No. 12-1182

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals committed a series of fundamental errors in a case of exceptional importance. The court first exceeded statutory limitations on its own jurisdiction and thereby decided questions not properly before it. It next used its arrogated power of judicial review to impose novel, non-statutory requirements on the exercise of authority by the Environmental Protection Agency (EPA) to administer the Clean Air Act, 42 U.S.C. 7401 *et seq.* (CAA). The court ultimately vacated the EPA's regulations on the ground that the agency lacked the prescience to discern and comply with the requirements that the court itself had contrived. In doing so, the court impermissibly "transfer[red] * * * archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests," from the EPA to itself. *City of Arlington* v. *FCC*, No. 11-1545 (May 20, 2013), slip op. 13 (citing *Chevron*

U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984)). The end result of its decision is validation of "a 'maximum delay' strategy for regulated entities" (Pet. App. 114a (Rogers, J., dissenting)), to the detriment of the public health. This Court's review is warranted.

A. Respondents' Arguments Against Certiorari Lack Merit

1. Respondents suggest that certiorari is not warranted because the court of appeals' decision does not conflict with a decision of another circuit. State-Local Br. in Opp. 11 (State-Local Br.); Industry-Labor Br. in Opp. 7 (Industry-Labor Br.). This objection fails in light of the CAA's grant of exclusive jurisdiction to the D.C. Circuit to review all nationally significant rules, 42 U.S.C. 7607(b) (2006 & Supp. V 2011); Pet. App. 783a-784a, which greatly diminishes the likelihood of any circuit split.

Respondents also contend that the court of appeals' decision does not "present[] any broadly recurring legal issue." Industry-Labor Br. 7. But the court below misconstrued core provisions of the CAA that apply broadly, *i.e.*, to every State. 42 U.S.C. 7410(a). Questions regarding the meaning of those provisions have already recurred, Pet. 4-5 (discussing *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (per curiam), cert. denied, 532 U.S. 903, 904 (2001), and *North Carolina* v. *EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam) (*North Carolina I*)), and will again, Pet. 32 (noting that the EPA had planned to use its approach here as a model for future rulemakings).

2. Respondents argue that review is not warranted because, even without the Transport Rule, there is "widespread [National Ambient Air Quality Standards (NAAQS)] attainment." State-Local Br. 35; see Industry-Labor Br. 33. It is true that many areas have

achieved attainment with the 1997 8-hour ozone NAAQS and the 1997 annual $PM_{2.5}$ NAAQS, the standards addressed in the Clean Air Interstate Rule (CAIR) and two of the standards addressed in the Transport Rule.[1] But the most recent preliminary ozone design values (for 2010-2012) identify multiple areas in the Transport Rule region—including metropolitan Washington, D.C., New York City, and Houston—with ozone levels above the 1997 8-hour ozone NAAQS.[2]

Moreover, the EPA has found the 1997 NAAQS inadequate to protect the public health, and has therefore made them more stringent. 78 Fed. Reg. 3120-3121 (Jan. 15, 2013) (annual $PM_{2.5}$); 73 Fed. Reg. 16,470-16,472 (Mar. 27, 2008) (8-hour ozone); 71 Fed. Reg. 61,161-61,162 (Oct. 17, 2006) (24-hour $PM_{2.5}$); see Pet. 6 n.4. The preliminary 2010-2012 data also identify numerous areas with ozone levels exceeding the revised 8-hour ozone NAAQS,[3] and show that air quality has dete-

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[1] EPA, *Clean Air Interstate Rule, Acid Rain Program, and Former NO_x Budget Trading Program: Progress Report 2011* 12, 14 (2013), http://www.epa.gov/airmarkt/progress/ARPCAIR11_downloads/ARPCAIR11_analyses.pdf

[2] EPA, *Air Quality Design Value Review, Design Values in Areas Previously Designated Nonattainment for the 1997 8-Hour Ozone NAAQS*, ozone(xlsx) Table 1b (2013), http://www.epa.gov/ttn/analysis/dvreview.htm. The tables cited in the next three footnotes are available at the same URL.

[3] EPA, *Air Quality Design Value Review, Design Values in Areas Previously Designated Nonattainment for the 2008 8-Hour Ozone NAAQS*, ozone(xlsx) Table 1a (2013); EPA, *Air Quality Design Value Review, Violating Monitors in Areas Not Previously Designated Nonattainment for the 2008 8-Hour Ozone NAAQS*, ozone(xlsx) Table 2 (2013).

riorated in many areas.[4] Likewise, several counties in the Transport Rule region do not meet the revised annual $PM_{2.5}$ NAAQS.[5] The EPA intended the rules at issue here to "provide important initial assistance to states" in meeting later adopted NAAQS, Pet. App. 170a, and to serve as a model for future rules, *id.* at 138a. The court of appeals' decision prevents the Transport Rule from performing those roles.

In any event, an air quality snap-shot can be influenced by numerous factors, including meteorological and economic conditions. Pet. App. 226a-227a. The CAA not only requires States to regulate emissions that "contribute significantly to nonattainment in" other States, but also directs them to regulate emissions that "interfere with maintenance" by States that are currently in attainment. 42 U.S.C. 7410(a)(2)(D)(i)(I). Accordingly, attainment by downwind States does not relieve upwind States of their good-neighbor obligations. The EPA found the Transport Rule necessary both to remedy non-attainment and to ensure that air-quality improvements endure over time. *E.g.*, Pet. App. 226a-227a.[6]

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[4] EPA, *Air Quality Design Value Review, Design Value History in Areas Previously Designated Nonattainment for the 2008 8-Hour Ozone NAAQS*, ozone(xlsx) Table 3a (2013).

[5] EPA, *Air Quality Design Value Review, Areas Previously Designated Nonattainment for the $PM_{2.5}$ 2012 Annual NAAQS*, PM2.5(xlsx) (2013).

[6] Relatedly, respondents contend that the Transport Rule "cannot be readopted" because of presently reduced non-attainment. Industry-Labor Br. 31-32. That is a non sequitur. If the court of appeals' decision vacating the Transport Rule is reversed, the EPA will not need to "readopt" the Transport Rule. Moreover, judicial review of agency action is based on the record before the agency at the time it

3. Respondents contend that certiorari is unwarranted because petitioners have identified threshold defects that should have prevented the court of appeals from deciding the statutory questions it addressed. State-Local Br. 12; Industry-Labor Br. 14-15. Because those defects are jurisdictional, petitioners are obligated to raise them. And while this Court is generally reluctant to review case-specific errors, a court of appeals' erroneous interpretation of a critical federal statute cannot be immunized from review on the ground that the court had no jurisdiction to announce that interpretation in the first place. The court of appeals' erroneous assertion of jurisdiction, which was a necessary predicate to the court's further errors in construing the CAA's substantive provisions, makes this case more, not less, worthy of review. In all events, petitioners' objections to review of the threshold questions would, at most, counsel in favor of a limited grant of certiorari, not a complete denial of review.

B. The Decision Below Is Incorrect

1. The court of appeals determined that the EPA could not pass judgment on State Implementation Plans

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acted, not on subsequent events. *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

In addition, respondents fault the EPA for not using CAIR as the baseline when calculating the projected health benefits of the Transport Rule. *E.g.*, Industry-Labor Br. 33. As the EPA explained at length (Pet. App. 190a-197a), however, the D.C. Circuit in *North Carolina I* directed the agency to *replace* CAIR in its entirety, not to merely supplement it with new requirements. The EPA therefore correctly declined to use the disapproved CAIR regime as its baseline, but instead chose to assume levels of pollution that would exist under *valid* regulatory requirements.

(SIPs) until it had quantified States' good-neighbor obligations. That holding was in substance an impermissible collateral attack on orders not before the court, and it was in any event inconsistent with the plain terms of the CAA. Pet. 12-18.

a. Respondents contend that their challenge to the EPA's issuance of Federal Implementation Plans (FIPs) was timely because "the issue could not have been resolved in challenges to EPA's earlier SIP disapprovals and findings of failure [to submit] under earlier programs." State-Local Br. 14. That argument is misconceived.

On the merits, respondents argue that the EPA's power to issue a FIP "comes into play only if a State fails to meet its initial obligation to submit an adequate SIP under section 7410(a), and *a State cannot fail to meet an obligation that EPA has not yet defined*." State-Local Br. 21-22 (emphasis added). The court of appeals likewise based its merits holding on what it described as a "problematic feature" in "*EPA's many SIP disapprovals and findings of failure to submit*," namely that "EPA made all of those findings *before* it told the States what emissions reductions their SIPs were supposed to achieve under the good neighbor provision." Pet. App. 49a (first emphasis added). Both those criticisms of the EPA's issuance of FIPs necessarily depend on the premise that States were not obligated to submit SIPs unless and until the EPA had defined the States' emission-reduction obligations.

If that premise were correct, however, the EPA erred in its prior findings that some States had failed to submit adequate SIPs, and in its disapprovals of other States' SIPs. Any argument to that effect could and should have been made through timely petitions for

review challenging those findings and disapprovals. See Pet. 13-14. Indeed, contrary to respondents' current contention that they could not have advanced this challenge prior to the Transport Rule proceedings, respondent Indiana *did* advance it in urging the EPA not to disapprove its SIP, and a commenter in respondent Alabama's SIP disapproval proceeding did the same. Pet. App. 77a (Rogers, J., dissenting).

b. On the merits, the EPA's previous SIP findings triggered a mandatory statutory duty to issue FIPs. Pet. 14-18. The CAA directs that the EPA "*shall* promulgate a [FIP] at any time within 2 years" after it "finds that a State has failed to make a required submission" or "disapproves" a SIP. 42 U.S.C. 7410(c)(1)(A) and (B) (emphasis added). Faced with this text, respondents' posit that "the only SIP submissions 'required' under section 7410(c)(1)(A) are ones for which EPA has disclosed the requirements, and EPA cannot properly 'disapprove[]' a SIP * * * unless the SIP contains a deficiency that a State could have identified and avoided on its own." State-Local Br. 22. Even apart from the fact that this argument is in substance an untimely collateral attack on prior EPA determinations, see pp. 6-7, *supra*, it founders on the statute's plain terms.

Nothing in the CAA requires the EPA to quantify upwind States' "significant contribution" obligations at all, much less to make those States' obligation to submit SIPs with good-neighbor provisions contingent on any such federal regulatory action. To the contrary, States' obligation to submit SIPs—with all required elements, including good-neighbor provisions—is imposed directly by the CAA itself, 42 U.S.C. 7410(a)(2). Br. for Respondent States & Cities in Support of Petitioners 9. Even if there were any ambiguity on this point, re-

spondents fail to demonstrate that the EPA's reading (Pet. App. 170a-172a, 174a-175a) is unreasonable.

Respondents contend that the EPA should have employed "the SIP-call provision" in 42 U.S.C. 7410(k)(5) rather than issue FIPs. State-Local Br. 22. The SIP-call mechanism typically applies in situations such as the NO_x SIP Call, see Pet. 4-5, where States already have SIPs approved as meeting statutory requirements. In any event, the potential availability of an alternative procedural mechanism does not demonstrate that the EPA lacked statutory authority to issue FIPs. Moreover, the EPA was operating under instructions from the court of appeals to complete remand proceedings expeditiously, *North Carolina* v. *EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam); Pet. App. 175a-176a, and a SIP call would have significantly delayed compliance with the court's mandate.

Respondents challenge the EPA's use of its authority under 42 U.S.C. 7410(k)(6) to correct statements in prior SIP approvals for some States. State-Local Br. 23-25. The court of appeals did not address that claim, Pet. App. 49a n.29, and it would be free to do so on remand if this Court grants certiorari and reverses the judgment below.[7] In any event, petitioners mischaracterize the EPA's action when they say that the agency used Section 7410(k)(6) authority to "retroactively disapprove[]" prior SIP submissions. State-Local Br. 23 (emphasis omitted). Instead, the EPA, "to avoid any confusion," merely "rescind[ed] any statements" in those prior approvals (each of which followed a still earlier disapproval

[7] That respondents have additional challenges to the Transport Rule, Industry-Labor Br. 34; State-Local Br. 36-38, is no impediment to review; those claims could likewise be addressed by the court of appeals on remand.

or finding of failure to submit) suggesting that the SIP submissions were compliant with the States' good-neighbor obligations. Pet. App. 173a. Those SIPs came in response to CAIR—the rule found by the D.C. Circuit in *North Carolina I* to be insufficiently protective of downwind States—and the EPA used its Section 7410(k)(6) authority here to make express what was already implicit after *North Carolina I*, namely that the CAIR SIPs were legally deficient. *Ibid.*

2. The court of appeals also erred both procedurally and substantively by reading a series of stringent requirements into the CAA's "significant contribution" provision, and then invalidating the EPA's rules for failure to comply with those requirements. Pet. 18-28.

a. The CAA prohibits judicial invalidation of EPA rulemaking on any ground not "raised with reasonable specificity during the period for public comment." 42 U.S.C. 7607(d)(7)(B). Although petitioners cite some comments from prior proceedings, and other comments that were submitted during the Transport Rule proceeding but asserted policy rather than statutory arguments, they do not identify a single comment that both (i) was filed in the Transport Rule proceeding itself and (ii) argued that the CAA imposed the three "red lines" (Pet. App. 22a) on the EPA's authority that the court of appeals discerned. The "failure to object specifically to EPA's lack of *statutory authority*" during the rulemaking should have been "grounds for dismissal of such objections" in the court of appeals. *Id.* at 97a (Rogers, J., dissenting).

b. As this Court recently reiterated, "the question in every case" involving a challenge to agency implementation of a statute "is, simply, whether the statutory text forecloses the agency's assertion of authority, or not."

City of Arlington, slip op. 9. "Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow." *Id.* at 16.

The court of appeals disregarded that framework.[8] If Congress had intended to limit the EPA's authority to implement the good-neighbor provision in the manner the court of appeals supposed (Pet. App. 22a), it would have done so expressly. Rather than imposing such limits, however, Congress gave the EPA broad authority to enforce the States' obligations to "prohibit[]" pollution that will "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to" NAAQS. 42 U.S.C. 7410(a)(2)(D)(i)(I). As one set of respondents acknowledges, "[t]he statute does not define 'contribute significantly' or 'interfere' either generally or with respect to specific NAAQS."

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[8] Respondents are wrong in contending that the government does not challenge the court of appeals' conclusion that the EPA had not complied with the "over-control" "red line[]" the court discerned in the CAA. Industry-Labor Br. 9-10; Pet. App. 22a, 27a-28a, 39a-40a. The government's certiorari petition challenged all of the court of appeals' "intertwined" conclusions (Pet. App. 31a), arguing categorically that "the court of appeals erred in invalidating the EPA's approach to the 'significant contribution' question." Pet. 21; see Pet. 12 ("The court * * * read several statutory commands of its own invention into the ambiguous term 'significant contribution' and faulted the EPA for not complying with those directives."); Pet. 23 (discussing "overcontrol"); Pet. 30 ("[T]he court of appeals placed onerous and unwarranted restrictions on the manner in which the agency may permissibly identify 'significant' contributions to downwind nonattainment."). Moreover, as respondents acknowledge (Industry-Labor Br. 12), the private petitioners also challenge the court of appeals' "over-control" conclusion. 12-1183 Pet. 23-25; see Br. of Respondents Calpine Corp. & Exelon Corp. in Support of Petitioners 18-24.

State-Local Br. 4. Congress thus delegated the task of implementing this open-ended standard (in an area of extraordinary technical complexity) to the expert agency.

Like the court of appeals, respondents focus on the hypothetical possibility of cases in which the EPA's methodology would lead to "over control" or to an inequitable degree of emission reduction in a particular upwind location. *E.g.*, Industry-Labor Br. 23 n.10, 27. Such situations—to the extent they ever materialized—would at most present bases for focused, record-based, arbitrary-and-capricious challenges. They do not support facial invalidation of a broadly-applicable rule.

Respondents argue that the EPA impermissibly considered cost-effectiveness when fashioning the Transport Rule, Industry-Labor Br. 24-28, and contend that it should have instead used a strictly emission-based approach, *id.* at 26. This argument is surprising, since regulated entities like respondents typically complain when agencies *fail* to take cost-effectiveness into account. Indeed, it is the court of appeals' approach that "cripple[s] EPA's ability to design a cost-effective, market-based program." Br. of Respondents Calpine Corp. & Exelon Corp. in Support of Petitioners 8. In any event, this Court has made clear that agencies are permitted to consider cost-effectiveness when construing broad qualitative standards. Pet. 25. The EPA was thus authorized to design its methodology in light of both air-quality and cost-effectiveness criteria. 12-1183 Pet. 28-30.

Finally, respondents observe that the "EPA stops short of saying it would be impossible for the agency to comply" with the court of appeals' "red lines." Industry-Labor Br. 29; Pet. App. 22a. In determining whether

the court of appeals' holdings are of sufficient practical importance to warrant this Court's review, however, the appropriate question is not whether compliance with the court's diktats would be "impossible," but whether such compliance would hobble and delay the agency's ability to discharge its statutory responsibilities and safeguard the environment and public health. The answer to that question is yes.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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