

weight to the parenthetical, which are “typically used to convey an aside or afterthought.”<sup>9</sup> Indeed, the Supreme Court has viewed parentheticals used in statutory provisions as being incapable of significantly altering the language outside the parentheses.<sup>10</sup> And, although the D.C. Circuit has reviewed the parenthetical language of 112(d)(3)(A) on several occasions, the court has never addressed whether the parenthetical impacts what constitutes the best performing 12 percent of a source category.<sup>11</sup>

This reading, as a practical matter, is at direct odds with the express language outside the parentheses, which requires EPA to base the limit on the average of the best 12% of existing sources. In taking 12% of the nine facilities for which the Agency had data,<sup>12</sup> EPA set the limit using data from just 6% of the 34 CMPUs it claims to make up the source category.<sup>13</sup> This is not the approach that Congress intended. Rather, EPA should have determined the total number of CMPUs in the source category, what number of CMPUs comprised 12% of the source category, and then evaluated the availability of data; thus, setting the limit based on 12% of the total rather than just two CMPUs.<sup>14</sup> Using such few facilities results in a disproportionate emission limit.

To illustrate this point, the VI sought to understand and demonstrate the variability of D/F emissions ascertainable from the Section 114 data submitted to EPA. As the box plot below indicates, there is a wide range of variability in the available Section 114 data that was not considered by EPA’s analysis. The boxplot provides a graphical representation of all the available data for each product classification (i.e., VCM/EDC or PVC Combined). The shaded region represents the interquartile range (IQR), which contains the middle 50% of the data,

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<sup>9</sup> *Boechler, P.C. v. Comm’r of Internal Revenue*, 596 U. S. 199, 206 (2022) (quoting B. Garner, *Modern English usage* 1020 (4<sup>th</sup> ed. 2016)).

<sup>10</sup> *Becerra v. Empire Health Found.*, 597 U. S. 424, 440 (2022) (“[i]f Congress ‘does not alter the fundamental[s]’ of a statutory scheme ‘in vague terms or ancillary provisions,’ then it ordinarily does not do so in parentheticals either”); *see also, Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (“[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of the statute”); *see also, Louisiana Environmental Action Network v. EPA*, 955 F. 3d 1088, 1098 (D.C. Cir. 2020) (“section 112(d)(6)’s parenthetical specification does not undercut EPA’s obligation to ‘revise’ an emission standard ‘as necessary’”).

<sup>11</sup> The court has not addressed the narrow issue discussed here, but has touched on the parenthetical in related, tangential contexts. *See, e.g., Nat’l Lime Ass’n v. E.P.A.*, 233 F.3d 625 (D.C. Cir. 2000), as amended on denial of reh’g (Feb. 14, 2001) (holding that the parenthetical did not forbid the Agency from considering more data beyond the best twelve percent of plants); *United States Sugar Corp. v. Env’tl. Prot. Agency*, 113 F.4th 984 (D.C. Cir. 2024) (holding that EPA is not required to use all emissions information in its possession to set emission limits). Furthermore, in its interpretation of Clean Air Act parenthetical phrases more generally, the D.C. Circuit has echoed the Supreme Court. *See, e.g., United States v. Bank of Am. Corp.*, 753 F.3d 1335, 1338 (D.C. Cir. 2014) (“The parenthetical . . . cannot sweep any further than the . . . language it illuminates.”); *Am. Fed’n of Lab. & Cong. Of Indus. Organizations v. Donovan*, 757 F.2d 330, 345 (D.C. Cir. 1985) (requiring that the parenthetical be read in light of the “plain thrust of the statutory language” according to a “reasonable” interpretation).

<sup>12</sup> 12% of 9 facilities is 1.08.

<sup>13</sup> Two CMPUS is 5.9% of 34.

<sup>14</sup> 12% of 34 CMPUS is 4.08.