

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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WEST VIRGINIA, ET AL., )  
 )  
 ) Petitioners, )  
 ) v. ) No. 20-1530  
 ) ENVIRONMENTAL PROTECTION AGENCY, )  
 ) ET AL., )  
 )  
 ) Respondents. )  
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THE NORTH AMERICAN COAL CORPORATION, )  
 )  
 ) Petitioner, )  
 ) v. ) No. 20-1531  
 ) ENVIRONMENTAL PROTECTION AGENCY, )  
 ) ET AL., )  
 )  
 ) Respondents. )  
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WESTMORELAND MINING HOLDINGS LLC, )  
 )  
 ) Petitioner, )  
 ) v. ) No. 20-1778  
 ) ENVIRONMENTAL PROTECTION AGENCY, )  
 ) ET AL., )  
 )  
 ) Respondents. )  
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NORTH DAKOTA, )  
 )  
 ) Petitioner, )  
 ) v. ) No. 20-1780  
 ) ENVIRONMENTAL PROTECTION AGENCY, )  
 ) ET AL., )  
 )  
 ) Respondents. )  
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23 Washington, D.C.  
 24 Monday, February 28, 2022

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

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

(10:00 a.m.)

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

Ms. See.

ORAL ARGUMENT OF LINDSAY S. SEE

ON BEHALF OF THE STATE PETITIONERS

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

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

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

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

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

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

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

20 And, finally, standing is no reason to  
21 avoid the merits. We're injured by a judgment  
22 that brings back to life a rule that hurts us  
23 and that takes off the books a rule that  
24 benefits us. Respondents' arguments 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 canon. Major  
6 questions is one of them. The federalism canon  
7 is a different version of the clear statement  
8 canon. The clear statement part simply says  
9 what we assume would be in the statute, how  
10 clearly Congress would speak before courts are  
11 willing to find this agency power. So major  
12 questions is one version of the clear statement  
13 canon.

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

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

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



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

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

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

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

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

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

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

7 JUSTICE THOMAS: Thank you.

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

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

14 MS. SEE: We would, Your Honor. We  
15 would say 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 a slightly  
11 different question of, can Congress delegate and  
12 has it given sufficient guidance? Major  
13 questions is asking the threshold question, in  
14 fact, did Congress delegate?

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

18 JUSTICE BREYER: The --

19 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

7 But you want to jump from there to the  
8 idea that it has to be plant by plant. Now  
9 that's -- at that point, I said, but, gee, it's  
10 easy for me to think of a system that they 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: Well, and, Your Honor, if I  
17 could 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 you 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's 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 that --

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 in --

11 JUSTICE SOTOMAYOR: Well, I wish --

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

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

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

25 That's because the --

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

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

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

22 JUSTICE GORSUCH: Count -- counsel,  
23 one argument we haven't addressed yet and I just  
24 want to make sure we do before your time expires  
25 is the question of standing or mootness.

1 MS. SEE: Of course.

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

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

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

10 CHIEF JUSTICE ROBERTS: Certainly.

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

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

24 Anything that happens afterwards, a  
25 temporary stay or voluntary cessation, is in

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

5 JUSTICE SOTOMAYOR: How are you --

6 CHIEF JUSTICE ROBERTS: Thank you --

7 JUSTICE SOTOMAYOR: -- different than

8 --

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

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

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

15 Justice Thomas, anything further?

16 JUSTICE THOMAS: Nothing.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Breyer?

19 Justice Sotomayor?

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

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

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

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

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

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

24 JUSTICE SOTOMAYOR: This is not a  
25 mootness question. This is an advisory opinion



1 question. That's how the EPA discussed it.

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

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

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

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

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

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

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

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

1 based on the particular rule before it.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

1 would suggest that a state, even if it wished  
2 to, could not do what this rule does. Is that  
3 -- is that right?

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

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

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

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

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

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

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

24           JUSTICE KAGAN: That -- that's helpful  
25 to me. Can I ask you a different question,

1     which is just this major question doctrine,  
2     like, how -- how big does a question have to be  
3     or how do you know when it's big enough?

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

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

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

24            It seems to me quite irrelevant to  
25    rules of statutory construction under the

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

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

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

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

23 MS. SEE: Well, Your Honor --

24 JUSTICE KAGAN: -- which suggests, you  
25 know, that what Congress wanted to do,

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

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

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

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

25 Now the agency, I don't believe, is



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

6 JUSTICE KAGAN: Thank you, General.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Gorsuch?

9 Justice Kavanaugh?

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

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

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

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

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

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

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett?

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

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

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

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

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

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

1 non-delegation question.

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

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

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

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

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

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

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

16 MS. SEE: Your Honor, I --

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

1 wanted to delegate, including this or not?

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

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

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

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

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

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

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

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

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Roth.

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

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

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

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

25 What is the right mix of energy



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

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

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

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

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

1 source doesn't have to continue to exist.

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

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

13           How do you make those distinctions?

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

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

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

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

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

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

25 So what's the difference?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. ROTH: Right.

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

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

20 MR. ROTH: Right. So --

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

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

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

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

5 MR. ROTH: -- because --

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

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

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

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

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

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

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

24 MR. ROTH: Right.

25 JUSTICE BREYER: And, of course, it



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

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

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

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

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

16 MR. ROTH: Right.

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

19 MR. ROTH: Right.

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

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

24 JUSTICE BREYER: Yeah.

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

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

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

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

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

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

21 JUSTICE SOTOMAYOR: Counsel --

22 MR. ROTH: -- refer to that.

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

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

7 MR. ROTH: Right.

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

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

19 MR. ROTH: Right.

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

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

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

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

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

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

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

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

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

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

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

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

15 JUSTICE KAGAN: Now I'm ready.

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

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

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

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

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

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

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Justice  
17 Thomas?

18 Justice Breyer, anything further?

19 Justice Alito?

20 Justice Sotomayor?

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

24 MR. ROTH: That is correct.

25 JUSTICE SOTOMAYOR: And the CWA is no



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

4 So -- but how do you have standing?

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

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

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

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

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

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

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

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

5           JUSTICE SOTOMAYOR: All right.

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

12          JUSTICE SOTOMAYOR: All right.

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

16          JUSTICE SOTOMAYOR: Thank you,  
17    counsel.

18          CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

1 here.

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

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

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

23 JUSTICE KAGAN: I feel like a little  
24 bit of a broken record, but I'll just bat this  
25 one back to you.

1           You can do that with source-by-source  
2 regulations. You know, if that's what EPA  
3 wanted to do, I have a basketful of  
4 source-by-source regulations that would allow  
5 them to get their way on all of those questions.  
6 It just has no necessary relationship to this  
7 fence/non-fence way of thinking of things.

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

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

21           But it's a -- just a fundamentally  
22 different order of -- of question and order of  
23 inquiry that the agency is engaged in. And I  
24 think, when you get to that high level of how  
25 should we generate electricity, how should

1 consumers use electricity, we have just gone so  
2 far beyond what we would expect the agency to be  
3 doing and what the agency has done for 40 years  
4 under this provision.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch?

8 Justice Kavanaugh?

9 Justice Barrett?

10 JUSTICE BARRETT: Just one question.

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

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

21 Here, if we're thinking about EPA  
22 regulating greenhouse gases, well, there's a  
23 match between the regulation and the agency's  
24 wheelhouse, right?

25 So you're describing something a

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

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

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

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

1 JUSTICE BARRETT: Thank you.

2 MR. ROTH: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

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

7 (Whereupon, a brief recess was taken.)

8 CHIEF JUSTICE ROBERTS: General  
9 Prelogar.

10 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR  
11 ON BEHALF OF THE FEDERAL RESPONDENTS

12 GENERAL PRELOGAR: Mr. Chief Justice,  
13 and may it please the Court:

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

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

25 Petitioners aren't harmed by the



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

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

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

24           We agree that EPA cannot do those  
25 things, but that's because of the express

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

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

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

23           I welcome the Court's questions.

24           JUSTICE THOMAS: Would you kindly say  
25 a bit more about your statement that the Court

1 did not below -- the D.C. Circuit did not  
2 reinstate the CCP?

3 GENERAL PRELOGAR: Yes, of course,  
4 Justice --

5 JUSTICE THOMAS: Or CPP.

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

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

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

23 And then, second, the industry had  
24 very much undergone tremendous changes, and so  
25 the CPP was totally obsolete. The emission

1 limits had been satisfied, and the compliance  
2 deadlines for submitting state plans had come  
3 and gone.

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

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

20           GENERAL PRELOGAR: That's correct.  
21 That's what the ACE Rule did.

22           JUSTICE BREYER: Okay. So then they  
23 go to the D.C. Circuit, and the D.C. Circuit  
24 says no, your interpretation of ACE is wrong.

25           Well, if their reason for getting rid

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

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

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

17 JUSTICE BREYER: Okay. And what did  
18 they say here?

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

21 JUSTICE BREYER: Did it say that?

22 GENERAL PRELOGAR: -- quite notably  
23 did not put the CPP back into effect. It only  
24 vacated ACE. And then the D.C. Circuit  
25 confirmed that that was the best reading of its

1 judgment when it issued the partial stay of the  
2 mandate to make clear that in the interim, until  
3 EPA conducts its own rule --

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

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

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

15 (Laughter.)

16 JUSTICE BREYER: And -- and -- and  
17 then -- and then -- and then suppose I don't  
18 agree with you. I think, oh, God, they're going  
19 to send it back, CPP will go back. And you are  
20 in the midst of a new rulemaking. So how do you  
21 get rid of CPP?

22 I mean, one, you have the power not to  
23 prosecute. A pretty broad power. But that's  
24 plant by plant.

25 Two, you have a power to suspend

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

6 Is there anything else you have?

7 GENERAL PRELOGAR: Well, Justice  
8 Breyer, I want to resist the premise in the  
9 first place that the CPP could possibly come  
10 back into effect. Among other things, all of  
11 the key compliance deadlines for the submission  
12 of state plans have come and gone --

13 JUSTICE BREYER: Yeah.

14 GENERAL PRELOGAR: -- so EPA would  
15 need to do a rulemaking regardless, as your  
16 question suggested --

17 JUSTICE BREYER: Yeah.

18 GENERAL PRELOGAR: -- in order to even  
19 sensibly try to implement the CPP.

20 But it said just the opposite. It is  
21 not seeking to reinstate CPP --

22 JUSTICE BREYER: Okay. I got that  
23 point. I -- I just wonder, maybe I'm just  
24 curious about it, what does -- what does the --  
25 how can an agency get rid of a rule it doesn't

1 want if it doesn't want to go through a big  
2 rulemaking in order to get rid of it because it  
3 wants to do something else?

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

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

18 JUSTICE SOTOMAYOR: General --

19 CHIEF JUSTICE ROBERTS: Well, before  
20 -- before the D.C. Circuit ruled, ACE was on the  
21 books, and they liked it. After they ruled, ACE  
22 was off the books, and they don't like that. I  
23 don't understand why that's not fully  
24 justiciable.

25 GENERAL PRELOGAR: Well, it's



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

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

17           CHIEF JUSTICE ROBERTS: Well, I guess,  
18 I mean, I -- I gather their position would be  
19 it's -- just because there's no regulation  
20 doesn't mean we're happy. They would like  
21 regulation according to their particular  
22 perspective. They'd like good regulation, which  
23 they think they had with ACE, and now they don't  
24 have it.

25           Again, why isn't that a justiciable

1 harm?

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

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

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

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

24 GENERAL PRELOGAR: So I think that's  
25 incorrect when you look at the analysis that EPA

1 conducted when it repealed the CPP, and in that  
2 regulatory impact analysis, what EPA observed is  
3 that taking into account delayed implementation,  
4 which would be necessary, and looking at the  
5 flexibilities that are offered by interstate  
6 trading, there would be no difference between a  
7 world where the CPP took effect and one where it  
8 didn't.

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

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

22 JUSTICE KAVANAUGH: What's the status  
23 of the new rulemaking to the extent you can  
24 share?

25 GENERAL PRELOGAR: EPA is still

1 undertaking preparatory activities. It expects  
2 to issue a notice of proposed rulemaking by the  
3 end of this year. In the past, it's taken about  
4 a year after that to issue a final rule.

5 JUSTICE SOTOMAYOR: Counsel, there are  
6 two parts --

7 JUSTICE KAGAN: This year, the  
8 calendar year?

9 GENERAL PRELOGAR: This calendar year,  
10 that's correct.

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

18 And, number two, what I'm troubled by  
19 is not generation shifting qua generation  
20 shifting because, as very clear in the  
21 questioning and -- and I think my logic, there  
22 could be some plant source changes that could  
23 force generation shifting anyway, so it's not  
24 generation shifting qua.

25 But I think what the major issue that

1 might trouble me is the claim that the emissions  
2 standards that you set force states to do  
3 generation shifting, that you have not given  
4 them options not to generation shift. You list  
5 out a whole bunch of options, but I thought one  
6 of their claims was that no matter what they  
7 did, they still had to generation shift.

8           So could you answer those two  
9 questions, old and new plants and whether there  
10 is -- have you exceeded your authority by  
11 forcing some -- forcing the states out of  
12 choices?

13           GENERAL PRELOGAR: Yes. And I'll take  
14 those questions in turn.

15           So, first, with respect to the  
16 argument that the existing source standard under  
17 the CPP was more stringent than the new source  
18 standard, I -- I think that's incorrect, and  
19 it's really trying to make an apples-and-oranges  
20 comparison.

21           The two standards operated quite  
22 differently and critically had different  
23 timeframes. So the new source standard took  
24 effect immediately, whereas, under the CPP, the  
25 existing sources wouldn't actually have to put

1 into place any kinds of emissions reductions  
2 until 2022 at the earliest or even 2023 in some  
3 cases. That means for the first seven years  
4 that both standards were contemplated to be in  
5 effect the new source standard was far more  
6 stringent because the new sources were already  
7 subject to that emission reduction.

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

17           To turn to the second aspect of your  
18 question, focused on whether the CPP effectively  
19 would have required generation shifting, the  
20 answer to that is no. The CPP itself emphasized  
21 that there were other types of mechanisms that  
22 sources could consider deploying, things like  
23 carbon capture and sequestration, natural gas  
24 co-firing. Those were not listed as components  
25 of the best system in the CPP, but they were

1 available technologies.

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

9           JUSTICE KAVANAUGH: I think the other  
10 -- keep going, sorry.

11           GENERAL PRELOGAR: Well, if I could  
12 make one final point in response to Justice  
13 Sotomayor.

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

18           But I don't think that there is any  
19 anomaly between that kind of correspondence  
20 between the best system of emission reduction  
21 and how the sources actually choose to comply  
22 because, of course, part of EPA's task here is  
23 to see what is adequately demonstrated, what is  
24 the power sector already doing to control  
25 emissions, and -- and that's the starting point

1 for identifying the best system, and they also  
2 have to look at cost.

3 So, to the extent that EPA is saying,  
4 here's what the power sector is doing to reduce  
5 their emissions, it's -- it's just not  
6 surprising to see that they would continue to  
7 generation shift to satisfy that emission limit.

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

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

24 GENERAL PRELOGAR: So I think that  
25 their reliance on that failed legislation in



1 Congress is -- is wholly misplaced. Those bills  
2 looked very different from the CPP. It's --  
3 it's not as though Congress considered something  
4 like the CPP and rejected it and said those  
5 bills would have applied to far more industry  
6 participants, not just power plants, would have  
7 governed far more pollutants and not just carbon  
8 dioxide.

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

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

1 standards of performance for their sources.

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

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

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

14 CHIEF JUSTICE ROBERTS: Well, okay --  
15 okay.

16 GENERAL PRELOGAR: It's always done it  
17 --

18 CHIEF JUSTICE ROBERTS: But what --

19 GENERAL PRELOGAR: -- with respect to  
20 actual effects.

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

24 GENERAL PRELOGAR: As I understand the  
25 way the Court has applied this interpretive

1 principle, it has at the outset always engaged  
2 in a traditional interpretive -- interpretive  
3 exercise, looking at the traditional tools of  
4 text, context, and structure.

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

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

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

22           CHIEF JUSTICE ROBERTS: Well, just  
23 getting back to what we're -- we're talking  
24 about, so you go through the whole analysis, you  
25 come up with what you think the right answer is,

1 and then you ask whether that's consistent with  
2 the major questions doctrine?

3 GENERAL PRELOGAR: That's how the  
4 decisions are --

5 CHIEF JUSTICE ROBERTS: Sounds like --

6 GENERAL PRELOGAR: -- structured.

7 CHIEF JUSTICE ROBERTS: -- a Rule --  
8 like a Rule of Lenity.

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

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

25 I -- I mean, I -- just thinking back

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

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

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

23 And so you can't sensibly apply a  
24 major questions lens until you've determined  
25 that there's some ambiguity to resolve. And to

1 --

2 CHIEF JUSTICE ROBERTS: I'm not sure I

3 --

4 GENERAL PRELOGAR: -- instead say --

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

10 GENERAL PRELOGAR: Well, let me try  
11 to make it --

12 CHIEF JUSTICE ROBERTS: That's a  
13 pretty concrete question.

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

22 You can imagine a future regulation  
23 that only uses biomass co-firing, for instance,  
24 and I -- I think it would be hard to say, well,  
25 that's a major question that has vast -- has

1 vast economic and political significance.  
2 Your -- your average Joe on the street probably  
3 hasn't even ever heard of biomass co-firing.

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

8 JUSTICE KAGAN: I mean, just to put it  
9 --

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

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

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

23 JUSTICE ALITO: Has the D.C. Circuit  
24 held that the reinstatement of the CPP is off  
25 the board?

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

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

25                           Why isn't that correct?



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

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

21           JUSTICE ALITO:  Well, the statute  
22    requires EPA to take into account, just to take  
23    into account, not even balance, take into  
24    account several factors, and they are  
25    incommensurable.  You know, how do you balance

1 or take into account, what weight do you assign  
2 to, the effects on climate change, which some  
3 people believe is a matter of civilizational  
4 survival, and the costs and the effect on jobs?

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

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

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

25 It can't threaten the reliability of

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

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

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

24 GENERAL PRELOGAR: Because the D.C.  
25 Circuit, which has principally been responsible

1 for looking at these types of actions, has  
2 interpreted those requirements to be real  
3 constraints here. And EPA cannot undertake  
4 action that would threaten the industry with  
5 unreasonable costs.

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

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

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

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

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

14                   CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16                   Justice Thomas?

17                   Justice Breyer?

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

21                   The reason I thought that the CPP is  
22 alive and there, this is the reason: On page  
23 37a of -- which has the opinion of the D.C.  
24 Circuit, it says: "At the outset, the ACE Rule  
25 repealed the Clean Power Act." Okay? It

1 explained it had to do that, the EPA, because  
2 the statute made them do it.

3           Then I look to 161, where they say --  
4 161a, where they say what they did. They say  
5 the only permissible interpretation, that's what  
6 ACE thinks, and -- but we cannot -- where a  
7 statute grants an agency discretion, but the  
8 agency erroneously believes it doesn't have it,  
9 we cannot uphold the result, correct, as an  
10 exercise of the discretion that the agency  
11 disavows. All right? Got that?

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

18           GENERAL PRELOGAR: It's --

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

24           So where is it it says that CPP  
25 doesn't exist? It says ACE is wrong, we remand

1 it for reconsideration. Now you tell me what to  
2 read.

3 GENERAL PRELOGAR: So I think where  
4 we're maybe talking past each other, Justice  
5 Breyer, is that we think that the D.C. Circuit  
6 would have -- would have had to expressly say  
7 and so the CPP comes back into effect.

8 Of course, we don't dispute one bit  
9 that the D.C. Circuit vacated ACE and therefore  
10 vacated the embedded repeal rule. But there is  
11 a body of precedent in the D.C. Circuit about  
12 what you do when a rule is invalid and whether  
13 it automatically bring backs -- brings back the  
14 prior regulatory regime.

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

18 GENERAL PRELOGAR: Exactly. So that  
19 goes back to the agency --

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

23 GENERAL PRELOGAR: That rule is gone  
24 --

25 JUSTICE BREYER: Okay. Fine.

1                   GENERAL PRELOGAR:  -- but they're not  
2 bringing back the old rule.

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

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

9                   JUSTICE BREYER:  Do we have that here?

10                  GENERAL PRELOGAR:  -- administrators  
11 -- it's at JA 269.

12                  JUSTICE BREYER:  Thank you.

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

17                  JUSTICE BREYER:  Okay.  Thank you.

18                  GENERAL PRELOGAR:  No one was  
19 advocating that result.

20                  JUSTICE BREYER:  Thank you.  Done.  
21 Done.  If that does it, that does it.  Thank  
22 you.

23                  CHIEF JUSTICE ROBERTS:  Justice Alito?  
24 Justice Sotomayor?  
25 Justice Kagan?



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

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

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

1 limit and generate a credit.

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

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

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

23 And if I could make one final point on  
24 all of this. That, of course, is language that  
25 governs what the states can do, and all the

1 normal presumptions here, the federalism canon,  
2 major questions, I think, provides no basis to  
3 adopt their interpretation, which would narrowly  
4 constrain what states and sources can do for  
5 compliance.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Gorsuch?

8 Justice Kavanaugh?

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

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

23 Do you have any disagreement with  
24 those two principles?

25 GENERAL PRELOGAR: No. I certainly

1 recognize the Court has used that as a basis to  
2 apply major questions, but I certainly dispute  
3 that either of those principles could carry the  
4 day here.

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

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

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

25           And then, finally, with the unheralded

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

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

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

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

23           So it hasn't referred to those types  
24 of principles in a context outside the -- the  
25 idea that there really are -- there really is an

1 agency regulation that is -- is having that kind  
2 of transformative effect.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett?

6 Thank you, General.

7 Ms. Brinkmann.

8 ORAL ARGUMENT OF BETH S. BRINKMANN

9 ON BEHALF OF THE POWER COMPANY RESPONDENTS

10 MS. BRINKMANN: Mr. Chief Justice, and  
11 may it please the Court:

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

18 The ACE Rule would exclude those  
19 measures from the BSER because they are not at  
20 or to a source, but nothing in the statute  
21 excludes them.

22 Congress directed the expert agency to  
23 look to reality when it makes the empirical  
24 determination of the best system of emission  
25 reduction for the source category.

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

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

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

17          I welcome questions from the Court.

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

23          MS. BRINKMANN: Yes. In 2005, Your  
24          Honor, the mercury rule used it in just this  
25          way. Petitioners try and suggest it wasn't part

1 of the BSER, but it indeed was. And I would  
2 also point, Your Honor, not just to the actual  
3 1174(d) mercury rule but also the acid rain rule  
4 and the Good Neighbor rule under 7410.

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

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

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



1 combination thereof' which reflects the best  
2 technological system of continuous emission  
3 reduction."

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, what  
2 about --

3 MS. BRINKMANN: -- of the power  
4 companies.

5 CHIEF JUSTICE ROBERTS: -- what about  
6 not so standard? Could the best system of  
7 emission reduction adequately demonstrated  
8 involve shutting down a plant?

9 MS. BRINKMANN: No, Your Honor. And  
10 that goes to these other constraints that are in  
11 the structure of the statute. At the beginning  
12 of the statute, it talks about categories of  
13 sources. That's the predicate for the ability  
14 to EPA to even regulate under 1174(a). You look  
15 at 1174(b), and (b) talks about the agency has  
16 to first list categories of sources, so --

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

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

23 CHIEF JUSTICE ROBERTS: Right.

24 MS. BRINKMANN: It's not about  
25 reducing the production of energy. Indeed,

1 that's contrary --

2 CHIEF JUSTICE ROBERTS: Well, why  
3 wouldn't reducing the emissions in a category  
4 source require reducing them to zero?

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, yeah,  
25 but the whole idea is that you take that

1 production and you shift it somewhere else,  
2 whether it's wind turbines or solar or -- or  
3 whatever.

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

10 There are two plants. This is an old,  
11 aging coal plant. It's got a couple years left.  
12 This is a new one. There's a big turbo-charged  
13 scrubber that has to be put on. It's just too  
14 expensive for this plant to invest in that.  
15 This plant can do it easily and reduce this to  
16 the level.

17 So the first plant says to the second  
18 plant: If you double your reduction, I'll pay  
19 you for that. And that's cheaper, it's more  
20 cost-effective for the power companies because  
21 the first plant can keep operating. Emissions  
22 trading is what keeps those plants operating.  
23 And they are reducing the emissions twice as  
24 much because the second plant --

25 CHIEF JUSTICE ROBERTS: I'm sorry, I

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

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

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

24 And I can also explain that language  
25 in (d) if we want to. I know, Justice Kagan,

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

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

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

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

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

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

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

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

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

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

22 JUSTICE SOTOMAYOR: Thank you.

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

1 MS. BRINKMANN: Yes.

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

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

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

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

24 JUSTICE BREYER: Yeah.

25 MS. BRINKMANN: So, if you understand



1 what that sentence is saying, it's saying you  
2 have to do it for all of them, for any in your  
3 state so none of them remain in --

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

7 MS. BRINKMANN: Right.

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

10 MS. BRINKMANN: Right. So --

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

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

16 JUSTICE BREYER: Yeah.

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

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

1 JUSTICE BREYER: Yeah, I know it's the  
2 state system.

3 MS. BRINKMANN: Right.

4 JUSTICE BREYER: Nobody says it isn't.

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

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

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

22 And we know, when Congress meant to  
23 limit something and to say no, no, you can only  
24 consider technology, you can only do more at two  
25 things, they did things like in (h). And it's

1 not just (h), the alternative I talked about  
2 before. It's also in 7412 and a host of other  
3 provisions.

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

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

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

25 JUSTICE SOTOMAYOR: So they -- they

1 sort of form-fit for that -- they fit for each  
2 source what their plan is?

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

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

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

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

14 MS. BRINKMANN: Yes.

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

18 MS. BRINKMANN: Not at all.

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

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

1 source.

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

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

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

1 their life in a more economic way, and this is  
2 incredibly cost-effective.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas?

6 Justice Breyer?

7 Justice Alito?

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

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

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

1 agency authority, something the agency actually  
2 did that reflected the authority they were  
3 claiming.

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

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

15 JUSTICE ALITO: Well, I --

16 MS. BRINKMANN: But --

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

21 Is that -- is that correct?

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

1 cramped areas or researchers for COVID. That's  
2 why that's so important.

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

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

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

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

23 JUSTICE ALITO: Yeah. No, it's a  
24 hypothetical.

25 MS. BRINKMANN: Yes. Okay.



1 JUSTICE ALITO: But if those  
2 conditions were met.

3 MS. BRINKMANN: Of course, of course.

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

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

14 JUSTICE ALITO: Well, I do think --

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

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

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

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

1 statute. This is our interpretation. But, for  
2 now, we're only doing a little. We're only  
3 exercising 5 percent of that authority.

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

8 Am I right?

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

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

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

24 MS. BRINKMANN: I -- I don't want to  
25 say I rule it out. If I could just -- let me

1 get -- I think that that rests -- oh, we can do  
2 this, it's kind of like dicta in a judicial  
3 opinion. They're saying that --

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

6 JUSTICE ALITO: Yeah.

7 JUSTICE BREYER: Look, in tobacco --

8 MS. BRINKMANN: Mm-hmm.

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

13 (Laughter.)

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

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

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

1 case by case. It depends.

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

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

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

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

1 whether it's a major question because it's  
2 contrary to what the agency has been doing in  
3 the past.

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

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

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

22           (Laughter.)

23           JUSTICE ALITO: But, you know, what  
24 happens after they -- the 5 percent case, they  
25 say, oh, this is not a big deal, it's not major,

1 and then the agency says, well, no, you know,  
2 we're going to claim 20 percent. And then  
3 they -- later they say we're claiming 40. And,  
4 eventually, they get up to 80, 90, or something  
5 like that. At some point, can it become a major  
6 question?

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

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

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

24 JUSTICE KAGAN: You know, it's not  
25 always the case, Ms. Brinkmann, that a lawyer

1 responds to one of Justice Breyer's  
2 hypotheticals by saying that's really helpful.

3 (Laughter.)

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

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

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

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

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

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

11 So is that right?

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

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



1 why it's source categories.

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

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

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

21 And I think, under the acid rain rule,  
22 for example, it's -- it's not the same  
23 pollutant, but it's certainly a system that  
24 Congress itself set up in 1990. At the same  
25 time it did not amend 7411(a) to limit it in

1 that way, it didn't require us to do it, but it  
2 certainly would have been in that, you know,  
3 basketful of measures to look at to see what  
4 best system of emissions reduction should be  
5 used for 7411(a).

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

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

21 A colleague of mine explained to me it  
22 was orthogonal, and I thought that was an  
23 interesting word that I looked up and understood  
24 that it just doesn't align with the "at"/"to"  
25 distinction. There could be things "at" that

1 are quite, you know, exorbitant; there can be  
2 things that are outside.

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

8 CHIEF JUSTICE ROBERTS: Justice  
9 Gorsuch?

10 Justice Kavanaugh?

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

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

25 The second, on the more legal

1 question, is, well --and you've mentioned it a  
2 few times -- the acid rain program was put in by  
3 Congress. That was cap-and-trade in -- in 1990.  
4 And then, second, in your brief and today,  
5 you've emphasized -- more in the brief -- the  
6 2005 mercury rule that the second Bush  
7 administration put in. And you've put some  
8 emphasis on that. And that was cap-and-trade.

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

11 MS. BRINKMANN: Yes.

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

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

25 So, if you don't have to do that,

1 then, of course, you look at emissions trading  
2 and all because everybody knows that's out in  
3 the basketful of tools.

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

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

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

23 So we know that all of that was out  
24 there, and it's -- it's based on the text, the  
25 structure, the direction to look at "adequately

1 demonstrated." So I would say, yes, it's very  
2 cost-effective for us. That's why it's  
3 adequately demonstrated. And it's really  
4 important to the grid. I think that's your  
5 point. But it's not a policy argument. It's  
6 looking at what the text of the statute tells  
7 the agency to do when they set this benchmark,  
8 What's adequately demonstrated.

9 The mercury rule --

10 JUSTICE KAVANAUGH: Right.

11 MS. BRINKMANN: -- was invalidated on  
12 other grounds, absolutely, but it did include  
13 emissions trading and generation shifting in the  
14 BSER. I know Petitioners are trying to say, oh,  
15 it was only used for compliance. If you go to  
16 the Federal Register and you look at that, they  
17 explain it as part of the BSER, the Best System  
18 of Emission Reduction.

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

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 JUSTICE BARRETT: No.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 General See.

8 REBUTTAL ARGUMENT OF LINDSAY S. SEE  
9 ON BEHALF OF THE STATE PETITIONERS  
10 MS. SEE: Thank you, Mr. Chief  
11 Justice.

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

19 So now we have the new argument today  
20 that the effect of the judgment does not  
21 actually bring the Clean Power Plan back to  
22 life. That's not true. In addition to the  
23 portions of the record that Justice Breyer  
24 mentioned, we can also look at Joint Appendix  
25 215, where the D.C. Circuit said that it vacated

1 the ACE Rule and the embedded CPP repeal.

2           The response we have from General  
3 Prelogar is that there's an internal memorandum  
4 from EPA that said that that didn't actually do  
5 what those words said. But, again, an internal  
6 memorandum that none of the Petitioners were  
7 able to have any input in by the side who was  
8 actually trying to have -- defeat this Court's  
9 jurisdiction should not be held against us. And  
10 there's no authority in this Court's precedent  
11 that that can be enough to erase the actual  
12 language of what the court below did.

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

21           When it comes to the potential limits  
22 that have been put on the statute, General  
23 Prelogar said that states actually have more  
24 options under a plan like the CPP. But she  
25 referred to things like carbon capture and



1 sequestration, natural gas co-firing. The CPP  
2 also said that those would be impossible for the  
3 vast majority of sources, so that's not a real  
4 option available.

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

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

20 No matter which of the factors this  
21 Court looks at from its previous decisions, this  
22 is major. This is new power. There are 70-plus  
23 regulations under 111(b) that have not used this  
24 interpretation of the statute. The only example  
25 given today is the clean air mercury rule, but

1 there, in the Federal Register, EPA was very  
2 clear that the actual emission limitation was  
3 based on physical and chemical carbon capture  
4 technologies.

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

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

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel. The case is submitted.

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

24

25

## Official - Subject to Final Review

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