

infrastructure

Vol. 61, No. 1, Fall 2021

The ACE Rule and the Chevron Doctrine

By Robert L. Brubaker and Eric B. Gallon

This is the most recent in a series of articles that we have written regarding the Clean Power Plan, which the Environmental Protection Agency (EPA) issued in October 2015. In our first article, *Part One: The Clean Power Plan: Legal Challenges and Prospects* (“Part One”), published in the Fall 2016 issue of *Infrastructure*, we analyzed the legal challenges to the plan.¹ In the second article, *Part Two: The Clean Power Plan: Legal Challenges and Prospects* (“Part Two”), published in the Winter 2017 issue of *Infrastructure*, we analyzed the prospects of the plan in light of the election of Donald J. Trump, including the possible legal paths available to the new administration (and its opponents) to roll back (or preserve) the Clean Power Plan.² This article examines the appellate challenge to the Trump Administration’s replacement of the Clean Power Plan with the Affordable Clean Energy (ACE) Rule.



Brubaker



Gallon

Robert L. Brubaker (rbrubaker@porterwright.com), counsel to the firm of Porter Wright Morris & Arthur LLP, specializes in environmental law and the Clean Air Act. He is also general counsel to the Ohio Chemistry Technology Council and a past chair of the ABA Infrastructure and Regulated Industries Section. Eric B. Gallon (egallon@porterwright.com), a partner at Porter Wright Morris & Arthur LLP, focuses on complex business and corporate litigation dealing with energy law, environmental law, and complex commercial disputes.



Image © twilightproductions via Getty Images

When the inevitable appeals were filed challenging the Obama Administration’s greenhouse gas emission rules for existing power plants (the Clean Power Plan³)—with major industry groups, environmental advocacy groups, almost all the states, members of Congress, and many amicus participants lined up for and against the rules—we anticipated an eventual Supreme Court showdown on the doctrine of deference that has evolved since the landmark 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁴ The first-ever Supreme Court stay⁵ of a rule that the D.C. Circuit refused to stay⁶ convinced us that the case was destined for Supreme Court review.

The Clean Power Plan had all of the ingredients to test the outer limits of *Chevron* deference. It was one

INSIDE: Bold, Not Burdensome, Regulations Can Stimulate Investment in Broadband Infrastructure to Close the Digital Divide . . . Page 3



of the most costly and far-reaching rules promulgated in the 45-year history of the Clean Air Act. It promised to transform the nation's electricity sector.⁷ It rested on the interpretation of a single word, “system,” in section 111(d) of the Clean Air Act,⁸ an obscure section used only a handful of times and only in the relatively distant past, with very limited scope. For the first time, EPA interpreted section 111(d) to authorize changes in an entire industry, as opposed to regulating individual emission sources. For the first time, it imposed requirements that could only be met by curtailing production at certain types of stationary sources (coal-fired power plants) and replacing it with production from different sources (mostly new natural-gas-fired electric generating units, but also new wind, solar, and other renewable sources)—a process known as *generation shifting*. Those requirements mandated changes in the generation mix that were previously thought to be within the exclusive jurisdiction of state public utilities commissions or the market. Most importantly to its proponents, the Clean Power Plan addressed what they considered the most important environmental threat to the nation and world. And it came in the wake of three Supreme Court decisions on the applicability of the Clean Air Act to greenhouse gases: *Massachusetts v. EPA*, which held that greenhouse gases come within the “capacious” Clean Air Act definition of “air pollutant”;⁹ *American Electric Power Co. v. Connecticut*, which held that the Clean Air Act displaced litigation over greenhouse gas abatement under federal common law;¹⁰ and *UARG v. EPA*, which held that greenhouse gases could not, by themselves, trigger the applicability of rigorous Clean Air Act permitting requirements for major new sources and major modifications.¹¹

How could the stakes be higher and the consequences of deference be more impactful? A blockbuster Supreme Court case seemed certain. But then—it didn't happen.

In *Part One* of our series, we analyzed the issues briefed in the appeal of the Clean Power Plan before the D.C. Circuit, and the expedited en banc oral arguments in that case, which lasted almost seven hours.¹² Then a Republican president was elected. President Donald Trump issued an executive order directing EPA to review and, “if appropriate, . . . publish for notice

and comment proposed rules suspending, revising, or rescinding” the Clean Power Plan;¹³ his administration then obtained a postponement of judicial deliberations on the Clean Power Plan while it reviewed those rules. Subsequently—as we suggested it might do in *Part Two* of our series—the Trump Administration repealed the Clean Power Plan. The Trump EPA replaced it with the ACE Rule,¹⁴ which reinterpreted section 111(d) of the Clean Air Act and required efficiency improvements at individual generating units rather than generation shifting. Not surprisingly, the ACE Rule was not expected to force anywhere near the level of greenhouse gas emission reductions as the Clean Power Plan's mandates.

Most of the parties in the Clean Power Plan appeals showed up in the appeals of the ACE Rule. The three judges hearing oral argument in the latter appeals had sat for oral argument in the earlier appeals. And after a nine-hour oral argument,¹⁵ on January 2021, the D.C. Circuit in *American Lung Association v. EPA* vacated and remanded the ACE Rule, with a partial dissent.¹⁶

As a result, the effort to mandate reductions in greenhouse gas emissions from existing power plants is back where it started, with some direct guidance from a divided D.C. Circuit panel but no direct guidance from the Supreme Court. A landmark pronouncement on administrative deference in the context of Clean Air Act climate change regulation is likely postponed and may never happen (though petitions for a writ of certiorari from the D.C. Circuit ruling are, as of mid-September 2021, still pending in the Supreme Court).¹⁷

Below, we analyze the D.C. Circuit's decision and offer some comments on the intersection of

administrative law and the Clean Air Act in the context of climate change regulation. But first, we begin with a review of the doctrine of *Chevron* deference, which provides the general framework for appellate courts' review of agencies' interpretations of their governing statutes.

An Overview of *Chevron* Deference

***Chevron* Steps One and Two**

The Clean Air Act has had an outsized impact on the development of administrative law over the past 50 years, and its most significant impact by far has been the doctrine of administrative deference articulated by the

The effort to mandate reductions in greenhouse gas emissions from existing power plants is back where it started.



Supreme Court's 1984 *Chevron*¹⁸ decision. The *Chevron* doctrine sets forth a two-step test.

Under Step One, the court asks “whether Congress has directly spoken to the precise question at issue.”¹⁹ If Congress has unambiguously addressed the point in question in the applicable statutory framework, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”²⁰ And for Step One, the court must “employ[] traditional tools of statutory construction” to determine whether “Congress had an intention on the precise question at issue”²¹

If the court concludes the statute is ambiguous, the court must move to Step Two, which asks whether the agency's interpretation “is based on a permissible construction of the statute.”²² If the agency's interpretation of the statute is not “arbitrary, capricious, or manifestly contrary to the statute[.]” the court must defer to that interpretation and not substitute its own interpretation.²³ The court explained that deference is a matter of conceding to the branch of government with both expertise and political authority:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. . . . When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.²⁴

Of course, *Chevron* Step Two has not always translated into acceptance of EPA's interpretations of the Clean Air Act. In *Michigan v. EPA*, for example, the Court held that EPA could not disregard the cost of regulating hazardous air pollutant emissions from power plants when determining whether such regulation would be “appropriate and necessary” under section 112(n)(1)

(A) of the Act.²⁵ “Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate[.]” the majority opinion by Justice Scalia held, so EPA's decision to ignore cost was “unreasonable” and not entitled to *Chevron* Step Two deference.²⁶

Chevron Step Zero?

In a 2006 law review article, Professor Cass Sunstein discussed case trends suggesting the existence of a separate category where *Chevron* deference may not apply: *Chevron* Step Zero.²⁷ Sunstein identified two lines of cases in that category.

The first line of cases involves statutory interpretations where “agencies have not exercised delegated power to act with the force of law” or “[w]hen an agency's decision [does not] have the force of law [and/or does not] result[] from some kind of formal process,” such as “notice-and-comment rulemaking or formal adjudication.”²⁸ To pick a recent example, in *Smith v. Berrybill*, the Court noted that *Chevron* deference would not apply when determining whether the Social Security Administration's Appeals Council's dismissal of a claim constituted a “final decision” subject to judicial review because “[t]he scope of judicial review . . . is hardly the kind of question that the Court presumes that Congress implicitly delegated to an agency.”²⁹ And in *Encino Motorcars, LLC v. Navarro*, the Court noted that “*Chevron* deference is not warranted where the regulation is ‘procedurally defective’—that is, where the agency errs by failing to follow the correct procedures in issuing the regulation”—and “a proper challenge is raised to the agency procedures”³⁰

The second line of cases are “major question” cases, i.e., cases where “a fundamental issue is involved, one that goes to the heart of the regulatory scheme at issue.”³¹ In *FDA v. Brown & Williamson Tobacco Corp.*, for example, the Supreme Court explained that:

Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.³²

Chevron Step Two has not always translated into acceptance of EPA's interpretations of the Clean Air Act.



The Court has applied this doctrine in at least two Clean Air Act cases. In *Whitman v. American Trucking Associations*, the majority opinion rejected the proposition that section 109(b)(1) allows EPA to consider cost when setting primary national ambient air quality standards. The statute instructs EPA to “prescribe[]” such standards at levels “which in the judgment of the Administrator, . . . allowing an adequate margin of safety, are requisite to protect the public health.”³³ Justice Scalia’s majority opinion found it “fairly clear that this text does not permit the EPA to consider costs in setting the standards,” and rejected the respondents’ argument that one could interpret “public health” to include economic considerations, holding: “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”³⁴

Similarly, in *Utility Air Regulatory Group v. EPA*, the Court rejected EPA’s argument that the Clean Air Act either “compelled” the agency to apply the Act’s Prevention of Significant Deterioration (PSD) and Title V operating permit requirements to greenhouse gases or (generally) allowed it to do so.³⁵ The majority opinion concluded that applying PSD and Title V to sources of greenhouse gas emissions that otherwise met the statutory standard to be considered “major emitting facilities” or “major sources” of greenhouse gas emissions (those potentially emitting at least 100 or 250 tons per year) would extend the “heavy substantive and procedural burdens” of those programs to thousands of relatively small sources, which “would be ‘incompatible’ with ‘the substance of Congress’s regulatory scheme.’”³⁶ The fact that “EPA’s interpretation . . . would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization” made it “unreasonable,” Justice Scalia’s majority opinion held, explaining that

When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” 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.”³⁷

There has been growing criticism of how *Chevron* deference has been applied since 1984.



The Current State of Chevron

Chevron remains good law. In fact, it “may be the most cited administrative law opinion of all time. . . .”³⁸ Although the U.S. Supreme Court’s 2019 opinion in *Kisor v. Wilkie* revisited and clarified the doctrine of *Auer* deference (the deference given an administrative agency’s interpretation of its own regulations),³⁹ the Court disclaimed that its opinion touched on agency interpretations of statutes under *Chevron*.⁴⁰

Yet there has been growing criticism of how *Chevron* deference has been applied since 1984.⁴¹ In a concurring opinion issued just before his retirement, Justice Kennedy “note[d] [his] concern with the way [*Chevron*] has come to be understood and applied” and invited, “in an appropriate case,” a reconsideration of “the premises that underlie *Chevron* and how courts have implemented that decision.”⁴² In particular, Justice Kennedy noted the “reflexive deference” some courts had given agency interpretations and called their “ cursory analysis” of congressional intent, and of the reasonableness of the agency’s interpretation, “an abdication of the Judiciary’s proper role in interpreting federal statutes.”⁴³ Those concerns have been echoed by several currently sitting justices, including two of Justice Kennedy’s former clerks.

In *Michigan v. EPA*, Justice Thomas filed a concurring opinion to express his belief that *Chevron* deference, which the majority had declined to give EPA under *Chevron* Step Two, nonetheless “raises serious separation-of-powers questions.”⁴⁴ Justice Thomas noted that if one views *Chevron* deference as taking the power to interpret federal statutes from judges and giving it to administrative agencies, then the doctrine violates Article III, Section 1, of the U.S. Constitution, “which vests the judicial power exclusively in Article III courts”⁴⁵ If one views *Chevron* deference as giving agencies the power “to formulate legally binding rules to fill in gaps [in the statutes] based on policy judgments made by the agency rather than Congress,” he wrote, then the doctrine violates Article I, Section 1, which vests the legislative powers exclusively in Congress.⁴⁶ Either way, Justice Thomas wrote, “we seem to be straying further and further from the Constitution without so much as pausing to ask why.”⁴⁷

In 2016, in *Gutierrez-Brizuela v. Lynch*, Judge (now Justice) Gorsuch⁴⁸ wrote a lengthy concurring opinion, in a case in which he also authored the majority

opinion, just to suggest that it might be time to confront the fact that *Chevron* and related precedent “permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design.”⁴⁹ Like Justice Thomas, then-Judge Gorsuch noted the separation-of-powers issues that can arise when a court is obligated to defer to an executive agency’s interpretation of a statute,⁵⁰ particularly if the court has previously ruled on the statute’s meaning and the agency then issues a new, and differing, interpretation.⁵¹ Like Justice Thomas, then-Judge Gorsuch noted that the assumption that Congress intended to delegate its authority “to the executive to make ‘reasonable’ policy choices” violates the nondelegation doctrine.⁵² Going further, then-Judge Gorsuch also asserted that *Chevron* Step Two violates the Administrative Procedure Act, which “vested the courts with the power to ‘interpret . . . statutory provisions’ and overturn agency action inconsistent with those interpretations.”⁵³ Moreover, he expressed concern that the *Chevron* doctrine gives rise to fair notice and equal protection concerns as it leaves the public to “guess whether [a] statute will be declared ‘ambiguous,’” “guess (again) whether an agency’s interpretation will be deemed ‘reasonable[],’” and then “remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and *still* prevail.”⁵⁴ Instead of *Chevron*, Gorsuch proposed that “courts . . . fulfill their duty to exercise their independent judgment about what the law *is*,” though he acknowledged that “courts could and would consult agency views and apply the agency’s interpretation when it accords with the best reading of a statute.”⁵⁵

That same year, then-Judge (now Justice) Kavanaugh asserted in the *Harvard Law Review* that “judges often cannot make [the] initial clarity versus ambiguity decision [required by *Chevron* Step One] in a settled, principled, or evenhanded way.”⁵⁶ “Instead,” he wrote, “courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons.”⁵⁷

Given the positions of Justices Gorsuch, Kavanaugh, and Thomas and the Court’s recent reinforcement and

further development of the limits on *Auer* deference that “cabin [its] scope,”⁵⁸ it is fair to say that *Chevron* deference is ripe for close scrutiny. And EPA’s Clean Air Act climate change rulemakings would represent an obvious opportunity for such a review.

A Brief History of Greenhouse Gas Regulation Since 2009

We described the process for promulgating New Source Performance Standards and existing source emissions guidelines in our Fall 2016 *Part One* and will not repeat it here. The Supreme Court also summarized that process in *American Electric Power. v. Connecticut*.⁵⁹ For our purposes, it is sufficient to note that two main questions of statutory interpretation have arisen in the legal disputes over the efforts to regulate greenhouse gases

under section 111(d), both of which we described in *Part One*. First, when EPA promulgates New Source Performance Standards for an air pollutant from a category of stationary sources under Clean Air Act section 111(b), section 111(d) says that states are generally required to establish standards of performance for the same air pollutant from existing sources in that category if the air pollutant is not a criteria air pollutant and is “not . . . emitted from a source category which is regulated under Section 7412[.]” which governs hazardous air pollutant emissions.⁶⁰ Electric generating units’ hazardous air pollutant emissions are regulated under section 112. Does that mean EPA cannot regulate greenhouse gas emissions from electric generating units under section 111(d)?

Second, states’ “standards of performance” must “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction [BSER] which (taking into account the cost

of achieving such reduction and any nonair quality health and environmental impact and energy requirements) [EPA’s] Administrator determines has been adequately demonstrated.”⁶¹ What is a “system of emission reduction”? For the second question, the Obama and Trump Administrations offered very different answers and, accordingly, reached very different results.

The Clean Power Plan: The Obama EPA Interprets BSER Broadly

In the Clean Power Plan, the Obama EPA started by broadly interpreting the phrase “system of emission reduction” to mean “a set of measures that work together to reduce emissions.”⁶² It then interpreted the

Chevron deference is now ripe for close scrutiny.



phrase “achievable through the application of the best system of emission reduction” to mean that the measures chosen as a BSER “must be measures that can be implemented— ‘appl[ied]’ —by the sources themselves, that is, as a practical matter, by actions taken by the owners or operators of the sources.”⁶³

With these definitions in mind, EPA selected a BSER “for CO₂ [carbon dioxide] from the power sector”⁶⁴ that comprised three building blocks: (1) increasing heat rate (i.e., efficiency), (2) shifting generation from existing steam electric generating units to existing natural gas combined cycle (NGCC) units, and (3) shifting generation from existing fossil-fuel-fired electric generating units to “new low- or zero-carbon generation sources”⁶⁵ EPA asserted that these measures (including the generation shifting in building blocks 2 and 3) could be implemented by the sources themselves because owners and operators of higher-emitting sources could, for example, reduce their own generation and acquire “[emission-reduction credits] representing the emissions-reducing effects of specific activities” or engage in “emissions trading.”⁶⁶ Through these measures, EPA estimated, the Clean Power Plan could reduce “CO₂ emission reductions from the utility power sector [by] approximately 32 percent from CO₂ emission levels in 2005.”⁶⁷

The specifics of the Clean Power Plan are discussed in greater detail in our Fall 2016 *Part One*.⁶⁸

The ACE Rule: The Trump EPA Takes a Much Narrower Approach

The Trump EPA chose to repeal the Clean Power Plan and replace it with a much less aggressive plan, the Affordable Clean Energy rule, which relied only on heat rate improvements to reduce greenhouse gas emissions.⁶⁹ Unlike the Obama EPA, the Trump EPA interpreted section 111 to “unambiguously” require a “best system of emission reduction” that “can be put into operation *at* a building, structure, facility, or installation,” such as “add-on controls” or “inherently lower-emitting processes/practices/designs.”⁷⁰

Applying its narrower interpretation, EPA concluded that the best system of emission reduction for electric generating units would be heat rate (efficiency) improvements.⁷¹ EPA developed a list of “candidate technologies” and information on the heat rate improvements that each technology might achieve.⁷² The states were directed to evaluate that list, determine which

measures were applicable to the affected coal-fired electric utility steam generating units in their jurisdictions,⁷³ and tailor a standard of performance to each unit.⁷⁴

Not surprisingly, this much more limited plan was expected to produce much more limited results: a reduction in CO₂ emissions by “less than one percent in 2025, 2030, and 2035.”⁷⁵

The Legal Challenges to the Clean Power Plan and the ACE Rule

The Obama EPA Asks for Chevron Step Two Deference But Never Gets a Ruling

In *Part One*, we described the main arguments on both sides regarding the proper interpretation of section 111(d)’s reference to section 112.⁷⁶ The petitioners argued that the statute means what it says and that EPA cannot regulate coal-fired generating units under both section 112 and section 111(d).⁷⁷ EPA responded that the House of Representatives and Senate had passed conflicting amendments to section 111(d) in 1990 and argued that an interpretation of the statute that gave effect to both amendments would prohibit EPA from regulating air pollutants under section 111(d) only if EPA already regulates the same types of pollutants, from the same source category, under section 112.

We also described the main arguments on both sides regarding the proper interpretation of “system of emission reduction.” The petitioners challenging the Clean Power Plan argued that “systems of emission reduction” are measures to reduce emissions that can be implemented at individual sources within the relevant source category (i.e., “inside the fence line”) and that shifting generation to lower- (or non-) emitting sources does not qualify. EPA, in contrast, argued that “system of emission reduction” was a broad term and that interpreting it to encompass generation shifting was reasonable given the purpose of section 111(d).

At the time we wrote *Part One*, we expected that the D.C. Circuit (and then the Supreme Court) would review the Clean Power Plan’s legality and potentially clarify the ultimate scope of *Chevron* deference. And in *Part Two* we noted that many legal observers had scored the oral argument on the Clean Power Plan as a win for EPA.⁷⁸ But the D.C. Circuit never ruled, the Supreme Court stayed the Plan before it could go into effect, and on March 28, 2017, President Trump issued an executive order instructing EPA to review, and if appropriate revise

We expected the D.C. Circuit and Supreme Court to review the Clean Power Plan’s legality and clarify *Chevron* deference.



or rescind, the Clean Power Plan.⁷⁹ That same day, EPA asked the D.C. Circuit “to hold these cases in abeyance while the agency conducts its review. . . .”⁸⁰ The court granted the motion in April 2017.⁸¹ Subsequent orders held the case in abeyance until the Trump EPA published the ACE Rule and repealed the Clean Power Plan in July 2019.⁸² At that point, the petitioners moved to dismiss the appeal as moot, and the court granted that motion in September 2019.⁸³

The Trump EPA Gambles on Chevron Step 1—and Loses Big

Unlike the Clean Power Plan, the ACE Rule did not expire in limbo. Numerous states and groups filed petitions for review in the D.C. Circuit. The court heard almost nine hours of oral argument on October 8, 2020.⁸⁴ And on January 19, 2021, the court issued an opinion vacating and remanding the ACE Rule for further proceedings. Although the opinion touched on several issues,⁸⁵ this article will focus on the two main questions raised in the Clean Power Plan litigation:

- (1) May EPA regulate electric generating units under section 111(d) of the Clean Air Act if it already regulates them under section 112?
- (2) What does “system of emission reduction” mean?

1. The Majority Says EPA May Regulate Power Plants’ Greenhouse Gas Emissions Under Section 111, and Power Plants’ Hazardous Air Pollutant Emissions Under Section 112. The Dissent Disagrees.

As explained in our *Part One*, this first issue arises because Congress adopted conflicting amendments to section 7411 when it amended the Clean Air Act in 1990.⁸⁶ The House language, which was codified, says that states need not establish standards of performance for existing sources “for any air pollutant . . . for which air quality criteria have . . . been issued . . . or which is . . . included on a list published under section 7408(a)⁸⁷ of this title or emitted from a source category which is regulated under section 7412”⁸⁸ The Senate language, which was not codified, excluded standards of performance for existing sources for air pollutants “not included on a list published under [Clean Air Act] section 108(a) [i.e., criteria pollutants] or 112(b) [i.e., hazardous air pollutants]”⁸⁹ Two coal mine petitioners argued that “because the EPA regulates one hazardous air

pollutant—mercury—emitted from coal-fired power plants,” it cannot regulate greenhouse gas emissions from those power plants under section 7411(d).⁹⁰

The D.C. Circuit’s per curiam opinion, which was joined by Judges Patricia A. Millett and Cornelia T. L. Pillard (both Obama appointees), rejected that argument, concluding that EPA “correctly and consistently read the statute to allow the regulation both of a source’s emission of hazardous substances under Section 7412 and of other pollutants emitted by the same source under Section 7411(d).”⁹¹ The majority first concludes that *Chevron* deference (Step Two) does not apply.⁹² Instead, the majority effectively undertakes a *Chevron* Step One analysis to “textually harmonize” the amendments, closely reviewing their text, context, purpose, and legislative history. Based on that review, the majority found that the coal mine petitioners’ arguments gave no effect to the Senate amendment⁹³ and were inconsistent with the “mission of the amendments” “to update Section 7411(d)’s outdated cross-reference” to section 112.⁹⁴ Instead, the majority held, the exclusionary phrase in section 7411(d) quoted above must be understood as defining those air pollutants not regulated under section 7411(d)—i.e., those air pollutants “not covered by [the National Ambient Air Quality Standards] or the Hazardous Air Pollutants program.”⁹⁵ Interpreting it otherwise, the majority held, would make the House amendment “a Trojan Horse,” silently and “abruptly withdrawing from Section 7411(d)’s reach entire source categories and all of the otherwise-unregulated emissions they spew . . . in direct conflict . . . with the Clean Air Act’s gap-filling structure and purpose. . . .”⁹⁶

The partial dissent, which was written by Judge Justin R. Walker, a Trump appointee, reached a different conclusion. According to the partial dissent, if the court assumes that the House and Senate amendments conflict and that the inclusion of both amendments was a drafter’s error, then *Chevron* deference does not apply because *Chevron* assumes that Congress delegated authority to the agencies to fill statutory gaps, not to correct “accidents.”⁹⁷ Instead, the partial dissent holds, the court should look to the legislative history to determine the proper interpretation.⁹⁸ There, the partial dissent finds a statement from the bill’s Senate managers indicating that the Senate intended to “recede[] to the House” regarding the amendments at issue.⁹⁹ Accordingly, the partial dissent states, the codified

But the D.C. Circuit never ruled, the Supreme Court stayed the Plan, and Trump asked EPA to review and revise or rescind it.



House language would prevail, meaning that “the EPA can’t regulate air pollutants from coal-fired power plants under § 111 when the plants are already regulated under § 112.”¹⁰⁰ On the other hand, if the House and Senate amendments do not conflict, the partial dissent says that they must be understood as additive: EPA cannot regulate under section 111(d) either source categories or pollutants that are regulated under section 112.¹⁰¹ In the *Chevron* framework, the partial dissent reads this as a Step One issue, i.e., a question of determining what the “plain text” of the House and Senate amendments states.¹⁰² “Either way,” the partial dissent states, “the law precludes what the House Amendment precludes. And the House Amendment precludes § 111 regulations of coal-fired power plants already covered by § 112.”¹⁰³ Thus, the partial dissent concludes, neither the Clean Power Plan nor the ACE Rule was lawful because both “improperly applied § 111 to coal-fired power plants already regulated under § 112.”¹⁰⁴

2. The Majority Says EPA May Choose a “Best System Of Emission Reduction” that Includes Generation Shifting. The Dissent Disagrees.

On question two, the majority indicated that it was not applying *Chevron* Step Two because the Trump EPA’s arguments rested on Step One—i.e., that the statute is not ambiguous.¹⁰⁵

In a 2019 paper, Joseph Goffman (then the executive director of the Environmental & Energy Law Program at Harvard Law School and now the acting assistant administrator for EPA’s Office of Air and Radiation)¹⁰⁶ argued that the Trump EPA’s “plain meaning” argument was risky. “[I]f the D.C. Circuit agrees with challengers that the statute is ambiguous,” he wrote, “EPA will not have an [alternative argument defending the reasonableness of its interpretation] to fall back on. . . .”¹⁰⁷

His argument proved prescient. The majority undertook a painstaking examination of the language of section 111(d) and concluded that nothing in the statute “constrain[ed] the Agency to identifying a best system of emission reduction consisting only of controls ‘that can be applied at and to a stationary source.’”¹⁰⁸ Although section 111(d)(1) requires the states to “establish[] standards of performance *for*” and “apply[] standard[s] of performance *to*” particular sources,¹⁰⁹ the majority concluded that nothing in section 111(a)’s definition of “standard of performance” requires EPA to select a “source-specific” “best system of emission reduction.”¹¹⁰

The “best system of emission reduction” *for* a source, the majority held, need not be a measure undertaken *at* a source.¹¹¹ Instead, the majority concluded that section 111(a)(1) left it to “the expert judgment of the EPA to determine . . . which already-demonstrated methods compose the ‘best system.’”¹¹² Moreover, the majority rejected the Trump EPA’s argument that defining standard of performance by reference to “the degree of emission limitation achievable through the *application* of the best system of emission reduction” implied that the chosen system of emission reduction would be a measure “applied ‘to and at *an individual existing source*. . . .”¹¹³ The majority held that the word “application” does not require an indirect object¹¹⁴ and that even if it did require an indirect object, that object could just as easily be “the source category or the emissions.”¹¹⁵

The majority opinion also declined the Trump EPA’s invitation to apply the “major questions” exception to *Chevron* deference (one of the lines of precedent that Sunstein identified as “*Chevron* Step Zero”). “Unlike cases that have triggered the major questions doctrine,” the majority held, “each critical element of the Agency’s regulatory authority on this very subject has long been recognized by Congress and judicial precedent.”¹¹⁶ Under *Massachusetts v. EPA*,¹¹⁷ the majority noted, greenhouse gases are air pollutants. Under *American Electric Power v. Connecticut*,¹¹⁸ the majority held, it “is [EPA’s] job to regulate power plants’ emissions of greenhouse gases under Section 7411.”¹¹⁹ Additionally, section 7411(a) explicitly directs EPA to determine the “best system of emission reduction,”¹²⁰ and the statute provides specific factors that the agency must weigh when choosing that system.¹²¹ And, according to the majority, “[t]

he States retain the choice of how to meet [the emission-reduction targets in EPA’s] guidelines through standards of performance tailored to their various sources.”¹²² Importantly, the majority rejected the Trump EPA’s argument that a “best system of emission reduction” that required generation shifting would “raise[] a major question” because, it concluded, no state plan *would* be required to include generation shifting.¹²³ The majority noted that the Clean Power Plan’s preamble “offered a list of alternative available technologies that reduced power plants’ carbon dioxide emissions per megawatt [without generation shifting], including carbon capture and storage, heat-rate improvements at non-coal plants, fuel switching to gas, fuel switching to biomass, and waste heat-to-energy

In 2019, Joseph Goffman argued that the Trump EPA’s “plain meaning” argument was risky. His argument proved prescient.



conversion,” as well as “alternative measures that States could implement to lower overall emissions from fossil-fuel-fired plants,” such as “demand-side energy efficiency”¹²⁴

Judge Walker’s partial dissent reached the opposite conclusion. In Walker’s view, how to address climate change (“and who should pay for it”) is clearly a “decision[] of vast economic and political significance[.]”¹²⁵ He noted that President Obama had described the Clean Power Plan as “the most important step America has ever taken in the fight against global climate change[.]” and that EPA and environmentalists had described the potential effects of climate change as catastrophic.¹²⁶ On the other hand, he noted that the Clean Power Plan was forecast to increase the cost of wholesale electricity by \$214 billion, require \$64 billion “to replace shuttered capacity,” and “put thousands of men and women out of work.”¹²⁷ Given the magnitude of the possible costs and benefits, he stated, the “major questions” doctrine would require the court to invalidate a rule like the Clean Power Plan absent a “clear statement [in section 111(d)] unambiguously authorizing the EPA to consider off-site solutions like generation shifting”¹²⁸ if section 111(d) did not otherwise prohibit the regulation of greenhouse gas emissions from power plants.

The Court Resets the Clock to Zero

Although the D.C. Circuit reversed and remanded the ACE Rule, it did not reinstate the Clean Power Plan. Indeed, reinstating that rule would have provided no benefit—the United States achieved the Clean Power Plan’s greenhouse gas reduction goal (“32 percent below 2005 levels”¹²⁹) two years ago.¹³⁰ Recognizing that “the passage of time” and “the changed facts and circumstances in the electricity sector” had mooted the Plan, the Biden administration asked the court to “stay the issuance of the mandate for the vacatur of” the Trump EPA’s repeal of the Clean Power Plan “until EPA responds to the Court’s remand in a new rulemaking action” under section 7411(d).¹³¹ No party opposed the motion, and the court granted it.¹³² For now, as a consequence, greenhouse gas emissions from existing fossil-fuel-fired electric generating units are not regulated in the United States.

Where Do the Biden EPA and the *Chevron* Doctrine Go from Here?

The two opinions in *American Lung Association* illustrate fault lines in *Chevron* Steps Zero, One, and Two.

Applying the same *Chevron*-based decision-making criteria, the two opinions reach diametrically opposite results, worlds apart. The majority opinion considered section 111(d) of the Clean Air Act to have an ambiguous gap intended by Congress to delegate broad interpretative discretion to EPA. The majority viewed the statutory interpretation underlying the Clean Power Plan more like an elephant in its natural habitat than an elephant long hidden in a mousehole. The dissenting opinion, in stark contrast, interpreted section 111(d) to unambiguously preclude *any* existing source performance standards at all under that section for greenhouse gas emissions from power plants. And the dissenting opinion would favor application of *Chevron* Step Zero (the major question exception) over *Chevron* Step Two deference to the interpretation of section 111(d) of the Clean Air Act underlying the Clean Power Plan.


The drastically different outcomes of the two opinions in *American Lung Association* are an indication that the application of *Chevron* criteria can be somewhat more subjective, malleable, and unstable than an ideal rule of law. They suggest a stunning amount of administrative agency legislative and judicial power that can be inflated or deflated by reviewing courts in the application of *Chevron*. The parting admonition of former Justice Kennedy¹³³ reinforces the likelihood that the Supreme Court will seize the opportunity in an appropriate case to clarify the permissible scope of *Chevron* deference.

If the U.S. Supreme Court grants certiorari in *American Lung Association*, that could provide the vehicle for such a clarification. At this point, however, a grant of certiorari appears unlikely. EPA has opposed the petitions, arguing that the petitioners are

effectively requesting an “advisory opinion” regarding “the regulatory approaches the [Biden EPA] *might* take” in a rulemaking it has yet to even propose.¹³⁴ “[W]hether the Clean Power Plan was lawful,” EPA argues, “has no continuing practical significance, since that Plan is no longer in effect and EPA does not intend to resurrect it.”¹³⁵ And in its new rulemaking, EPA says it will “take a fresh look at the scope of its authority under Section 7411(d),” considering both the Supreme Court’s stay of the Clean Power Plan and the D.C. Circuit’s ruling in *American Lung Association*.¹³⁶ That “fresh look” will undoubtedly give rise to another heated debate in the D.C. Circuit, with both sides arguing once more over the proper applications of *Chevron* Steps Zero, One, and Two.

For now, greenhouse gas emissions from existing fossil-fuel-fired electric generating units are not regulated in the United States.



But whether that contest ultimately leads to a Supreme Court opinion on deference in the context of Clean Air Act climate change regulation depends on a host of factors—most notably, whether the Court can take up the lawfulness of the Biden EPA’s rule before a subsequent administration repeals it. In the end, due to the changing regulatory climate at EPA, the fate of *Chevron* may depend upon appellate review of an administrative rulemaking action not involving the climate change regulatory framework relied upon for EPA’s Clean Power Plan and Affordable Clean Energy rules. 

Endnotes

1. Robert L. Brubaker & Eric B. Gallon, *Part One: The Clean Power Plan: Legal Challenges and Prospects*, *INFRASTRUCTURE*, no. 1, Fall 2016 at 1.
2. Robert L. Brubaker & Eric B. Gallon, *Part Two: The Clean Power Plan: Legal Challenges and Prospects*, *INFRASTRUCTURE*, no. 2, Winter 2017 at 3.
3. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60, subpt. UUUU) [hereinafter Clean Power Plan or the Plan].
4. 467 U.S. 837 (1984).
5. *West Virginia v. EPA*, No. 15A773 (U.S. Feb. 9, 2016) (order in pending case).
6. *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016) (order).
7. A White House fact sheet said the Clean Power Plan’s renewable energy and energy efficiency requirements would “drive a more aggressive transformation in the domestic energy industry.” Joby Warrick, *White House Set to Adopt Sweeping Curbs on Carbon Pollution*, *WASH. POST* (Aug. 1, 2015), https://www.washingtonpost.com/national/health-science/white-house-set-to-adopt-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html (last visited Aug. 10, 2021).
8. 42 U.S.C. § 7411(d).
9. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1443 (2007).
10. *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 429 (2011).
11. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321–22 (2014).
12. A recording of the oral argument is available in two parts on the D.C. Circuit web site at <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=15-1363&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE>.
13. Exec. Order No. 13783, 82 Fed. Reg. 16,093, 16,094–16,095 (2017).
14. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, 84 Fed. Reg. 32,520 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60, subpt. UUUUa) [hereinafter Repeal of the Clean Power Plan].
15. A recording of this oral argument is available on the D.C. Circuit web site, at <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=19-1140&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE>.
16. *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 995 (2021).
17. *See West Virginia v. EPA*, No. 20-1530 (U.S. Apr. 29, 2021); *N. Am. Coal Corp. v. EPA*, No. 20-1531 (U.S. Apr. 30, 2021); *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1778 (U.S. June 23, 2021); *North Dakota v. EPA*, No. 20-1780 (U.S. June 23, 2021).
18. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).
19. *Id.* at 842.
20. *Id.* at 842–43.
21. *Id.* at 843 n.9.
22. *Id.* at 843.
23. *Id.* at 844.
24. *Id.* at 865–66.
25. *Michigan v. EPA*, 576 U.S. 743, 760 (2015).
26. *Id.* at 752–53.
27. Cass Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187, 193 (2006). Sunstein made clear that he believed the Step Zero framework was overly complicated and largely unnecessary, and he argued for “applying the standard *Chevron* framework” whenever possible. *Id.* at 194.
28. *Id.* at 193, 218, 222.
29. *Smith v. Berryhill*, 139 S. Ct. 1765, 1778 (2019).
30. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citing *United States v. Mead Corp.* 533 U.S. 218, 227 (2001)).
31. Sunstein, *supra* note 27, at 193.
32. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (internal citation omitted).
33. 42 U.S.C. § 7409(b)(1).
34. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 466–68 (2001).
35. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321–22 (2014).
36. *Id.* at 322 (quoting *Brown & Williamson*, 529 U.S. at 156).
37. *Id.* at 324 (quoting *Brown & Williamson*, 529 U.S. at 159, 160).
38. Kristin E. Hickman & Aaron L. Nielson, *Narrowing Chevron’s Domain*, 70 *DUKE L.J.* 931, 953 n.123 (2021) (citing Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 *U. CHI. L. REV.* 757, 772 (2017)).
39. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).
40. *See id.* at 2425 (Roberts, C.J., concurring) (stating “[i]ssues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. . . . I do not regard the Court’s decision today to touch upon the latter question[.]”).
41. *See, e.g., Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting) (describing *Chevron* as “once celebrated, and now increasingly maligned”).
42. *Id.* at 2120–21 (Kennedy, J., concurring).
43. *Id.* at 2120.
44. 576 U.S. 743, 761 (2015).
45. *Id.* at 762.
46. *Id.*

47. *Id.* at 763.

48. Justice Gorsuch is the son of Anne Gorsuch Burford, who was EPA's Administrator when the D.C. Circuit issued the opinion that was overturned in *Chevron*. See, e.g., Ilya Somin, *Gorsuch Is Right About Chevron Deference*, WASH. POST (Mar. 25, 2017), <https://www.washingtonpost.com/news/volokh-conspirac/wp/2017/03/25/gorsuch-is-right-about-chevron-deference> (last visited Sept. 15, 2021).

49. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

50. See *id.* at 1154.

51. See *id.* at 1150 (quoting *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)) (explaining that “the framers sought to ensure that judicial judgments ‘may not lawfully be revised, overturned or refused faith and credit by’ the elected branches of government[.]”).

52. *Id.* at 1153.

53. *Id.* at 1151 (quoting 5 U.S.C. § 706).

54. *Id.* at 1152 (emphasis in original).

55. *Id.* at 1158 (emphasis in original). This is in line with what was referred to as *Skidmore* deference, given under the Administrative Procedure Act to agency interpretations of statutes prior to *Chevron* (and not mentioned in the *Chevron* opinion). See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

56. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing Robert A. Katzmann, *JUDGING STATUTES* (2014)).

57. *Id.* at 2121 (emphasis in original).

58. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

59. *Am. Elec. Power Co.*, 564 U.S. at 429.

60. 42 U.S.C. § 7411(d).

61. *Id.* § 7411(a)(1) (defining “standard of performance”).

62. Clean Power Plan, *supra* note 3, at 64,720.

63. *Id.*

64. *Id.* at 64,664.

65. *Id.* at 64,724.

66. *Id.*

67. *Id.* at 64,665.

68. Brubaker & Gallon, *supra* note 1.

69. Repeal of the Clean Power Plan, *supra* note 14.

70. *Id.* at 32,524 (emphasis in original).

71. See *id.* at 32,535.

72. *Id.* at 32,536–32,537.

73. See *id.* at 32,533.

74. *Id.* at 32,550.

75. U.S. Evtl. Prot. Agency, *Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units 3–11* (June 2019), https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf.

76. Brubaker & Gallon, *supra* note 1.

77. Brief for Petitioner at 61–62, *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Feb. 19, 2016).

78. Brubaker & Gallon, *supra* note 2 (citing, e.g., Emily Holden, *EPA's Clean Power Plan Does Well in Court*, SCI. AM.

(Sept. 28, 2016), <https://www.scientificamerican.com/article/epa-s-clean-power-plan-does-well-in-court/#> (last visited Sept. 15, 2021)).

79. See Exec. Order No. 13783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

80. Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Cases in Abeyance 1–2, *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Mar. 28, 2017).

81. Order at 2, *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017).

82. 84 Fed. Reg. 32,520 (July 8, 2019).

83. *State of West Virginia v. EPA*, No. 15-1363 (Sept. 17, 2019) (order).

84. See, e.g., Zack Hale, *DC Circuit Eyes US EPA's Power Plant Rule with Skepticism During Oral Arguments*, S&P GLOB. (Oct. 9, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/dc-circuit-eyes-us-epa-s-power-plant-rule-with-skepticism-during-oral-arguments-60679461> (last visited Sept. 15, 2021).

85. This article will not, and could not, summarize all of the D.C. Circuit's holdings on the ACE Rule; the court's opinion is almost 200 pages long, and a complete catalog of its holdings would rival that length.

86. Brubaker & Gallon, *supra* note 1.

87. Clean Air Act § 108(a).

88. 42 U.S.C. § 7411(d)(1).

89. Pub. L. 101-549, § 302(a), 104 Stat. 2574 (1990).

90. *Am. Lung Ass'n*, 985 F.3d at 979.

91. *Id.*

92. *Id.* at 980.

93. *Id.*

94. *Id.*

95. *Id.* at 982.

96. *Id.* at 982–83.

97. *Id.* at 1006 (Walker, J., dissenting in part).

98. *Id.* at 1006–07 (Walker, J., dissenting in part).

99. *Id.* at 1008 (Walker, J., dissenting in part) (citing S. 1630, Clean Air Act Amendments of 1990, 136 CONG. REC. 36,007, 36,067 (Oct. 27, 1990) (Chafee-Baucus statement of Senate managers)).

100. *Id.*

101. *Id.* at 1010 (Walker, J., dissenting in part).

102. *Id.*

103. *Id.* at 1013 (Walker, J., dissenting in part).

104. *Id.*

105. *Id.* at 944. Although the majority disclaimed any intention “to decide whether the approach of the ACE Rule is a permissible reading of the statute as a matter of agency discretion[.]” *id.*, it strongly suggested that the Trump EPA's rule was indefensible. The majority wrote, for example, that

generation shifting to prioritize use of the cleanest sources of power is one of the most cost-effective means of reducing emissions that plants have already adopted and that have been demonstrated to work,

and . . . generation shifting is capable of achieving far more emission reduction than controls physically confined to the source.

Id. at 945. *See also id.* at 963 (repeating that, according to the Clean Power Plan record, “generation-shifting measures . . . are already widely in use by States and power plants and have been demonstrated to be reasonable, reliable, effective, and not unduly disruptive to the regulated industry” (citing Clean Power Plan, *supra* note 3, 80 Fed. Reg. at 64,735, 64,769)).

106. Joseph Goffman was the Legislative Director for Senator Joe Lieberman from 2005 to 2008, and Associate Assistant Administrator for Climate and Senior Counsel in EPA’s Office of Air and Radiation during the Obama Administration, where he provided EPA’s contributions to President Obama’s 2013 Climate Action Plan and played a lead role in the development of the Clean Power Plan.

107. Joseph Goffman & Caitlin McCoy, *EPA’s House of Cards: The Affordable Clean Energy Rule*, HARV. L. SCH. ENV’T & ENERGY L. PROGRAM (Oct. 23, 2019), <http://eelp.law.harvard.edu/wp-content/uploads/ACE-Paper-Final.pdf>.

108. *Am. Lung Ass’n*, 985 F.3d at 944; *see also id.* at 945.

109. 42 U.S.C. § 7411(d)(1) (emphasis added).

110. *Am. Lung Ass’n*, 985 F.3d at 945–46.

111. *Id.* at 950.

112. *Id.* at 946.

113. *Id.* at 947–48 (first emphasis added; second emphasis in original).

114. *Id.*

115. *Id.* at 949.

116. *Id.* at 959.

117. *Massachusetts v. EPA*, 549 U.S. 497 (2015).

118. 564 U.S. 410 (2011).

119. *Am. Lung Ass’n*, 985 F.3d at 959.

120. *Id.* at 962.

121. *Id.*

122. *Id.* at 963.

123. *Id.*

124. *Id.* at 963 n.10 (citing Clean Power Plan, *supra* note 3, at 64,755–64,758). The alternatives to generation shifting as a means of achieving the Clean Power Plan’s BSER standards were not analyzed for equivalency by EPA or the court and might not meet the cost and energy requirement constraints on BSER under section 111(a).

125. *Id.* at 1001–02 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (Walker, J., dissenting in part) (further citation omitted).

126. *Id.* at 1000–01 (Walker, J., dissenting in part) (citations omitted).

127. *Id.* at 1000, 1002 (Walker, J., dissenting in part) (citations omitted).

128. *Id.* at 996 (Walker, J., dissenting in part).

129. Clean Power Plan, *supra* note 3, at 64,665.

130. U.S. ENERGY INFO. ADMIN., U.S. ENERGY-RELATED CARBON DIOXIDE EMISSIONS, 2019, at 13 (Sept. 2020), https://www.eia.gov/environment/emissions/carbon/pdf/2019_co2analysis.pdf (noting that “[b]etween 2005 and 2019, total U.S. electricity generation increased by almost 2% while related CO2 emissions fell by 33%[]”).

131. Respondents’ Motion for a Partial Stay of Issuance of the Mandate at 1, 3–5, *Am. Lung Ass’n v. EPA*, Nos. 19-1140 et al. (D.C. Cir. Feb. 12, 2021).

132. *Am. Lung Ass’n v. EPA*, Nos. 19-1140 et al. (D.C. Cir. Feb. 22, 2021) (order).

133. *Pereira*, 138 S. Ct. at 2120–21.

134. Brief for the Federal Respondents in Opposition at 16, *West Virginia v. EPA*, No. 20-1530 (U.S. Aug. 5, 2021) (emphasis in original).

135. *Id.*

136. *Id.* at 18.