Greetings, Legal Planet readers! As many of you know, I left the UCLA Law community several months ago for a new position in the environmental law world. But today, I emerge from blog-retirement for one very special post: insights from Tuesday's **oral arguments in the D.C. Circuit Court of Appeals over EPA's Clean Power Plan**.

A full audio recording of the oral argument is posted on the D.C. Circuit's website. I warn you, however, that it is like listening to talk radio inside of a soup can.

I have blogged extensively about the Clean Power Plan (CPP) here on Legal Planet, and you can read my introductions to the rule and the ensuing litigation in the archives. I was also the lead drafter of the Grid Experts Amicus Brief in this case, working together with the Emmett Institute's Cara Horowitz, Sarah Duffy, and Ann Carlson, and Colorado Law's William Boyd. It was my immense privilege to attend this epic hearing and see the rule finally get its day in court.

Waiting in line for the court doors to open, circa 5:00 AM.

Be forewarned that the oral argument was *extremely long*, and thus, so is this blog. Those who are not climate law wonks should take heed! But if you make it through, you just may be able to skip the soup can radio. With that, let's dig in.

Setting the Scene

Yesterday was, for many, a culmination of years of advocacy, analysis, and preparation. ***West Virginia et al. v. EPA* (D.C. Cir. No. 15-1363)** is the biggest environmental law case in U.S. history in terms of the volume of parties, and also one of the most significant climate change cases of all time. You could immediately feel in the mood of the courtroom that stakes were high. Everyone brought her A-game.

Parties had a limited number of reserved seats in the en banc courtroom and/or an overflow room with a live video feed. Most attendees—including yours truly—had to line up outside the courthouse in the wee morning hours for a chance at a seat. (I know I am delayed in posting this blog, but please take pity—my alarm went off at 2:45 AM Tuesday morning.)

Vehicles plastered with anti-Clean Power Plan propaganda circled the courthouse.

The scene was the environmental law equivalent of queuing for rock concert tickets. Friends greeted old friends who had flown in from across the country. We had tailgating chairs and snacks. It was raining, so we had rain pants, umbrellas, and galoshes over our suits.

Vehicles plastered with pictures of a burning U.S. Constitution circled the courthouse. Some lawyers paid for professional "line standers" to wait in line for them. The manager of the line-standing service played fast and loose with the court's rule of "one line stander per attendee," which drew the ire of others in line as well as court security guards. It was complete mishegoss.

The spectacle outside the courtroom doors was no match for the performance within, however. An *en banc* court of ten of the eleven active D.C. Circuit judges (6 appointed by Democrats: Judges Wilkins, Millett, Rogers, Tatel, Srinivasan, and Pillard; and 4 appointed by Republicans: Presiding Judge Henderson, and Judges Kavanaugh, Brown, and Griffith) heard an epic round of oral arguments that lasted more than 7 hours (a typical oral argument is 1 hour or less!). The court was extraordinarily well prepared. And the questions were many and very engaged (with the mysterious exception of the ever-silent Judge Wilkins).

Clean Power Plan supporters battle the rain, circa 4:00 AM.

I felt like I was attending an all-day master class on oral advocacy. All arguments were top notch, sophisticated, and extremely well prepared. And, even as the hours wore on, the judges and advocates continued to give it their all. The audience hung on every word. I cannot overstate how singular this hearing was.

Overall, I left the court feeling positive about EPA's chances of prevailing. It was a good day for EPA. The longer the argument went on, the more EPA rose to the top. Of course, just because a Judge asks a particular question does not say anything about her leanings or view about the issue. One should take any oral argument analysis with heaps of salt; but signs point to a better-than-anticipated, very positive outcome for Respondents.

Oral argument was broken down into five consecutive segments: **1)** Generation shifting and state authority; **2)** The threshold question whether Section 112 toxics regulation means section 111(d) carbon dioxide regulation is precluded; **3)** Constitutional issues; **4)** Notice issues; and **5)** Record-based issues. I summarize each in turn below, focusing primarily on the first segment, which was the heart of the hearing, and I believe may be, for the court, EPA's biggest hurdle.

1. **Statutory Issues: *Generation Shifting and State Authority***

This segment was the longest and most intense of the day, lasting several hours—far longer than originally scheduled, because the judges had many questions. **Elbert Lin, the Solicitor General of West Virginia, kicked it off for State Petitioners. He was followed by the always impressive Peter Keisler for Non-State Petitioners.** Lin was good—hearing his reputation, I had expected an even more spectacular performance, but he was nonetheless solid. Keisler was as formidable as ever; but even still, I do not think Petitioners carried the day.

Lin opened with familiar critiques of the rule: the rule stems from a "little used provision"; it is not really about improving performance but rather the creation of a new energy economy. For these reasons, the rule triggers the major questions doctrine of *UARG v. EPA* and *FDA v. Brown & Williamson Tobacco Corp.*, and should be invalidated as an unreasonable interpretation under *Chevron* Step 2. As the Supreme Court found in *UARG*:

> EPA's interpretation [of the Clean Air Act] is . . . unreasonable because it would bring about **an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.** When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," *Brown & Williamson*, 529 U.S., at 159, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance." *Id.*, at 160.

Questions from Judges Griffith, Tatel, Pillard, and Srinivasan began to flow early. Judge Griffith questioned whether the rule is truly "transformative"—necessitating a higher standard of scrutiny by the court—given that coal is already being replaced by cheaper, lower-carbon resources. He opined that the "best system of emission reduction" (BSER) standard is very broad, and equated the term "system" with the interconnected electric grid network—without any need for argument on this point from EPA! Judge Griffith noted that EPA selected a regulatory option that made emission reductions easier and cheaper.

Indeed, it quickly became clear that the whole *en banc* court understood and accepted the key concept of the regional electric grids as integrated machines, where generation shifting and least-cost dispatch are business as usual. Judge Rogers even went so far as to praise our Grid Experts Brief several times for describing so well how the electricity system and the rule works. For me, this was a very proud moment and personal professional highlight! But more importantly, it signaled that the *en banc* court had taken the time to fully prepare and really understand the complex functioning of the electric sector and the mechanics of the rule, which is key to understanding why EPA elected to incorporate generation shifting into the rule.

Judges Tatel, Millet, Srinivasan, and Pillard at least seemed willing to grant EPA traditional *Chevron* deference. Even still, these judges took a hard look at the statutory issues.

Judge Tatel proposed that the rule follows longstanding EPA practice of setting pollution performance standards, and that the only "transformative" difference between historical standards and the CPP is regulation of GHGs, which *Massachusetts v. EPA* has already settled as appropriate for the Clean Air Act (CAA).

Judge Millett agreed, positioning the rule, and its employment of generation shifting, as directly within EPA's longstanding CAA authority to adopt technology-forcing regulations. She continued to revive this idea throughout the hearing.

Judge Pillard came right out and stated that this case does not seem like *UARG* or *Brown & Williamson*. Period.

Judge Srinivasan dug right to the heart of the discrete question before the court—skirting Petitioners' attempts throughout this case to erode *Massachusetts* and *AEP v. Connecticut*, which confirm EPA's authority to regulate power-plant GHGs under the CAA. Taking it as a given that EPA does have that authority, Judge Srinivasan characterized the question before the court as whether EPA made a permissible choice regarding how to regulate GHGs—i.e., incorporating generation shifting into the rule. Overall, Judge Srinivasan was very engaged

and sophisticated in his questioning.

This is just an inference from reading the faces of the folks sitting near to me, but I do not think Petitioners expected the *en banc* court would respond quite this way, and so readily.

Keisler hammered at the point that the CPP forces fossil-fuel-fired power plant owners to subsidize their competitors (i.e., wind and solar generators). He argued that the rule is impermissible under *Chevron* Step 1 because the statute does not give EPA authority to compel a plant owner to invest in non-regulated entities such as wind farms. He emphasized that "owner" and "source" are distinct statutory terms, and that EPA unlawfully equates them in the rule. An owner's activity is explicitly limited to operation of the source, per CAA section 111(e) ("[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.") Keisler proclaimed that upholding the rule would permit EPA to direct industrial policy in this country, which he decried as outside the permissible boundaries of CAA section 111(d).

The judges dug in. Judge Kavanaugh was sympathetic to Keisler. In contrast, Judge Pillard did not seem sold at all. She asked whether Keisler had anything stronger because "that's hanging a lot on section 111(e)."

Judge Millett pushed back hard on the idea that the rule forces regulated entities to subsidize their competitors. She drew a parallel to regulations requiring scrubbers: don't such rules require plants to subsidize the scrubber industry? Don't *all* pollution-control regulations inherently require some form of subsidy? She questioned Keisler's characterization of "source," too. Is the source the technology inside the structure, or the structure itself? Are the source's "operations" the production of electricity, or the burning of coal? She also emphasized that sources can meet their emission-reduction standard by fuel switching or co-firing rather than subsidizing a competitor. (It is a positive sign for EPA that the *en banc* court understood this aspect of the rule.)

Judge Tatel picked up a hypothetical from our Grid Experts' Amicus Brief, asking whether EPA could permissibly have modeled and set standards based on how many solar panels could fit on the roof of a coal-fired power plant—emphasizing that in this hypo, investments are confined to the "source" itself. Keisler countered that co-located renewables are not integrated meaningfully into the source, and are therefore not part of the "source"—and indeed, never could be a "source" because they do not emit pollutants. Judge Tatel rightfully refocused, however, on the reality that the regional electricity grids are integrated machines incorporating all generators. In that context, it makes no sense to confine regulations only to measures that can be applied within the fenceline of a facility.

Judge Srinivasan then brought up emission trading and averaging: wouldn't it be anomalous if states could comply by trading/averaging across sources, but EPA could not consider trading/averaging in developing its standard? This was a theme that members of the *en banc* court returned to throughout the day, and Judge Srinivasan's question was a good sign for EPA. Keisler had a tough line to walk here, given that some of his clients believe that trading/averaging should be allowed for compliance while other clients reject any incorporation of trading/averaging into either rule design or compliance. Keisler made it clear that all Petitioners agree the rule cannot require investment in other facilities. He got a bit bungled by follow-up questions from Judge Millett, who asked whether other sections of the CAA that explicitly allow trading, such as section 110 and title IV, include text distinguishing "source" and "owner." Keisler's answer struck me as unsatisfactory and stretched: he proposed that trading can only be effectuated by an owner, so Congress "necessarily contemplated" owners' participation in the trading schemes it established. This reading contrasts starkly with Petitioner's textual readings of section 111.

Judge Tatel left EPA with the strongest supporting statement of the morning: isn't "BSER" here like the term "pollutant" in *Massachusetts*, broad and capacious? Isn't reading generation shifting into the statute necessary to keep the CAA up-to-date and ensure the statute evolves to adapt to GHGs, as Congress intended? It was a great sign for EPA that at least some of the judges had internalized this line of argumentation.

Overall, although Keisler tried to focus the *en banc* court on the intricate legal distinction between "source" and "owner," the judges kept zooming back out to big-picture policy issues and commonsense arguments, offering hope that this case will follow in the footsteps of *EPA v. EME Homer City Generation* and *Massachusetts*. Indeed, throughout the day, policy questions were a primary focus of the *en banc* court.

While I understand that West Virginia feels a particular ownership over this case, I would have put Keisler first—both for a stronger opening advocate and because it would have made for a better flow of issues for the court (from *Chevron* Step 1 to Step 2). But I suspect Petitioners reasoned that the major questions doctrine is their strongest claim and wanted it aired first.

And I think they are right, as evidenced by the *en banc* court's engagement with counsel for respondents: **Eric Hostetler for EPA,** California's own **Kevin Poloncarz for power company intervenors,** and **Michael Myers of the New York Attorney General's Office for state intervenors**.

Hostetler swiftly covered his key talking points in support of the reasonableness of the

rule: it is readily achievable, cost-effective, and draws on procedures industry has already been using for years. The rule is completely suited to an industry that operates as an integrated machine and to a ubiquitous, globalized air pollutant.

Judge Kavanaugh was Hostetler's toughest questioner, and apparently also the most likely to conclude that the rule triggers the major questions canon. Interestingly, Judge Kavanaugh described the major questions canon as "deeply rooted in decades of caselaw," which seems rather an overstatement given the doctrine's modern emergence and the rarity of agency failure at *Chevron* Step 2. (In support of his proposition, Judge Kavanaugh gave shout-outs to post-*UARG* law review articles by Professors Freeman, Lazarus, and Heinzerling.) Judge Kavanaugh even read the above-quoted excerpt from *UARG* verbatim, opining that the Supreme Court's description "sounds exactly like this case." He described this as a "huge case" with "national and international" implications, and said it was "hard to swallow" that this case is somehow not "economically significant."

Judge Brown then brought up the unfortunate quote from EPA Administrator Gina McCarthy describing the rule as "transformative." This was an oops for McCarthy, and a cautionary tale for us all, but it hardly waylaid the oral argument.

By contrast, Judge Tatel wondered if the rule could be "transformative" if it only causes a small decline in coal use beyond business-as-usual projections. He suggested that while many regulations have economic impacts, what is potentially "transformative" here is EPA's chosen technique—generation shifting—which lacks explicit congressional approval. This seems to be where the majority of the *en banc* court ultimately landed by the end of argument: if the rule is found to be "transformative," it will be because generation shifting is transformative—not because the rule will have massive, sweeping economic impacts. The *en banc* court as a whole simply did not seem interested to dig into the economic impacts of the rule, and they did not bite on Petitioner's argument that a power-hungry EPA has run amuck.

In response, Hostetler clarified that the major questions canon is a thin exception to the default *Chevron* deference rule, and he distinguished the broad *UARG* language from the circumstances in this case. Here, the rule is incremental, costs are comparable to past rules (e.g., MATS), and this is far from the first instance in which the agency has taken advantage of generation shifting to reduce pollutants (*see, e.g.*, the Transport Rule). Unlike in *UARG*, EPA's jurisdiction under the CPP is not expanding to new, previously unregulated sources; the CPP regulates a traditional source category (power plants) that EPA has long regulated under the CAA. Hostetler was most persuasive when he built upon Srinivasan's earlier questioning by emphasizing that EPA took its cues from what is going on in the real

world—actions power companies are actually taking on-the-ground to reduce emissions and accelerated trends that are already underway in the power sector.

Judges Kavanaugh and Griffith expanded upon their separation of powers concerns. Shouldn't Congress be making big policy decisions about how to address climate pollution, rather than unelected judges? Isn't it important to recognize that Congress is not settled on how to respond to climate change? Judge Kavanaugh emphasized that he was sympathetic to frustrations with Congressional inaction, and understood the gravity of climate change and the challenges of collective action (note the progress here!). But he expressed his view that only Congress has the ability to adopt a holistic climate policy that could include responsive measures for people whose livelihoods would be adversely impacted by the transition to clean energy, such as coal miners. Unlike Congress, EPA focuses single-mindedly on pollution control.

Hostetler countered that the rule comports with every statutory element of "standard of performance" and "BSER." Under the rule, regulated industry will continue to produce the very same product: electricity. In his words, "Petitioners' argument is based on the fiction that each source is a hermetically sealed island." This response was powerful, but perhaps not enough to calm those with separation of powers concerns. Which narrative the court ultimately prefers will be important: is EPA implementing the will of Congress in applying 111(d) sensibly, as the statutory elements dictate, and in accordance with *Massachusetts*, or did EPA resort to utilizing the ill-fitting section 111(d) as a "Plan B" because Congress failed to take comprehensive climate action? The former evades the major questions canon; the latter seems to court to canon. But even in the latter case, the court would still have to find that the rule is "transformative," and the court responded with reluctance to Petitioner's argument that generation shifting is routine as a practical matter yet transformative as a legal matter in the context of section 111(d).

Judges Millett and Srinivasan called upon Hostetler to respond to Keisler's argument that the rule requires sources to invest in competitors. (Judge Millett seems particularly concerned about this aspect of the rule.) Hostetler responded quite effectively that sources can meet the standard on site (e.g., with co-firing or carbon capture technology), that the industry is already deeply cross-invested in multiple forms of generation, and that "we have already crossed the bridge decades ago" in determining that an emission control system need not be within a facility's fenceline. He referenced numerous trading/averaging schemes that are commonplace under the CAA.

Judge Kavanaugh asked whether EPA could set the limit for coal-fired generation at zero, and Hostetler articulated six statutory constraints on EPA's authority that would bar such

an outcome (e.g., measures must be "adequately demonstrated," and EPA must take costs and energy requirements into account). Hostetler responded quite effectively, in my opinion.

There was a brief reference to CAA section 115. In a moment that drew literal gasps from the audience, Judge Brown asked why, assuming a clear statement from Congress is needed to regulate GHGs under 111(d), EPA couldn't regulate existing power plants under section 115 instead? Hostetler responded that he would not speculate regarding section 115, since *AEP* clarified that section 111 applies to existing power plants. Was Judge Brown signaling that she seeks a way to apply the major questions canon while also ensuring that existing power plant GHGs are nonetheless regulated under the CAA somehow, in accordance with the intent of *Massachusetts* and *AEP*? It is difficult to tell where Judge Brown lands, but she did also later propose that *Massachusetts* and *AEP* render congressional inaction and the major questions canon irrelevant to deciding this case. This framing left an opening for EPA, and Hostetler seized it. He noted that Petitioners' preferred outcome—a rule based on Building Block 1 alone—"would make a mockery of *Massachusetts*" because it would not result in meaningful emission reductions. The core pollution-reduction objective of the CAA is consistent with EPA's rule—not Petitioners' interpretation.

Poloncarz was extraordinarily effective in speaking on behalf of power companies in support of the rule. He drove home the point that generation shifting is "business as usual." Also, what business is doing in the real world is entirely relevant to EPA's rule—it is "the heart" of determining BSER, and EPA should not "live in a make-believe world" by pretending not to recognize that generation shifting is how industry would comply. What Petitioners call a subsidy, he reframed as simply how the grid operates according to principles of constrained least-cost dispatch. It was clear that testimony about the achievability of the rule from regulated companies themselves was incredibly persuasive to the full *en banc* court. The judges continued to refer back to Poloncarz's testimony throughout the day. I think Polonzarz's dynamic performance, and the *en banc* court's reception of it, was one of the highlights of the day for EPA–making it all the more impressive that this was his D.C. Circuit debut!

Myers also did a very nice job, as he always does, of explaining how the rule gives flexibility to states and builds upon successful state programs.

Lin's rebuttal questioning offered some insight into the judges' state-of-mind. Judge Millett stated she was confident that regulation of GHGs from existing sources as a general matter does not trigger the major questions canon, as this was settled by *Massachusetts* and *AEP*. Therefore, the only question remaining is whether generation shifting triggers the canon? Lin responded—I think, unsatisfyingly—that it is states' prerogative to determine their

energy mix ("energy mix is an area of traditional state authority"), so any rule that effects any change in energy mix de facto triggers the canon. Judges Millett and Tatel pushed back on this, noting again that generation shifting is both a routine function of the grid and the inevitable response of the system to pollution controls. Again, some of the judges were skeptical about how generation shifting could be routine in daily practice, and common in many existing regulatory programs, yet "transformative" as a tool to reduce to GHGs from existing power plants under 111(d).

During **Keisler's** rebuttal, Judge Pillard asked whether his position implies that certain sources are so dirty that they are immunized from regulation? And if so, isn't Petitioners' reading asking the public to subsidize power plants through costs to public health and welfare? Keisler's response was underwhelming: Congress simply has not given EPA the tools to deal with this pollution problem—case closed. Even though some companies are engaging in generation shifting voluntarily, that does not mean EPA has the authority to compel owners of sources to engage in generation shifting. Given the tenor of the questioning up until this point, I don't think this was an attractive resolution for the judges. Judge Pillard clearly sought a way to give effect to *Massachusetts* and *AEP*, and the pollution-reduction goals of the CAA, and Keisler's answer offered no pathway to meaningfully reduce GHG emissions from existing sources.

Overall, I think EPA won this round. How many judges are still tempted by the major questions canon remains to be seen, but I guess that it is less than five, and perhaps only Judge Kavanaugh. The Petitioners reached too far in insisting that EPA can and should ignore on-the-ground realities about the nature of electricity infrastructure and markets. Petitioners failed to provide any practical reconciliation of their position with the broad goals of the CAA and the clear intent of *Massachusetts* and *AEP.* The judges signaled they will not ignore these, indicating the *en banc* court seeks a middle path, yet Lin and Keisler did not offer a palatable solution. This is not surprising: Petitioners have no real desire for a practical solution. Indeed, they have been trying to walk back *Massachusetts* for years. Petitioners' underlying motive is to avoid regulation of GHGs from existing sources altogether—which I think the court recognized, to EPA's benefit. That is not to say, however, that Petitioners' separation of powers arguments will not still be influential. The *en banc* court made clear that it will take Supreme Court precedent very seriously.

In sum: The major doctrinal question is whether generation shifting is so "transformative"—as was the agency's course of action in *UARG*—that the Clean Power Plan requires a stricter scrutiny by the court than *Chevron* deference would otherwise require. I think Respondents were successful in both briefing and argument in communicating that generation shifting is routine practice in the sector and has a long history under the CAA.

Therefore, the rule is not "transformative," and EPA's target-setting exercise is due deference by the *en banc* court. Most of the judges signaled that they want to defer to EPA on the statutory interpretation issues. Ultimately, how comfortable the court will feel deferring to EPA will be, I think, directly correlated to how fearful they are that the rule will not be achievable and will result in the sweeping adverse impacts that Petitioners claim. On that point, as described below, Respondents did a good job of responding to record issue claims later in the day.

2. Statutory Issues: Is EPA's Section 112 MATS rule a barrier to section 111(d) regulation of carbon dioxide?

I will not spend much time on the Section 112 segment because **Lin and Allison Wood (representing non-state petitioners)** did not get much traction here. Judges Rogers, Pillard, Millett, Srinivasan, Kavanaugh, and Tatel all came at Lin with hard questioning. I think Judge Kavanaugh's opening comments summarize the tenor of the questioning well: he described Lin's argument as a "hall of mirrors" and stated that he "needed a stiff drink" after reading this section of Petitioners' brief. And later, in response to Lin's suggestion that the court should give both the House and Senate amendments "maximum effect," Judge Kavanaugh replied, "The only thing we do know for certain, though, is that Congress didn't want that." Ouch. Take a few sips for Lin.

Judge Millett described Lin's argument as a "bait-and-switch" because it would gut the rationale for *AEP* and return GHGs to the land of nuisance lawsuits, which is to no one's benefit. In her words, "the Clean Air Act is where Congress put CO_2 regulation." Period. When Judge Tatel asked Lin whether CO_2 could be regulated as a criteria pollutant, if not under section 111(d), Lin admitted that Petitioners would "raise other difficulties with that" course of action. This drew hearty chuckles from the crowd—Petitioners would vigorously oppose a NAAQS program for CO_2, as the Court well knew.

Overall, the judges struggled to find a policy rationale to support Petitioners' suggested reading. **Wood** was visibly frustrated by the court's questioning about this, and the judges grew equally frustrated with her unsatisfying answers, as well.

In contrast, **Amanda Berman of DOJ** suggested a more sensible resolution than Petitioners' "hyper-literal reading": allow EPA, the expert agency, to "devise a middle course." Her supporting rationale also seemed more persuasive: 111(d) is a core statutory program, and Congress would not have intended the massive change Petitioners suggest.

Sean Donahue (for environmental and public health intervenors) gave an excellent

follow-up defense of EPA's reading and explained clearly for the court why EPA's resolution was sensible. Congress wanted to strengthen the CAA in its 1990 amendments and would not have gutted section 111. He urged the *en banc* court to allow context to inform their reading of the plain text, summoning *UARG*. He further emphasized how this case is, in various respects, an attack on the core principles outlined in *Massachusetts*—a theme that many judges picked up and echoed throughout the day. Carbon dioxide is special, and does not fit into other CAA pollutant categories, which is why it the fail-safe section 111(d) is so important. He got few or no questions from the panel, which I took as a very good sign.

In sum: Petitioners' claims that EPA's section 112 MATS rule bars later section 111(d) carbon dioxide regulation seemed to get little traction. The majority of the *en banc* court actively sided with EPA's interpretation.

3. Constitutional Issues

The *en banc* court seemed equally uninspired by Petitioners' Constitutional arguments. **David Rivkin, Jr. argued for state petitioners** and Harvard Law School's eminent Constitutional Law expert **Professor Laurence Tribe argued for non-state petitioners**.

Rivkin characterized the rule as leaving states "no choice at all but to implement the federal policy of generation shifting, which EPA cannot implement on its own." He argued that a federal mandate asking states to "dismantle and replace some portion of their energy mix" is unconstitutional commandeering of state authority.

Judges Tatel and Millett went after Rivkin on this, with Judge Tatel asking how this Clean Air Act rule is different from the rules implementing the Americans with Disabilities Act (ADA), which requires states to approve zoning changes and building permits in order for private parties to meet compliance requirements. Rivkin's answers were unsatisfactory. He tried to demonstrate, erroneously, that "each state plans its own grid," but the judges came after him directly with facts about the regional functioning of the grid, noting that power flows freely across state boundaries.

Professor Tribe seemed to be batting clean up. His argument seemed muddled and scattered, without clear focus or direction. His main point was that "states have only a theoretical choice. If they don't comply [with the rule], they'll be worse off." Through their questioning, the judges all once again seemed to be seeking solutions for how to reconcile this argument with *AEP* and *Massachusetts*, and Tribe failed to provide a practical answer. The *en banc* court clearly enjoyed hearing from Tribe and gave him great respect and attention; but I do not think Tribe was successful in persuading them of his legal argument.

DOJ's Berman was electric, in striking contrast to Tribe's more academic style of argument. She framed the rule as "permissible cooperative federalism." Under the CPP, states have a classic, cooperative-federalism choice: develop a state implementation plan or EPA will impose a federal plan that places emission-reduction burdens directly on regulated sources. There are no penalties if a federal plan is imposed. Siting and permitting decisions related to plan implementation would not be beyond the norm. She clarified that states are but one actor in regulating the energy sector; FERC, the Department of Energy, ISOs/RTOs, and other entities play key roles in regulating the complex functioning of the electricity grid. She argued that Petitioners' overbroad constitutional arguments "would take down much of the Clean Air Act."

Judges Kavanaugh and Millet raised the possibility of adverse reliability impacts associated with the rule and federal plan, but Berman dismissed those fears as having no basis in the record. She strongly positioned EPA as the expert agency: under the clear terms of the CAA, "EPA decides how to regulate this source category for this pollutant."

In sum: I do not foresee Petitioners' constitutional claims (apart from the major questions canon) having success. DOJ's briefing and oral advocacy carried the day here.

4. Notice Issues

The notice segment of the argument was, again, not a win for Petitioners. **Tom Lorenzen** surprised the court by focusing on an un-briefed argument. He asked the *en banc* court to reverse decades of D.C. Circuit precedent regarding notice requirements under CAA section 307(d)(7)(B), which reads:

> If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise [an] objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment . . . and if such objection is of central relevance to the outcome of the rule, [EPA] shall convene a proceeding for reconsideration of the rule . . . . If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals . . .

Historically, the court has required notice claims to be first raised in a petition for agency reconsideration. If the agency denies that petition, petitioners can seek judicial review of EPA's denial. Lorenzen proposed that "it makes no sense to consider notice issues in a

petition for reconsideration . . . . Failure of notice is not procedure; it's the complete absence of procedure." He argued that the final Clean Power Plan diverged significantly from the proposed rule in that subcategory emission reduction rates for coal and gas were not a logical outgrowth of the proposal. Lorenzen suggested that the judges should rule on the notice issue even though EPA has not yet rendered a decision on Petitioners' petitions for reconsideration. The policy rationale for his argument was that notice issues necessarily will occur after the fact; therefore, requiring a petition for reconsideration allows EPA to shield rules that have never been proposed from challenge until its too late to dismantle them.

Lorenzen is a masterful oral advocate, but the judges seemed turned off by the idea that they should reverse circuit precedent. In the words of Judge Rogers, "Yes, *en banc* we have authority to overrule our precedent, but why should we? Aren't you a little premature?"

Norman Rave (DOJ) was superb in responding to his former DOJ colleague. Not only are petitions for reconsideration of this issue still pending with EPA but also Petitioners have failed to meet their burden to show that the rule would be substantially changed but for the claimed procedural inadequacy. Rave showed that Petitioners' comments on the proposed rule and Notice of Data Availability demonstrated they knew exactly the direction EPA's final rule was heading in. Indeed, the complained-of changes in the final rule were directly responsive to commenters' concerns about unbalanced state targets in the proposal, which disadvantaged early-actor states. According to Rave, "Petitioners have not identified a single piece of data that they were unable to provide and that would result in a changed rule."

The judges did not seem bothered that EPA had yet to rule on the petitions for reconsideration or that the longstanding practice of requiring petitions disadvantaged the public. They were simply not interested in overruling their precedent.

John Campbell Barker's rebuttal for state petitioners raised the futility doctrine, arguing that EPA's statements here explained exactly what it thinks about the petitions for reconsideration, and therefore, the petition process is futile. Judge Millett countered that Petitioners did not know EPA's position when they filed their lawsuit, and therefore had no basis for a futility claim. Bingo! In any case, she pointed out that there is not a substantial likelihood the rule would change.

In sum: Lorenzen's argument was a long shot, and the questioning judges indicated that they are not interested in overruling precedent. I suspect the outcome of the court's decision will be to direct Petitioners to raise notice issues later, following EPA's decision on

their petitions for reconsideration. This segment seems like the most likely victory for EPA.

5. Record-Based Issues

Last but not least, the final hour of oral argument addressed record-based issues. **F. William Brownell (for non-state Petitioners)** and **Misha Tseytlin, the Solicitor General of Wisconsin (for state Petitioners)** attempted to explain to the court that EPA has failed to "adequately demonstrate" that its rule is "achievable" because EPA did not prove that sufficient trading markets will develop for emission rate credits.

It was hard to tell how the *en banc* court actually feels about the strength of Petitioners' record-based claims because the judges were clearly tired by this point in the day. Questioning was not as energetic as in the morning sessions. That said, the questions that were asked revealed, I think, that the majority of the *en banc* court sides with EPA as the expert agency.

Judge Kavanaugh noted it is the nature of the administrative state to develop new programs, the outcome of which cannot be perfectly predicted. He also pointed to the CAA statutory language, which says that it is up to "the administrator's determination" whether a system is "adequately demonstrated." Judge Millet remarked that EPA "didn't pull this [rule] out of thin air," but rather based its projections on trends already underway. And Judge Rogers emphasized that it is "too early in the game," in advance of the development of any state implementation plans, to address state-specific objections. Down the road, if a particular state cannot comply for whatever reason, the state Petitioners should raise that problem to the court.

Tseytlin oddly chose to focus on an eleventh hour Rule 28(j) letter that Petitioners filed just days before the argument. The letter cited California state regulations that limit California's cap-and-trade program linkages only to other states with similarly stringent emission requirements. Petitioners claimed that EPA has not shown that states can meet CPP emission targets within their borders, and that EPA has not shown that trading programs will develop. The heart of Tseytlin's argument was that because states are not required to trade with one another, EPA cannot guarantee that they will do so.

The judges noticeably hesitated to wade into the technical complexities of Petitioner's argument. Judge Rogers pointed out that California filed a responsive letter explaining that Petitioners are wrong. She asked, isn't it too early for us to be wading into this? Can't EPA just proceed based on this letter from California? She also suggested that Tseytlin was positing facts outside the record.

In general, the court seemed less concerned about technical back-and-forth and most concerned about whether, if there is in fact some problem down the road, there are outlets for states and EPA to manage and resolve those problems. **Rave** and **Brian Lynk (DOJ)** reassured the court that the rule is based on sensible measures that are already in operation in the power sector. In other words, the sky is not falling. There are opportunities for states to appeal to EPA if they have problems with compliance, including through a robust state planning process. Rave and Lynk further emphasized that states have a great many available compliance measures that could enable them to meet targets even without trading (e.g., demand response, energy efficiency, carbon capture, distributed renewable generation, and repowering).

In general, Rave and Lynk underscored that EPA has discretion to make reasonable policy choices. EPA does not have to persuade or prove anything to Petitioners so long as EPA's exercise of discretion was reasonable. In terms of trading, every time EPA has set up a trading system, it has worked. And California's cap-and-trade program and RGGI are examples of successful trading programs for carbon. Rave noted that state and industry commenters overwhelmingly asked for trading to be incorporated into the final rule.

Poloncarz doubled-down on Rave's and Lynk's arguments with powerful statements emphasizing the rule's achievability. He stated that his clients operate in 20 states, and manage the largest natural gas fleet in the country, and the final rule is "exactly what we asked for." Poloncarz further explained that trading has "universal support in the power sector," and that EPA's Building Block projections were highly conservative.

In sum: the technical details and concerns raised by Petitioners were not very attractive to the court. The *en banc* court did not seem willing to dig into issues that fall within EPA's technical expertise and discretion—beyond ensuring, in basic terms, that the rule will not cause some kind of energy sector meltdown. I think EPA demonstrated adequately that there are mechanisms to adjust requirements should circumstances change down the road.

In Conclusion

Yesterday's oral argument was extraordinary. It was an incredible privilege to participate in this case and to watch the judges and advocates at work in the courtroom.

Of course, no one should read too much into a particular judge's questions—I cannot emphasize this enough. But it did seem to me from the questions the judges asked that a majority of the *en banc* court is in EPA's camp, at least on the major issues. The big question the judges are left to grapple with is whether incorporating generation shifting into the

rule's design is so "transformative" as to require a clear statement from Congress.

I think EPA wins here, but it is, of course, impossible to know how the court will decide this case. There could be multiple strong opinions accompanying the ruling.

As Presiding Judge Henderson noted in her closing, the *en banc* court has more than enough information to work with in coming to a decision. Both sides have done all they can do. The case is completely in the D.C. Circuit's capable hands.

And now, we wait.

The opinions expressed herein are the author's own and do not reflect the views of any organization. All quotes are approximate and based on handwritten notes taken in the court in advance of the release of the official transcript.