 important to get this straight in my mind.

23 The reason I thought that the CPP is
24 alive and there, this is the reason: On page
25 37a of -- which has the opinion of the D.C.

1 Circuit, it says: "At the outset, the ACE Rule
2 repealed the Clean Power Act." Okay? It
3 explained it had to do that, the EPA, because
4 the statute made them do it.

5 Then I look to 161, where they say --
6 161a, where they say what they did. They say
7 the only permissible interpretation, that's what
8 ACE thinks, and -- but we cannot -- where
9 statute grants an agency discretion, but the
10 agency erroneously believes it doesn't have it,
11 we cannot uphold the result, correct, as an
12 exercise of the discretion that the agency
13 disavows. All right? Got that.

14 Then they say: And the regulation
15 must be declared invalid. Okay, that's ACE.
16 That's ACE they're talking about. We conclude
17 that the EPA fundamentally has misconceived the
18 law such that its conclusion may not stand. Its
19 conclusion was to get rid of CPP.

20 GENERAL PRELOGAR: It's --

21 JUSTICE BREYER: And then it says we
22 hold the ACE Rule must be vacated and remanded
23 to the EPA so the agency may consider the
24 question afresh in light of the ambiguity we
25 see.

1 So where is it it says that CPP
2 doesn't exist? It says ACE is wrong, we remand
3 it for reconsideration. Now you tell me what to
4 read.

5 GENERAL PRELOGAR: So I think where
6 we're maybe talking past each other, Justice
7 Breyer, is that we think that the D.C. Circuit
8 would have -- would have had to expressly say
9 and so the CPP comes back into effect. Of
10 course, we don't dispute one bit that the D.C.
11 Circuit vacated ACE and therefore vacated the
12 embedded repeal rule. But there is a body of
13 precedent in the D.C. Circuit about what you do
14 when a rule is invalid and whether it
15 automatically bring backs -- brings back the
16 prior regulatory regime.

17 JUSTICE BREYER: So, when they say the
18 ACE Rule must be vacated so that the agency may
19 "consider the question afresh" --

20 GENERAL PRELOGAR: Exactly. So that
21 goes back to the CPP --

22 JUSTICE BREYER: -- that means
23 consider it afresh even though the rule that
24 they're trying to get rid of is gone?

25 GENERAL PRELOGAR: That rule is gone

1 --

2 JUSTICE BREYER: Okay. Fine.

3 GENERAL PRELOGAR: -- but they're not
4 bringing back the old rule.

5 JUSTICE BREYER: Now what do I read to
6 make sure that's right?

7 GENERAL PRELOGAR: So I would point
8 you to a memorandum that EPA prepared after the
9 D.C. Circuit's judgment to provide guidance
10 to regional --

11 JUSTICE BREYER: Do we have that here?

12 GENERAL PRELOGAR: -- administrators
13 -- it's at JA 269.

14 JUSTICE BREYER: Thank you.

15 GENERAL PRELOGAR: I would take a look
16 at EPA's analysis of that issue, and what EPA
17 said is it interpreted the judgment not to put
18 CPP back into effect.

19 JUSTICE BREYER: Okay. Thank you.

20 GENERAL PRELOGAR: No one was
21 advocating that result.

22 JUSTICE BREYER: Thank you. You've
23 done that. If that does it, that does it.
24 Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 Justice Sotomayor?

2 Justice Kagan?

3 JUSTICE KAGAN: General Prelogar, the
4 Petitioners here say, well, you have "system" on
5 your side, it's true, "system" is a big word,
6 but we have on our side "standards of
7 performance for any existing source." So why
8 doesn't that tilt in their favor?

9 GENERAL PRELOGAR: So we certainly
10 agree that a standard of performance for an
11 existing source means that each individual
12 source has to be held accountable for operating
13 its plant in conformance with that standard.
14 But where I think their interpretation breaks
15 down is there is nothing in that language that
16 says that each plant has to take identical
17 action or the emissions reductions have to be
18 achieved from each plant in an identical way.

19 And if I could just use an example of
20 a -- a trading scheme, which is commonplace in
21 this sector, you can imagine a best system that
22 involves a technological solution, like carbon
23 capture and sequestration, paired with trading,
24 and a plant can decide, well, it's
25 cost-effective to put in the -- the carbon

1 capture and storage, we'll do that, and, in
2 fact, we'll reduce our emissions even below the
3 limit and generate a credit.

4 Another plant that's differently
5 situated and would incur far greater expense to
6 put in the technology is going to be better off
7 in the trading system to buy the credit.

8 And the system is operating as
9 intended. It is reducing emissions across the
10 source category as a whole. It's just doing so
11 in a very cost-effective way, which I think
12 explains why the power plants by and large are
13 on our side in this case. They want that kind
14 of flexibility because this is business as usual
15 for them.

16 There's no apparent reason from that
17 language, standard of performance, for an
18 existing source to think that Congress instead
19 said, no, rigidly, all of the plants have to put
20 in the carbon capture and storage, even if
21 that's going to be no greater emission reduction
22 and come at far greater cost to them. So we
23 just think that the terminology can't bear the
24 weight that they would place on it.

25 And if I could make one final point on

1 all of this. That, of course, is language that
2 governs what the states can do, and all the
3 normal presumptions here, the federalism canon,
4 major questions, I think, provides no basis to
5 adopt their interpretation, which would narrowly
6 constrain what states and sources can do for
7 compliance.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: On major
12 questions, I just want to repeat two things from
13 Uarg and if you would caution us against using
14 these as -- as continuing standards for major
15 questions.

16 One thing we said is that Congress
17 must speak clearly if it wishes to assign an
18 agency decisions of vast economic and political
19 significance. And the second thing we said is
20 that the Court greets with a measure of
21 skepticism when agencies claim to have found in a
22 long extant statute an unheralded power to
23 regulate a significant portion of the American
24 economy.

25 Do you have any disagreement with

1 those two principles?

2 GENERAL PRELOGAR: No. I certainly
3 recognize the Court has used that as a basis to
4 apply major questions, but I certainly dispute
5 that either of those principles could carry the
6 day here.

7 With respect to vast economic and --
8 and political significance, of course, there's
9 no agency regulation to review, but even looking
10 at how the statutory scheme operates, I -- I
11 don't see how EPA could issue that kind of
12 regulation without transgressing the other
13 limits.

14 If it were really a transformational
15 type of regulation, it wouldn't be adequately
16 demonstrated. It wouldn't be what the industry
17 is already doing to control pollution. It
18 wouldn't be cost-effective. Maybe it would
19 transform the nature of our reliance on
20 particular forms of energy and so threaten
21 the -- the reliability of the grid.

22 So, on all of those ways, I just don't
23 think you can get to that end result of saying
24 that the statute would necessarily encompass
25 those kinds of effects and certainly not through

1 this inside/outside-the-fence-line restriction.

2 And then, finally, with the unheralded
3 power language that you read, you know, this is
4 a statute where the Court has already recognized
5 in American Electric Power that Congress spoke
6 directly to the issue of who EPA should
7 regulate, existing power plants, what it should
8 regulate, their greenhouse-gas emissions, under
9 this exact provision, Section 7411(d).

10 And I acknowledge in a colloquial
11 sense that that seems like a pretty big deal,
12 but that is right in EPA's wheelhouse because
13 this Court already recognized that Congress
14 conferred on EPA, the expert agency, the
15 authority here to make those judgments.

16 JUSTICE KAVANAUGH: So you don't
17 dispute the general principles, but you think
18 the general principles don't apply to this
19 particular situation?

20 GENERAL PRELOGAR: I think that they
21 both don't apply to this situation and that
22 those principles are never something the Court
23 has looked at without taking stock of the actual
24 effects of a particular regulation.

25 So it hasn't referred to those types

1 of principles in a context outside the -- the
2 idea that there really are -- there really is an
3 agency regulation that is -- is having that kind
4 of transformative effect.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Thank you, General.

9 Ms. Brinkmann.

10 ORAL ARGUMENT OF BETH S. BRINKMANN

11 ON BEHALF OF THE POWER COMPANY RESPONDENTS

12 MS. BRINKMANN: Mr. Chief Justice, and
13 may it please the Court:

14 The statutory framework Congress
15 created in Section 7411 is critical to the power
16 companies. For years, the power companies have
17 used emissions trading, generation shifting, and
18 other measures to reduce emissions while keeping
19 the lights on at reasonable cost.

20 The ACE Rule would exclude those
21 measures from the BSER because they are not
22 adder to a source, but nothing in the statute
23 excludes them.

24 Congress directed the expert agency to
25 look to reality when it makes the empirical

1 determination of the best system of emission
2 reduction for the source category.

3 Congress would have expected the
4 agency to consider emissions trading. Congress
5 had allowed emissions trading by fossil fuel
6 plants to control emissions of various
7 pollutants for decades.

8 We know that Congress did not impose
9 the ACE Rule restriction on the BSER because of
10 the other sections of the statute where Congress
11 did narrow the text to -- for certain other
12 emissions limitations but not in 1174(a).

13 The ACE Rule would eliminate
14 significant long-standing, cost-effective means
15 of lowering emissions. That's why the power
16 companies urge rejection of the ACE Rule while
17 embracing the many limits that the Clean Air Act
18 place on EPA's authority.

19 I welcome questions from the Court.

20 JUSTICE THOMAS: Ms. Brinkmann, I know
21 you have some concerns about how the major
22 questions doctrine was used here, but have you
23 seen 7411 used in this way in previous
24 regulatory actions by EPA?

25 MS. BRINKMANN: Yes. In 2005, Your

1 Honor, the mercury rule used it in just this
2 way. Petitioners try and suggest it wasn't part
3 of the BSER, but it indeed was. And I would
4 also point, Your Honor, not just to the actual
5 1174(d) mercury rule but also the acid rain rule
6 and the Good Neighbor rule under 7410.

7 Those were all instances where
8 Congress said that they had to use emissions
9 trading, for example, but they did not require
10 it in 1174(a), but there's no indication that it
11 excluded it.

12 And if I could, I think that the
13 statute really answers this question. There are
14 limits, many limits which the solicitor general
15 addressed, but there's no at-and-to limit. And
16 if I could, I'd like to really focus on
17 subsection (h).

18 Subsection (h) in 7411 is a provision
19 that is used as an alternative to (a). Under
20 (h), that is the provision that says, if a
21 standard of performance is not feasible for
22 certain reasons, then -- I'm going to quote,
23 this is on page 9A of the solicitor general's
24 gray brief -- "he may instead" -- instead of
25 1174(a), what we've been talking about -- "he

1 may instead promulgate a 'design, equipment, or
2 practice or operational standard or combination
3 thereof' which reflects the best technological
4 system of continuous emission reduction."

5 That is the alternative to (a). Those
6 limits and restrictions are not in (a) in the
7 best systems of emission reduction. So we know
8 that it's not in the text and we know, when you
9 look at the adequately demonstrated provision of
10 1174(a), of course, emissions trading certainly
11 would have been considered because it was
12 already being done by fossil fuel plants under
13 the acid rain rule, under the Good Neighbor
14 provision, and there had been the mercury rule.

15 The other thing when you're looking at
16 adequately demonstrated, there is a -- since
17 2009, there's been a regional greenhouse gas
18 initiative where many states do generation
19 shifting.

20 So the statute answers the question in
21 this case. It is clear from that that the best
22 system of reduction -- emissions reduction,
23 which is a benchmark that the EPA sets, that the
24 emissions guidelines that they set using the
25 BSER is not prohibited from using these very

1 standard practices of the power companies.

2 CHIEF JUSTICE ROBERTS: Well, what
3 about -- what about not so standard? Could the
4 best system of emission reduction adequately
5 demonstrated involve shutting down a plant?

6 MS. BRINKMANN: No, Your Honor. And
7 that goes to these other constraints that are in
8 the structure of the statute. At the beginning
9 of the statute, it talks about categories of
10 sources. That's the predicate for the ability
11 to EPA to even regulate under 1174(a).

12 You look at 1174(b), and (b) talks
13 about the agency has to first list categories of
14 sources, so --

15 CHIEF JUSTICE ROBERTS: Okay. Okay.
16 I -- I haven't gotten to the part yet where they
17 can't do that.

18 MS. BRINKMANN: Right, because it's
19 about reducing the emissions in that category
20 source.

21 CHIEF JUSTICE ROBERTS: Right.

22 MS. BRINKMANN: It's not about
23 reducing the production of energy. Indeed,
24 that's contrary --

25 CHIEF JUSTICE ROBERTS: Well, why

1 wouldn't reducing the emissions in a category
2 source require reducing them to zero?

3 MS. BRINKMANN: Because the purpose is
4 to reduce emissions while maintaining power and
5 energy. That's what's so important to the power
6 companies about the reliability of this very
7 complex power grid that's --

8 CHIEF JUSTICE ROBERTS: Well, what's
9 all the stuff about generation shifting then if
10 you can't generate -- you can't shift a
11 generation down to zero? You -- I mean, would
12 it be all right if you -- this resulted in
13 generation shifting requiring a 10 percent
14 reduction?

15 MS. BRINKMANN: One of the explicit
16 requirements of 1174(a) is to consider the
17 energy requirements, and saying that a -- basing
18 the best system of emission reduction on the
19 fact that some plant had to be shut down is not
20 consistent with that. It's not about reducing
21 production. It's about keeping the production
22 but reducing emissions.

23 CHIEF JUSTICE ROBERTS: Well, yeah,
24 but the whole idea is that you take that
25 production and you shift it somewhere else,

1 whether it's wind turbines or solar or -- or
2 whatever.

3 MS. BRINKMANN: If I could try an
4 example, Your Honor, because the ACE Rule
5 eliminates a lot more than generation shifting.
6 I think I'm going to the emissions trading
7 example that the solicitor general was talking
8 about.

9 There are two plants. This is an old,
10 aging coal plant. It's got a couple years left.
11 This is a new one. There's a big turbo-charged
12 scrubber that has to be put on.

13 It's just too expensive for this plant
14 to invest in that. This plant can do it easily
15 and reduce this to the level. So the first
16 plant says to the second plant: If you double
17 your reduction, I'll pay you for that. And
18 that's cheaper, it's more cost-effective for the
19 power companies because the first plant can keep
20 operating. Emissions trading is what keeps
21 those plants operating. And they are reducing
22 the emissions twice as much because the second
23 plant --

24 CHIEF JUSTICE ROBERTS: I'm sorry, I
25 don't see -- I -- I'm sorry, I'm being -- I'm

1 being thick here, but I don't see how the old
2 power plant with two years left, how it has kept
3 operating under the scenario you just described.

4 MS. BRINKMANN: Because it gets
5 credits. It gets the emission credits from
6 paying the second plant to reduce twice as much
7 its reduction. That doubled reduction wouldn't
8 happen except for that the first plant, it's
9 cheaper for the first plant to pay the fancier
10 new plant to double their reduction. And so the
11 first plant can live out its life because it
12 gets those credits towards its limit.

13 That's what these restrictions place
14 on. I should also say there is no ability for
15 the agency to require our companies to invest in
16 electric vehicles or to plant trees because the
17 reductions of emissions have to come from the
18 source category, and that source category is --
19 is where the Petitioners get off -- they keep
20 talking about source, source. No, it's the
21 source category that triggers the ability for
22 the agency to regulate.

23 And I can also explain that language
24 in (d) if we want to. I know, Justice Kagan,
25 you were asking about that. When you look at

1 the language about any source, it also says any
2 pollutant, that's the introductory sentence in
3 there saying, states, you have to do a plan for
4 any -- it's what Justice Breyer was saying; in
5 other words, all of them. You know, you can't
6 leave anything unregulated.

7 We do agree that the state plans and
8 the standards of performance go to individual
9 plants. And if you look later in (d), actually,
10 at the bottom, it talks about when we can take
11 into -- when the state can take into account the
12 remaining useful life, it says any particular
13 source.

14 I mean, it is very clear when you
15 march through it that the BSER here, which sets
16 a benchmark, this is not command-and-control
17 regulation, this is a benchmark that then is
18 used for the emission guidelines, that in that
19 sense we're looking at the source category.

20 JUSTICE SOTOMAYOR: Ms. Brinkmann, as
21 I read (d)(1) and as -- just going to what
22 Justice Roberts asked you, a state could, in its
23 judgment, exempt a particular power plant from
24 regulation, correct?

25 MS. BRINKMANN: The statute explicitly

1 says in (d)(1) that they can take into account
2 the remaining useful life, and that's why this
3 kind of emissions trading in the credits is so
4 important because it's not just --

5 JUSTICE SOTOMAYOR: But they don't
6 have to do that. They could do an exemption for
7 that source.

8 MS. BRINKMANN: Yes. That's correct,
9 Your Honor.

10 JUSTICE SOTOMAYOR: Because the credit
11 could be too expensive, that it could kill the
12 plant now rather than in two years, and so a
13 state could decide that, correct?

14 MS. BRINKMANN: And -- yes. And
15 that's what such a huge problem is with the
16 Petitioners' argument suggesting that our
17 flexibility and ability to comply with the state
18 plans also would somehow be cabined by this.

19 And the statutory text cannot support
20 that. The framework cannot support that.

21 JUSTICE SOTOMAYOR: Thank you.

22 JUSTICE BREYER: What is -- before you
23 finish with (d), I didn't quite get it. So (d)
24 has to do with state plans --

25 MS. BRINKMANN: Yes.

1 JUSTICE BREYER: -- applied to
2 existing sources, and it says the administrator
3 shall prescribe regulations under which -- this
4 is the EPA -- under which each state shall
5 submit a plan which -- and now we're talking
6 about the state plans -- establishes standards
7 of performance -- and that includes the word
8 "system" standards of performance -- for any
9 existing source.

10 Now you heard your -- your -- your --
11 your colleagues, your brother on the other side.
12 He said no. He said that -- it says for any
13 existing source. So it means a system for any
14 existing source. And his point is, if that's
15 what the state has to do, surely the EPA plan
16 has to be similar.

17 Now there may be some space in there,
18 but how do you interpret those words which he
19 brought up?

20 MS. BRINKMANN: So, Your Honor, the
21 next three words after you stopped reading say
22 "for any air pollutant."

23 JUSTICE BREYER: Yeah.

24 MS. BRINKMANN: So, if you understand
25 what that sentence is saying, it's saying you

1 have to do it for all of them, for any in your
2 state so none of them remain in the dark.

3 JUSTICE BREYER: Oh, all right. But
4 carbon is an air pollutant. And so, if it's for
5 any air pollutant --

6 MS. BRINKMANN: Right.

7 JUSTICE BREYER: -- you have to do it
8 for carbon.

9 MS. BRINKMANN: Right. So --

10 JUSTICE BREYER: And what you have to
11 do is provide a standard of performance for any
12 existing source of carbon.

13 MS. BRINKMANN: That's the -- the
14 standard performance that the states do.

15 JUSTICE BREYER: Yeah.

16 MS. BRINKMANN: And if you go further
17 down, Your Honor, at the bottom, it talks about
18 also regulations of the administrator shall
19 permit the state in applying a standard
20 performance to any particular source under a
21 plan submitted under state -- into consideration
22 remaining useful life.

23 That is clearly the -- the state
24 system. If you go back to --

25 JUSTICE BREYER: Yeah, I know it's the

1 state system.

2 MS. BRINKMANN: Right.

3 JUSTICE BREYER: Nobody says it isn't.

4 MS. BRINKMANN: But, if you're going
5 back to (a)(1) and we talk about the best system
6 of emission reductions, that's the benchmark
7 that is then -- that is the best system of
8 reduction that is then used to set this
9 benchmark, this emissions guideline.

10 There, Congress spoke very clearly,
11 and the reason they can, you know, do this is
12 because it's a category of source under (b)
13 that's been listed, and so they can only do this
14 if there's a source category.

15 So then you look at the source
16 category, and what's really important, you have
17 to look at what's adequately demonstrated. That
18 means you look to reality. You look to what's
19 been going on. And we know emissions trading
20 has been going on.

21 And we know, when Congress meant to
22 limit something and to say no, no, you can only
23 consider technology, you can only do more at two
24 things, they did things like in (h). And it's
25 not just (h), the alternative I talked about

1 before. It's also in 7412 and a host of other
2 provisions.

3 In (a), which is addressing the best
4 system of emissions reduction here, there's no
5 limitation on that, and that makes complete
6 sense because that's what Congress wanted to do,
7 particularly in this very complicated electrical
8 grid scenario, where you look at the industry,
9 you look what's adequately demonstrated.

10 JUSTICE SOTOMAYOR: Do states do a
11 plan that includes each power source in their
12 grid? Meaning -- or is it like what the EPA
13 does, a general standard, and then the -- the
14 states decide how it applies to each source?
15 That sounds to me like the state comes in and
16 says, for this kind of source, you have to do
17 this; for that kind of source, you have to do
18 that. Am I correct about that?

19 MS. BRINKMANN: Yes. And the states,
20 in fact, have to go through and even identify
21 all the sources are covered based on, you know,
22 their size and their emissions and that type of
23 thing.

24 JUSTICE SOTOMAYOR: So they -- they
25 sort of form-fit for that -- they fit for each

1 source what their plan is?

2 MS. BRINKMANN: And it's -- yes, Your
3 Honor. It's very --

4 JUSTICE SOTOMAYOR: And so that's why,
5 for each plant, there could be a different set
6 of systems that meets the goal, correct, a
7 different way for each plant?

8 MS. BRINKMANN: There could be
9 different measures that they use, Your Honor,
10 and that's why it's so important --

11 JUSTICE SOTOMAYOR: And so that's why
12 what you were saying --

13 MS. BRINKMANN: Yes.

14 JUSTICE SOTOMAYOR: -- which is to say
15 for each source doesn't mean that it limits you
16 to in-fence regulation?

17 MS. BRINKMANN: Not at all.

18 JUSTICE SOTOMAYOR: It lets you do
19 whatever regulation is necessary to reach the
20 standard?

21 MS. BRINKMANN: Although I would step
22 back and say, of course, not whatever because it
23 has to be reducing emissions, not power. It has
24 to be reducing emissions from this category
25 source.

1 And I think that's the kind of word
2 game that comes in. Oh, well, then there's no
3 limit. No. The fact that "at" and "to" is not
4 a limit does not mean it's a free-for-all.
5 There are other limits.

6 And I also would say, Justice
7 Sotomayor, that I really think goes to that,
8 it's really significant to me that when you read
9 the term "standard of performance" in
10 7411(a)(1), it says it has to be a standard
11 which reflects the degree of emission limitation
12 that's achievable. That -- that is going to
13 exactly how this works. You know, it's this
14 benchmark. It's not this command-and-control
15 regulation that EPA does.

16 Now it's also, I think, you know,
17 significant when you look at the way in which
18 the states then have the flexibility and the
19 power companies certainly have the flexibilities
20 to do something as important and as critical as
21 emissions trading, which reduces the emissions
22 that would not otherwise be reduced in this
23 source category and yet allows infrastructure
24 investment to remain, allows plants to live out
25 their life in a more economic way, and this is

1 incredibly cost-effective.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Breyer?

6 Justice Alito?

7 JUSTICE ALITO: Yeah. May I ask you
8 to respond to -- I think it was the last
9 question that Justice Kavanaugh asked the
10 solicitor general, and that has to do with the
11 scope of the major questions doctrine. And he
12 pointed out language referring to questions of
13 vast political and economic significance and
14 reading a new interpretation into a long-dormant
15 statute. Her answer was that those would be
16 important factors in considering whether the --
17 the major questions doctrine applies. At least
18 that's how I understood her answer.

19 If that is correct, would you agree
20 with it?

21 MS. BRINKMANN: It needs to be
22 considered at less of a level of abstraction
23 with all due respect, Your Honor. For example,
24 the Court has always looked to an exercise of
25 agency authority, something the agency actually

1 did that reflected the authority they were
2 claiming.

3 And I point to the OSHA vaccine case,
4 that recent decision there, because, of course,
5 the Court's rationale was, you know, OSHA is now
6 regulating every employer, everybody, vaccines,
7 outside of the workplace, and gave pause in
8 that.

9 But, in that opinion, it was very
10 specific to say, you know, that's when you're
11 taking every employer that has more than a
12 hundred employees in this country, and I don't
13 even know how many millions that covered.

14 JUSTICE ALITO: Well, I --

15 MS. BRINKMANN: But --

16 JUSTICE ALITO: -- I take your answer
17 to mean that we should look to what the agency
18 is actually doing and not what it could do under
19 a particular interpretation.

20 Is that -- is that correct?

21 MS. BRINKMANN: That's part of it,
22 Your Honor, because there it said, you know,
23 this might be okay for OSHA to be doing for
24 medics or for people who work in particularly
25 cramped areas or researchers for COVID. That's

1 why that's so important.

2 And we think that, you know,
3 considering it out of that in a more abstract
4 way is not the threshold question. That's why
5 we think the statute would be --

6 JUSTICE ALITO: Well, how -- how would
7 that work? Let's say an agency takes a
8 long-dormant statute and interprets it in a way
9 that would have vast political and economic
10 significance if the agency exercised all of the
11 power that it claims it has under its
12 interpretation.

13 But, as a first move, it adopts a
14 fairly modest rule that only invokes, let's say,
15 5 percent of that power. You would say that's
16 not an occasion for applying the major questions
17 doctrine. Is that right?

18 MS. BRINKMANN: I would say -- first,
19 I just want to say I would push back on the
20 premise that this is a long-dormant authority
21 because it has to be --

22 JUSTICE ALITO: Yeah, no, it's a
23 hypothetical.

24 MS. BRINKMANN: Yes. Okay.

25 JUSTICE ALITO: But if those

1 conditions were met.

2 MS. BRINKMANN: Of course, of course.

3 Looking at the exercise of the agency
4 authority helps determine whether or not it
5 poses a question of significant consequence
6 because, of course, Congress does sometimes,
7 like, crystal clear give very, very important
8 significance.

9 So we really agree with the idea that
10 you look at that first and if there's some
11 ambiguity, but we think, here, the text answers
12 it.

13 JUSTICE ALITO: Well, I do think --

14 MS. BRINKMANN: But then, if there's
15 ambiguity --

16 JUSTICE ALITO: -- I do think you're
17 hyping my hypothetical -- you're hyping -- you
18 are -- you're questioning my hypothetical.
19 You're --

20 MS. BRINKMANN: I'm sorry, Your Honor.

21 JUSTICE ALITO: -- dismissing the
22 hypothetical. Maybe it's not a good
23 hypothetical, but the agency says, here's the
24 statute. We think we can do a lot under this
25 statute. This is our interpretation. But, for

1 now, we're only doing a little. We're only
2 exercising 5 percent of that authority.

3 And you would say no, that's not a
4 major question because we look at just what
5 they're doing and that's not all that
6 disruptive.

7 Am I right?

8 MS. BRINKMANN: No. I'd want to know
9 as a judge what exactly they did, and then I
10 would compare it to the statute. You need to
11 pressure test it against the statute first to
12 see if there's authority for it for --

13 JUSTICE ALITO: I -- I'm going to ask
14 it one more time because I think you're just
15 disagreeing with the hypothetical.

16 They say, we can do all this, but
17 we're only doing this, all right? Don't
18 question whether they -- there's ambiguity about
19 whether they can do all of this. They say, we
20 can do all this, but we're only doing a little
21 for now. Is that -- do you rule out major
22 questions because they haven't done it now?

23 MS. BRINKMANN: I -- I don't want to
24 say I rule it out. If I could just -- let me
25 get -- I think that that rests -- oh, we can do

1 this, it's kind of like dicta in a judicial
2 opinion. They're saying that --

3 JUSTICE BREYER: I think he's
4 saying -- do you mind if I --

5 JUSTICE ALITO: Yeah.

6 JUSTICE BREYER: Look, in tobacco --

7 MS. BRINKMANN: Mm-hmm.

8 JUSTICE BREYER: -- suppose they
9 started off in saying we are regulating the
10 advertising of four-foot cigars smoked through
11 hookahs, okay?

12 (Laughter.)

13 JUSTICE BREYER: Now the problem is,
14 can you regulate tobacco? And if you can
15 regulate tobacco, that's a very big deal.

16 But they say, no, it isn't. It's just
17 this tiny -- you know, there aren't -- there are
18 only three in the whole country, so it's a
19 little deal. So it isn't the major question
20 doctrine.

21 And I think what he wants to -- I
22 would want to know too is -- is, hey, do you
23 apply it when it's just a little thing? Now you
24 might say, I guess you are trying to say, it's
25 case by case. It depends.

1 MS. BRINKMANN: I think that, you
2 know, that helped me, Your Honor, and, Justice
3 Alito, I really don't mean to be not answering
4 your question, but the fact that it involved
5 tobacco right there would be a question, and you
6 would look at it against the statute and say I
7 don't see tobacco there.

8 And then you start looking at this
9 doctrine to see, and you look at -- I -- I would
10 say there are at least three or four issues you
11 look at. Is it expanding regulation over a lot
12 more entities or people? OSHA, in the UARG
13 case, there were millions more.

14 Of course, here, nobody -- there are
15 no additional entities being regulated. It's
16 just a benchmark. It's not even a command and
17 control. The other thing I would say, it's
18 clearly in the wheelhouse. It's not like OSHA
19 and -- or -- or -- or -- or CDC and
20 landlord/tenant.

21 The other thing that the Court has
22 looked to a lot, Your Honor, and I think this
23 goes to how looking at the agency is useful to
24 know whether you look at major question is
25 whether it's a major question because it's

1 contrary to what the agency has been doing in
2 the past.

3 And, here, we really would say that
4 seeing what it's done like here, this "at" and
5 "to" would eliminate emissions trading. That's
6 been going on for pollutants under many
7 provisions of the statute for decades and
8 including under this one in the -- the 2005 rule
9 that was invalidated on other grounds, but I
10 think that is why I -- I hesitate to say that
11 you could do it at the threshold.

12 I really think that it has to be the
13 statute can answer it. And if the statute
14 answers it, that should be the first question.
15 But, if it says tobacco and there's nothing in
16 the statute about tobacco, then, you know, you
17 need to -- to consider these other factors.

18 JUSTICE ALITO: Well, I won't -- I
19 won't belabor it. And I -- I can never equal my
20 -- my colleague's evocative hypotheticals.

21 (Laughter.)

22 JUSTICE ALITO: But, you know, what
23 happens after they -- the 5 percent case, they
24 say, oh, this is not a big deal, it's not major,
25 and then the agency says, well, no, you know,

1 we're going to claim 20 percent.

2 And then they -- later they say we're
3 claiming 40. And, eventually, they get up to
4 80, 90, or something like that. At some point,
5 can it become a major question?

6 MS. BRINKMANN: It may. I mean, here,
7 it's not a percentage. It's -- you know, it's
8 a -- a different sort of thing. And, to me,
9 that is the problem that there's just -- and,
10 again, you go to the text first, but if there's
11 some new extraordinary exercise of power that
12 would come in and the statute doesn't answer it
13 and there is some ambiguity, then we would say
14 that's what this Court's precedents teach us to
15 look at.

16 But, in each of the Court's
17 precedents, Your Honor, they have looked at the
18 agency action first and they have pressure
19 tested it against the statute before jumping to
20 major question.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor, anything further?

23 JUSTICE KAGAN: You know, it's not
24 always the case, Ms. Brinkmann, that a lawyer
25 responds to one of Justice Breyer's

1 hypotheticals by saying that's really helpful.

2 (Laughter.)

3 MS. BRINKMANN: Well, I appreciated
4 it.

5 JUSTICE KAGAN: But that's not my
6 question.

7 I think it was the Chief Justice who
8 asked General Prelogar, like, if -- if -- if the
9 major questions doctrine is supposed to be
10 asking some form -- some question like is it
11 really surprising that the agency did this in
12 the way that it was really surprising that the
13 FDA regulated tobacco or whatnot.

14 And General Prelogar's answer to that
15 question very much from an agency perspective
16 was, like, it's not really surprising at all
17 after Massachusetts versus EPA at the very least
18 that this agency is doing greenhouse gas
19 regulation. This is in -- you know, exactly in
20 its wheelhouse.

21 But I -- I hear you making a kind of
22 different argument, and I just want to make sure
23 that I'm reading you right because you're saying
24 not from the agency perspective but instead from
25 the power plant perspective something along the

1 lines of: If you do anything about the way
2 power plants operated, which maybe we do and
3 maybe we don't, but you would know that we do
4 these kinds of outside-the-fence things all the
5 time and that it's a sensible way for all of us
6 to proceed and that if you took that away, you
7 would be essentially -- you know, it's not
8 surprising because that's what the industry
9 does.

10 So is that right?

11 MS. BRINKMANN: Yes, Your Honor, and
12 we would say that what Congress did in the
13 statute reflects that. They told the agency,
14 you have to look at what's adequately
15 demonstrated. That's not a very common
16 directive that Congress gives to agencies, which
17 we welcome because we think there are abundant
18 limitations in this statute.

19 So they have to look to what
20 adequately is demonstrated. Also, not only has
21 the -- the power companies been engaging this,
22 but it's critical that, you know, these
23 emissions trading in particular, I think it also
24 explains and understands the statutory scheme,
25 why it's source categories.

1 That's what the agency has to list
2 under (b). And I figure, okay, we're going to
3 look at that now, what's adequately demonstrated
4 in the source category, and then we're going to
5 look through and we're going to look -- and, you
6 know, Petitioners acknowledge this for other
7 factors in 7411(a). So did the ACE Rule.

8 When they were looking at whether
9 something was adequately demonstrated, they
10 looked, of course, at source category, not for
11 one individual source. That's not what 7411(a)
12 is about.

13 So, yes, Your Honor, we -- we do say
14 that from our perspective, you know, that's
15 what's important to the statutory scheme in 7411
16 that Congress set up and directed the agency to
17 look to those standard practices that we've been
18 engaging in.

19 And I think, under the acid rain rule,
20 for example, it's -- it's not the same
21 pollutant, but it's certainly a system that
22 Congress itself set up in 1990. At the same
23 time, it did not amend 7411(a) to limit it in
24 that way. It didn't require us to do it, but it
25 certainly would have been in that, you know,

1 basketful of measures to look at to see what
2 best system of emissions reduction should be
3 used for 7411(a).

4 JUSTICE KAGAN: And is there any
5 necessary relationship or, indeed, is there even
6 a probable relationship between this
7 inside-the-fence and outside-the-fence
8 regulation, on the one hand, and huge economic
9 impact, on the other?

10 MS. BRINKMANN: Not at all, Your
11 Honor. That's why I tried to use, in my
12 oversimplified example about emissions trading,
13 two coal plants with a really expensive
14 scrubber. No, I mean, something could be really
15 expensive and, you know, it could cause
16 generation shifting, it could cause all manner
17 of things, but it does not align with the "at"
18 or "to."

19 A colleague of mine explained to me it
20 was orthogonal, and I thought that was an
21 interesting word that I looked up and understood
22 that it just doesn't align with the "at" / "to"
23 distinction. There could be things "at" that
24 are quite, you know, exorbitant; there can be
25 things that are outside.

1 For example, pre-washing coal at
2 another site that then comes onto the actual
3 facility, that's something that would be outside
4 the fence line or not "at" and "to." And that
5 that makes a little sense.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: I think the
10 potential surprise here, to pick up on Justice
11 Kagan's question, doesn't go to regulating CO2,
12 as she rightly says, but is using a
13 cap-and-trade regime given the statutory
14 language.

15 And I don't -- your responses to that,
16 I think, fall into two categories. One is
17 cap-and-trade is much better for the industry.
18 It makes a lot more sense, more flexible,
19 industry prefers it, it's good policy, it's
20 better than command and control. And I think
21 those are all -- you know, those are solid
22 arguments that we -- we need to consider.

23 The second, on the more legal
24 question, is, well --and you've mentioned it a
25 few times -- the acid rain program was put in by

1 Congress. That was cap-and-trade in -- in 1990.
2 And then, second, in your brief and today,
3 you've emphasized -- more in the brief -- the
4 2005 mercury rule that the second Bush
5 administration put in. And you've put some
6 emphasis on that. And that was cap-and-trade.

7 And so the question there, though, is
8 that rule was then vacated in 2008 --

9 MS. BRINKMANN: Yes.

10 JUSTICE KAVANAUGH: -- on -- on
11 different grounds. How should we think about
12 that 2005 mercury rule as we think about this
13 issue? What significance should it play?
14 Because you did play it up quite a bit in the
15 brief.

16 MS. BRINKMANN: If I could, I think
17 there's one predicate argument that I would
18 make, Your Honor, that I think you have to look
19 at subsection (h) as a textual matter. That's
20 what tells us that 1174(a) does not have -- it's
21 not excluding things and saying you can only
22 look at technology and things "at" and "to."

23 So if you don't have to do that, then
24 of course you look at emissions trading now
25 because everybody knows that's out in the

1 basketful of tools.

2 But under (h) Congress said if you
3 can't do(a) for -- because it's not feasible,
4 you do this other thing, and you can promote a
5 design, equipment, work practice, or operational
6 standard, or combination thereof.

7 So that's not in (a). So then you go
8 to (a) and you look at the text, and it says
9 what's out there that's adequately demonstrated?
10 Well, we know what's adequately demonstrated for
11 this source category. Fossil fuel plants is
12 what's at issue in the acid rain rule. That was
13 in 1990.

14 There's also in 7410, which is
15 cross-referenced, but setting aside that textual
16 argument, we know it was in the basket of
17 measures that could be made because there's the
18 cross state air pollution control rule that this
19 Court upheld in the Homer case. That also
20 involves emissions trading.

21 So we know that all of that was out
22 there, and it -- it's based on the text, the
23 structure, the direction to look at "adequately
24 demonstrated." So I would say yes, it's very
25 cost-effective for us. That's why it's

1 adequately demonstrated. And it's really
2 important to the grid. I think that's your
3 point. But it's not a policy argument. It's
4 looking at what the text of the statute tells
5 the agency to do when they set this benchmark.
6 What's adequately demonstrated.

7 And the mercury rule was invalidated
8 on other grounds, absolutely, but it did include
9 emissions trading and generation shifting in the
10 BSER. I know Petitioners are trying to say, oh,
11 it was only used for compliance. If you go to
12 the Federal Register and you look at that, they
13 explain it as part of the BSER, the best system
14 of emission reduction.

15 And that's what we're talking about
16 here today. It's whether or not there is a
17 restriction against the agency taking into
18 account anything other than "at" and "to" for
19 that. And we would say the critically important
20 aspect that also under (d), that the power
21 companies have flexibility in compliance.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 General See.

4 REBUTTAL ARGUMENT OF LINDSAY S. SEE

5 ON BEHALF OF THE STATE PETITIONERS

6 MS. SEE: Thank you, Mr. Chief
7 Justice.

8 Moving first to justiciability, it's
9 critical today that General Prelogar has backed
10 away from the stay, and that's for good reason.
11 It doesn't make sense that a doctrine that's
12 meant to protect parties like us from the effect
13 of the judgment should be the very thing that
14 can deprive this Court of jurisdiction.

15 So now we have the new argument today
16 that the effect of the judgment does not
17 actually bring the Clean Power Plan back to
18 life. That's not true. In addition to the
19 portions of the record that Justice Breyer
20 mentioned, we can also look at Joint Appendix
21 215, where the D.C. Circuit said that it vacated
22 the ACE Rule and the embedded CPP repeal.

23 The response we have from General
24 Prelogar is that there's internal memorandum
25 from EPA that said that that didn't actually do

1 what those words said. But, again, an internal
2 memorandum that none of the Petitioners were
3 able to have any input in by the side who was
4 actually trying to have -- defeat this Court's
5 jurisdiction should not be held against us. And
6 there's no authority in this Court's precedent
7 that that can be enough to erase the actual
8 language of what the court below did.

9 All that's left, then, is the prospect
10 of new rule-making, but, again, the Respondents
11 have not challenged that they have to show that
12 we are certain not to be hurt by the new rule.
13 They said in their brief that they might enact
14 the very same provision, and they have told you
15 nothing different here today. So this Court
16 should proceed to the merits.

17 When it comes to the potential limits
18 that have been put on the statute, General
19 Prelogar said that states actually have more
20 options under a plan like the CPP. But she
21 referred to things like carbon capture and
22 sequestration, natural gas co-firing. The CPP
23 also said that those would be impossible for the
24 vast majority of sources, so that's not a real
25 option available.

1 Ms. Brinkmann talked about what's
2 achievable for the source category, but she's
3 certainly moving beyond the source category, and
4 the CPP did there. It's not simply what
5 coal-fired or natural gas power plants can do.
6 Generation shifting, under the guise of the CPP,
7 requires bringing into that category renewables
8 as well, an entirely different sector.

9 And so that's what takes us into the
10 major question territory. This is a major
11 question because it allows EPA to determine what
12 the power sector as a whole should look like and
13 who can be in it. It transforms the statute
14 from something that is about how a particular
15 source can operate more efficiently.

16 No matter which of the factors this
17 Court looks at from its previous decisions, this
18 is major. This is new power. There are 70 plus
19 regulations under 111(b) that have not used this
20 interpretation of the statute. The only example
21 given today is the clean air mercury rule, but
22 there in the Federal Register, EPA was very
23 clear that the actual emission limitation was
24 based on physical and chemical carbon capture
25 technologies.

1 Certainly, it said that there could be
2 other compliance mechanisms. But that's not the
3 same thing as saying the actual emission limit
4 was based on outside-the-fenceline measures. So
5 this is new power. This is transformative
6 power. It's power that goes into an area of
7 traditional state authority, which is energy and
8 utility regulation.

9 So whatever definition of major
10 questions the Court does, this is far on the
11 other side of it. This Court has full power to
12 give us an answer, and it should. This is a
13 critical question. The Court has a rule before
14 it, and it should give an answer.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 The case is submitted.

19 (Whereupon, at 12:06 p.m., the case
20 was submitted.)

21

22

23

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