Nos. 12-1182, 12-1183

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.*,
Respondents.

AMERICAN LUNG ASSOCIATION, *et al.*,
Petitioners,
v.
EME HOMER CITY GENERATION, L.P., *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF INDUSTRY AND LABOR RESPONDENTS

F. WILLIAM BROWNELL
HUNTON & WILLIAMS LLP
2200 Pennsylvania
Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

P. STEPHEN GIDIERE III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203
(205) 251-8100

PETER D. KEISLER
Counsel of Record
C. FREDERICK BECKNER III
ROGER R. MARTELLA, JR.
TIMOTHY K. WEBSTER
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Luminant Generation Company LLC et al.

[Additional Counsel Listed on Inside Pages]

BART E. CASSIDY
KATHERINE L. VACCARO
DIANA A. SILVA
MANKO, GOLD, KATCHER
& FOX, LLP
401 City Avenue
Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

Counsel for ARIPPA

JEFFREY L. LANDSMAN
VINCENT M. MELE
WHEELER, VAN SICKLE &
ANDERSON, S.C.
25 West Main Street
Suite 801
Madison, WI 53703-3398
(608) 255-7277

Counsel for Dairyland Power Cooperative

CLAUDIA M. O'BRIEN
LORI ALVINO MCGILL
JESSICA E. PHILLIPS
KATHERINE I. TWOMEY
STACEY VANBELLEGHEM
LATHAM & WATKINS LLP
555 Eleventh St., N.W.
Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200

Counsel for EME Homer City Generation, L.P.

WILLIAM M. BUMPERS
JOSHUA B. FRANK
MEGAN H. BERGE
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7700

Counsel for Entergy Corporation, Northern States Power Company – Minnesota, Southwestern Public Service Company, and Western Farmers Electric Cooperative

KELLY M. MCQUEEN
ASSISTANT GENERAL COUNSEL
ENTERGY SERVICES, INC.
425 W. Capitol Avenue
27th Floor
Little Rock, AR 72201
(501) 377-5760

Counsel for Entergy Corporation

ROBERT J. ALESSI
DLA PIPER LLP (US)
677 Broadway
Suite 1205
Albany, NY 12207
(518) 788-9710

Counsel for Environmental Energy Alliance of New York, LLC

DENNIS LANE
STINSON MORRISON HECKER LLP
1150 18th Street, N.W.
Suite 800
Washington, D.C. 20036-3816
(202) 785-9100

DAVID R. TRIPP
PARTHENIA B. EVANS
STINSON MORRISON HECKER LLP
1201 Walnut Street
Suite 2900
Kansas City, MO 64106
(816) 842-8600

Counsel for Kansas City Board of Public Utilities – Unified Government Wyandotte County/Kansas City, Kansas, Kansas Gas and Electric Co., Sunflower Electric Power Corp., and Westar Energy, Inc.

MAUREEN N. HARBOURT
TOKESHA M. COLLINS
KEAN MILLER LLP
P.O. Box 3513
Baton Rouge, LA 70821-3513
(225) 387-0999

Counsel for the Lafayette Utilities System and Louisiana Chemical Association

ANN M. SEHA
ASSISTANT GENERAL COUNSEL
XCEL ENERGY INC.
414 Nicollet Mall
5th Floor
Minneapolis, MN 55401
(612) 215-4619

Counsel for Northern States Power Company – Minnesota and Southwestern Public Service Company

MICHAEL J. NASI
JACOB ARECHIGA
JACKSON WALKER L.L.P.
100 Congress Avenue
Suite 1100
Austin, Texas 78701
(512) 236-2000

Counsel for San Miguel Electric Cooperative, Inc.

GRANT CRANDALL
ARTHUR TRAYNOR, III
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Suite 200
Triangle, VA 22172
(703) 291-2457

EUGENE M. TRISKO
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 47
Glenwood, MD 21738
(301) 639-5238

Counsel for United Mine Workers of America

RICHARD G. STOLL
FOLEY & LARDNER LLP
3000 K Street, N.W.
Suite 600
Washington, D.C. 20007
(202) 295-4021

BRIAN H. POTTS
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
(608) 258-4772

Counsel for Wisconsin Public Service Corporation

RULE 29.6 STATEMENT

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally friendly circulating fluidized bed ("CFB") boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988 for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Big Brown Lignite Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Big Brown Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Dairyland Power Cooperative is a non-stock, not-for-profit cooperative association organized under the laws of the State of Wisconsin, with its principal office located in La Crosse, Wisconsin. Dairyland is engaged, among other things, in the business of generating and transmitting electric power to its 25 member distribution cooperatives and to other wholesale customers. Dairyland has no corporate parent. No publicly held corporation owns a 10% or greater ownership interest in Dairyland.

EME Homer City Generation, L.P. ("EME Homer City") is a limited partnership composed of Mission Energy Westside, Inc., a California corporation, as the general partner and Chestnut Ridge Energy Company, a California corporation, as the limited partner. Mission Energy Westside, Inc. and Chestnut Ridge Energy Company are wholly owned subsidiaries of Edison Mission Holdings Company, which, in turn, is a wholly owned subsidiary of Edison Mission Energy. Edison Mission Energy is a Delaware Corporation, which is a wholly owned subsidiary of Mission Energy Holdings Company, a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison Mission Group, Inc., a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison International, a California corporation.

On May 2, 2013, EME Homer City filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Illinois. EME Homer City has requested that the bankruptcy court jointly administer its case (13-18703) with the lead case, *In re Edison Mission Energy*, Case No. 12-49219 (JPC).

When EME Homer City filed its petition in the Court of Appeals, EME Homer City was the lessee and operator of the Homer City generating station, a coal-burning electric power facility that is affected by the Transport Rule. Edison Mission Energy is an independent power producer that generates electricity to sell wholesale in the open market. The ultimate parent company, Edison International, is engaged in the business of holding for investment the common stock of its subsidiaries which also include Southern California Edison, a California public utility corporation, and Edison Capital, which has investments in

energy and infrastructure projects worldwide. In addition, the following parent companies, or affiliates of EME Homer City have outstanding shares that are in the hands of the public: Edison International and Southern California Edison.

Entergy Corporation is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in Entergy Corporation.

Environmental Energy Alliance of New York, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

The Kansas City Board Of Public Utilities-Unified Government Wyandotte County/Kansas City, Kansas is not required to provide a Corporate Disclosure Statement because it is a governmental entity organized under the laws of the state of Kansas. Accordingly, no Corporate Disclosure Statement is being provided.

The Lafayette Utilities System, a department within the Lafayette City-Parish Consolidated Government, is a local government utility primarily servicing the citizens of the City of Lafayette, Louisiana. As a customer-owned municipal utility, the Lafayette Utilities System's mission is to provide its customers with quality and affordable electric, water, wastewater and fiber optic services. The Lafayette Utilities System does not issue stock; it does not have a parent corporation, and no publicly held corporation holds any Lafayette Utilities System stock.

The Louisiana Chemical Association has no parent companies, and no publicly held company has a 10% or greater ownership interest. The Louisiana Chemical Association is a non-profit Louisiana corporation formed in 1959. Its mission is to promote a positive climate for chemical manufacturing that ensures

long-term economic growth for its members. It is a "trade association."

Luminant Big Brown Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Energy Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Generation Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Holding Company LLC is the parent company that wholly owns Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, Oak Grove Management Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company LLC, and Luminant Energy Company LLC (collectively, the "Luminant Entities"). Luminant Holding Company LLC is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"). EFCH is a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."), formerly TXU Corp. Substantially all of the common stock of EFH Corp is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater ownership interest in EFH Corp.

Luminant Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

Northern States Power Company – Minnesota is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Northern States Power Company – Minnesota.

Oak Grove Management Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

San Miguel Electric Cooperative, Inc. is a 400 MW, mine-mouth, lignite-fired electric generating unit located in Atascosa County, Texas roughly 45 miles south of San Antonio. San Miguel was created on February 17, 1977, under the Rural Electric Cooperative Act of the State of Texas, for the purpose of owning and operating the generating plant and associated mining facilities that furnish power and energy to Brazos Electric Power Cooperative, Inc. and South Texas Electric Cooperative, Inc. San Miguel is a not-for-profit electric cooperative incorporated in the State of Texas under the Electric Cooperative Corporation Act, Tex. Util. Code, Chapter 161. San Miguel does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public and no publicly owned company has an ownership interest in San Miguel.

Sandow Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC,

whose complete corporate disclosure statement appears above.

Southwestern Public Service Company is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Southwestern Public Service Company.

Sunflower Electric Power Corporation is a Kansas non-profit corporation doing business as a cooperative with its principal place of business in Hays, Kansas. It is not a publicly held corporation; no publicly held corporation holds any ownership interest in it and it has no "parent" corporation. It is owned solely by its seven member distribution cooperatives, all of which are located in western Kansas. Sunflower Electric Power Corporation is engaged in the generation, transmission and sale of electric power and energy at wholesale to its member distribution cooperatives and municipalities in the state of Kansas.

United Mine Workers of American ("UMWA") is a non-profit national labor organization with headquarters in Triangle, Virginia. UMWA's members are active and retired miners engaged in the extraction of coal and other minerals in the United States and Canada, and workers in other industries in the United States organized by the UMWA. UMWA is affiliated with the American Federation of Labor-Congress of Industrial Organizations. UMWA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Westar Energy, Inc., a publicly traded Kansas corporation with its principal place of business in Topeka, Kansas, is the parent corporation of Kansas Gas

and Electric Company ("KGE"), a Kansas corporation with its principal place of business in Topeka, Kansas. Westar and its wholly owned subsidiary, KGE, are electric utilities engaged in the generation, transmission, distribution and sale of electric power and energy at wholesale and retail to approximately 687,000 customers in the state of Kansas. Westar owns all of the stock of KGE. In addition to Westar's publicly traded stock, both Westar and KGE have issued debt and bonds to the public. There is no corporation that owns 10% or more of the stock of Westar Energy, Inc.

Western Farmers Electric Cooperative ("WFEC") hereby certifies that no publicly held company has a 10 percent or greater ownership interest in WFEC. WFEC is a non-profit generation and transmission rural electric cooperative that supplies wholesale electricity to its member owners, which include 19 rural electric distribution cooperatives located in Oklahoma and 4 distribution cooperatives located in New Mexico.

Wisconsin Public Service Corporation ("WPSC") is a wholly owned subsidiary of the publicly owned corporation Integrys Energy Group, Inc (NYSE: TEG). WPSC is a regulated electric and natural gas utility operating in northeast and central Wisconsin and an adjacent portion of Upper Michigan.

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INTRODUCTION

The Clean Air Act's "good-neighbor" provision requires upwind States to prohibit air pollutant emissions in "amounts which will ... contribute significantly" to downwind States' nonattainment of federal air-quality standards. 42 U.S.C. §7410(a)(2)(D)(i)(I). In the Transport Rule, EPA relied on this provision to impose what it deemed "reasonable" and "cost-effective" emission reductions on upwind States, without regard to each individual upwind State's actual contribution to downwind nonattainment, and without regard to whether the overall reductions mandated were greater than necessary to achieve downwind attainment. The court of appeals correctly held that this approach exceeds EPA's statutory authority under the good-neighbor provision.

While faulting the court of appeals for purportedly failing to ground its holdings in any "language in the Act," EPA Br. 45, EPA makes no serious attempt to square its interpretation with the good-neighbor provision's text. Nor could it. The good-neighbor provision did not grant EPA general authority to impose "reasonable" or "cost-effective" emission reductions. Indeed, as read by EPA, the good-neighbor provision would impose no meaningful limits on the agency. As EPA acknowledged below, its reading of the statute would allow the agency to "require a State to reduce *more than the State's total emissions that go out of State*." Pet.App.38a n.23.

Congress, however, did not give EPA a blank check in the good-neighbor provision. The statute grants EPA only limited authority to require upwind States to "prohibit" emissions based on their effect on downwind attainment. EPA's approach is fundamentally inconsistent with the statutory criteria estab-

lished by Congress and, as implemented in the Transport Rule, transgressed EPA's legal authority in three independent ways, each of which provides a ground for vacating the Transport Rule. The decision below is correct and should be affirmed.

STATEMENT OF THE CASE

1. The Clean Air Act (CAA or Act) requires EPA to establish national ambient air quality standards (NAAQS) for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7408(a)(1)(A); see also *id.* §7409. It also requires EPA to designate areas of the country as "attainment," "nonattainment," or "unclassifiable" for each such pollutant, depending on whether the area meets NAAQS. *Id.* §7407(c), (d). Although EPA sets NAAQS, each State has "primary responsibility for assuring air quality" within its borders, *id.* §7407(a), and must develop a state implementation plan (SIP) to meet NAAQS and submit its SIP to EPA for approval, *id.* §7410.

Section 110(a)(2) addresses the specific elements that must be included in a SIP. These elements include a "good-neighbor" provision to address interstate pollution. Section 110(a)(2)(D) requires that SIPs "contain adequate provisions" prohibiting, "consistent with the provisions of this subchapter, any source … within the State from emitting any air pollutant in amounts which will … contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." *Id.* §7410(a)(2)(D)(i)(I). As pertinent here, various sources, including power plants, emit sulfur dioxide (SO_2) and nitrogen oxides (NO_x), which can contribute to downwind States' nonattainment of the

particulate matter ($PM_{2.5}$) and ozone NAAQS. 76 FR 48208, 48218 (Aug. 8, 2011) (Pet.App.165a–169a).[1]

2. In 1998, EPA issued the "NO_x SIP Call." This rule instructed more than 20 upwind States to revise their SIPs to mitigate downwind ozone by imposing NO_x emission limits on sources in these States. 63 FR 57356 (Oct. 27, 1998). EPA determined whether an upwind State was "contribut[ing] significantly to nonattainment" by using a "multifactor" test that considered both air quality and the cost of emission reductions. *Id.* 57376. EPA then set regulated upwind States' emission-reduction obligations (known as "emission budgets") based on the amount of emissions that could be eliminated through "reasonable, highly cost-effective NO_x control measures." *Id.* 57423. EPA ensured that these emission budgets did not produce "'overkill'"—*i.e.*, "that none of the upwind reductions required … [wa]s more than necessary to ameliorate downwind nonattainment." *Id.* 57403; see also *id.* 57379; EPA *Michigan* Cert. Opp. 11.

The D.C. Circuit largely upheld the NO_x SIP Call in *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000). Relevant here, the court held that EPA could consider "cost-effectiveness in determining what contributions are 'significant.'" *Id.* 675. The court held that the term "significant" was ambiguous and that the D.C. Circuit's precedents authorized agencies to ensure that regulations provide "benefits at least 'roughly commensurate with their costs.'" *Id.* 679.

Judge Sentelle dissented from the majority's holding that EPA could define "contribute significantly" based on "cost-effectiveness." Under the statute's

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[1] The relevant NAAQS attainment thresholds are 15 $\mu g/m^3$ for annual $PM_{2.5}$, 35 $\mu g/m^3$ for 24-hour $PM_{2.5}$, and 85 ppb for 8-hour ozone. 76 FR at 48218 (Pet.App.168a).

plain language, Judge Sentelle observed, "Congress clearly empowered EPA to base its actions on amounts of pollutants, those amounts to be measured in terms of significance of contribution to downwind nonattainment." *Id.* 695. Judge Sentelle faulted the majority for reading "significantly" in isolation. *Id.* 696–97. "While the contribution must affect nonattainment significantly, no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily-defined authority." *Id.* 696.

3. In 2005, EPA issued the Clean Air Interstate Rule (CAIR), which addressed downwind attainment of the annual $PM_{2.5}$ NAAQS in addition to the ozone NAAQS. 70 FR 25162 (May 12, 2005). In CAIR, EPA purported to "adop[t] much the same interpretation and application of section 110(a)(2)(D) … as EPA adopted in the NO_x SIP Call." *Id.* 25174. But it used a different approach for determining whether an upwind State was "contribut[ing] significantly" to downwind nonattainment. Using computer modeling, EPA projected whether, assuming the controls to be required by CAIR were not in effect, upwind States would contribute more than a specified threshold amount of pollution to downwind locations experiencing $PM_{2.5}$ or ozone attainment problems. *Id.* 25174, 25189–92. Only States that contributed more than this threshold were found to be "contribut[ing] significantly" and subject to emission budgets. *Id.*; see also *id.* 25188 ("[A]mbient impacts below the threshold mean that the upwind State's emissions do not contribute significantly to nonattainment."); *id.* 25191 (contribution below "this threshold … indicates a lack of significant contribution").

After determining which upwind States were "contribut[ing] significantly to nonattainment," EPA

set emission budgets using the same approach as in the NO_x SIP Call—*i.e.*, by reference to regionwide "highly cost effective" emission controls. *Id.* 25173, 25176–77, 25199–215. EPA refused to adjust its emission budgets "simply because they may have the effect of reducing the upwind State's contribution to below the initial threshold" used to determine whether the upwind State was "contribut[ing] significantly to nonattainment" in the first instance. *Id.* 25177. On the other hand, as in the NO_x SIP Call, EPA did consider whether its "cost-effective" controls were "more than is necessary for downwind areas to attain" NAAQS. *Id.* 25175; see *id.* 25177 ("[T]he regionwide reductions do not reduce $PM_{2.5}$ levels beyond what is needed for attainment and maintenance.").

In *North Carolina* v. *EPA*, the D.C. Circuit invalidated CAIR because EPA had not tailored its budgets to individual upwind States' emissions that actually "contribute significantly" to downwind nonattainment. 531 F.3d 896 (D.C. Cir.), *on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008). *North Carolina* rejected EPA's approach of allocating emission-reduction burdens among States in a way the agency considered "fai[r]." *Id.* 918–19. It held that EPA has "no authority to force an upwind state to share the burden of reducing other upwind states' emissions"; rather, "[e]ach state must eliminate its own significant contribution to downwind pollution," and EPA "may not require some states to exceed the mark." *Id.* 921. The D.C. Circuit remanded, but allowed CAIR to remain in place while EPA developed a new rule. 550 F.3d at 1178.

4. In response to *North Carolina*, EPA issued the Transport Rule at issue here, which addresses NO_x and SO_2 emissions that affect downwind States' ability to meet NAAQS for annual $PM_{2.5}$, 24-hour $PM_{2.5}$, and ozone. 76 FR at 48209 (Pet.App.128a–129a). De-

spite *North Carolina*, EPA in the Transport Rule retained the same basic approach it used in CAIR to define "contribute significantly."

EPA initially determined which downwind locations would have problems attaining or maintaining NAAQS in 2012 if CAIR were not in effect. *Id.* 48211 (Pet.App.137a). Because of the hypothetical nature of this inquiry, EPA used computer modeling to predict future downwind air quality on the assumption that States were not implementing CAIR. *Id.* 48229–30 (Pet.App.217a–225a).[2] EPA then used a two-stage approach to determine (1) whether to regulate an upwind State's emissions and (2) the emission budget for each regulated State.

At the first stage, EPA used its air-quality models to predict the amount each upwind State would contribute to the downwind locations it had identified (again assuming, counterfactually, that CAIR was not in effect). *Id.* 48233–36 (Pet.App.236a–254a). To determine which upwind States to regulate, EPA set air-quality contribution thresholds at 1% of each NAAQS. *Id.* 48236 (Pet.App.255a). Upwind States whose contributions to a nonattainment or maintenance location were predicted to exceed this threshold were deemed "linked" to that location and subjected to emission budgets. *Id.* Conversely, EPA found that "states whose contributions are below these

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[2] Specifically, EPA projected "design values"—EPA's statistic for measuring air quality relative to NAAQS—for receptor locations assuming no CAIR or Transport Rule requirements were in place, and called this projection the "base case." EPA also made "remedy case" projections reflecting projected air quality after imposition of Transport Rule emission budgets. See CAJA2945–48 (describing air-quality assessment tools); CAJA2549–637 (providing "base case" and "remedy case" air-quality projections for locations in Eastern U.S.).

thresholds *do not significantly contribute* to nonattainment," and thus were not subject to emission budgets. *Id.* (emphasis added); see also *id.* 48237 (Pet.App.256a) (the 1% threshold "identif[ies] states whose contributions *do not significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS") (emphasis added).

After determining which upwind States to regulate, EPA proceeded in the second stage to determine their emission-reduction obligations based on EPA's view of "reasonable" and "cost-effective" controls. *Id.* 48248–49, 48257 (Pet.App.316a–323a, 355a–358a). Specifically, EPA generated "cost curves" by evaluating the combined emission reductions that would result if upwind States adopted the emission controls available at varying costs per ton, used those curves to identify the "cost threshold" at which downwind air-quality improvements could be achieved at the cost per ton EPA deemed "cost-effective," and then set individual State emission budgets based on the reductions achievable in each State at that uniform cost threshold. *Id.*; see Calpine Br. 23–25 ("the cost of reducing emissions was a key factor EPA used to define 'amounts' that 'contribute significantly'").[3]

Thus, in contrast to its method for deciding which States to regulate, where it determined whether a State "contribute[s] significantly" by examining its actual contribution to downwind air quality, in set-

[3] For 2012 budgets, EPA chose a $500/ton threshold for both SO_2 and NO_x—*i.e.*, EPA calculated the amount of SO_2 and NO_x emissions each State could reduce at $500 per ton of emissions removed. 76 FR at 48249–52, 48257–59 (Pet.App.324a–332a, 355a–365a). For 2014 budgets, EPA split the States into two groups for SO_2, and chose $2,300/ton for Group 1 and $500/ton for Group 2. *Id.* The 2014 NO_x budgets used the $500/ton threshold. *Id.*

ting emission budgets EPA "define[d] each state's significant contribution … as the emission reductions available at [the applicable] cost threshold." 76 FR at 48248 (Pet.App.318a); see also *id.* 48303 (Pet.App. 577a) ("a state's significant contribution to nonattainment or interference with maintenance is defined by EPA as all emissions that can be eliminated for a specific cost").

Consequently, a State's emission budget bore no relationship to its relative contribution to downwind nonattainment. For example, although Florida was "linked" to just two receptors (in Harris, Texas) for ozone, 76 FR at 48246 (tbl.V.D-9) (Pet.App.306a), and although Louisiana's contribution to those receptors was greater than Florida's, CAJA2704, EPA's cost-based methodology imposed much larger emission-reduction obligations on Florida than Louisiana, 76 FR 48262–63 (tbl.VI.D-4), 48307 (tbl.VIII.A-5) (Pet.App.382a, 592a) (requiring Florida to reduce NO_x emissions from 45,993 tons to 27,825 tons, while requiring Louisiana to reduce from 13,924 tons to 13,432 tons).

Further, in stark contrast to its approach in CAIR and the NO_x SIP Call, EPA never considered whether the emission reductions it directed were greater than necessary to achieve attainment. Compare 76 FR at 48250, 48256–57 (Pet.App.325a, 354a), with 63 FR at 57379, 57403; 70 FR at 25175, 25177. With regard to NO_x, EPA refused to consider evidence indicating that less costly controls would still allow downwind States to attain NAAQS. CAJA1062–69. EPA's sole explanation was that some power plants might cease operating some existing NO_x controls at a cost threshold below \$500/ton. 76 FR at 48256–57 (Pet.App.354a). EPA offered no justification at all for its refusal to consider SO_2 controls costing less than

$500/ton, even though data demonstrated "similar air quality benefits could be achieved at between $200 and $400 per ton." CAJA1374.

Because EPA set emission budgets based on "reasonable" and "cost-effective" controls, it did not measure the air-quality contributions each individual upwind State's emissions would be making after imposition of emission controls. Thus, as in CAIR, EPA did not assess whether the emission controls it mandated would drive a State's contribution below the insignificance threshold, even though EPA previously had determined in stage one that emissions below that threshold "d[id] not significantly contribute to nonattainment or interfere with maintenance." 76 FR at 48236 (Pet.App.255a).

5. On review, the court of appeals concluded that "EPA's reading of Section 110(a)(2)(D)(i)(I)—a narrow and limited provision—reaches far beyond what the text will bear." Pet.App.40a. The court rejected EPA's position that the good-neighbor provision grants EPA a "blank check" to impose "reasonable" and "cost-effectiv[e]" emission reductions, *id.* 2a, 23a & n.12, 38a & n.23, finding it "inconceivable that Congress buried in" the good-neighbor provision "an open-ended authorization for EPA to effectively force every power plant in the upwind States to install every emissions control technology EPA deems 'cost-effective,'" *id.* 41a. Specifically, the court held that EPA's approach disregarded "the limits imposed by the statutory text" in "at least three independent" respects. *Id.* 4a, 31a.

First, the court held that the statute's text does not permit EPA to "force a State to eliminate more than its own '*significant*' contribution to a downwind State's nonattainment area." Pet.App.23a. The court held that EPA's methodology violated this constraint

because EPA first defined "amounts" of air-quality contribution that were "insignificant," thereby "establish[ing] a floor below which 'amounts' of air pollution do not 'contribute significantly,'" but then "ignore[d]" that statutory boundary and set emission budgets "in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State." *Id.* 36a–37a.

Second, the court held that the good-neighbor provision does not permit EPA to set emission budgets "without regard to an individual upwind State's actual contribution to downwind air quality," which necessarily depends on "each State's relative contribution to the downwind State's nonattainment." Pet.App.23a–24a. The court found that EPA violated this requirement because it relied on "cost-effectiveness" to require upwind States "to eliminate *more* than [their] statutory fair share," without taking into account their actual contributions to the downwind State's air quality or the downwind State's own contribution. *Id.* 38a–39a.

Third, the court held that because the good-neighbor provision targets only "those emissions from upwind States that 'contribute significantly *to nonattainment*,'" EPA must "ensure that the combined obligations of the various upwind States, as aggregated, do not produce more than necessary 'over-control' in the downwind States—that is, that the obligations do not go beyond what is necessary for the downwind States to achieve the NAAQS." Pet.App.27a–28a. The court found that "EPA did not try to take steps to avoid such over control." *Id.* 40a.

The court recognized, however, that "multiple upwind States may affect a single downwind State" and "a single upwind State may affect multiple downwind States." Pet.App.29a. The court held that EPA had

"discretion" to account for these complexities and was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not … possible" to do so. *Id.* The court required EPA to eliminate "over-control" only where technically feasible and not where it is "unavoidable." *Id.* 28a–29a.

Because the court concluded that the "Transport Rule stands on an unsound foundation," including EPA's "flawed construction" of the good-neighbor provision, and because that deficiency was "too fundamental" to cure through targeted corrections, the court vacated the Transport Rule. Pet.App.62a–63a.[4] However, the court allowed EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* 64a. Under CAIR, the vast majority of downwind locations in the eastern United States (the area of concern in the Transport Rule) have attained the NAAQS at issue in the rule. EPA, *Progress Report 2011: Environmental and Health Results* 12, 14 (2013) (*2011 Progress Report*). The emission-reduction obligations imposed in the Transport Rule, however, are substantially greater than those imposed under CAIR. 76 FR 70091, 70099 (Nov. 10, 2011); 75 FR 45210, 45217 (Aug. 2, 2010); 76 FR at 48214–15 (Pet.App.149a–155a).

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[4] The court did not rule on several arguments raised below that would independently require vacatur of the Transport Rule. See Industry/Labor CA Br. 37–47; States CA Br. 42–55. Thus, even if this Court were to reverse, a remand would be required to resolve these remaining objections.

SUMMARY OF ARGUMENT[5]

I. The court of appeals correctly held that in promulgating the Transport Rule EPA exceeded its statutory authority under the good-neighbor provision in three independent respects.

A. EPA failed to ensure that the emission reductions it ordered were not greater than necessary for downwind States to attain and maintain NAAQS. The good-neighbor provision requires upwind States to prohibit emissions that "contribute significantly *to nonattainment*." Despite record data showing it had massively overcontrolled upwind States and that less stringent emission-reduction obligations would have achieved downwind attainment, EPA refused to consider less stringent emission-reduction obligations, offering as its sole reason that they might cause some sources to discontinue operating existing controls. Neither that naked policy reason nor any of the *post hoc* rationales petitioners advance in their briefs justifies EPA's failure to limit emission reductions to those necessary to achieve downwind attainment.

B. EPA further exceeded its authority by defining "contribute significantly" based on the cost of emission controls rather than States' relative contributions to downwind nonattainment. By its terms, the good-neighbor provision focuses on the *effect* a State's emissions have on downwind air quality, not the *cost* of eliminating them. Given that Congress expressly authorized consideration of costs in many other provisions of the CAA, Congress' silence as to costs here

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[5] This brief addresses the court of appeals' holding that the Transport Rule violated the good-neighbor provision's substantive limits. The court also held that the Transport Rule violated the CAA's "cooperative federalism" structure; that issue is addressed in the state and local governments' brief.

precludes EPA from considering costs to define "contribute significantly."

Petitioners' contrary argument improperly reads the term "significantly" in isolation, ignores both the remainder of the provision and its statutory history, and produces the untenable result that States contributing identical "amounts" of air pollution to the same downwind location may be deemed to have different "significant contributions." Contrary to its contentions here, EPA never claimed in the Transport Rule, and certainly has not shown, that it would be impossible to comply with the statute's directive to define "contribute significantly" based on each State's actual contribution to downwind nonattainment.

C. EPA also erred by setting emission budgets without regard to its finding that States contributing less than 1% of the NAAQS do not "contribute significantly" to nonattainment. In so doing, EPA adopted fundamentally inconsistent definitions of the *same statutory term* and adopted a methodology that could require a State to eliminate more than its own "significant contribution." Petitioners' *post hoc* assertion that it is "unlikely" any State was driven below the insignificance threshold is both legally irrelevant and unsupported by the record, which shows that EPA imposed substantial emission-reduction obligations on States that were contributing only slightly above the 1% insignificance threshold.

II. Although petitioners assert that the court of appeals "lacked jurisdiction" to consider the challenges on which it granted relief, they make no effort to show that the issue-exhaustion requirement in CAA §307(d)(7)(B) is jurisdictional. It is not. The provision limits the objections the parties may raise, not the issues the reviewing court may decide. Another subsection of §307(d) expressly requires compliance with

the issue-exhaustion requirement as a condition of the court's power to grant relief on *procedural* grounds, making clear that Congress preserved the court's common-law discretion to grant relief on unexhausted *substantive* grounds. The answer to the first question presented is therefore "no," and the Court need not address petitioners' factbound exhaustion contentions, which are outside the scope of the questions presented.

In any event, petitioners' exhaustion arguments, which either were not made at all below or were made only in the most tentative and glancing fashion, lack merit. Each of the issues on which the court of appeals granted relief was raised with "reasonable specificity" in comments presented to EPA during the Transport Rule proceeding. Petitioners either ignore these comments entirely or erroneously assert that they made only "policy" arguments, apparently because they failed to recite the magic words petitioners think are necessary to preserve a "statutory" objection. Regardless, EPA cannot credibly claim it lacked an opportunity to address these issues, which it has repeatedly considered in three separate rulemakings over more than a decade.

Finally, this Court can and should decide the merits of the issues, regardless of whether they were properly exhausted, because they were passed upon by the court of appeals. As EPA itself explained in urging the Court to grant certiorari, the issues have ongoing significance because EPA intends to use the Transport Rule as a model for future rulemakings. The issues have been fully briefed, are squarely presented, and will persist. In the interest of efficiency, and to provide needed guidance on the scope of EPA's authority under the good-neighbor provision, the Court should decide them now.

ARGUMENT

I. THE TRANSPORT RULE EXCEEDS EPA'S STATUTORY AUTHORITY UNDER THE GOOD-NEIGHBOR PROVISION.

A. EPA Failed To Ensure That The Emission Reductions It Mandated Were Not Greater Than Necessary For Downwind States To Achieve Attainment.

1. The court of appeals correctly held that the Transport Rule must be vacated because EPA "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." Pet.App.39a. This holding flows directly from the good-neighbor provision's text, which requires States to prohibit only those emissions that "contribute significantly *to nonattainment*." "The good neighbor provision is not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS." *Id.* 28a. Once a downwind location is able to attain and maintain NAAQS, EPA's authority to regulate upwind emissions ceases.

Thus, EPA was obligated to ensure that its emission controls did not "require upwind States to do more than necessary for the downwind States to achieve the NAAQS." Pet.App.39a–40a. This obligation applies regardless of the criteria EPA uses to define "contribute significantly," *i.e.*, even if EPA may consider costs. But see *infra,* I.B. If less costly emission controls would have achieved downwind attainment, EPA was required to "ratchet back the upwind States' obligations to the levels of reductions necessary and sufficient to produce attainment in the downwind States." Pet.App.28a. In past rulemakings,

EPA recognized this statutory obligation to avoid "'overkill.'" 63 FR at 57403; see *supra*, 3, 5.

In the Transport Rule, however, EPA refused to take steps to avoid such overcontrol. Commenters proffered data showing that less costly emission controls would have enabled downwind States to achieve attainment at almost all the same locations as the more costly controls EPA chose. See CAJA1062–69, 1351–52, 1371–74, 1384–86, 1662–65, 1694, 1959. But EPA refused to consider whether lower cost thresholds would have sufficed for upwind States linked to those locations. As to SO_2, EPA offered no reason for its refusal, and as to NO_x, it stated only that it "did not find cost thresholds lower than \$500/ton for ozone-season NO_x to be reasonable" because they might cause some sources "to stop operating existing pollution control equipment." 76 FR at 48257 (Pet.App.354a).

Petitioners do not dispute the court of appeals' textual analysis. EPA Br. 49–53; ALA Br. 41–45. And EPA does not even attempt to defend its only stated reason for refusing to consider lower cost thresholds, which has no statutory basis—if upwind States can cease operating existing controls and still produce downwind attainment, EPA has no authority under the good-neighbor provision to require continued operation of existing controls. Instead, petitioners offer a series of arguments that were not made in the Transport Rule itself and are therefore barred, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), and that in any event have no basis in the administrative record or the text of the good-neighbor provision.

2. EPA suggests it prevented overcontrol through its cost-benefit analysis, EPA Br. 52, which identified the "point [at which] air quality gains per dollar spent on additional reductions are … smaller," 76 FR

at 48258 (Pet.App.359a). But such a cost-benefit analysis, even if properly conducted, is *irrelevant* to whether EPA overcontrolled. "Cost-effective" emission controls can still require upwind States to reduce more emissions than necessary for downwind States to achieve attainment. Likewise, it is irrelevant that the Transport Rule produced what EPA deems to be "beneficial and appropriate" downwind air quality. EPA Br. 53. The relevant statutory issue is whether *less stringent* emission budgets would *also* achieve downwind attainment. EPA cites no place in the Transport Rule where it conducted a relevant overcontrol analysis.[6]

EPA cannot provide such a citation because, as EPA ultimately concedes, EPA Br. 11, it expressly *refused* to undertake the necessary analysis based on policy concerns with no statutory foundation. ALA tries to justify EPA's failure to consider lower cost thresholds on the separate policy ground that the requirements EPA imposed were "modest." ALA Br. 43–44. But the good-neighbor provision does not allow EPA to prohibit "modest" amounts of upwind emissions without regard to whether those reductions are necessary to achieve downwind attainment. Regardless, ALA's "modesty" analysis was never provided by EPA in the Transport Rule and thus cannot sustain the rule. See *Chenery*, 332 U.S. at 196.

3. Alternatively, EPA suggests that its emission budgets did not cause any "significant amount of avoidable over-control." EPA Br. 53. EPA provides no

[6] ALA's contention that EPA avoided overcontrol "in multiple ways," ALA Br. 41–42, fails for the same reason. Like EPA, ALA does not identify any part of the Transport Rule where EPA considered whether less stringent controls would allow some or all downwind States to achieve attainment.

citation for this claim, nor could it. Having refused to consider whether less stringent controls would achieve attainment, EPA never found that it had produced no avoidable overcontrol. This argument is thus barred by *Chenery*.

In fact, EPA did not merely fail to "sto[p] 'on a dime,'" *id.* 51—it drove through a flashing red light without even looking. The record shows that EPA massively overcontrolled. For example, for the locations projected to have problems attaining or maintaining the annual $PM_{2.5}$ NAAQS, EPA projected that the emission reductions it mandated would achieve air quality at *each* location *superior to* NAAQS, in many cases by a substantial margin. CAJA2964. The difference between NAAQS and the average air-quality levels EPA imposed for these locations was more than *15 times* the air-quality threshold (0.15 $\mu g/m^3$) that triggered emission budgets. See *id.* EPA likewise projected outcomes substantially superior to NAAQS for 24-hour $PM_{2.5}$[7] and ozone[8] for the substantial *majority* of locations.[9]

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[7] See CAJA2965 (listing 2014 "remedy case" design values for projected 24-hour $PM_{2.5}$ nonattainment and maintenance receptors). EPA projected that the 24-hour $PM_{2.5}$ receptors of concern would achieve, on average, a design value of 29.53 $\mu g/m^3$—well below the NAAQS of 35 $\mu g/m^3$. *Id.*

[8] Compare 76 FR at 48244–46 (Pet.App.301a–309a) (listing projected nonattainment and maintenance receptors for 8-hour ozone), with CAJA2549–79 (listing 2014 "remedy case" design values for 8-hour ozone for all downwind locations modeled by EPA relative to NAAQS attainment threshold of 85 ppb).

[9] Contrary to ALA's suggestion, ALA Cert. Reply 3–4, these same air-quality projections demonstrate that the Transport Rule also imposed emission reductions far greater than necessary to eliminate maintenance concerns at the substantial majority of locations at issue. EPA thus overcontrolled even under a "worst case" scenario that assumes these locations would ex-

Other EPA data also confirm that individual States were overcontrolled. For example, Texas was "linked" solely to Madison, Illinois for $PM_{2.5}$, 76 FR at 48241 (tbl.V.D-2), 48243 (tbl.V.D-5) (Pet.App.278a, 291a), but Madison was projected to achieve air quality significantly superior to NAAQS, CAJA2964–65. So too for South Carolina. Compare 76 FR at 48241 (tbl.V.D-2) (Pet.App.278a) (linking South Carolina solely to Fulton, Georgia for annual $PM_{2.5}$), with CAJA2964 (projecting post-Rule air quality for Fulton superior to NAAQS). Examples of overcontrol for ozone abound as well. Compare, *e.g.*, 76 FR at 48246 (tbl.V.D-9) (Pet.App.307a) (linking Maryland and New Jersey solely to Fairfield and New Haven, Connecticut), with CAJA2550 (projecting post-Rule air quality for Fairfield and New Haven superior to NAAQS).

Indeed, EPA imposed emission reductions with regard to locations that were expected to achieve attainment in the near future *even without any good-neighbor emission reductions* (typically because of other federal requirements, independent State regulation, and other undertakings by industry). In the Transport Rule, EPA found that numerous locations that were expected to have attainment or maintenance problems would achieve NAAQS by 2014 without any good-neighbor emission reductions. See 76 FR at 48308 (tbl.VIII.B-1) (Pet.App.596a–597a). For example, although Florida and South Carolina were "linked" only to certain receptors in Harris, Texas for ozone, *id.* 48246 (tbl.V.D-9) (Pet.App.306a, 308a), and although EPA projected those locations would have no attainment or maintenance problems in 2014 without any good-neighbor emission reductions,

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perience meteorological conditions "promoting ozone or fine particle formation." 76 FR at 48228 (Pet.App.213a).

CAJA2575–76, EPA still required Florida and South Carolina to adopt $500/ton emission controls in 2014.

Finally, that EPA overcontrolled is further confirmed by the fact that there has been widespread attainment of the NAAQS at issue in the Transport Rule under CAIR, yet the Transport Rule "mandates even greater reductions than have already occurred under CAIR." 76 FR at 70099; see CAJA1351–52, 1662–65, 1694; *2011 Progress Report* at 12, 14. By definition, the additional emission reductions required by the Transport Rule are not necessary to achieve downwind attainment of the NAAQS at issue in the rule in locations that are already achieving those standards at *current* upwind emission levels.[10]

4. There is also no merit to petitioners' suggestion that this overcontrol is necessary to ensure that some downwind locations attain NAAQS or to avoid the "risk" of undercontrol. EPA Br. 51–52; ALA Br. 45. *Chenery* bars these arguments as well because EPA never made any such findings in the Transport Rule. Nor could such findings have responsibly been made on this record. That one upwind State may need to be overcontrolled in the sense posited by EPA to ensure that a downwind location achieves attainment is not grounds for overcontrolling *other* upwind States that are not "linked" to that location.[11] Likewise, that a

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[10] That EPA has subsequently adopted stricter NAAQS for some of the pollutants at issue cannot justify the Transport Rule's overcontrol. See EPA Cert. Reply 3–4. EPA in the Transport Rule addressed only the existing NAAQS and rejected arguments that it should set regulatory obligations based on future NAAQS. 76 FR at 48218–19 (Pet.App.168a–170a).

[11] For example, Texas and South Carolina were each "linked" solely to a single downwind location that was projected to achieve air quality superior to the relevant NAAQS. See *supra*,

few locations may not achieve attainment after imposition of the Transport Rule's emission budgets provides no justification for overcontrolling other upwind States that are not "contribut[ing] significantly" to those locations. Cf. EPA Br. 53; ALA Br. 42.

Nor can EPA's failure to undertake the inquiry mandated by the statute be excused on the ground that the "web of interconnecting upwind/downwind linkages" made it too "comple[x]." EPA Br. 51. This finding was never made by the agency below, and like EPA's other *post hoc* assertions, is barred by *Chenery*. Regardless, EPA plotted cost curves and examined whether the emission reductions required at the cost points it chose produced attainment. It would not have been *any* more "complex" to determine whether the emission reductions required at lower cost points would also produce attainment. And to the extent avoiding overcontrol requires separate consideration of upwind States linked to different downwind locations, that analytical step does not introduce any substantial "complexity." EPA found it was feasible to consider different cost thresholds for different upwind States (and indeed did so for the higher cost points it chose). *Id.* 52–53; 76 FR at 48249, 48252 (Pet.App. 322a, 331a–332a).

Further, shortly after issuing the Transport Rule, EPA promulgated two different rules acknowledging unrelated errors in the Transport Rule that required EPA to increase many upwind States' emission budgets, some by a substantial amount. 77 FR 34830, 34838–42 (June 12, 2012); 77 FR 10324, 10326–29 (Feb. 21, 2012). EPA determined that the increased budgets would produce "no estimated changes in the

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19. That some other locations may not attain NAAQS provides no justification for overregulating Texas or South Carolina.

patterns of attainment, nonattainment, and maintenance" found in the Transport Rule. *Final June Revisions Rule Significant Contribution Assessment TSD* 4 (June 2012);[12] *Final Revisions Rule Significant Contribution Assessment TSD* 4 (Feb. 2012);[13] see also 77 FR at 34837 (finding that increased budgets produced only "minor changes in estimated air quality concentrations at the receptors to which the states in this rule were 'linked' in the final Transport Rule"). Thus, EPA's own actions establish both that the Transport Rule imposed emission-reduction obligations greater than necessary to achieve downwind attainment and that EPA is capable of assessing whether less stringent emission budgets could still achieve attainment.

B. EPA Improperly Relied On Cost Rather Than Each State's Relative Contribution To Downwind Air Quality To Define "Contribute Significantly."

The court of appeals also invalidated the Transport Rule because it defined each State's "significant contribution" without reference to the relative "amounts" of pollution each State contributes to downwind nonattainment. Pet.App.38a–39a. Specifically, EPA "define[d] each state's significant contribution … as the emission reductions available at a particular cost threshold." 76 FR at 48248 (Pet.App.318a); see also *id.* 48260 (Pet.App.367a). Thus, EPA quantified a State's "significant contribution," not based on the "amounts" of emissions from the State that travel to

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[12] http://www.epa.gov/airtransport/CSAPR/pdfs/FinalJuneRevisionsRuleSignificantContributionAssessmentTSD.pdf

[13] http://www.epa.gov/airtransport/CSAPR/pdfs/Final%20Revisions%20Rule%20Significant%20Contribution%20Assessment%20TSD.pdf

the downwind location and adversely affect air quality there, but rather "based on the reductions [in a State's total emissions] achievable at a particular cost per ton." *Id.* 48270 (Pet.App.419a); see also *id.* 48303 (Pet.App.577a) ("a state's significant contribution to nonattainment or interference with maintenance is defined by EPA as all emissions that can be eliminated for a specific cost").

Petitioners contend that the court of appeals erred because the good-neighbor provision does not compel a "strict air quality-only methodological approach." EPA Br. 46; see also ALA Br. 39. In their view, the statute's "ambiguous and undefined terms" permit EPA to "conside[r] cost-effectiveness in defining significant contribution," and the court should have deferred to EPA's "reasonable construction." EPA Br. 44–45; see also ALA Br. 35–37.

Petitioners are wrong, and EPA's reading of the good-neighbor provision is entitled to no deference. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The good-neighbor provision requires each State to prohibit only those "amounts" of air pollution emitted within the State that "contribute significantly" to another State's nonattainment or "interfere" with another State's maintenance of NAAQS. 42 U.S.C. §7410(a)(2)(D)(i). By its terms, the statute focuses on the *effect* a State's emissions have on downwind air quality, not on the *cost* of reducing those emissions. EPA's assertion of broader authority to order whatever additional upwind reductions it deems "cost-effective" exceeds the fundamental statutory limits on its authority and must be rejected.

1. In determining whether EPA may consider costs in defining "contribute significantly," this Court does not write on a blank slate. The Court confronted a similar question in *Whitman* v. *American Trucking Associations*, 531 U.S. 457 (2001), which held that EPA may not consider costs in setting NAAQS under CAA §109(b). *Id.* 464–71. The Court emphasized that many other provisions of the CAA "explicitly permitted or required economic costs to be taken into account in implementing the air quality standards." *Id.* 467. The Court "therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id.* Absent a "textual commitment of authority to the EPA to consider costs in setting NAAQS," the Court concluded that the CAA "unambiguously bars cost-consideration from the NAAQS-setting process, and thus ends the matter for us as well as the EPA." *Id.* 468, 471.

Accordingly, petitioners "must show a textual commitment of authority to EPA to consider costs" in defining "contribute significantly" under the good-neighbor provision. *Id.* 468. They cannot do so. The good-neighbor provision addresses only the "amounts" of "air pollutants" that "contribute significantly" to another State's nonattainment or "interfere" with another State's maintenance of NAAQS. The statutory text makes clear that the "amounts" of "air pollutants" each State is required to eliminate must be quantified based on the degree to which they affect another State's ability to attain or maintain NAAQS—*i.e.*, based on their effect on downwind air quality. Nowhere does the statute mention the cost-effectiveness of emission controls on upwind States.

This silence is telling: If Congress had intended EPA to consider costs in defining "contribute signifi-

cantly," surely it would have said so expressly, as it did in numerous other provisions of the Act. See *id.* 467. Indeed, there are hundreds of instances in which the term "cost" appears in the CAA, as well as numerous instances in which Congress specifically directed consideration of "cost-effectiveness," see, *e.g.*, 42 U.S.C. §§7404(a)(1), 7511b(d), 7628(a)(1)(A), 7651c(f)(1)(A), (B)(iv). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) (alteration and internal quotation marks omitted).

Petitioners largely ignore *American Trucking*, relying instead on *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208 (2009), to argue that agencies should be permitted to consider costs except where "expressly precluded by statute." EPA Br. 44.[14] But *Entergy* does not stand for that proposition, which would turn both *American Trucking* and ordinary principles of administrative law on their heads. See *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("To suggest … that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power … is both flatly unfaithful to the principles of administrative law … and refuted by precedent.") (omissions in original).

Moreover, the provision in *Entergy* appeared in the Clean Water Act, not the CAA, and used language that comfortably accommodated cost considerations. See 556 U.S. at 218 ("one could certainly use the phrase 'best technology' to refer to that which pro-

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[14] That *American Trucking* "noted" the D.C. Circuit's decision in *Michigan*, EPA Br. 44, does not mean the Court approved it.

duces a good at the lowest per-unit cost"). In addition, the provision was "silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors." *Id.* 222. The good-neighbor provision, by contrast, contains no language that can reasonably be read to authorize EPA to consider costs in defining "contribute significantly," and it expressly identifies the only relevant factor—the extent to which the "amounts" of pollution from the upwind state affect downwind attainment. See 76 FR at 48216 (Pet.App.160a) (the good-neighbor provision "requires states to prohibit certain emissions *because of their impact on air quality in downwind states*") (emphasis added).

Further, EPA itself has explained that its role under the good-neighbor provision "is analogous to determining [NAAQS]." 63 FR at 57369. In the NO_x SIP Call, EPA emphasized that it must determine "the overall level of reductions" "by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of section 110(a)(2)(D)," and then "it falls to the State to determine the appropriate mix of controls to achieve those reductions." *Id.* *American Trucking* found this same division of responsibilities supported the conclusion that costs may not be considered by EPA in setting NAAQS, but may be considered by States in determining how to "implement" NAAQS. 531 U.S. at 470–71; see *infra*, n.17.

Accordingly, as in *American Trucking*, the absence of textual authority to consider costs in defining "contribute significantly," when viewed in the "relevant 'statutory context'" of the CAA, "is best interpreted as limiting agency discretion." *Entergy*, 556 U.S. at 223.

2. Petitioners nevertheless contend that Congress implicitly authorized EPA to consider costs in defining "contribute significantly." But they make no

meaningful effort to analyze the statutory text or to explain how the provision, read as a whole, supports this interpretation. Instead, they attempt to find authorization to consider costs in a single word—"significantly." EPA Br. 43; ALA Br. 35.

In so doing, petitioners "mak[e] a fundamental mistake by divorcing the adverb 'significantly' from the verb it modifies, 'contribute,'" and then "compoun[d] their error by divorcing significantly from the rest of the statutory provision." *Michigan*, 213 F.3d at 696 (Sentelle, J., dissenting). The subject of the clause is the "amounts" of "air pollutants" emitted in the upwind State, and those "amounts" must "contribute significantly" to another State's nonattainment of NAAQS. The adverb "significantly" describes the degree to which the amounts of air pollutants "contribute" to downwind nonattainment, and the term "contribute" in this context means to "help to cause or bring about." *New Oxford American Dictionary* 378 (3d ed. 2010); cf. *Massachusetts* v. *EPA*, 549 U.S. 497, 532–33 (2007) (reading "contribute to" in 42 U.S.C. §7521(a)(1) as a causation standard).

The relevant question, therefore, is the extent to which the "amounts" of "air pollution" from an upwind State help cause or bring about another State's nonattainment of NAAQS. The answer depends on the quantity of emissions that travel to the downwind location and their qualitative impact on air quality there. While EPA no doubt has some latitude in determining when effects on downwind attainment are of sufficient magnitude to be deemed "significan[t]," there is no sense in which the effect of a given "amoun[t]" of air pollution on downwind air quality depends on the cost of emission controls. Just as the term "adequate" in CAA §109 does not authorize consideration of costs in setting NAAQS, *Am. Trucking*,

531 U.S. at 468, the term "significantly" cannot be plucked out of context and used to justify reliance on cost considerations that have no bearing on the degree to which an upwind State's emissions affect downwind attainment, see *City of Chi.* v. *Envtl. Def. Fund*, 511 U.S. 328, 339 (1994) (rejecting "the Solicitor General's plea for deference to the EPA's interpretation" because it went "beyond the scope of whatever ambiguity [the statute] contain[ed]"); *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and in judgment) ("It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"). "Significant" cannot be read to mean "inexpensive to reduce."

The good-neighbor provision's focus on the causal relationship between upwind emissions and downwind air quality is further made clear by the "interfere with maintenance" prong, which "significantly" does not modify. In determining whether the "amounts" of "air pollutants" from an upwind State "interfere" with a downwind State's maintenance of NAAQS, petitioners can point to no textual basis whatsoever for the Transport Rule's reliance on costs, not even the fig leaf of "significantly." And petitioners offer no reason to suppose Congress authorized EPA to consider costs in assessing whether upwind emissions "contribute significantly to nonattainment," but not whether they "interfere with maintenance."

The good-neighbor provision's history makes clear that Congress did no such thing. When originally enacted in 1970, the good-neighbor provision required States to ensure that their emissions did "not interfere with the attainment or maintenance" of NAAQS by downwind States. 84 Stat. 1676, 1681 (1970). In 1977, Congress modified the text, requiring States to

prohibit emissions that would "prevent attainment or maintenance" of NAAQS by downwind States. 91 Stat. 685, 693 (1977). Neither of these predecessor versions of the good-neighbor provision contained any arguable textual basis for considering costs. And when Congress amended the good-neighbor provision to its current form in 1990, there is no indication that it intended the term "contribute significantly," which focuses on emissions contributing to downwind air quality, to grant EPA new authority to consider costs. Rather, the amendment was intended only to make clear that an upwind State's emissions need not be a "but for" cause of the downwind State's attainment problem. See S. Rep. No. 101-228, at 21 (1989).

Thus, EPA can read "costs" into the "contribute significantly" determination only by improperly isolating the term "significantly" from the remainder of the provision, ignoring the good-neighbor provision's statutory history, and disregarding this Court's precedents. As EPA has recognized before, an interpretation that "extrapolate[s] from isolated phrases" and "overlook[s] context" is "fundamentally unsound." EPA *Am. Trucking* (No. 99-1426) Br. 35. Just as the CAA "unambiguously bars cost considerations from the NAAQS-setting process," *Am. Trucking*, 531 U.S. at 471, it unambiguously bars cost considerations in defining "contribute significantly."

3. EPA's reliance on costs further conflicts with the statute's text and structure because it treats the same "amounts" of "air pollutants" differently based solely on the relative costs of emission controls in the contributing States. Under EPA's approach, the "amoun[t]" that a particular State is deemed to "contribute significantly to nonattainment" depends entirely on the amount of emissions it can eliminate at EPA's chosen cost threshold. See 76 FR at 48270

(Pet.App.419a). To the extent an upwind State can eliminate more emissions at that cost threshold than other upwind States that also "contribute" to the same downwind location, it has a greater reduction obligation, even if all the upwind States contribute the same "amounts" of "air pollutants" and those pollutants have the same effect on the downwind location's air quality.

Consequently, under EPA's approach, States that contribute identical "amounts" of air pollution to the same downwind location may be deemed to have substantially *different* "amounts" that "contribute significantly" based solely on EPA's views of their relative efficiencies in reducing air pollution. Indeed, a State that contributes only a relatively small amount of downwind air pollution may be deemed to have a substantially greater "significant contribution" than neighboring States that contribute substantially greater amounts of pollution to the very same location. See *Michigan*, 213 F.3d at 679 (requiring "small contributors" to "make reductions equivalent to those achieved by highly cost-effective measures" is an "ineluctabl[e]" feature of "EPA's uniform control strategy").

For example, as noted above, while Louisiana was projected to contribute greater amounts to Harris County's maintenance problems than Florida, Florida was required to reduce its NO_x emissions to a far greater extent than Louisiana. *Supra*, 8.[15] Similarly, even though South Carolina was linked only to Ful-

[15] Indeed, the vast majority of the emission reductions expected at $500/ton were due to Florida's reductions alone. 76 FR at 48250–51 (tbl.VI.B-2) (Pet.App.327a–328a) (showing that all upwind States combined were expected to reduce ozone-season NO_X emissions by approximately 19,000 tons, but Florida alone was expected to reduce by approximately 15,000 tons).

ton, Georgia for annual $PM_{2.5}$, 76 FR at 48241 (tbl.V.D-2) (Pet.App.278a), and was projected to contribute less than half as much as Alabama to that location, CAJA2706–07, South Carolina was required to reduce its SO_2 emissions by a greater percentage, and to a substantially lower absolute level, than Alabama, 76 FR 48261–62 (tbl.VI.D-3), 48305 (tbl.VIII.A-3) (Pet.App.377a–378a, 588a–589a) (requiring South Carolina to reduce emissions by 57.7% to 88,620 tons, while requiring Alabama to reduce by 48.9% to 213,258 tons).

But nothing in the good-neighbor provision permits EPA to increase emission-reduction obligations on one State merely because that State can reduce emissions more cheaply than another State. If that had been Congress' intent, it would have written a different statute. EPA proceeds as if the good-neighbor provision were a freestanding grant of authority to require States to "adopt such cost-effective emission controls as are necessary to ensure that interstate air pollution does not contribute significantly to any State's nonattainment of NAAQS." Regardless of the regulatory merits of EPA's approach, that is not the statute Congress wrote.

Instead, Congress placed the good-neighbor provision in §110 as a requirement governing each State's SIP, making clear that State boundaries cannot simply be ignored as inconvenient obstacles to regulatory efficiency. And it required each State to prohibit only those "amounts" of "air pollutants" that "contribute significantly to nonattainment" or "interfere with maintenance" of NAAQS by downwind States. Under EPA's approach, however, a State's reduction obligation depends on its relative efficiency compared to other States in eliminating air pollution, *not* the amount of pollution the State is actually contributing

to downwind attainment problems. EPA did not even measure how much each individual upwind State would be contributing after adoption of the Transport Rule's emission budgets. Pet.App.37a n.21; EPA CA Br. 33 n.20. Indeed, as the court of appeals recognized, EPA's methodology would allow it to "require a State to reduce *more than the State's total emissions that go out of State*." Pet.App.38a n.23.[16] The court of appeals correctly held that EPA's approach violates the statute's plain terms and deserves no deference.

4. In setting cost-based emission budgets, EPA also "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." Pet.App.39a. Although the downwind States have the "primary responsibility" for achieving attainment, 42 U.S.C. §7407(a), EPA concluded that "a strategy based on adopting cost effective controls on sources of transported pollutants as a first step will produce a more *reasonable, equitable and optimal strategy than one beginning with local controls*." 75 FR at 45226 (emphasis added). Thus, in projecting downwind air quality, EPA did not take into account "local control programs that may be necessary for areas to attain … NAAQS," *id.* 45241, and it imposed strict upwind emission budgets even when it recognized that "local sources are at the heart of the … problem," 76 FR 68699, 68703 (Nov. 7, 2011) (discussing Allegheny, Pennsylvania).

EPA claims this concern is "hypothetical" because the "contribution from the downwind State itself was

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[16] EPA's unsupported assertion that all in-State emissions travel beyond the State's borders, EPA Br. 48 n.14, does not answer the court of appeals' core concern. Under EPA's approach, a State that could eliminate 100% of its emissions at EPA's chosen cost threshold would be required to do so, regardless of its contribution to downwind nonattainment.

in *all* cases below" NAAQS, EPA Br. 48, and because upwind States were responsible for the vast majority of downwind attainment problems, *id.* 7–8; see also ALA Br. 17, 41. But EPA never made these findings in the rule, and for good reason: EPA's brief misinterprets the data on which it relies and, as a result, misstates the record. EPA argues that the tables in Appendix F to the Air Quality Modeling Technical Support Document (TSD) (JA177–85) show that the downwind State's own contribution was in all cases below NAAQS, but those tables *exclude* significant sources of in-State contribution, such as biogenic emissions, primary $PM_{2.5}$ emissions, and secondary organic aerosols. See CAJA2442–48.

Indeed, the exclusion of significant sources of contribution is confirmed by the fact that, based on the data in Appendix F, all downwind locations of concern would be *well below NAAQS even after adding the total contribution from all upwind States*, in which case there would be no basis to regulate upwind emissions. JA177–85 (showing aggregate emissions less than NAAQS attainment thresholds of 15 $\mu g/m^3$ for annual $PM_{2.5}$, 35 $\mu g/m^3$ for 24-hour $PM_{2.5}$, and 85 ppb for ozone). The tables in Appendix F are also inconsistent with the tables in Appendix B to the Air Quality Modeling TSD, which EPA used to determine the locations that are expected to have attainment problems. Compare *id.*, with CAJA2546–699 (showing 2012 base case average design values for the locations listed in Appendix F). And they conflict with EPA's finding that even after eliminating the upwind contribution, Lancaster and Allegheny Counties in Pennsylvania would not attain the 24-hour $PM_{2.5}$ NAAQS as a result of *local* emissions. See 76 FR at 48258–59 (Pet.App.361a–364a); cf. JA182

(Appendix F showing in-State contribution well below the 35 μg/m^3 attainment threshold for these counties).

5. Ultimately, EPA tries to justify its approach on two policy grounds. *First*, EPA claims that the court of appeals' approach is "not mathematically possible" when a State contributes to multiple downwind locations. EPA Br. 50. EPA, however, did not invoke mathematical impossibility during the rulemaking. Although it cited "technical difficulty" in determining each State's required reduction, EPA recognized that it was possible to set emission budgets based on each State's maximum downwind air-quality contribution to nonattainment or maintenance. CAJA2312; see 76 FR 48240 (tbl.V.D-1), 48242 (tbl.V.D-4), 48244–45 (tbl.V.D-7) (Pet.App.271a–273a, 282a–284a, 301a–302a) (listing maximum contributions for each pollutant). EPA rejected this approach because it could result in more reductions than necessary for each area to achieve attainment. CAJA2312; see EPA Br. 47–48. But EPA has not explained why, in the event of such overcontrol, it could not "ratchet back the upwind States' obligations to the level of reductions necessary and sufficient to produce attainment in the downwind States." Pet.App.28a.

In any event, the court of appeals fully understood that there are multiple overlapping linkages, and its ruling accounted for this fact. Pet.App.28a–29a. The court held that EPA was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not … possible" to do so, or to eliminate "over-control" when it was "unavoidable." *Id.* But EPA may not use the purported complexity of the problem as an excuse to abandon altogether the statute's requirement that "contribute significantly" be defined by each State's actual contribution to downwind nonattainment.

Second, EPA argues that the court of appeals' approach does not take into account the "different degrees of pollution-control progress" that States have made, and could potentially impose "large and expensive emission-reduction requirements on States whose sources were already well controlled." EPA Br. 49–50. In particular, EPA poses a hypothetical in which three upwind States contribute equal amounts to a downwind State's nonattainment but have made differing levels of investment in pollution controls. *Id.* 49. EPA contends that requiring all three States to make equivalent emission reductions would be inefficient because a State that had not previously invested in emission controls might be able to eliminate pollution more cheaply than a State that had already made such investments. *Id.*

Again, EPA's arguments only highlight its failure to "adhere to th[e] basic requirement of the statutory text." Pet.App.37a–38a. As discussed above, the good-neighbor provision does not permit EPA to deem the same "amounts" of air pollution from different upwind States to be simultaneously significant and insignificant depending on how much it would cost each State to eliminate them. Even as a policy matter, moreover, EPA never explains why it would be unfair to treat the same "amounts" of contribution by two States equally merely because one State had previously made investments to reduce its amount to the *same* level as a neighboring State. The neighboring State may have achieved lower "amounts" of emissions by mandating greater use of clean energy or undertaking policies that minimized energy consumption, or its economy may simply have a different industrial base—none of which makes it necessarily

more equitable, much less lawful, to require it to bear a portion of the first State's statutory burden.[17]

C. EPA Improperly Disregarded The Insignificance Threshold In Setting Emission Budgets.

1. The court of appeals also vacated the Transport Rule because EPA, having found that contributions below 1% of NAAQS did not "contribute significantly" to nonattainment, improperly disregarded that finding and set emission budgets without regard to whether they drove a State's emissions below the 1% insignificance threshold. Pet.App.31a–38a. Having "creat[ed] a floor below which 'amounts' of downwind pollution were not significant …. EPA could not then ignore that mark and redefine each State's 'significant contribution' in such a way that an upwind

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[17] Although not at issue here, petitioners are wrong in arguing that the fact that EPA cannot use cost to define a State's "significant contribution" means that costs can never be considered in this context. EPA Br. 46 n.13; ALA Br. 38 n.14. For example, costs may be considered in implementing EPA's emission budgets—*i.e.*, determining how to allocate among sources elimination of the "significant contribution" amount defined by EPA. See *Am. Trucking*, 531 U.S. at 470. Likewise, a SIP's good-neighbor provisions must be "consistent with the [other] provisions of this subchapter," 42 U.S.C. §7410(a)(2)(D)(i), which permit consideration of costs to limit the emission reductions that would otherwise be required to achieve air-quality goals, see, *e.g.*, 42 U.S.C. §7502(c)(1) (requiring State nonattainment plans to provide for "reasonably available control measures"); 40 C.F.R. §51.100(o)(2) ("reasonably available" requires consideration of "economic impact"); see also 42 U.S.C. §§7502(c)(2), 7509(d)(2), 7513(e). That Congress elsewhere gave EPA or the States general authority to consider costs in *ameliorating* undue regulatory burdens also underscores that EPA cannot rely on costs to define and *enlarge* a State's obligation under the good-neighbor provision to eliminate "significant contribution" solely because it would be relatively inexpensive for a State to comply.

State's required reductions could be *more* than its own significant contribution to a downwind State." *Id.* 36a.

This error flows largely from EPA's improper reliance on costs rather than air quality to define "contribute significantly" in setting emission budgets. Accordingly, the Court need not separately address the issue if it agrees that EPA may not consider costs in defining "contribute significantly." See *supra*, I.B. But even if costs may be considered, the court of appeals correctly held that EPA may not require a State to reduce its emissions below the level that EPA has determined does not "contribute significantly."

2. Petitioners do not present this issue fairly because they studiously ignore the operative language from the Transport Rule. One would never know by reading their briefs that EPA found that "states whose contributions are below th[e] [1%] thresholds *do not significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS." 76 FR at 48236 (Pet.App.255a) (emphasis added); accord *id.* 48237 (Pet.App.256a). Nor would one know that EPA made the very same finding in the Transport Rule's predecessor, CAIR. 70 FR at 25188 ("[A]mbient impacts below the threshold mean that the upwind State's emissions do not contribute significantly to nonattainment."). Instead, petitioners invent a new nomenclature that never appeared in the Transport Rule, calling stage one "the screening analysis" and stage two "the control analysis." EPA Br. 10. But whatever their terminology, petitioners do not and cannot dispute that EPA expressly found that certain "amounts" of air pollutants were insignificant and then ignored that statutory boundary in determining the amount of reductions to order.

Because petitioners do not acknowledge what EPA found in the Transport Rule, they offer no objection to the court of appeals' reasoning. EPA Br. 54; ALA Br. 33. Instead, EPA tries to side-step the issue by saying that it did not "set out to regulate emissions that will contribute *in*significantly to downwind nonattainment" and that the court merely found that "the Rule does not eliminate that possibility." EPA Br. 54. From this premise, EPA argues that any such "incidenta[l]" overcontrol can be excused given the "complexit[y]" of the regulatory issue. *Id.* at 51, 54.

But the error the court of appeals identified does not turn on EPA's intent; nor is it "incidental." Rather, it reflects a fundamental flaw in EPA's methodology. Although EPA adopted a two-stage approach, both stages purported to define the very same thing: the "amounts" that "contribute significantly to nonattainment." Whether determining which States should be subject to emission controls or the level of those controls, the good-neighbor provision permits EPA to prohibit only those "amounts" of air pollution that "contribute significantly to nonattainment."

EPA, however, adopted inconsistent definitions *of the very same statutory language.* Pet.App.37a n.22. In the second stage, EPA defined each State's "significant contribution" based on cost without regard to the actual amounts of air pollutants that the State contributes, but in the first stage defined "amounts" that "contribute significantly to nonattainment" exclusively based on actual air pollutant amounts. Compare 76 FR at 48248 (Pet.App.318a) (EPA "define[d] each state's significant contribution … as the emission reductions available at a particular cost threshold"), with *id.* 48236 (Pet.App.255a) ("states whose contributions are below these [air-quality] thresholds do not significantly contribute to nonat-

tainment"). No amount of "interpretive contortion" can allow EPA to "giv[e] the same word[s], *in the same statutory provision*, different meanings." *United States* v. *Santos*, 553 U.S. 507, 522 (2008) (plurality).

3. Given the "illogi[c]" of EPA's conflicting definitions of "contribute significantly," Pet.App.37a n.22—such that air quality is the exclusive basis for determining whether an upwind State should be regulated but then entirely ignored when it comes to the extent of the regulation—EPA's two-stage approach cannot be saved merely by making *ad hoc* adjustments to emission budgets, as EPA suggests. EPA Br. 55. Nor does it matter whether some upwind States were forced to reduce their emissions below the 1% insignificance threshold. EPA cannot adopt an inherently inconsistent reading of the very same statutory text regardless of whether any particular State was driven below the insignificance threshold.

In all events, whether EPA required States to eliminate "amounts" that it had deemed insignificant is not "hypothetical." *Id.* 54. Rather, the extent to which this occurred is not *knowable* on the administrative record because EPA never measured how much any upwind State would be contributing after imposition of the Transport Rule's cost-based emission budgets. Pet.App.15a–17a; EPA CA Br. 33 n.20 ("this was not an issue EPA analyzed in a direct fashion for the Rule"). As the D.C. Circuit observed in *North Carolina*, "[w]hen a petitioner complains EPA is requiring a state to eliminate more than its significant contribution, it is inadequate for EPA to respond that it never measured individual states' significant contributions." 531 F.3d at 920.

Remarkably, having acknowledged that EPA did not determine the amounts that upwind States would be contributing to nonattainment after the imposition

of emission budgets, petitioners assert that it is "unlikely" that any upwind States were forced to reduce emissions below the insignificance threshold. EPA Br. 55; ALA Br. 33. The record indicates the opposite. In several instances, the Transport Rule required States that were contributing only slightly above the insignificance threshold to make substantial emission reductions. See*, e.g.*, 76 FR at 48240 (tbl.V.D-1) (Pet.App.273a) (showing Texas contribution of only 0.03 $\mu g/m^3$ above the insignificance threshold); *id.* 48245 (tbl.V.D-7) (Pet.App.302a) (showing South Carolina contribution of only 0.1 ppb above the insignificance threshold); *id.* 48261–63 (tbls.VI.D-3, VI.D-4) (Pet.App.377a–379a, 382a) (emission budgets). To the extent petitioners rely on calculations undertaken by EPA's lawyers in the court of appeals, such *post hoc* analysis is barred by *Chenery* and, in all events, the calculations did not measure the level of contribution post-Transport Rule for $PM_{2.5}$ or address ozone at all. See Industry/Labor CA Reply 5–6.

EPA seeks to excuse this failure by asserting that no party raised any concern about whether EPA's regulatory approach could force States to eliminate insignificant contributions. EPA Br. 54. But as explained above, the core error was not EPA's failure to make *ad hoc* adjustments to individual State emission budgets based on the 1% threshold, but its fundamentally flawed approach to defining "contribute significantly." And, as explained in greater detail below, commenters not only objected to EPA's approach, but also—specifically citing the 1% insignificance threshold—asked EPA to provide State-specific contribution data showing what reductions were necessary to eliminate significant contribution "without considering costs." JA240–41. EPA's response was to ignore the issue.

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For all of these reasons, the methodology EPA adopted in the Transport Rule is fundamentally inconsistent with the statutory limits on EPA's authority, and the court of appeals correctly concluded that the rule must be set aside. Pet.App.62a–63a. Without citing any authority, petitioners contend that EPA's errors support only targeted arbitrary-and-capricious challenges by affected States and not facial invalidation of the rule. EPA Br. 53, 55; ALA Br. 40. These arguments are meritless. Where, as here, an agency adopts a rule that is fundamentally at odds with the statute's terms, "a facial challenge is … a proper response to the systemic disparity between the statutory standard and the [agency's] approach," and parties are not "compelled to raise a separate, as-applied challenge to the regulations." *Sullivan* v. *Zebley*, 493 U.S. 521, 537 n.18 (1990).

That is especially true here, given EPA's view that regulating interstate pollution under the good-neighbor provision requires an integrated analysis of a "web of interconnecting upwind/downwind linkages," EPA Br. 51, that must be considered comprehensively and not in piecemeal fashion based on State-specific, *ad hoc* adjustments. Because the errors the court of appeals identified permeate the rule, the Transport Rule should be vacated.

II. THE COURT OF APPEALS HAD JURISDICTION TO CONSIDER THE CHALLENGES ON WHICH IT GRANTED RELIEF.

Petitioners do not dispute that the D.C. Circuit had jurisdiction to review the Transport Rule under CAA §307(b)(1). They argue, however, that the court exceeded its jurisdiction by considering the issues on which it granted relief, and that this Court should

not reach the merits of those issues, because they purportedly were not "raised with reasonable specificity" during the comment period as required by §307(d)(7)(B). EPA Br. 33–42; ALA Br. 28–35.

Petitioners' efforts to avoid a decision on the merits fail for three reasons. *First*, because §307(d)(7)(B)'s issue-exhaustion requirement is not jurisdictional, the court of appeals had jurisdiction to consider the issues on which it granted relief regardless of whether they were raised before EPA. *Second*, the court of appeals correctly held that the issues were raised with reasonable specificity during the comment period and did not abuse its discretion in deciding them even if they were not. *Third*, the issues are properly before this Court because they were passed upon below, and given their ongoing importance to the implementation of the good-neighbor provision, the Court should decide them now rather than needlessly perpetuate the legal uncertainty the Court granted certiorari to resolve.

1. In arguing that the court of appeals erred by reaching the merits of the issues on which it ruled, petitioners focus almost exclusively on whether the comments submitted to EPA satisfied the requirements of §307(d)(7)(B). In so doing, petitioners ignore the question on which this Court granted certiorari: "Whether the court of appeals lacked *jurisdiction* to consider the challenges on which it granted relief." EPA Pet. I (emphasis added). Although petitioners assert that the court of appeals exceeded its jurisdiction, EPA Br. 34; ALA Br. 28, they make no effort to show that §307(d)(7)(B) is a jurisdictional requirement.[18] For that reason alone, the Court should an-

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[18] EPA cites *National Association of Clean Water Agencies* v. *EPA*, No. 11-1131, 2013 WL 4417438, at *41 (D.C. Cir. Aug. 20,

swer the first question presented in the negative and proceed to the merits.

Even aside from petitioners' failure to address the question presented, it is clear that §307(d)(7)(B)'s issue-exhaustion requirement is nonjurisdictional. This Court has "'tried in recent cases to bring some discipline to the use' of the term 'jurisdiction.'" *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013). "To ward off profligate use of the term 'jurisdiction,' [the Court] ha[s] adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional": Absent a "clear statement" from Congress that a rule is jurisdictional, "'courts should treat the restriction as nonjurisdictional in character.'" *Id.* This rule applies to "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010) (administrative exhaustion provision in Copyright Act is nonjurisdictional).

Section 307(d)(7)(B) contains no such jurisdictional clear statement. Jurisdictional statutes delineate the "classes of cases" a court may hear, *id.* 160, and restrict "'a court's adjudicatory authority,'" *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 648 (2012). Section

2013), for the proposition that the court lacks jurisdiction to consider an objection that was not raised before EPA. But neither that decision nor the case on which it relied contains any analysis of whether §307(d)(7)(B) is jurisdictional. See *id.* (citing *Portland Cement Ass'n* v. *EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011)). This Court has "described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect.'" *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006). ALA, for its part, does not even mention jurisdiction, merely asserting without explanation or citation of authority that the court is "authorized" to consider only those objections that were presented to the agency. ALA Br. 28.

307(d)(7)(B), by contrast, does not mention jurisdiction, does not define a class of cases the court may hear, and does not address the court's adjudicatory authority. Rather, by its terms, it addresses only the "objection[s]" that "may be raised during judicial review." This language speaks to the parties, not to courts. See EPA Br. 38 ("An 'objection' is made by a party in administrative proceedings, not by appellate judges reviewing them."). Because §307(d)(7)(B) limits the objections the parties may raise, not the issues the court may decide, it does not restrict the court's jurisdiction. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) ("jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties'"); cf. *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (statute providing that no objection not presented to the agency "shall be considered by the court" spoke "to courts, not parties").

Any doubt on this score is put to rest by the fact that in another subsection of §307(d) Congress expressly required issue exhaustion as a condition of the court's power to grant relief, but only for *procedural* errors. See 42 U.S.C. §7607(d)(9)(D)(ii) (providing that the court "may reverse" the agency on procedural grounds "if … the requirement of paragraph (7)(B) has been met"). By contrast, Congress did not require compliance with paragraph (7)(B) before a court "may reverse" agency action found to be arbitrary and capricious or in excess of statutory authority. *Id.* §7607(d)(9)(A), (C). If §307(d)(7)(B) by its own force restricted the court's jurisdiction, then the express requirement of compliance with §307(d)(7)(B) as a condition of the court's power to grant relief on procedural grounds would be surplusage, and no effect would be given to Congress's conspicuously different treatment of substantive errors. See *Gonzalez*,

132 S. Ct. at 649 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally ….") (alteration and internal quotation marks omitted).

Moreover, the legislative history of §307(d)(7)(B) shows that Congress intended to codify common-law issue exhaustion. "By and large," the House Report says, "[§307(d)] represents a legislative adoption of the suggestions for a rulemaking record set forth in a recent law review article." H.R. Rep. No. 94-1175, at 260 (1976). That law-review article, Pederson, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975), discusses common-law exhaustion and cites common-law cases, *id.* 76–77 & n.140 (citing *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973)). And like the trial-court preservation requirements from which it is derived, see *Sims* v. *Apfel*, 530 U.S. 103, 108–09 (2000), common-law administrative issue exhaustion has always been considered nonjurisdictional, see *id.* 106 n.1; *McKart* v. *United States*, 395 U.S. 185, 197–200 (1969); *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941).

Thus, far from reflecting a "clear statement" that Congress intended §307(d)(7)(B) to "rank as jurisdictional," *Sebelius*, 133 S. Ct. at 824, the statute's text and history reveal the opposite: Congress did not limit the court's jurisdiction to grant relief based on substantive agency errors, regardless of whether they were raised in comments before EPA.

2. Because §307(d)(7)(B) is nonjurisdictional, the answer to the first question presented is "no," and this Court need not address the separate, factbound question whether the comments submitted to EPA were sufficiently specific to preserve the issues. Indeed, because the latter issue is "outside the ques-

tions presented by the petition for certiorari," the Court should follow its "general rule" and decline to address it. *Glover* v. *United States*, 531 U.S. 198, 205 (2001); see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

That course is doubly warranted here because, in contrast to the waiver arguments it makes here, which have now mushroomed to fill nine pages of its brief, EPA barely even argued waiver below. With respect to the going-beyond-attainment issue, EPA addressed the merits of the argument head on without ever suggesting it was waived. EPA CA Br. 36–42. With respect to EPA's reliance on costs rather than relative contributions to downwind air quality to define "significant contribution," EPA acknowledged that commenters had raised the issue and merely complained that they had not done so "'forcefully,'" without actually contending that the argument was waived. *Id.* 21 n.11, 30 & n.16 (citing comments from Wisconsin, Connecticut, and Delaware). With respect to EPA's disregard of the 1% insignificance threshold, EPA suggested only that the argument "likely has been waived," but noted that Tennessee's comment was "arguably relevant." *Id.* 32 & n.18. And ALA did not argue waiver in its brief below at all. As a result, petitioners' waiver arguments should themselves be deemed waived. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976) (administrative exhaustion is subject to waiver).

Moreover, petitioners' contention that EPA did not have notice of the issues or an opportunity to address them, EPA Br. 35–36, ALA Br. 29–30, rings hollow. EPA has long recognized that it lacks authority to impose reductions that are greater than necessary to

resolve downwind attainment problems, see *supra*, 3, 5, yet here it refused to consider commenters' demonstration that lower cost thresholds would achieve attainment, 76 FR at 48257 (Pet.App.354a). Likewise, EPA has long interpreted the good-neighbor provision to permit the agency to define "contribute significantly" based on cost rather than each State's proportionate contribution to downwind air quality, EPA Br. 42, and EPA reiterated that interpretation here, rejecting an approach based on "'each State's individualized air quality impact on downwind nonattainment,'" 76 FR 48270–71 (Pet.App.418a–421a); CAJA2311–12. And in CAIR, EPA rejected the argument that it may not require States to reduce their emissions below the insignificance threshold. 70 FR at 25176–77. EPA has had more than "a fair opportunity to evaluate and choose among proposed alternative constructions" and "to avoid mistakes." EPA Br. 35–36.[19]

Particularly given this background, each of the issues on which the court of appeals granted relief was adequately presented to EPA during the comment period. As to going beyond attainment, commenters argued that EPA's cost thresholds were higher than necessary and presented data showing that most downwind locations could achieve attainment at lower cost thresholds—and indeed that most downwind locations were already in attainment as a result of CAIR's less stringent requirements. See CAJA1062–69, 1371–74, 1384–86, 1351–52, 1662–65, 1694, 1959. EPA addressed these comments as to NO_x, stating that it "did not find cost thresholds lower than

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[19] In any event, because the court of appeals' holdings are dictated by the statute's unambiguous text, EPA's interpretation is irrelevant. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

\$500/ton for ozone-season NO_x to be reasonable" because they might cause some sources "to stop operating existing pollution control equipment." 76 FR at 48257 (Pet.App.354a). As noted, EPA never contended in the court of appeals that this objection had been waived; nor does ALA make that argument here. See ALA Br. 28–35.

As to proportionality, EPA expressly considered and rejected air-quality approaches, after soliciting the views of interested parties at the outset of the rulemaking. 75 FR at 45299; CAJA2307, 2311–12. Even after EPA had rejected these approaches in its notice of proposed rulemaking, commenters argued that EPA needed to rely on a State's physical contribution to downwind air quality rather than costs to define its "significant contribution." *E.g.*, CAJA1756 (Delaware comment arguing that "an upwind state's emissions contribution is significant or interferes with maintenance in a downwind state based on the emissions and their effect on air quality, and is independent of cost considerations"), 1971, 2007, 2056, 1755–56.[20] West Virginia even "request[ed] a tabular summary by state and pollutant that demonstrates the reductions necessary for each state to eliminate significant contribution and interference with maintenance (without considering costs)." JA240–41; see also CAJA1823 (similar request from Tennes-

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[20] There is no basis for EPA's assertion that Delaware's comment was merely "a policy 'opinion.'" EPA Br. 41. Delaware was expressing an "opinion" about the meaning of the statutory terms. CAJA1756 (opining on what significant contribution "is"). Nor does it matter whether Delaware supported greater or lesser upwind reductions. Either way, its comment put EPA on notice of a statutory objection to its reliance on costs to define significant contribution.

see).[21] Commenters also argued that a State's significant contribution depends on its contribution relative to those of other upwind States and the downwind State. CAJA903, 1060–62, 1519, 1634. And in the final rule, EPA yet again rejected air-quality approaches in favor of one that used costs to define "amounts" that "contribute significantly." 76 FR 48270–71 (Pet.App.418a–421a).[22]

As to EPA's disregard of the 1% insignificance threshold—the only issue as to which petitioners actually address the comments submitted during the rulemaking—petitioners fail to identify any error in the court of appeals' holding that the issue was adequately raised. Pet.App.32a n.18. Petitioners wrongly suggest the court held that §307(d)(7)(B) was satisfied solely by comments made in the predecessor

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[21] Contrary to EPA's assertion, EPA Br. 41, nothing prevents respondents from relying on additional comments such as West Virginia's that provide further support for respondents' showing below that the issues were preserved. Cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

[22] ALA, but not EPA, mistakenly argues that the proportionality issue was not adequately raised in the briefs below. ALA Br. 34. Respondents argued repeatedly below that the statute required EPA to define each State's "significant contribution" based not on cost, but on the relative "amounts" of pollution it contributed to downwind nonattainment compared to other upwind States and the downwind State. Industry/Labor CA Br. 19–26, 33; Reply 4, 8–10. EPA acknowledged and responded to these arguments. EPA CA Br. 21–22 ("'Industry petitioners … read [the good-neighbor provision] as prohibiting any consideration of costs or cost-effectiveness in determining what contributions are '"significant."'"); see also *id.* 18–19, 40 n.26. In any event, whether the issue was raised in the court of appeals implicates neither jurisdiction nor §307(d)(7)(B). The issue was passed upon and is properly before this Court for that reason alone, *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and it is the question on which this Court granted certiorari.

CAIR rulemaking. EPA Br. 38–39; ALA Br. 31. In fact, the court properly considered comments made in the CAIR proceeding, along with *North Carolina's* reasons for invalidating CAIR, as relevant *context* in finding that the comments submitted in the Transport Rule proceeding were "reasonabl[y] specifi[c]." See Pet.App.34a n.18.

In particular, the court of appeals evaluated the Transport Rule comments in light of the fact that EPA "considered—and rejected—precisely this same argument in CAIR." Pet.App.32a n.18. CAIR commenters argued "that the threshold contribution level selected by EPA should be considered a floor, so that upwind States should be obliged to reduce their emissions only to the level at which their contribution to downwind nonattainment does not exceed that threshold level." 70 FR at 25176–77. In issuing CAIR, EPA acknowledged and rejected this argument. *Id.* 25177; see also EPA Reh'g Pet. 11 (acknowledging that CAIR rejected this objection "for legal and policy reasons"). And EPA had another opportunity—indeed, an obligation—to revisit this issue after *North Carolina*, which held that once EPA defines each State's "significant contribution," it may not "require some states to exceed the mark." 531 F.3d at 921. As a result, *North Carolina* found that CAIR was "fundamentally flawed" and instructed "EPA [to] redo its analysis from the ground up." *Id.* 929.

In this context, Tennessee's and Wisconsin's comments were sufficiently specific to preserve the issue. Tennessee contended that EPA should not apply its uniform cost controls when doing so would "reduce [a State's] contribution below [the] 1% significance [threshold]." CAJA556. And Wisconsin argued that, in setting emission budgets, EPA had improperly abandoned the air-quality approach it had used to de-

termine which states were required to reduce emissions. CAJA1293.[23] Contrary to petitioners' contentions, EPA Br. 40–41, ALA Br. 32 n.12, there is no basis for dismissing these comments as mere policy arguments. Wisconsin expressly characterized its objection as "legal" in nature, CAJA1293, and Tennessee's comment that a State should not be required to reduce its "contribution below 1% significance," CAJA556, is fairly read as invoking EPA's lack of statutory authority to require reductions of amounts that do not "contribute significantly." Section 307(d)(7)(B) requires only "reasonable specificity." It does not require commenters to incant magic words.[24]

In any event, the court of appeals did not abuse its discretion in deciding these key statutory issues, even if they were not adequately raised before EPA. See, *e.g., Appalachian Power Co.* v. *EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (holding the court may reach unexhausted arguments regarding "'key assumptions'" underlying EPA rules); cf. *McKart*, 395 U.S. at 197–99 (exhaustion not required where question was "solely one of statutory interpretation"). As discussed above, Congress expressly required issue exhaustion as a condition of the court's power to reverse agency action on *procedural* grounds, making clear that the court has discretion to reverse based on unexhausted *substantive* grounds. Compare 42 U.S.C. §7607(d)(9)(D)(ii), with *id.* §7607(d)(9)(A), (C). And

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[23] Wisconsin did not advocate "*more* stringent controls." EPA Br. 40. Wisconsin's proposed approach would have produced *less* stringent budgets where the agency had required a State to eliminate more than its significant contribution.

[24] Even if construed as making only "policy" arguments, Tennessee's and Wisconsin's comments would still support vacatur on the ground that EPA's use of inconsistent definitions of "contribute significantly" was arbitrary and capricious.

Congress modeled §307(d)(7)(B) on common-law preservation requirements, which courts have always had discretion to relax when circumstances warrant. See *Hormel*, 312 U.S. at 557; cf. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 (2008) ("when to deviate" from preservation rules is "a matter 'left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases'").

Given all the circumstances—the fact that EPA has squarely addressed the issues, the centrality of the issues to the statutory scheme, the inconsistency between EPA's approach and the court of appeals' mandate in *North Carolina*, petitioners' failure to argue waiver either at all or forcefully in their briefs below, and the fact that commenters did in fact raise the issues before EPA—the court of appeals did not abuse its discretion in resolving the issues it did.

3. In all events, this Court can and should decide the merits of the issues because they were passed upon below and have ongoing significance for the administration of the CAA.

This Court retains wide discretion to consider any issue that has been decided by a lower court, even if it was not properly raised by the litigants. See, *e.g.*, *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002); *United States* v. *Williams*, 504 U.S. 36, 41 (1992). For example, in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), the court of appeals reached a statutory issue that had not been preserved during a civil trial in federal court. *Id.* 1099 n.8. This Court reached the issue as well, explaining that "[i]t suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Id.* (internal citations and quota-

tion marks omitted); see also *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

Likewise here, there are compelling reasons for this Court to review the merits of the D.C. Circuit's holdings. *First*, the issues have ongoing importance to the administration of the CAA. EPA has indicated that it intends to use the Transport Rule as a model for future rulemakings. EPA Cert. Pet. 12, 32. Thus, as EPA explained in urging the Court to grant review, the "importance" of the issues presented in this case "transcends the rulemaking at issue." *Id.* 32. In addition, even if this Court affirmed, EPA would still need to revise the Transport Rule in light of new air-quality data and revised NAAQS. See Industry/Labor Cert. Opp. 30–32. Declining to decide the merits of the issues here would merely delay their resolution, needlessly perpetuating uncertainty and creating further litigation. It is in everyone's interest to resolve the issues now, before EPA and regulated parties expend further efforts on yet another rule that must be vacated because EPA ignored the statutory limits on its authority.

Second, the issues were fully aired below, the court of appeals decided them in a thorough, reasoned opinion, and the parties have briefed the merits of the issues in this Court. And as discussed above, EPA has had ample opportunity to "'bring its expertise to bear'" on the issues in three separate rulemakings over more than a decade. Pet.App.32a n.18; cf. *Williams*, 504 U.S. at 44–45 (reaching an "important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue"). Further litigation is

therefore unlikely to aid this Court's resolution of the issues and would only waste this Court's resources as well as the parties'.

Third, the issues presented are pure questions of law and are squarely presented. No further factual development is necessary to assess whether EPA's methodology is consistent with the statutory limits on its authority. Petitioners complain that the purported lack of specific comments on the 1% threshold issue prevented EPA from evaluating the likelihood that any State was driven below the insignificance threshold and considering whether to adopt a "backstop mechanism." EPA Br. 37–38; ALA Br. 33. But commenters asked EPA to produce precisely this information. See JA240–41; CAJA1823. And petitioners ignore that EPA claims authority to use a methodology that sets emission budgets without regard to whether they drive a State's emissions below the insignificance threshold. See EPA Br. 54.

When confronted with the issue in CAIR, moreover, EPA did not analyze whether any State's emissions were driven below the insignificance threshold, belying any suggestion that it would have done so here had the issue been presented with even more specificity. See 70 FR at 25176–77.[25] Regardless, EPA's assertion of authority to require emission reductions below the level that EPA has determined does not

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[25] In CAIR, EPA *necessarily* required elimination of insignificant emissions because it imposed emission-reduction obligations on Minnesota even though Minnesota was contributing exactly at the insignificance threshold before imposition of CAIR budgets. See *North Carolina*, 531 F.3d at 926 (noting EPA in CAIR ultimately determined that Minnesota's expected "contribution was actually 0.20 $\mu g/m^3$, the exact threshold for inclusion"); *CAIR Response to Comments* 599–600 (corrected Apr. 2005), *available at* http://www.epa.gov/cair/pdfs/cair-rtc.pdf.

"contribute significantly" raises a basic question of statutory interpretation that is ripe for this Court's review. No purpose would be served by remanding the case to the D.C. Circuit without this Court's authoritative guidance on the scope of EPA's authority under the good-neighbor provision.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

PETER D. KEISLER
Counsel of Record
C. FREDERICK BECKNER III
ROGER R. MARTELLA, JR.
TIMOTHY K. WEBSTER
ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

F. WILLIAM BROWNELL
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

P. STEPHEN GIDIERE III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203
(205) 251-8100

Counsel for Luminant Generation Company LLC et al.

BART E. CASSIDY
KATHERINE L. VACCARO
DIANA A. SILVA
MANKO, GOLD, KATCHER
& FOX, LLP
401 City Avenue
Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

Counsel for ARIPPA

JEFFREY L. LANDSMAN
VINCENT M. MELE
WHEELER, VAN SICKLE &
ANDERSON, S.C.
25 West Main Street
Suite 801
Madison, WI 53703-3398
(608) 255-7277

Counsel for Dairyland Power Cooperative

CLAUDIA M. O'BRIEN
LORI ALVINO MCGILL
JESSICA E. PHILLIPS
KATHERINE I. TWOMEY
STACEY VANBELLEGHEM
LATHAM & WATKINS LLP
555 Eleventh St., N.W.
Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200

Counsel for EME Homer City Generation, L.P.

WILLIAM M. BUMPERS
JOSHUA B. FRANK
MEGAN H. BERGE
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7700

Counsel for Entergy Corporation, Northern States Power Company – Minnesota, Southwestern Public Service Company, and Western Farmers Electric Cooperative

KELLY M. MCQUEEN
ASSISTANT GENERAL
COUNSEL
ENTERGY SERVICES, INC.
425 W. Capitol Avenue
27th Floor
Little Rock, AR 72201
(501) 377-5760

Counsel for Entergy Corporation

ROBERT J. ALESSI
DLA PIPER LLP (US)
677 Broadway
Suite 1205
Albany, NY 12207
(518) 788-9710

Counsel for Environmental Energy Alliance of New York, LLC

DENNIS LANE
STINSON MORRISON
HECKER LLP
1150 18th Street, N.W.
Suite 800
Washington, D.C. 20036-3816
(202) 785-9100

DAVID R. TRIPP
PARTHENIA B. EVANS
STINSON MORRISON
HECKER LLP
1201 Walnut Street
Suite 2900
Kansas City, MO 64106
(816) 842-8600

Counsel for Kansas City Board of Public Utilities – Unified Government Wyandotte County/Kansas City, Kansas, Kansas Gas and Electric Co., Sunflower Electric Power Corp., and Westar Energy, Inc.

MAUREEN N. HARBOURT
TOKESHA M. COLLINS
KEAN MILLER LLP
P.O. Box 3513
Baton Rouge, LA 70821-3513
(225) 387-0999

Counsel for the Lafayette Utilities System and Louisiana Chemical Association

ANN M. SEHA
ASSISTANT GENERAL COUNSEL
XCEL ENERGY INC.
414 Nicollet Mall
5th Floor
Minneapolis, MN 55401
(612) 215-4619

Counsel for Northern States Power Company – Minnesota and Southwestern Public Service Company

MICHAEL J. NASI
JACOB ARECHIGA
JACKSON WALKER L.L.P.
100 Congress Avenue
Suite 1100
Austin, Texas 78701
(512) 236-2000

Counsel for San Miguel Electric Cooperative, Inc.

GRANT CRANDALL
ARTHUR TRAYNOR, III
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Suite 200
Triangle, VA 22172
(703) 291-2457

EUGENE M. TRISKO
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 47
Glenwood, MD 21738
(301) 639-5238

Counsel for United Mine Workers of America

RICHARD G. STOLL
FOLEY & LARDNER LLP
3000 K Street, N.W.
Suite 600
Washington, D.C. 20007
(202) 295-4021

BRIAN H. POTTS
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
(608) 258-4772

Counsel for Wisconsin Public Service Corporation

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