

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.)

Pages: 1 through 138

Place: Washington, D.C.

Date: February 28, 2022

HERITAGE REPORTING CORPORATION

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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:
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3 Virginia; on behalf of the State Petitioners.
4 JACOB M. ROTH, ESQUIRE, Washington, D.C.; on behalf of
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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 sound in
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 canons. 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 that 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 the 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, hundred percent changes the opposite --
4 the economic system of the United States, that's
5 a little far. It's hard to believe that
6 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 say, but, gee, it's
10 easy for me to think of a system that they might
11 choose, EPA, that isn't plant by plant or isn't
12 within the fence but isn't really a big deal.

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

19 MS. SEE: Right.

20 JUSTICE BREYER: -- across the day.
21 Okay. So many companies put in time-of-day
22 metering, and, therefore, it's cheaper if you
23 get your electricity at night and store it. And
24 so EPA might say: Hey, when you're doing that,
25 PJM or -- this isn't plant. This is the

1 computer for about a hundred plants.

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

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

12 MS. SEE: Your --

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

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

22 If you remove that limit, that's what
23 shows how major the power at stake here is
24 because, once that limit is gone, EPA is not
25 limited to something that's simply two cents or

1 a quarter. EPA can make --

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

11 MS. SEE: And -- and --

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

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

21 If we look at the Brown & Williamson
22 case, for instance, this Court was faced with a
23 particular tobacco marketing rule, but, when
24 determining whether it was a major question, the
25 Court looked at how far the theory of statutory

1 interpretation --

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

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

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

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

23 EPA has to focus on systems that are
24 achievable, lead to achievable emission
25 reductions that are adequately demonstrated.

1 Those are constraints that make sense for a
2 source-specific requirement.

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

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

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

22 So, in a number of provisions, it says
23 very clearly an existing source that has
24 installed the best available control technology.
25 That -- very much inside the fence. An existing

1 source that has installed the best available
2 technology. That's in at least two provisions.

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

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

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

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

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

24 JUSTICE SOTOMAYOR: I understand --

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

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

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

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

22 So what's -- tease out for me more
23 precisely what this major question doctrine
24 involves --

25 MS. SEE: I think what --

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

4 MS. SEE: And -- and -- and --

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

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

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

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

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

25 JUSTICE SOTOMAYOR: It doesn't use

1 "limit" there. It says "best system of emission
2 reduction." I don't read the word "limit"
3 there.

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

11 JUSTICE SOTOMAYOR: Well, I wish that
12 --

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
6 of, you know, regulate to the end of the world
7 kind of statute. It very clearly says that
8 there are other constraints that have to be
9 considered to 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: Counsel, one
24 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 emission 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 THOMAS: Nothing.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer?

20 Justice Sotomayor?

21 JUSTICE SOTOMAYOR: How is this any
22 different than EPA versus Brown? There, the EPA
23 announced while the case was pending that it was
24 planning to modify a regulation that had been
25 challenged. The government asked, like you're

1 asking, that we offer guidance to the EPA, like
2 at various points in your brief, you talked
3 about guidance for the rulemaking that's taking
4 an effect. And we strongly said that would be
5 an advisory opinion. The government has
6 disavowed that it's going to re-adopt the CWA,
7 and it -- we said new regulation's coming.

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

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

17 JUSTICE SOTOMAYOR: Oh, that's
18 absolutely true.

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

25 JUSTICE SOTOMAYOR: This is not a

1 mootness question. This is an advisory opinion
2 question. That's how the EPA discussed it.

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

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

23 And I think the same prudential
24 factors weigh strongly here. This is a clean
25 legal issue, and this is an area where the

1 parties need certainty. The states and
2 regulated parties make decisions decades in
3 advance. So there's no jurisdictional bar to
4 the Court giving the answer, and there are very
5 strong prudential reasons why it should.

6 JUSTICE SOTOMAYOR: How does it change
7 being an advisory opinion?

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

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

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

1 fact that the Court can and should give us
2 relief today based on the particular rule before
3 it.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

15 MS. SEE: That is certainly one of
16 them, Your Honor.

17 JUSTICE KAGAN: The major one, the big
18 one?

19 MS. SEE: We also think that Section
20 111(a)(1) has particular textual-based cues as
21 well. Yes.

22 JUSTICE KAGAN: Okay. Well, in the
23 absence of your telling me what they are, as you
24 say, the "for any existing source" comes from
25 (d)(1), not from (a)(1). And, of course, (d)(1)

1 applies to the states. So this is more a
2 clarification question than anything else. That
3 would suggest that a state, even if it wished
4 to, could not do what this rule does. Is that
5 -- is that right?

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

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

19 MS. SEE: I think there's two reasons
20 why that's not a problem for federalism and
21 state flexibility.

22 The first is that states always retain
23 inherent discretion to impose more stringent
24 plans. So, if a state or a group of states
25 wants to have a trading program, they can do

1 that. Section 7416 expressly preserves that
2 right for the states.

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

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

23 That's written out of the statute if
24 EPA can set anything as a system and apply it at
25 any level.

1 JUSTICE KAGAN: That -- that's helpful
2 to me. Can I ask you a different question,
3 which is just this major question doctrine,
4 like, how -- how big does a question have to be
5 or how do you know when it's big enough?

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

17 But we can also look at the broader
18 economic and social consequences --

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

1 It seems to me quite irrelevant to
2 rules of statutory construction under the
3 theories that this Court has most frequently
4 used in recent years about, like, oh, if we look
5 around the world today, we see that this
6 particular rule has a big impact.

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

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

22 JUSTICE KAGAN: Well, but the actual
23 words, you know, unfortunately for your
24 position, says "system" --

25 MS. SEE: Well, Your Honor --

1 JUSTICE KAGAN: -- which suggests, you
2 know, that what Congress wanted to do,
3 understanding that this was an area that was
4 going to move very fast, has lots of technical
5 components to it, that it wanted to give the
6 agency flexibility to regulate as times changed,
7 as circumstances changed, as economic impacts
8 changed, all things that they could not possibly
9 have known at the time.

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

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

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

1 mean owner and operator.

2 Now the agency, I don't believe, is
3 trying to justify that statutory sleight of hand
4 here, but it still wants to get away from the
5 restriction that "application" actually means
6 something a source can do. So it's not just
7 "system."

8 JUSTICE KAGAN: Thank you, General.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: What -- what
13 happens to this case if EPA issues a new rule
14 before we decide this case?

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

22 That wouldn't necessarily be the
23 result. I think the City of Jacksonville case
24 is helpful for us on that point. That involved
25 an ordinance that had been repealed by the time

1 the case made it to this Court, and that
2 ordinance had actually been replaced by
3 something that was different in some significant
4 ways. And the Court found that the challenge to
5 the first ordinance was still not moot because
6 it injured the parties in "fundamentally the
7 same way."

8 So, if there is a new rule that is
9 based on the same legal error that hurts the
10 states in the same way, it wouldn't necessarily
11 be moot. But we do think that a final rule
12 would be a significantly different situation
13 than here, where a year after the D.C. Circuit's
14 decision we still don't even have a notice of
15 proposed rulemaking to know what direction the
16 agency might go in.

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

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: General, what is the

1 daylight between the major questions doctrine
2 and the non-delegation doctrine?

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

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

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

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

24 And then it would be a separate
25 question to say, if Congress clearly said, EPA,

1 you may go forward and exercise this
2 transformative power, that might be a separate
3 non-delegation question.

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

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

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

23 MS. SEE: It is similar in that sense.
24 It -- if what you mean by linguistics is that it
25 is text-based, that is true. We're not asking

1 the Court to change the text that's in the
2 statute. It's a question about what is the text
3 we would expect Congress to have put there. So
4 it's -- in this particular class of cases,
5 Congress's silence is unambiguous that it did
6 not give that power to the agency.

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

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

18 MS. SEE: Your Honor, I --

19 JUSTICE BREYER: And there are many,
20 many things that might argue for or against
21 that. Is it an interstitial matter? Is it a
22 minor matter having to do with administration
23 that they're more familiar with? Is it
24 something that's going to change the whole
25 United States of America? That cuts the other

1 way. But a question is, how do we in the face
2 of silence determine what Congress would have
3 wanted to delegate, including this or not?

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

8 MS. SEE: They are, of course, Your
9 Honor.

10 JUSTICE BREYER: And so how -- how do
11 you see it?

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

20 I think a simpler answer here about
21 what the Congress actually meant, we can look at
22 1990, which is the last time the Clean Air Act
23 was amended. Congress made particular changes
24 to 111, but it also made changes to three other
25 portions of the statute where it specifically

1 wrote in trading and cap-and-trade language.
2 That's in the implementation standards for NAAQS
3 standards. It's in the stratospheric ozone
4 portion of the statute and also acid rain.

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

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

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

25 And, of course, there would be a

1 separate question if this Court would revisit --
2 would be inclined to revisit in a future case
3 whether or not Congress could delegate that.
4 But, again, Congress does not need to reach that
5 question here because it certainly did not
6 delegate that power.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Roth.

10 ORAL ARGUMENT OF JACOB M. ROTH

11 ON BEHALF OF THE PRIVATE PETITIONERS

12 MR. ROTH: Mr. Chief Justice, and may
13 it please the Court:

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

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

1 electricity.

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

10 With that, I welcome the Court's
11 questions.

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

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

24 Respondents' interpretation doesn't
25 fit with any of those words because they're not

1 looking at a source. The source doesn't have to
2 be performing. It could be shut down. And the
3 source doesn't have to continue to exist.

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

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

15 How do you make those distinctions?

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

23 JUSTICE THOMAS: But it would seem as
24 though that EPA could regulate the source in a
25 way that actually requires a change, for

1 example, in the mix of energy generation that --
2 for example, that the cost of running a facility
3 is so high that you begin to change your
4 generation sources, say, from coal to natural
5 gas or natural gas to solar.

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

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

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

1 cause you to do that yourself.

2 So what's the difference?

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

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

23 JUSTICE KAGAN: I -- I guess just
24 given the way the grid works, this distinction
25 between incidental and not incidental does not

1 strike me as very convincing because the way the
2 grid works is it -- it -- it prefers cheaper
3 methods. And so EPA could come out with a rule
4 that is very plant-by-plant but that makes coal
5 plants hugely more expensive. I mean, this is
6 essentially what the market is already doing,
7 but EPA could do it faster.

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

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

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

21 So, if the agency is being honest and
22 says the best way to reduce emissions from this
23 plant is to buy this scrubber and install this
24 scrubber and, yes, that's going to increase its
25 costs and there's going to be some effect to

1 that, but the reason we are doing this is
2 because the best system for this plant is to get
3 that scrubber, look, it's doing what the statute
4 tells it to do. I don't think we would have an
5 objection to that. We could say maybe it's not
6 adequately demonstrated or isn't the best --

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

13 So why shouldn't EPA have that
14 ability? Why shouldn't the states have that
15 ability?

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

23 JUSTICE BREYER: Although you have --
24 why isn't it a -- look, "the administrator shall
25 prescribe regulations which shall establish a

1 procedure similar," dah, dah, dah, dah, "which
2 establishes standards of performance," which
3 includes system, "for any existing source,"
4 okay, and "which it would apply if such existing
5 source were a new source." All right? That's
6 what you're supposed to do.

7 MR. ROTH: Right.

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

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

22 MR. ROTH: Right. So --

23 JUSTICE BREYER: So what -- the words
24 that stop that?

25 MR. ROTH: -- so, Justice Breyer, I

1 don't think that could be called a standard of
2 performance for any existing source because, on
3 that hypothetical, Your Honor, I know the source
4 is --

5 JUSTICE BREYER: Why? It affects
6 every --

7 MR. ROTH: -- because --

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

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

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

15 MR. ROTH: I -- I -- I --

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

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

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

1 MR. ROTH: Right.

2 JUSTICE BREYER: And, of course, it
3 affects and thereby applies to all the -- all
4 the plants that have time-of-day metering, which
5 are, let's say, 50 percent of those in the
6 United States.

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

12 JUSTICE BREYER: No. No. What it
13 does -- oh, yeah, that --

14 MR. ROTH: It's about reduce --

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

18 MR. ROTH: Right.

19 JUSTICE BREYER: -- instead of number
20 2 --

21 MR. ROTH: Right.

22 JUSTICE BREYER: -- that comes after
23 1.

24 MR. ROTH: So the regulated source,
25 Justice Breyer --

1 JUSTICE BREYER: Yeah.

2 MR. ROTH: -- is just operating less.
3 It's not operating better. I don't think that's
4 a standard of performance.

5 JUSTICE BREYER: Okay. Where does it
6 say better?

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

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

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

23 JUSTICE SOTOMAYOR: Counsel --

24 MR. ROTH: -- refer to that.

25 JUSTICE SOTOMAYOR: -- the problem I

1 have with your argument is that you're looking
2 at "system" as involving just the one plant, but
3 the entire structure of the EPA, if you look at
4 7410, which 711 -- 7411 says you look at, okay,
5 in looking at the structure of the plant, that
6 very directly says that the state's plan can
7 include incentives, such as fees, marketable
8 permits, and auctions of emission rights.

9 MR. ROTH: Right.

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

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

21 MR. ROTH: Right.

22 JUSTICE SOTOMAYOR: So let's go that
23 far, and now we're going to go to what you were
24 answering for Justice Breyer. "System" can't
25 mean the reduction by one plant because that's

1 not going to meet the overall standard, which
2 says we don't want to reduce carbon monoxide or
3 carbon dioxide in one plant; we want to reduce
4 it across the system by 30 percent.

5 And across the system may be that
6 plant A is not going to reduce by 10 percent,
7 but it's going to go into the market and reduce
8 by 5 percent, but someone else is going to
9 reduce by 50 percent. And we're going to even
10 out so the system, the ozone layer, has
11 30 percent less.

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

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

22 Section 7410 is about getting to a
23 certain level of pollutant in the ambient air.
24 And so, if that is your goal, if that's what the
25 EPA is trying to do, it makes perfect sense to

1 say we're going to have the plants, you know,
2 trade and -- we just want to get to this level
3 in the ambient air for -- right, for the whole
4 area.

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

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

11 MR. ROTH: Sure, Justice Kagan. The
12 procedures are --

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

16 MR. ROTH: For -- for the procedures.

17 JUSTICE KAGAN: Now I'm ready.

18 MR. ROTH: For the procedures, Justice
19 Kagan, and the procedures are the state comes up
20 with a plan, submits it to EPA. I agree,
21 they're similar in that respect. But, in terms
22 of the way they're designed and the substantive
23 goal of those two provisions, they're totally
24 different types of provisions. Again, one is
25 focused on the levels in the overall area, and

1 one is focused on making sure these sources
2 operate as best as they can. Just so --

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

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

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

25 JUSTICE KAGAN: Well, not if your

1 statutory interpretation is correct, you
2 couldn't.

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

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

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

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

25 JUSTICE KAGAN: I -- I would think

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Thomas?

20 Justice Breyer, anything further?

21 Justice Alito?

22 Justice Sotomayor?

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

1 MR. ROTH: That is correct.

2 JUSTICE SOTOMAYOR: And the CWA is no
3 longer in effect. You got the ruling you
4 wanted, vacatur of the ACE Rule. That's been
5 put on hold.

6 So -- but how do you have standing?

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

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

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

19 MR. ROTH: -- update the Clean Power
20 Plan --

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

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

1 JUSTICE SOTOMAYOR: It's now said we
2 have a new rule.

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

7 JUSTICE SOTOMAYOR: All right.

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

14 JUSTICE SOTOMAYOR: All right.

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

18 JUSTICE SOTOMAYOR: Thank you,
19 counsel.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

1 understanding of these cases. And I would like
2 you to tell me whether you think I have the
3 right understanding or the wrong understanding.
4 If the right one, why you fit into it, and if
5 the wrong one, you know, whatever.

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

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

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

1 might suggest, but I think that version is
2 perfectly consistent with what we're arguing
3 here.

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

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

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

25 JUSTICE KAGAN: I feel like a little

1 bit of a broken record, but I'll just bat this
2 one back to you.

3 You can do that with source-by-source
4 regulations. You know, if that's what EPA
5 wanted to do, I have a basketful of
6 source-by-source regulations that would allow
7 them to get their way on all of those questions.
8 It just has no necessary relationship to this
9 fence/non-fence way of thinking of 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 a -- 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 -- I think that was for good
17 reason. There were really three key facts that
18 had changed on the ground that I think prompted
19 the 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: Oh, 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 --

9 JUSTICE BREYER: Right.

10 GENERAL PRELOGAR: -- that speaks
11 precisely --

12 JUSTICE BREYER: Right.

13 GENERAL PRELOGAR: -- to that issue in
14 the D.C. Circuit about what the effects will be
15 when a rule is invalid and vacated.

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

23 JUSTICE BREYER: Okay. And what did
24 they say here?

25 GENERAL PRELOGAR: And, here, we think

1 the D.C. Circuit's judgment --

2 JUSTICE BREYER: Did it say that?

3 GENERAL PRELOGAR: -- quite notably
4 did not put the CPP back into effect. It only
5 vacated ACE. And then the D.C. Circuit
6 confirmed that that was the best reading of its
7 judgment when it issued the partial stay of the
8 mandate to make clear that in the interim, until
9 EPA conducts its own rule --

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

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

17 JUSTICE BREYER: If I read that
18 interpretation -- now, if I don't agree with
19 that, I don't know if I -- you know, I haven't
20 really read it, but I -- but I'll go read that.

21 (Laughter.)

22 JUSTICE BREYER: And -- and -- and
23 then -- and then -- and then suppose I don't
24 agree with you. I think, oh, God, they're going
25 to send it back, CPP will go back. And you are

1 in the midst of a new rulemaking. So how do you
2 get rid of CPP?

3 I mean, one, you have the power not to
4 prosecute. A pretty broad power. But that's
5 plant by plant.

6 Two, you have a power to suspend
7 things for good cause. You know, the good
8 cause, you don't have to go -- you -- you
9 wouldn't have to get rid of CPP via a rulemaking
10 because you can do it quickly through good
11 cause.

12 Is there anything else you have?

13 GENERAL PRELOGAR: Well, Justice
14 Breyer, I want to resist the premise in the
15 first place --

16 JUSTICE BREYER: Yeah, of course, of
17 course.

18 GENERAL PRELOGAR: -- that the CPP
19 could possibly come back into effect. Among
20 other things, all of the key compliance
21 deadlines for the submission of state plans have
22 come and gone --

23 JUSTICE BREYER: Yeah.

24 GENERAL PRELOGAR: -- so EPA would
25 need to do a rulemaking regardless, as your

1 question suggested --

2 JUSTICE BREYER: Yeah.

3 GENERAL PRELOGAR: -- in order to even
4 sensibly try to implement the CPP.

5 But it said just the opposite. It is
6 not seeking to reinstate CPP --

7 JUSTICE BREYER: Okay. I got that
8 point. I -- I just wonder, maybe I'm just
9 curious about it, is -- is -- what does -- what
10 does the -- how can an agency get rid of a rule
11 it doesn't want if it doesn't want to go through
12 a big rulemaking in order to get rid of it
13 because it wants to do something else?

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

23 And we were on record, making clear in
24 the D.C. Circuit that if ACE were invalidated,
25 EPA was going to conduct a new rulemaking.

1 That's exactly what it's doing, and so no
2 federal regulation is in place.

3 JUSTICE SOTOMAYOR: General --

4 CHIEF JUSTICE ROBERTS: Well, before
5 -- before the D.C. Circuit ruled, ACE was on the
6 books, and they liked it. After they ruled, ACE
7 was off the books, and they don't like that. I
8 don't understand why that's not fully
9 justiciable.

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

19 And they can't say that they have any
20 concrete injury or harm from not having the
21 regulation of ACE, from not having to start
22 working on state plans that are just going to
23 become overtaken by events when EPA completes
24 that rulemaking. Instead, what they're focused
25 on is the effects of what's going to happen in

1 the future. They're very clearly --

2 CHIEF JUSTICE ROBERTS: Well, I guess,
3 I mean, I -- I gather their position would be
4 it's -- just because there's no regulation
5 doesn't mean we're happy. They would like
6 regulation according to their particular
7 perspective. They'd like good regulation, which
8 they think they had with ACE, and now they don't
9 have it.

10 Again, why isn't that a justiciable
11 harm?

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

22 What they don't have an injury from is
23 the absence of having a federal regulation in
24 place that would impose additional regulatory
25 burdens on them in the meantime.

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

4 What do we make of that? Because you
5 said the industry has reached the limits, but 20
6 states haven't. What do you make of that
7 statement by her? And why is that fact not
8 important?

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

19 On a nationwide level, the emissions
20 limits have been reached, and so, effectively,
21 there would be no cost to states to engage in
22 that interstate trading to get their limits
23 below the requisite levels.

24 And for that reason, in terms of costs
25 and benefits, what the repealed rule said is no

1 cost savings to states from repealing this
2 because it wouldn't impose any burdens on them
3 and also no further benefits with respect to
4 further emissions reductions because we don't
5 expect that there would be any further emissions
6 reductions under the CPP itself.

7 JUSTICE KAVANAUGH: What's the status
8 of the new rulemaking to the extent you can
9 share?

10 GENERAL PRELOGAR: EPA is still
11 undertaking preparatory activities. It expects
12 to issue a notice of proposed rulemaking by the
13 end of this year. In the past, it's taken about
14 a year after that to issue a final rule.

15 JUSTICE SOTOMAYOR: Counsel, there are
16 two parts --

17 JUSTICE KAGAN: This year, the
18 calendar year?

19 GENERAL PRELOGAR: This calendar year,
20 that's correct.

21 JUSTICE SOTOMAYOR: There are two
22 questions I have. At least one brief, I think
23 it might have been two, claims that the Clean
24 Power Plan placed more stringent emissions on
25 existing plants than it did on new sources,

1 which seems -- I don't understand how that makes
2 sense.

3 And, number two, what I'm troubled by
4 is not generation shifting qua generation
5 shifting because, as very clear in the
6 questioning and -- and I think my logic, there
7 could be some plant source changes that could
8 force generation shifting anyway, so it's not
9 generation shifting qua.

10 But I think what the major issue that
11 might trouble me is the claim that the emissions
12 standards that you set force states to do
13 generation shifting, that you have not given
14 them options not to generation shift. You list
15 out a whole bunch of options, but I thought one
16 of their claims was that no matter what they
17 did, they still had a generation shift.

18 So could you answer those two
19 questions, old and new plants and whether there
20 is -- have you exceeded your authority by
21 forcing some -- forcing the states out of
22 choices?

23 GENERAL PRELOGAR: Yes. And I'll take
24 those questions in turn.

25 So, first, with respect to the

1 argument that the existing source standard under
2 the CPP was more stringent than the new source
3 standard, I -- I think that's incorrect, and
4 it's really trying to make an apples-and-oranges
5 comparison.

6 The two standards operated quite
7 differently and critically had different
8 timeframes. So the new source standard took
9 effect immediately, whereas, under the CPP, the
10 existing sources wouldn't actually have to put
11 into place any kinds of emissions reductions
12 until 2022 at the earliest or even 2023 in some
13 cases. That means for the first seven years
14 that both standards were contemplated to be in
15 effect the new source standard was far more
16 stringent because the new sources were already
17 subject to that emission reduction.

18 And then the second thing I would
19 point to is that even after that initial period,
20 the phase-in period, EPA has a statutory
21 obligation to revisit the new source standard
22 every eight years to take account of any changed
23 circumstances. And so there was no guarantee
24 that that standard would remain unchanged and
25 would function as a less stringent standard as

1 compared to the existing source standard.

2 To turn to the second aspect of your
3 question, focused on whether the CPP effectively
4 would have required generation shifting, the
5 answer to that is no. The CPP itself emphasized
6 that there were other types of mechanisms that
7 sources could consider deploying, things like
8 carbon capture and sequestration, natural gas
9 co-firing. Those were not listed as components
10 of the best system in the CPP, but they were
11 available technologies.

12 And just as a matter of on-the-ground
13 realities, the coal plants in -- in some
14 instances have used those technologies to emit
15 at levels below what the CPP contemplated. So
16 it's just wrong to say that the standards
17 couldn't have been met through any other way
18 than generation shifting. But --

19 JUSTICE KAVANAUGH: I think the other
20 -- keep going, sorry.

21 GENERAL PRELOGAR: Well, if I could
22 make one final point in response to Justice
23 Sotomayor.

24 I do want to acknowledge that, of
25 course, EPA recognized that sources were most

1 likely to comply through generation shifting.
2 That would be most cost-effective for them.

3 But I don't think that there is any
4 anomaly between that kind of correspondence
5 between the best system of emission reduction
6 and how the sources actually choose to comply
7 because, of course, part of EPA's task here is
8 to see what is adequately demonstrated, what is
9 the power sector already doing to control
10 emissions, and -- and that's the starting point
11 for identifying the best system, and they also
12 have to look at cost.

13 So, to the extent that EPA is saying,
14 here's what the power sector is doing to reduce
15 their emissions, it's -- it's just not
16 surprising to see that they would continue to
17 generation shift to satisfy that emission limit.

18 JUSTICE KAVANAUGH: The other side's
19 theory, I think, zooming out a bit, is that
20 Congress knows how to do cap-and-trade. They
21 did it with acid rain. There were bills pending
22 in Congress to do cap-and-trade for CO2
23 emissions. Ultimately, those did not pass. And
24 then what happened is the executive branch, as
25 executive branches are, unhappy with the pace of

1 what's going on in Congress, tried to do a
2 cap-and-trade regime through an old and somewhat
3 ill-fitting regulation.

4 So the cap-and-trade aspect of this, I
5 just want you to address and kind of put that in
6 context of, like, UARG, squeezing it into a --
7 an old statute that wasn't necessarily designed
8 for something like this.

9 GENERAL PRELOGAR: So I think that
10 their reliance on that failed legislation in
11 Congress is -- is wholly misplaced. Those bills
12 looked very different from the CPP. It's --
13 it's not as though Congress considered something
14 like the CPP and rejected it instead those bills
15 would have applied to far more industry
16 participants, not just power plants, would have
17 governed far more pollutants and not just carbon
18 dioxide.

19 And I think, as -- as this Court
20 recognized in Massachusetts versus EPA, when it
21 relied on or rejected a similar type of argument
22 pointing to failed legislation, I just don't
23 think there's anything to glean from that record
24 that would suggest that Congress had
25 specifically contemplated and disapproved of the

1 CPP itself.

2 And -- and just one final point on
3 that is to emphasize that, of course, the CPP
4 was not a -- a national cap-and-trade scheme.
5 EPA exercised its role as kind of intermediate
6 step of announcing the degree of emission
7 limitation achievable based on the system it had
8 identified, but then it was up to the states to
9 exercise their role in this cooperative
10 federalism scheme to identify the standards of
11 performance for their sources.

12 And as I had mentioned to Justice
13 Sotomayor, nothing required that they actually
14 use the best system that EPA had identified to
15 any particular degree or -- or even at all.

16 CHIEF JUSTICE ROBERTS: General, do --
17 do I take from your opening comments that you
18 agree that there is such a thing as the major
19 questions doctrine?

20 GENERAL PRELOGAR: I certainly agree
21 that the Court has applied that interpretive
22 principle but not in a case that looks like this
23 one.

24 CHIEF JUSTICE ROBERTS: Well, okay --
25 okay.

1 GENERAL PRELOGAR: It's always done it

2 --

3 CHIEF JUSTICE ROBERTS: But what --

4 GENERAL PRELOGAR: -- with respect to
5 actual effects.

6 CHIEF JUSTICE ROBERTS: So -- right.

7 So how would you articulate what the major
8 questions doctrine is?

9 GENERAL PRELOGAR: As I understand the
10 way the Court has applied this interpretive
11 principle, it has at the outset always engaged
12 in a traditional interpretive -- interpretative
13 exercise, looking at the traditional tools of
14 text, context, and structure.

15 And then, in cases like UARG or -- or
16 Brown & Williamson or eviction moratorium, the
17 Court has said that if there were any doubt
18 about what it has already articulated as the
19 best interpretation of the statute, that
20 ambiguity would be resolved by the fact that the
21 particular agency action has sweeping
22 consequences based on its costs or the number of
23 people involved or the type of authority
24 claimed.

25 And that's just very different, I

1 think, down the line from how Petitioners are
2 asking the Court to rely on major questions
3 here.

4 First and foremost, there is no agency
5 regulation for the Court to review to evaluate
6 those kinds of effects.

7 CHIEF JUSTICE ROBERTS: Well, just
8 getting back to what we're -- we're talking
9 about, so you go through the whole analysis, you
10 come up with what you think the right answer is,
11 and then you ask whether that's consistent with
12 the major questions doctrine?

13 GENERAL PRELOGAR: That's how the
14 decisions are --

15 CHIEF JUSTICE ROBERTS: Sounds like --

16 GENERAL PRELOGAR: -- structured.

17 CHIEF JUSTICE ROBERTS: -- a Rule --
18 like a Rule of Lenity.

19 GENERAL PRELOGAR: It's -- I -- I
20 think the Court has applied it as additional
21 confirmation of what it has understood to be the
22 best interpretation of a statute based on those
23 traditional tools.

24 CHIEF JUSTICE ROBERTS: Well, why --
25 why doesn't -- I think there's some disagreement

1 about how to apply it. Why -- why wouldn't you
2 look at it out -- at the outset and say, as I
3 think the Court did in FDA, you know, why is the
4 FDA deciding whether, you know, cigarettes are
5 illegal or not, and then that is something that
6 you look at while you're reading the particular
7 statute or whatever other things you look at
8 when you're trying to interpret a statute and
9 see if it's reasonable to suppose that.

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

21 GENERAL PRELOGAR: Well, I certainly
22 don't dispute that the Court in those cases has
23 looked at the actual effects of the agency
24 regulation and -- and found them to be
25 surprising and incredibly consequential.

1 But I do think that it wouldn't make
2 sense to try to ask this as an abstract question
3 at the outset because, among other things, we
4 agree with how Justice Kagan articulated the
5 principle, that this is really about filling in
6 or directing what to do when there's ambiguity
7 in a statute.

8 And so you can't sensibly apply a
9 major questions lens until you've determined
10 that there's some ambiguity to resolve. And to
11 --

12 CHIEF JUSTICE ROBERTS: I'm not sure I
13 --

14 GENERAL PRELOGAR: -- instead say --

15 CHIEF JUSTICE ROBERTS: -- understand
16 you. I mean, you described it as an abstract
17 inquiry. I don't know how abstract it is. It's
18 just you look at it and you say, why is the CDC
19 regulating evictions?

20 GENERAL PRELOGAR: Well, let me try
21 to make it --

22 CHIEF JUSTICE ROBERTS: That's pretty
23 concrete question.

24 GENERAL PRELOGAR: And, here, I think,
25 though, it's -- it's not concrete at all because

1 there's not any agency action for the Court to
2 review. And, instead, Petitioners have pressed
3 on this idea that the Court should adopt an
4 inside-the-fence-line limitation that is not at
5 all the dividing line between what kinds of
6 agency effects would be consequential or minor.

7 You can imagine a future regulation
8 that only uses biomass co-firing, for instance,
9 and I -- I think it would be hard to say, well,
10 that's a major question that's has vast -- has
11 vast economic and political significance.
12 Your -- your average Joe on the street probably
13 hasn't even ever heard of biomass co-firing.

14 So, here, I think it's particularly
15 abstract because there's no agency action to
16 review to try to put that major questions gloss
17 on it.

18 JUSTICE KAGAN: I mean, just to put it
19 --

20 JUSTICE ALITO: You're shifting --
21 your -- your argument is shifting back and forth
22 between your mootness argument and your argument
23 on the merits.

24 As to the mootness argument, have we
25 ever held that the issuance of a stay can moot a

1 case?

2 GENERAL PRELOGAR: I'm not aware of a
3 precedent, but I want to be clear that we're not
4 arguing that it was the stay itself that mooted
5 the case. We think the stay just confirmed the
6 D.C. Circuit's judgment not to reinstate the
7 CPP.

8 JUSTICE ALITO: Has the D.C. Circuit
9 held that the reinstatement of the CPP is off
10 the board?

11 GENERAL PRELOGAR: I think that's the
12 only reasonable interpretation of this judgment.
13 And this was something that the parties had
14 touched on in the briefing before the D.C.
15 Circuit. It came up at the oral argument. No
16 one was pressing to have the CPP be reinstated
17 because it just couldn't sensibly apply now
18 given that it's been overtaken by events.

19 JUSTICE ALITO: Well, on to the merits
20 part of what you said just before I asked my
21 question, Mr. Roth made the argument that the
22 application of the major questions doctrine here
23 would be very similar to the application of that
24 doctrine in the tobacco case or in the eviction
25 moratorium case because, here, what your

1 interpretation of the statute claims for EPA is
2 not a technical matter, it is not a question of
3 how to reduce emissions from particular sources,
4 but you are claiming that the interpretation
5 gives you the authority to set industrial policy
6 and energy policy and balance such things as
7 jobs, economic impact, the potentially
8 catastrophic effects of climate change, as well
9 as costs.

10 Why isn't that correct?

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

24 And what's missing is this
25 inside-the-fence-line limitation, which we don't

1 think tracks what will be major and what
2 wouldn't be and would deny much needed
3 flexibility to do commonsense and commonplace
4 and -- and well-established limits in this
5 industry for things like averaging and trading.

6 JUSTICE ALITO: Well, the statute
7 requires EPA to take into account, just to take
8 into account, not even balance, take into
9 account several factors, and they are
10 incommensurable. You know, how do you balance
11 or take into account, what weight do you assign
12 to, the effects on climate change, which some
13 people believe is a matter of civilizational
14 survival, and the costs and the effect on jobs?

15 GENERAL PRELOGAR: So I think it's
16 important to distinguish between that type of
17 cost/benefit analysis, which EPA would conduct
18 in a regulatory impact analysis under an
19 executive order, and the separate statutory
20 constraints in Section 7411, which we think
21 wouldn't require that kind of balancing and very
22 much constrain EPA.

23 First, EPA has to determine that the
24 standard is adequately demonstrated or the
25 system is adequately demonstrated. And I think

1 that answers the concern about EPA just
2 restructuring the industry. Instead, it looks
3 at what the sector is already doing as the
4 baseline.

5 Second, of course, as we've noted, you
6 have to look at costs, and that means that it
7 cannot be of unreasonable costs on the industry
8 that cannot be balanced away by saying that
9 there are tremendous benefits.

10 It can't threaten the reliability of
11 the electricity grid, which means that, again,
12 EPA cannot undertake these kinds of substantial
13 transformations or restructuring that would
14 ultimately threaten our access to electricity in
15 this country.

16 And then there are additional limits
17 under the term "system of emission reduction"
18 that we think would further guard against things
19 like offsets or taxes or simply shutting down
20 plants. EPA can't do those things because they
21 wouldn't qualify as a system of emission
22 reduction.

23 JUSTICE ALITO: I really don't see
24 what the concrete limitations are in any of what
25 you said. When you take in -- if you take the

1 arguments about climate change seriously and
2 this is a matter of survival, so long as the
3 system that you devise doesn't mean that there
4 isn't going to be -- there isn't going to be
5 electricity, and so long as the costs are not
6 absolutely crushing for the society, I don't
7 know why EPA can't go even a lot further than it
8 did in the CPP.

9 GENERAL PRELOGAR: Because the D.C.
10 Circuit, which has principally been responsible
11 for looking at these types of actions, has
12 interpreted those requirements to be real
13 constraints here. And EPA cannot undertake
14 action that would threaten the industry with
15 unreasonable costs.

16 So I think this just underscores why
17 it's -- it's problematic to try and think about
18 exercises of authority in an abstract way
19 without a currently applicable regulation before
20 you to actually measure these kinds of things.

21 JUSTICE ALITO: Well, under your
22 interpretation, is there any reason why EPA
23 couldn't force the adoption of a system for
24 single-family homes that is similar to what it
25 has done in -- what it is claiming it can do

1 with respect to existing power plants?

2 GENERAL PRELOGAR: The limit on that
3 is the fact that EPA has never listed homes as a
4 source category and couldn't do so because they
5 are far too diverse and differentiated. You
6 couldn't sensibly apply the statute to them
7 because you wouldn't have an adequately
8 demonstrated system that could be
9 cost-effectively installed at each and every
10 home given how different they are.

11 And I would just emphasize, Justice
12 Alito, that even their own example of homes,
13 which is the -- an idea that EPA would require
14 the installation of solar panels on homes, that
15 just shows the problem with their interpretation
16 because that is a quintessential
17 inside-the-fence-line measure. It's a
18 technological solution at the home that reduces
19 emissions at the home.

20 So the -- the interpretation they're
21 asking the Court to adopt doesn't address those
22 concerns. Instead, it's the express constraints
23 in the statute that we think prevent that.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 Justice Breyer?

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

6 The reason I thought that the CPP is
7 alive and there, this is the reason: On page
8 37a of -- which has the opinion of the D.C.
9 Circuit, it says: "At the outset, the ACE Rule
10 repealed the Clean Power Act." Okay? It
11 explained it had to do that, the EPA, because
12 the statute made them do it.

13 Then I look to 161, where they say --
14 161a, where they say what they did. They say
15 "the only permissible interpretation," that's
16 what ACE thinks, and -- but we cannot -- "where
17 a statute grants an agency discretion, but the
18 agency erroneously believes" it doesn't have it,
19 we cannot uphold the result, correct, "as an
20 exercise of the discretion that the agency
21 disavows." All right? Got that?

22 Then they say: "And the regulation
23 must be declared invalid." Okay, that's ACE.
24 That's ACE they're talking about. "We conclude
25 that the EPA fundamentally has misconceived the

1 law such that its conclusion may not stand."

2 Its conclusion was to get rid of CPP.

3 GENERAL PRELOGAR: It's --

4 JUSTICE BREYER: And then it says "we
5 hold the ACE Rule must be vacated and remanded
6 to the EPA so the agency may consider the
7 question afresh in light of the ambiguity we
8 see."

9 So where is it it says that CPP
10 doesn't exist? It says ACE is wrong, we remand
11 it for reconsideration. Now you tell me what to
12 read.

13 GENERAL PRELOGAR: So I think where
14 we're maybe talking past each other, Justice
15 Breyer, is that we think that the D.C. Circuit
16 would have -- would have had to expressly say
17 "and so the CPP comes back into effect."

18 Of course, we don't dispute one bit
19 that the D.C. Circuit vacated ACE and therefore
20 vacated the embedded repeal rule. But there is
21 a body of precedent in the D.C. Circuit about
22 what you do when a rule is invalid and whether
23 it automatically bring backs -- brings back the
24 prior regulatory regime.

25 JUSTICE BREYER: So, when they say

1 "the ACE Rule must be vacated" "so that the
2 agency may 'consider the question afresh'" --

3 GENERAL PRELOGAR: Exactly. So that
4 goes back to the agency --

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

8 GENERAL PRELOGAR: That rule is gone
9 --

10 JUSTICE BREYER: Okay. Fine.

11 GENERAL PRELOGAR: -- but they're not
12 bringing back the old rule.

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

15 GENERAL PRELOGAR: So I would point
16 you to a memorandum that EPA prepared after the
17 D.C. Circuit's judgment to provide guidance
18 to regional --

19 JUSTICE BREYER: Do we have that here?

20 GENERAL PRELOGAR: -- administrators
21 -- it's at JA 269.

22 JUSTICE BREYER: Thank you.

23 GENERAL PRELOGAR: I would take a look
24 at EPA's analysis of that issue, and what EPA
25 said is it interpreted the judgment not to put

1 CPP back into effect.

2 JUSTICE BREYER: Okay. Thank you.

3 GENERAL PRELOGAR: No one was
4 advocating that result.

5 JUSTICE BREYER: Thank you. Done.
6 Done. If that does it, that does it. Thank
7 you.

8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 Justice Sotomayor?
10 Justice Kagan?

11 JUSTICE KAGAN: General Prelogar, the
12 Petitioners here say, well, you have "system" on
13 your side, it's true, "system" is a big word,
14 but we have on our side "standards of
15 performance for any existing source." So why
16 doesn't that tilt in their favor?

17 GENERAL PRELOGAR: So we certainly
18 agree that a standard of performance for an
19 existing source means that each individual
20 source has to be held accountable for operating
21 its plant in conformance with that standard.
22 But where I think their interpretation breaks
23 down is there is nothing in that language that
24 says that each plant has to take identical
25 action or the emissions reductions have to be

1 achieved from each plant in an identical way.

2 And if I could just use an example of
3 a -- a trading scheme, which is commonplace in
4 this sector, you can imagine a best system that
5 involves a technological solution, like carbon
6 capture and sequestration, paired with trading,
7 and a plant can decide, well, it's
8 cost-effective to put in the -- the carbon
9 capture and storage, we'll do that, and, in
10 fact, we'll reduce our emissions even below the
11 limit and generate a credit.

12 Another plant that's differently
13 situated and would incur far greater expense to
14 put in the technology is going to be better off
15 in the trading system to buy the credit.

16 And the system is operating as
17 intended. It is reducing emissions across the
18 source category as a whole. It's just doing so
19 in a very cost-effective way, which I think
20 explains why the power plants by and large are
21 on our side in this case. They want that kind
22 of flexibility because this is business as usual
23 for them.

24 There's no apparent reason from that
25 language, "standard of performance for an

1 existing source," to think that Congress instead
2 said, no, rigidly, all of the plants have to put
3 in the carbon capture and storage, even if
4 that's going to be no greater emission reduction
5 and come at far greater cost to them. So we
6 just think that the terminology can't bear the
7 weight that they would place on it.

8 And if I could make one final point on
9 all of this. That, of course, is language that
10 governs what the states can do, and all the
11 normal presumptions here, the federalism canon,
12 major questions, I think, provides no basis to
13 adopt their interpretation, which would narrowly
14 constrain what states and sources can do for
15 compliance.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: On major
20 questions, I just want to repeat two things from
21 UARG and if you would caution us against using
22 these as -- as continuing standards for major
23 questions.

24 One thing we said is that Congress
25 must "speak clearly if it wishes to assign an

1 agency decisions of vast economic and political
2 significance." And the second thing we said is
3 that the Court greets with "a measure of
4 skepticism" when agencies claim to have found in
5 "a long-extant statute an unheralded power to
6 regulate a significant portion of the American
7 economy."

8 Do you have any disagreement with
9 those two principles?

10 GENERAL PRELOGAR: No. I certainly
11 recognize the Court has used that as a basis to
12 apply major questions, but I certainly dispute
13 that either of those principles could carry the
14 day here.

15 With respect to vast economic and --
16 and political significance, of course, there's
17 no agency regulation to review, but even looking
18 at how the statutory scheme operates, I -- I
19 don't see how EPA could issue that kind of
20 regulation without transgressing the other
21 limits.

22 If it were really a transformational
23 type of regulation, it wouldn't be adequately
24 demonstrated. It wouldn't be what the industry
25 is already doing to control pollution. It

1 wouldn't be cost-effective. Maybe it would
2 transform the nature of our reliance on
3 particular forms of energy and so threaten
4 the -- the reliability of the grid.

5 So, in all of those ways, I just don't
6 think you can get to that end result of saying
7 that the statute would necessarily encompass
8 those kinds of effects and certainly not through
9 this inside/outside-the-fence-line restriction.

10 And then, finally, with the unheralded
11 power language that you read, you know, this is
12 a statute where the Court has already recognized
13 in American Electric Power that Congress spoke
14 directly to the issue of who EPA should
15 regulate, existing power plants, what it should
16 regulate, their greenhouse-gas emissions, under
17 this exact provision, Section 7411(d).

18 And I acknowledge in a colloquial
19 sense that that seems like a pretty big deal,
20 but that is right in EPA's wheelhouse because
21 this Court already recognized that Congress
22 conferred on EPA, the expert agency, the
23 authority here to make those judgments.

24 JUSTICE KAVANAUGH: So you don't
25 dispute the general principles, but you think

1 the general principles don't apply to this
2 particular situation?

3 GENERAL PRELOGAR: I think that they
4 both don't apply to this situation and that
5 those principles are never something the Court
6 has looked at without taking stock of the actual
7 effects of a particular regulation.

8 So it hasn't referred to those types
9 of principles in a context outside the -- the
10 idea that there really are -- there really is an
11 agency regulation that is -- is having that kind
12 of transformative effect.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Thank you, General.

17 Ms. Brinkmann.

18 ORAL ARGUMENT OF BETH S. BRINKMANN

19 ON BEHALF OF THE POWER COMPANY RESPONDENTS

20 MS. BRINKMANN: Mr. Chief Justice, and
21 may it please the Court:

22 The statutory framework Congress
23 created in Section 7411 is critical to the power
24 companies. For years, the power companies have
25 used emissions trading, generation shifting,

1 other measures to reduce emissions while keeping
2 the lights on at reasonable cost.

3 The ACE Rule would exclude those
4 measures from the BSER because they are not at
5 or to a source, but nothing in the statute
6 excludes them.

7 Congress directed the expert agency to
8 look to reality when it makes the empirical
9 determination of the best system of emission
10 reduction for the source category.

11 Congress would have expected the
12 agency to consider emissions trading. Congress
13 had allowed emissions trading by fossil fuel
14 plants to control emissions of various
15 pollutants for decades.

16 We know that Congress did not impose
17 the ACE Rule restriction on the BSER because of
18 the other sections of the statute where Congress
19 did narrow the text to -- for certain other
20 emissions limitations but not in 1174(a).

21 The ACE Rule would eliminate
22 significant, long-standing, cost-effective means
23 of lowering emissions. That's why the power
24 companies urge rejection of the ACE Rule while
25 embracing the many limits that the Clean Air Act

1 place on EPA's authority.

2 I welcome questions from the Court.

3 JUSTICE THOMAS: Ms. Brinkmann, I know
4 you have some concerns about how the major
5 questions doctrine was used here, but have you
6 seen 7411 used in this way in previous
7 regulatory actions by EPA?

8 MS. BRINKMANN: Yes. In 2005, Your
9 Honor, the mercury rule used it in just this
10 way. Petitioners try and suggest it wasn't part
11 of the BSER, but it indeed was. And I would
12 also point, Your Honor, not just to the actual
13 1174(d) mercury rule but also the acid rain rule
14 and the Good Neighbor rule under 7410.

15 Those were all instances where
16 Congress said that they had to use emissions
17 trading, for example, but they did not require
18 it in 1174(a), but there's no indication that it
19 excluded it.

20 And if I could, I think that the
21 statute really answers this question. There are
22 limits, many limits which the solicitor general
23 addressed, but there's no "at and to" limit.
24 And if I could, I'd like to really focus on
25 subsection (h).

1 Subsection (h) in 7411 is a provision
2 that is used as an alternative to (a). Under
3 (h), that is the provision that says, if a
4 standard of performance is not feasible for
5 certain reasons, then -- I'm going to quote,
6 this is on page 9a of the solicitor general's
7 gray brief -- "he may instead" -- instead of
8 1174(a), what we've been talking about -- "he
9 may instead promulgate a 'design, equipment,
10 work practice, or operational standard or
11 combination thereof' which reflects the best
12 technological system of continuous emission
13 reduction."

14 That is the alternative to (a). Those
15 limits and restrictions are not in (a) in the
16 best systems of emission reduction. So we know
17 that it's not in the text and we know, when you
18 look at the adequately demonstrated provision of
19 1174(a), of course, emissions trading certainly
20 would have been considered because it was
21 already being done by fossil fuel plants under
22 the acid rain rule, under the Good Neighbor
23 provision, and there had been the mercury rule.

24 The other thing when you're looking at
25 adequately demonstrated, there is a -- since

1 2009, there's been a regional greenhouse gas
2 initiative where many states do generation
3 shifting.

4 So the statute answers the question in
5 this case. It is clear from that that the best
6 system of reduction -- emissions reduction,
7 which is a benchmark that the EPA sets, that the
8 emissions guidelines that they set using the
9 BSER is not prohibited from using these very
10 standard practices --

11 CHIEF JUSTICE ROBERTS: Well, what
12 about --

13 MS. BRINKMANN: -- of the power
14 companies.

15 CHIEF JUSTICE ROBERTS: -- what about
16 not so standard? Could the best system of
17 emission reduction adequately demonstrated
18 involve shutting down a plant?

19 MS. BRINKMANN: No, Your Honor. And
20 that goes to these other constraints that are in
21 the structure of the statute. At the beginning
22 of the statute, it talks about categories of
23 sources. That's the predicate for the ability
24 to EPA to even regulate under 1174(a). You look
25 at 1174(b), and (b) talks about the agency has

1 to first list categories of sources, so --

2 CHIEF JUSTICE ROBERTS: Okay. Okay.

3 I -- I haven't gotten to the part yet where they
4 can't do that.

5 MS. BRINKMANN: Right, because it's
6 about reducing the emissions in that category
7 source.

8 CHIEF JUSTICE ROBERTS: Right.

9 MS. BRINKMANN: It's not about
10 reducing the production of energy. Indeed,
11 that's contrary --

12 CHIEF JUSTICE ROBERTS: Well, why
13 wouldn't reducing the emissions in a category
14 source require reducing them to zero?

15 MS. BRINKMANN: Because the purpose is
16 to reduce emissions while maintaining power and
17 energy. That's what's so important to the power
18 companies about the reliability of this very
19 complex power grid --

20 CHIEF JUSTICE ROBERTS: Well, what's
21 all the stuff about generation shifting then if
22 you can't generate -- you can't shift generation
23 down to zero? You -- I mean, would it be all
24 right if you -- this resulted in generation
25 shifting requiring a 10 percent reduction?

1 MS. BRINKMANN: No. One of the
2 explicit requirements of 1174(a) is to consider
3 the energy requirements, and saying that a --
4 basing the best system of emission reduction on
5 the fact that some plant had to be shut down is
6 not consistent with that. It's not about
7 reducing production. It's about keeping the
8 production but reducing emissions.

9 CHIEF JUSTICE ROBERTS: Well, yeah,
10 but the whole idea is that you take that
11 production and you shift it somewhere else,
12 whether it's wind turbines or solar or -- or
13 whatever.

14 MS. BRINKMANN: If I could try an
15 example, Your Honor, because the ACE Rule
16 eliminates a lot more than generation shifting.
17 I think I'm going to the emissions trading
18 example that the solicitor general was talking
19 about.

20 There are two plants. This is an old,
21 aging coal plant. It's got a couple years left.
22 This is a new one. There's a big turbo-charged
23 scrubber that has to be put on. It's just too
24 expensive for this plant to invest in that.
25 This plant can do it easily and reduces to the

1 level.

2 So the first plant says to the second
3 plant: If you double your reduction, I'll pay
4 you for that. And that's cheaper, it's more
5 cost-effective for the power companies because
6 the first plant can keep operating. Emissions
7 trading is what keeps those plants operating.
8 And they are reducing the emissions twice as
9 much because the second plant --

10 CHIEF JUSTICE ROBERTS: I'm sorry, I
11 don't see -- I -- I'm sorry, I'm being -- I'm
12 being thick here, but I don't see how the old
13 power plant with two years left, how it is kept
14 operating under the scenario you just described.

15 MS. BRINKMANN: Because it gets
16 credits. It gets the emission credits from
17 paying the second plant to reduce twice as much
18 its reduction. That doubled reduction wouldn't
19 happen except for that the first plant, it's
20 cheaper for the first plant to pay the fancier
21 new plant to double their reduction. And so the
22 first plant can live out its life because it
23 gets those credits towards its limit.

24 That's what these restrictions place
25 on. I should also say there is no ability for

1 the agency to require our companies to invest in
2 electric vehicles or to plant trees because the
3 reductions of emissions have to come from the
4 source category, and that source category is --
5 is where the Petitioners get off -- they keep
6 talking about source, source. No, it's the
7 source category that triggers the ability for
8 the agency to regulate.

9 And I can also explain that language
10 in (d) if we want to. I know, Justice Kagan,
11 you were asking about that. When you look at
12 the language about any source, it also says any
13 pollutant, that's the introductory sentence in
14 there saying, states, you have to do a plan for
15 any -- it's what Justice Breyer was saying; in
16 other words, all of them. You know, you can't
17 leave anything unregulated.

18 We do agree that the state plans and
19 the standards of performance go to individual
20 plants. And if you look later in (d), actually,
21 at the bottom, it talks about when we can take
22 into -- when the state can take into account the
23 remaining useful life, it says any particular
24 source.

25 I mean, it is very clear when you

1 march through it that the BSER here, which
2 that's a benchmark, this is not
3 command-and-control regulation, this is a
4 benchmark that then is used for the emission
5 guidelines, that in that sense we're looking at
6 the source category.

7 JUSTICE SOTOMAYOR: Ms. Brinkmann, as
8 I read (d)(1) and as -- just going to what
9 Justice Roberts asked you, a state could, in its
10 judgment, exempt a particular power plant from
11 regulation, correct?

12 MS. BRINKMANN: The statute explicitly
13 says in (d)(1) that they can take into account
14 the remaining useful life, and that's why this
15 kind of emissions trading in the credits is so
16 important because it's not just --

17 JUSTICE SOTOMAYOR: But they don't
18 have to do that. They could do an exemption for
19 that source.

20 MS. BRINKMANN: Yes. That's correct,
21 Your Honor.

22 JUSTICE SOTOMAYOR: Because the credit
23 could be too expensive, that it could kill the
24 plant now rather than in two years, and so a
25 state could decide that, correct?

1 MS. BRINKMANN: And -- yes. And
2 that's what such a huge problem is with the
3 Petitioners' argument suggesting that our
4 flexibility and ability to comply with the state
5 plans also would somehow be cabined by this.

6 And the statutory test cannot support
7 that. The framework cannot support that.

8 JUSTICE SOTOMAYOR: Thank you.

9 JUSTICE BREYER: Wait, but what is --
10 before you finish with (d), I didn't quite get
11 it. So (d) has to do with state plans --

12 MS. BRINKMANN: Yes.

13 JUSTICE BREYER: -- applied to
14 existing sources, and it says "the administrator
15 shall prescribe regulations" under which -- this
16 is the EPA -- under which each state shall
17 submit a plan which -- and now we're talking
18 about the state plans -- establishes standards
19 of performance -- and that includes the word
20 "system" standards of performance -- for any
21 existing source.

22 Now you heard your -- your -- your --
23 your colleagues, your brothers on the other
24 side. He said no. He said that it says "for
25 any existing source," so it means a system for

1 any existing source, and his point is, if that's
2 what the state has to do, surely the EPA plan
3 has to be similar.

4 Now there may be some space in there,
5 but how do you interpret those words which he
6 brought up?

7 MS. BRINKMANN: So, Your Honor, the
8 next three words after you stopped reading say
9 "for any air pollutant."

10 JUSTICE BREYER: Yeah.

11 MS. BRINKMANN: So, if you understand
12 what that sentence is saying, it's saying you
13 have to do it for all of them, for any in your
14 state so none of them remain in limbo.

15 JUSTICE BREYER: Oh, all right. But
16 carbon is an air pollutant. And so, if it's for
17 any air pollutant --

18 MS. BRINKMANN: Right.

19 JUSTICE BREYER: -- you have to do it
20 for carbon.

21 MS. BRINKMANN: Right. So --

22 JUSTICE BREYER: And what you have to
23 do is provide a standard of performance for any
24 existing source of carbon.

25 MS. BRINKMANN: That's the -- the

1 standard of performance that the states do.

2 JUSTICE BREYER: Yeah.

3 MS. BRINKMANN: And if you go further
4 down, Your Honor, at the bottom, it talks about
5 also "regulations of the administrator shall
6 permit the state in applying a standard
7 performance to any particular source under a
8 plan submitted under state -- into consideration
9 remaining useful life."

10 That is clearly the -- the state
11 system. If you go back to --

12 JUSTICE BREYER: Yeah, I know it's the
13 state system.

14 MS. BRINKMANN: Right.

15 JUSTICE BREYER: Nobody says it isn't.

16 MS. BRINKMANN: But, if you're going
17 back to (a)(1) and we talk about the best system
18 of emission reductions, that's the benchmark
19 that is then -- that is the best system of
20 reduction that is then used to set this
21 benchmark, this emissions guideline.

22 There, Congress spoke very clearly,
23 and the reason they can, you know, do this is
24 because of it's a category of source under (b)
25 that's been listed, and so they can only do this

1 if there's a source category.

2 So then you look at the source
3 category, and what's really important, you have
4 to look at what's adequately demonstrated. That
5 means you look to reality. You look to what's
6 been going on. And we know emissions trading
7 has been going on.

8 And we know, when Congress meant to
9 limit something and to say no, no, you can only
10 consider technology, you can only do more at two
11 things, they did things like in (h). And it's
12 not just (h), the alternative I talked about
13 before. It's also in 7412 and a host of other
14 provisions.

15 In (a), which is addressing the best
16 system of emissions reduction here, there's no
17 limitation on that, and that makes complete
18 sense because that's what Congress wanted to do,
19 particularly in this very complicated electrical
20 grid scenario, where you look at the industry,
21 you look what's adequately demonstrated.

22 JUSTICE SOTOMAYOR: Do states do a
23 plan that includes each power source in their
24 grid? Meaning -- or is it like what the EPA
25 does, a general standard, and then the -- the

1 states decide how it applies to each source?
2 That sounds to me like the state comes in and
3 says, for this kind of source, you have to do
4 this; for that kind of source, you have to do
5 that. Am I correct about that?

6 MS. BRINKMANN: Yes. And the states,
7 in fact, have to go through and even identify
8 all the sources are covered based on, you know,
9 their size and their emissions and that type of
10 thing.

11 JUSTICE SOTOMAYOR: So they -- they
12 sort of form-fit for that -- they fit for each
13 source what their plan is?

14 MS. BRINKMANN: And it's -- yes, Your
15 Honor. It's very --

16 JUSTICE SOTOMAYOR: And so that's why,
17 for each plant, there could be a different set
18 of systems that meets the goal, correct, a
19 different way for each plant?

20 MS. BRINKMANN: There could be
21 different measures that they use, Your Honor,
22 and that's why it's so important --

23 JUSTICE SOTOMAYOR: And so that's what
24 you were saying --

25 MS. BRINKMANN: Yes.

1 JUSTICE SOTOMAYOR: -- which is to say
2 for each source doesn't mean that it limits you
3 to in-fence regulation?

4 MS. BRINKMANN: Not at all.

5 JUSTICE SOTOMAYOR: It lets you do
6 whatever regulation is necessary to reach the
7 standard?

8 MS. BRINKMANN: Although I would step
9 back and say, of course, not whatever because it
10 has to be reducing emissions --

11 JUSTICE SOTOMAYOR: Right.

12 MS. BRINKMANN: -- not power.

13 JUSTICE SOTOMAYOR: Right.

14 MS. BRINKMANN: It has to be reducing
15 emissions from this category source.

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

21 And I also would say, Justice
22 Sotomayor, that I really think goes to that,
23 it's really significant to me that when you read
24 the term "standard of performance" in
25 7411(a)(1), it says it has to be a standard

1 which "reflects the degree of emission
2 limitation that's achievable." That -- that is
3 going to exactly how this works. You know, it's
4 this benchmark. It's not this
5 command-and-control regulation that EPA does.

6 Now it's also, I think, you know,
7 significant when you look at the way in which
8 the states then have the flexibility and the
9 power companies certainly have the flexibilities
10 to do something as important and as critical as
11 emissions trading, which reduces the emissions
12 that would not otherwise be reduced in this
13 source category and yet allows infrastructure
14 investment to remain, allows plants to live out
15 their life in a more economic way, and this is
16 incredibly cost-effective.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

20 Justice Breyer?

21 Justice Alito?

22 JUSTICE ALITO: Yeah. May I ask you
23 to respond to -- I think it was the last
24 question that Justice Kavanaugh asked the
25 solicitor general, and that has to do with the

1 scope of the major questions doctrine, and he
2 pointed out language referring to questions of
3 vast political and economic significance and
4 reading a new interpretation into a long-dormant
5 statute. Her answer was that those would be
6 important factors in considering whether the --
7 the major questions doctrine applies. At least
8 that's how I understood her answer.

9 If that is correct, would you agree
10 with it?

11 MS. BRINKMANN: It needs to be
12 considered at less of a level of abstraction
13 with all due respect, Your Honor. For example,
14 the Court has always looked to an exercise of
15 agency authority, something the agency actually
16 did that reflected the authority they were
17 claiming.

18 And I'd point to the OSHA vaccine
19 case, that recent decision there, because, of
20 course, the Court's rationale was, you know,
21 OSHA is now regulating every employer,
22 everybody, vaccines, outside of the workplace,
23 and gave pause in that.

24 But, in that opinion, it was very
25 specific to say, you know, that's when you're

1 taking every employer that has more than a
2 hundred employees in this country, and I don't
3 even know how many millions that covered.

4 JUSTICE ALITO: Well, I --

5 MS. BRINKMANN: But --

6 JUSTICE ALITO: -- I take your answer
7 to mean that we should look to what the agency
8 is actually doing and not what it could do under
9 a particular interpretation.

10 Is that -- is that correct?

11 MS. BRINKMANN: That's part of it,
12 Your Honor, because there it said, you know,
13 this might be okay for OSHA to be doing for
14 medics or for people who work in particularly
15 cramped areas or researchers for COVID. That's
16 why that's so important.

17 And we think that, you know,
18 considering it out of that in a more abstract
19 way is not the threshold question. That's why
20 we think the statute answers it --

21 JUSTICE ALITO: Well, how -- how would
22 that work? Let's say an agency takes a
23 long-dormant statute and interprets it in a way
24 that would have vast political and economic
25 significance if the agency exercised all of the

1 power that it claims it has under its
2 interpretation.

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

8 MS. BRINKMANN: I would say -- first,
9 sorry, I just want to say I would push back on
10 the premise that this is a long-dormant
11 authority because it has to do with --

12 JUSTICE ALITO: Yeah. No, it's a
13 hypothetical.

14 MS. BRINKMANN: Yes. Okay.

15 JUSTICE ALITO: But if those
16 conditions were met.

17 MS. BRINKMANN: Of course, course.

18 Looking at the exercise of the agency
19 authority helps determine whether or not it
20 poses a question of significant consequence
21 because, of course, Congress does sometime,
22 like, crystal clear give very, very important
23 significance.

24 So we really agree with the idea that
25 you look at that first and if there's some

1 ambiguity, but we think, here, the text answers
2 it.

3 JUSTICE ALITO: Well, I do think
4 you're --

5 MS. BRINKMANN: But then, if there's
6 ambiguity --

7 JUSTICE ALITO: -- I do think you're
8 hyping my hypothetical -- you're hyping -- you
9 are -- you're questioning my hypothetical.
10 You're --

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

12 JUSTICE ALITO: -- dismissing the
13 hypothetical. Maybe it's not a good
14 hypothetical. But the agency says, here's the
15 statute. We think we can do a lot under this
16 statute. This is our interpretation. But, for
17 now, we're only doing a little. We're only
18 exercising 5 percent of that authority.

19 And you would say no, that's not a
20 major question because we look at just what
21 they're doing and that's not all that
22 disruptive.

23 Am I right?

24 MS. BRINKMANN: No. I'd want to know
25 as a judge what exactly they did, and then I

1 would compare it to the statute. You need to
2 pressure test it against the statute first to
3 see if there's authority for it or not.

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

7 They say, we can do all this, but
8 we're only doing this, all right? Don't
9 question whether they -- there's ambiguity about
10 whether they can do all of this. They say, we
11 can do all this, but we're only doing a little
12 for now. Is that -- do you rule out major
13 questions because they haven't done it now?

14 MS. BRINKMANN: I -- I don't want to
15 say I rule it out. If I could just -- let me
16 get -- I think that that rests -- oh, we can do
17 this, it's kind of like dicta in a judicial
18 opinion. They're saying that --

19 JUSTICE BREYER: I think he's
20 saying -- do you mind if I --

21 JUSTICE ALITO: Yeah.

22 JUSTICE BREYER: Look, in tobacco --

23 MS. BRINKMANN: Mm-hmm.

24 JUSTICE BREYER: -- suppose they
25 started off in saying we are regulating the

1 advertising of four-foot cigars smoked through
2 hookahs, okay?

3 (Laughter.)

4 JUSTICE BREYER: Now the problem is,
5 can you regulate tobacco? And if you can
6 regulate tobacco, that's a very big deal.

7 But they say, no, it isn't. It's just
8 this tiny -- you know, there aren't -- there are
9 only three in the whole country, so it's a
10 little deal. So it isn't the major question
11 doctrine.

12 And I think what he wants to -- if --
13 if -- I would want to know too is -- is, hey, do
14 you apply it when it's just a little thing? Now
15 you might say -- I guess you are trying to say
16 it's case by case. It depends.

17 MS. BRINKMANN: I think that, you
18 know, that helped me, Your Honor, and, Justice
19 Alito, I really don't mean to be not answering
20 your question, but the fact that it involved
21 tobacco right there would be a question, and you
22 would look at it against the statute and say I
23 don't see tobacco there.

24 And then you start looking at this
25 doctrine to see, and you look at -- I -- I would

1 say there are at least three or four issues you
2 look at. Is it expanding regulation over a lot
3 more entities or people? OSHA, in the UARG
4 case, there were millions more.

5 Of course, here, nobody -- there are
6 no additional entities being regulated. It's
7 just a benchmark. It's not even a command and
8 control. The other thing I would say, it's
9 clearly in the wheelhouse. It's not like OSHA
10 and -- or -- or -- or -- or CDC and
11 landlord/tenant.

12 The other thing that the Court has
13 looked to a lot, Your Honor, and I think this
14 goes to how looking at the agency is useful to
15 know whether you look at major question, is
16 whether it's a major question because it's
17 contrary to what the agency has been doing in
18 the past.

19 And, here, we really would say that
20 seeing what it's done like here, this "at and
21 to" would eliminate emissions trading. That's
22 been going on for pollutants under many
23 provisions of the statute for decades and
24 including under this one in the -- the 2005 rule
25 that was invalidated on other grounds, but I

1 think that is why I -- I hesitate to say that
2 you could do it at the threshold.

3 I really think that it has to be the
4 statute can answer it. And if the statute
5 answers it, that should be the first question.
6 But, if it says tobacco and there's nothing in
7 the statute about tobacco, then, you know, you
8 need to -- to consider these other factors.

9 JUSTICE ALITO: Well, I won't -- I
10 won't belabor it. And I -- I can never equal my
11 -- my colleague's evocative hypotheticals.

12 (Laughter.)

13 JUSTICE ALITO: But, you know, what
14 happens after they -- the 5 percent case, they
15 say, oh, this is not a big deal, it's not major,
16 and then the agency says, well, no, you know,
17 we're going to claim 20 percent. And then
18 they -- later they say we're claiming 40. And,
19 eventually, they get up to 80, 90, or something
20 like that. At some point, can it become a major
21 question?

22 MS. BRINKMANN: It may. I mean, here,
23 it's not a percentage. It's -- you know, it's
24 a -- a different sort of thing. And, to me,
25 that is the problem that there's just -- and,

1 again, you go to the text first, but if there's
2 some new extraordinary exercise of power that
3 would come in and the statute doesn't answer it
4 and there is some ambiguity, then we would say
5 that's what this Court's precedents teach us to
6 look at.

7 But, in each of the Court's
8 precedents, Your Honor, they have looked at the
9 agency action first and they have pressure
10 tested it against the statute before jumping to
11 major question.

12 CHIEF JUSTICE ROBERTS: Justice
13 Sotomayor, anything further?

14 JUSTICE KAGAN: You know, it's not
15 always the case, Ms. Brinkmann, that a lawyer
16 responds to one of Justice Breyer's
17 hypotheticals by saying that's really helpful.

18 (Laughter.)

19 MS. BRINKMANN: Well, I appreciated
20 it.

21 JUSTICE KAGAN: But that's not my
22 question.

23 I think it was the Chief Justice who
24 asked General Prelogar, like, if -- if -- if the
25 major questions doctrine is supposed to be

1 asking some form -- some question, like, is it
2 really surprising that the agency did this in
3 the way that it was really surprising that the
4 FDA regulated tobacco or whatnot.

5 And General Prelogar's answer to that
6 question very much from an agency perspective
7 was, like, it's not really surprising at all
8 after Massachusetts versus EPA at the very least
9 that this agency is doing greenhouse gas
10 regulation. This is in -- you know, exactly in
11 its wheelhouse.

12 But I -- I hear you making a kind of
13 different argument, and I just want to make sure
14 that I'm reading you right because you're saying
15 not from the agency perspective but instead from
16 the power plant perspective something along the
17 lines of: If you do anything about the way
18 power plants operated, which maybe we do and
19 maybe we don't, but you would know that we do
20 these kinds of outside-the-fence things all the
21 time and that it's a sensible way for all of us
22 to proceed and that if you took that away, you
23 would be essentially -- you know, it's not
24 surprising because that's what the industry
25 does.

1 So is that right?

2 MS. BRINKMANN: Yes, Your Honor, and
3 we would say that what Congress did in the
4 statute reflects that. They told the agency,
5 you have to look at what's adequately
6 demonstrated. That's not a very common
7 directive that Congress gives to agencies, which
8 we welcome because we think there are abundant
9 limitations in this statute.

10 So they have to look to what
11 adequately is demonstrated. Also, not only has
12 the -- the power companies been engaging this,
13 but it's critical that, you know, these
14 emissions trading in particular, and I think it
15 also explains and understands the statutory
16 scheme, why it's source categories.

17 That's what the agency has to list
18 under (b). And they figure, okay, we're going
19 to look at that now, what's adequately
20 demonstrated in the source category, and then
21 we're going to look through and we're going to
22 look -- and, you know, Petitioners acknowledge
23 this for other factors in 7411(a). So did the
24 ACE Rule.

25 When they were looking at whether

1 something was adequately demonstrated, they
2 looked, of course, at source category, not for
3 one individual source. That's not what 7411(a)
4 is about.

5 So, yes, Your Honor, we -- we do say
6 that from our perspective, you know, that's
7 what's important to the statutory scheme in 7411
8 that Congress set up and directed the agency to
9 look to those standard practices that we've been
10 engaging in.

11 And I think, under the acid rain rule,
12 for example, it's -- it's not the same
13 pollutant, but it's certainly a system that
14 Congress itself set up in 1990. At the same
15 time it did not amend 7411(a) to limit it in
16 that way, it didn't require us to do it, but it
17 certainly would have been in that, you know,
18 basketful of measures to look at to see what
19 best system of emissions reduction should be
20 used for 7411(a).

21 JUSTICE KAGAN: And is there any
22 necessary relationship or, indeed, is there even
23 a probable relationship between this
24 inside-the-fence and outside-the-fence
25 regulation on the one hand and huge economic

1 impact on the other?

2 MS. BRINKMANN: Not at all, Your
3 Honor. That's why I tried to use in my
4 oversimplified example about emissions treating
5 two coal plants with a really expensive
6 scrubber. No, I mean, something could be really
7 expensive and, you know, it could cause
8 generation shifting, it could cause all manner
9 of things, but it does not align with the "at"
10 or "to."

11 A colleague of mine explained to me it
12 was orthogonal, and I thought that was an
13 interesting word that I looked up and understood
14 that it just doesn't align with the "at"/"to"
15 distinction. There could be things "at" that
16 are quite, you know, exorbitant; there can be
17 things that are outside.

18 For example, pre-washing coal at
19 another site that then comes onto the actual
20 facility, that's something that would be outside
21 the fence line or not "at and to," and that
22 makes little sense.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 Justice Kavanaugh?

1 JUSTICE KAVANAUGH: I think the
2 potential surprise here, to pick up on Justice
3 Kagan's question, doesn't go to regulating CO2,
4 as she rightly says, but is using a
5 cap-and-trade regime given the statutory
6 language.

7 And I -- your responses to that, I
8 think, fall into two categories. One is
9 cap-and-trade is much better for the industry.
10 It makes a lot more sense, more flexibility,
11 industry prefers it, it's good policy, it's
12 better than command and control. And I think
13 those are all -- you know, those are solid
14 arguments that we -- we need to consider.

15 The second, on the more legal
16 question, is, well --and you've mentioned it a
17 few times -- acid rain program was put in by
18 Congress. That was cap-and-trade in the -- in
19 1990. And then, second, in your brief and
20 today, you've emphasized -- more in the brief --
21 the 2005 mercury rule that the second Bush
22 administration put in. And you've put some
23 emphasis on that. And that was cap-and-trade.

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

1 MS. BRINKMANN: Yes.

2 JUSTICE KAVANAUGH: -- on different
3 grounds. How should we think about that 2005
4 mercury rule as we think about this issue? What
5 significance should it play? Because you did
6 play it up quite a bit in the brief.

7 MS. BRINKMANN: If I could, I think
8 there's one predicate argument that I would
9 make, Your Honor, that I think you have to look
10 at subsection (h) as a textual matter. That's
11 what tells us that 1174(a) does not have -- it's
12 not excluding things and saying you can only
13 look at technology and things "at and to."

14 So, if you don't have to do that,
15 then, of course, you look at emissions trading
16 and all because everybody knows that's out in
17 the basketful of tools.

18 But, under (h), Congress said, if you
19 can't do (a) for -- because it's not feasible,
20 you do this other thing, and you can promote a
21 design, equipment, work practice, or operational
22 standard, or combination thereof.

23 So that's not in (a). So then you go
24 to (a) and you look at the text, and it says,
25 what's out there that's adequately demonstrated?

1 Well, we know that what's adequately
2 demonstrated for this source category, fossil
3 fuel plants, is what's at issue in the acid rain
4 rule. That was in 1990.

5 There's also in 7410, which is
6 cross-referenced, but setting aside that textual
7 argument, we know it was in the basket of
8 measures that could be made because there's the
9 cross-state air pollution control rule that this
10 Court upheld in the Homer case. That also
11 involves emissions trading.

12 So we know that all of that was out
13 there, and it's -- it's based on the text, the
14 structure, the direction to look at "adequately
15 demonstrated." So I would say, yes, it's very
16 cost-effective for us. That's why it's
17 adequately demonstrated. And it's really
18 important to the grid. I think that's your
19 point. But it's not a policy argument. It's
20 looking at what the text of the statute tells
21 the agency to do when they set this benchmark,
22 What's adequately demonstrated.

23 And the mercury rule --

24 JUSTICE KAVANAUGH: Right.

25 MS. BRINKMANN: -- was invalidated on

1 other grounds, absolutely, but it did include
2 emissions trading and generation shifting in the
3 BSER. I know Petitioners are trying to say, oh,
4 it was only used for compliance. If you go to
5 the Federal Register and you look at that, they
6 explain it as part of the BSER, the Best System
7 of Emission Reduction.

8 And that's what we're talking about
9 here today. It's whether or not there is a
10 restriction against the agency taking into
11 account anything other than "at and to" for
12 that. And we would say the critically important
13 aspect that also under (d), that the power
14 companies have flexibility in compliance.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: No.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 General See.

22 REBUTTAL ARGUMENT OF LINDSAY S. SEE

23 ON BEHALF OF THE STATE PETITIONERS

24 MS. SEE: Thank you, Mr. Chief

25 Justice.

1 Moving first to justiciability, it's
2 critical today that General Prelogar has backed
3 away from the stay, and that's for good reason.
4 It doesn't make sense that a doctrine that's
5 meant to protect parties like us from the effect
6 of the judgment should be the very thing that
7 can deprive this Court of jurisdiction.

8 So now we have the new argument today
9 that the effect of the judgment does not
10 actually bring the Clean Power Plan back to
11 life. That's not true. In addition to the
12 portions of the record that Justice Breyer
13 mentioned, we can also look at Joint Appendix
14 215, where the D.C. Circuit said that it vacated
15 the ACE Rule and the embedded CPP repeal.

16 The response we have from General
17 Prelogar is that there's an internal memorandum
18 from EPA that said that that didn't actually do
19 what those words said. But, again, an internal
20 memorandum that none of the Petitioners were
21 able to have any input in by the side who was
22 actually trying to defeat this Court's
23 jurisdiction should not be held against us. And
24 there's no authority in this Court's precedent
25 that that can be enough to erase the actual

1 language of what the court below did.

2 All that's left then is the prospect
3 of new rulemaking, but, again, the Respondents
4 have not challenged that they have to show that
5 we are certain not to be hurt by the new rule.
6 They said in their brief that they might enact
7 the very same provision, and they have told you
8 nothing different here today. So this Court
9 should proceed to the merits.

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

19 Ms. Brinkmann talked about what's
20 achievable for the source category, but she's
21 certainly moving beyond the source category, and
22 the CPP did there. It's not simply what
23 coal-fired or natural gas power plants can do.
24 Generation shifting, under the guise of the CPP,
25 requires bringing into that category renewables

1 as well, an entirely different sector.

2 And so that's what takes us into the
3 major question territory. This is a major
4 question because it allows EPA to determine what
5 the power sector as a whole should look like and
6 who can be in it. It transforms the statute
7 from something that is about how a particular
8 source can operate more efficiently.

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

19 Certainly, it said that there could be
20 other compliance mechanisms. But that's not the
21 same thing as saying the actual emission limit
22 was based on outside-the-fence-line measures.
23 So this is new power. This is transformative
24 power. It's power that goes into an area of
25 traditional state authority, which is energy and

1 utility regulation.

2 So whatever definition of major
3 questions the Court does, this is far on the
4 other side of it. This Court has full power to
5 give us an answer, and it should. This is a
6 critical question. The Court has a rule before
7 it, and it should give an answer.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

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

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