No. 12-

IN THE

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Air Act's "Good Neighbor" provision requires that state implementation plans contain "adequate" provisions prohibiting emissions that will "contribute significantly" to another state's nonattainment of health-based air quality standards. 42 U.S.C. 7410(a)(2)(D)(i). A divided D.C. Circuit panel invalidated, as contrary to statute, a major EPA regulation, the Transport Rule, that gives effect to the provision and requires 27 states to reduce emissions that contribute to downwind states' inability to attain or maintain air quality standards. The questions presented are:

(1) Whether the statutory challenges to EPA's methodology for defining upwind states' "significant contributions" were properly before the court, given the failure of anyone to raise these objections at all, let alone with the requisite "reasonable specificity," "during the period for public comment," 42 U.S.C. 7607(d)(7)(B);

(2) Whether the court's imposition of its own detailed methodology for implementing the Good Neighbor provision violated foundational principles governing judicial review of administrative decision-making;

(3) Whether an upwind state that is polluting a downwind state is free of any obligations under the Good Neighbor provision unless and until EPA has quantified the upwind state's contribution to downwind states' air pollution problems.

PARTIES TO THE PROCEEDING

The following were parties in the proceedings in the United States Court of Appeals for the District of Columbia Circuit:

American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club, petitioners in this Court, were intervenors in support of the United States Environmental Protection Agency.

The United States Environmental Protection Agency ("EPA"), respondent in the D.C. Circuit, has filed a separate petition in this Court. The other named respondent in the court of appeals was EPA Administrator Lisa Perez Jackson. As of February 15, 2013, Ms. Jackson no longer holds that office. Robert Perciasepe is the Acting Administrator.

Additional respondent-intervenors below in support of the United States Environmental Protection Agency, who are nominal respondents on review, are Calpine Corporation; City of Bridgeport, Connecticut; City of Chicago; City of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395); City of Philadelphia; Commonwealth of Massachusetts; District of Columbia; Exelon Corporation; Mayor and City Council of Baltimore; Public Service Enterprise Group, Inc.; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395);

State of North Carolina; State of Rhode Island; and State of Vermont.

Petitioners below, who are respondents in this Court, were AEP Texas North Company; Alabama Power Company; American Coal Company; American Energy Corporation; Appalachian Power Company; ARRIPA; Big Brown Lignite Company LLC; Big Brown Power Company LLC; City of Ames, Iowa; City of Springfield, Illinois, Office of Public Utilities, d/b/a City Water, Light & Power; Columbus Southern Power Company; Consolidated Edison Company of New York, Inc.; CPI USA North Carolina LLC; Dairyland Power Cooperative; DTE Stoneman, LLC; East Kentucky Power Cooperative, Inc.; EME Homer City Generation, LP; Entergy Corporation; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Environmental Energy Alliance of New York, LLC; GenOn Energy, Inc.; Georgia Power Company; Gulf Power Company; Indiana Michigan Power Company; International Brotherhood of Electrical Workers, AFL-CIO; Kansas City Board of Public Utilities, Unified Government of Wyandotte County, Kansas City, Kansas; Kansas Gas and Electric Company; Kenamerican Resources, Inc.; Kentucky Power Company; Lafayette Utilities System; Louisiana Chemical Association; Louisiana Department of Environmental Quality; Louisiana Public Service Commission; Luminant Big Brown Mining Company LLC; Luminant Energy Company LLC; Luminant Generation Company LLC; Luminant Holding Company LLC; Luminant Mining Company LLC; Midwest Food Processors; Mississippi Power

Company; Mississippi Public Service Commission; Municipal Electric Authority of Georgia; Murray Energy Corporation; National Rural Electric Cooperative Association; Northern States Power Company (a Minnesota Corporation); Oak Grove Management Company LLC; Ohio Power Company; Ohio Valley Coal Company; Ohio American Energy Inc.; Peabody Energy Inc.; Public Service Commission of Oklahoma; Public Utility Commission of Texas; Railroad Commission of Texas; Sandow Power Company; South Mississippi Electric Power Association; Southern Company Service, Inc.; Southern Power Company; Southwestern Electric Power Company; Southwestern Public Service Company; State of Alabama; State of Florida; State of Georgia; State of Indiana; State of Kansas; State of Louisiana; State of Michigan; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; State of Virginia; State of Wisconsin; Sunbury Generation LP; Sunflower Electric Power Corp.; Texas Commission on Environmental Quality; Texas General Land Office; Utility Air Regulatory Group; United Mine Workers of America; Utah America Energy, Inc.; Westar Energy, Inc.; Western Farmers Electric Cooperative; Wisconsin Case Metals Association; Wisconsin Electric Power Company; Wisconsin Paper Council, Inc.; Wisconsin Manufacturers and Commerce; and Wisconsin Public Service Corp.

Intervenors in support of petitioners below, who are respondents or nominal respondents on review, were City of New York (D.C. Cir. Nos. 11-1388 & 11-

1395 only); San Miguel Electric Cooperative, and State of New York (D.C. Cir. Nos. 11-1388 & 11-1395 only).

RULE 29.6 DISCLOSURE STATEMENT

Petitioners American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club have no parent companies. Nor have any of them issued publicly held stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 696 F.3d 7. The opinion may be found in the Appendix to the Environmental Protection Agency's petition for certiorari (hereinafter "App.") at 1a-116a.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. That court denied petitions for rehearing en banc on January 24, 2013.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

Section 110(a)(2)(D) of the Clean Air Act requires that each state implementation plan contain "adequate provisions":

> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will –
>
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . .

42 U.S.C. 7410(a)(2)(D).

Section 110(c) of the Act provides that:

> (1) The [EPA] Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
> (A) finds that a State has failed to make a required submission . . . or
> (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Id. 7410(c)(1).

Challenges to EPA actions under the Clean Air Act "shall be filed sixty days from the date notice of such action . . . appears in the Federal Register." *Id.* 7607(b)(1). "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." *Id.* 7607(d)(7)(B).

EPA's Cross State Air Pollution Rule, 76 Fed. Reg. 48208 (Aug. 8, 2011) ("Transport Rule"), is reprinted at App. B to EPA's petition for certiorari.

INTRODUCTION

Air quality in large areas of the nation is impaired by air pollution that crosses state lines and causes thousands of premature deaths and illnesses each year. Interstate pollution raises difficult and complex problems of measurement and equitable standard-setting; it is well-suited to legislative judgment and administrative expertise. Section 110(a)(2)(D)(i)(I) of the Act – known as the "Good Neighbor" provision – requires that state implementation plans contain adequate provisions to

prohibit emissions activity within their borders that will "contribute significantly" to any other state's nonattainment of air quality standards. 42 U.S.C. 7410(a)(2)(D)(i)(I).

In this case, a divided D.C. Circuit panel struck down EPA's Transport Rule, a major regulation designed to bring long-delayed relief to millions of Americans whose health is at risk because they live in downwind states unable to attain or maintain air quality standards because of pollution from upwind states. The Rule was designed to conform to a decision by a different panel of the same court that had declared unlawful a predecessor interstate air pollution rule in large part because it did not deliver downwind states sufficiently timely or certain relief.

The court of appeals' decision is riddled with error. The majority overran express statutory limits on its review authority. Despite the Act's rigorous exhaustion requirement, the panel ruled on issues that the challengers had plainly failed to raise during the public comment period. The panel also allowed collateral attacks on past agency actions long after expiration of the statute's jurisdictional time period for review. The court imposed a series of rigid strictures upon EPA's authority to give effect to the Good Neighbor provision that are not found in the statutory text and that vastly complicate its implementation. The court disregarded EPA's own explanation for the technical judgments and complex policy choices it made in crafting the Rule. And the court created an entirely new limitation, not found in the statutory text or prior administrative practice, that the Good Neighbor provision imposes no obligations on upwind states unless and until EPA

issues regulations quantifying the upwind states' contribution and abatement obligations.

The harmful effects of these erroneous rulings are far-reaching. Downwind states need the protection the Rule afforded in order to meet their own statutory obligations and to protect the health and welfare of their citizens. The decision will complicate the crafting of a workable rule that can deliver the protection downwind states were promised decades ago when the Good Neighbor provision was enacted and amended.

This Court's review is warranted.

STATEMENT OF THE CASE

A. Statutory Background

In the Clean Air Act amendments of 1970, Congress adopted a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Act requires the EPA to establish science-based national ambient air quality standards for certain pollutants to protect public health and the environment. *See* 42 U.S.C. 7408, 7409. States then have a responsibility to adopt state implementation plans ("SIPs") adequate to maintain air quality standards in "attainment" areas and to bring "nonattainment" areas into compliance with those standards. *Id.* 7410(a); see *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). If a state does not timely adopt an adequate state plan, EPA must adopt a federal implementation plan for the state to address

the deficiencies. *Id.* 7410(c)(1). Specific temporal deadlines for nonattainment areas to meet air quality standards vary, and standards must in addition be achieved as "expeditiously as practicable." See, *e.g.*, *id.* 7502(a)(2)(A), 7511(a)(1), 7513(c).

The Clean Air Act establishes a comprehensive judicial review scheme that entrusts the D.C. Circuit with exclusive review of rulemakings of national significance. 42 U.S.C. 7607(b)(1). The Act affords parties broad rights of participation, and requires EPA to respond to "each of the significant comments, criticisms and new data submitted . . . during the comment period." *Id.* 7607(d)(6)(B). The Act also imposes limits on the judicial review process, including that review must be sought within 60 days of EPA's action, *id.* 7607(b)(1), and that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review," *id.* 7607(d)(7)(B). See also *id.* 7607(e) ("Nothing in this chapter shall be construed to authorize judicial review . . . except as provided in this section.").

B. Interstate Air Pollution and the Act's "Good Neighbor" Provision

Decades before Congress enacted the Clean Air Act, this Court recognized interstate pollution to be a distinct problem and area of special federal responsibility. In a series of decisions, this Court determined that a state could obtain judicial relief from out-of-state pollution on the principle that:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

Georgia v. Tennessee Copper Co., 206 U.S. 230, 236 (1907); see also *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Missouri v. Illinois*, 200 U.S. 496, 519 (1906). In issuing Georgia's requested injunction, the Court explained that it was "a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale" by pollution from beyond its borders. *Id.* at 238.

Interstate pollution remains a serious problem to this day. For many areas with difficulties attaining or maintaining the health-based air quality standards, pollution from upwind states accounts for more than three-quarters of local air pollution concentrations.[1]

State-by-state implementation of national ambient air quality standards does not by itself deal effectively with interstate air pollution because each state lacks the ability to regulate "persons beyond its control." *Tennessee Copper*, 206 U.S. at 238. The 1970 Act attempted to address interstate transport by requiring states to include transport-related "intergovernmental cooperation" provisions in their

[1] See, *e.g.*, Air Quality Modeling Final Rule Technical Support Document, App. F (June 2011), *available at* http://www.epa.gov/airtransport/CSAPR/techinfo.html.

implementation plans. See Pub. L. No. 91-604, §4(a), 84 Stat. 1676, 1681 (1970); see also *Natural Resources Defense Council, Inc. v. EPA*, 483 F.2d 690, 692 (8th Cir. 1973). In 1977, Congress amended the interstate transport provision by requiring states to prohibit emissions from "any stationary source within the State . . . which will . . . prevent attainment or maintenance by any other state." Pub. L. No. 95-95, §108(a)(1), 91 Stat. 685, 693 (1977). Determining that "additional efforts must be made" to address the "transport problem," see S. Rep. No. 101-228, at 48-49 (1989), Congress again amended the Act in 1990 to include the current Good Neighbor provision, which requires that implementation plans:

> (D) contain adequate provisions –
>
> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will –
>
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . .

42 U.S.C. 7410(a)(2)(D).

C. The D.C. Circuit's Prior Transport Decisions

In the first major EPA rulemaking under the Good Neighbor provision, the 1998 NO_x SIP Call, EPA determined that the "major reason" that some states failed to timely demonstrate attainment with the

national ozone standard was that states were not able to address pollution transported from upwind areas. 63 Fed. Reg. 57356, 57361 (Oct. 27, 1998). That rule required 22 states and the District of Columbia to address their interstate contributions to downwind states' ozone pollution by reducing their emissions of nitrogen oxides ("NO_x," an ozone precursor). *Id.* at 57358. For purposes of setting upwind states' NO_x emissions "budgets," EPA determined upwind states' "significant contributions" to downwind nonattainment based on "both air quality factors relating to amounts of upwind emissions and their ambient impact downwind, as well as cost factors relating to the costs of the upwind emissions reductions." *Id.* at 57376. EPA established a model emissions credit trading program as a flexible and cost-effective mechanism for states to meet their emissions budgets. *Id.* at 57359.

In *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), the D.C. Circuit upheld the NO_x SIP Call in relevant respects. The court upheld EPA's use of "a very low threshold of contribution" to determine which upwind states contributed to downwind nonattainment. *Id.* at 675. Noting the "ambiguity" of the statute's "significant" contribution formulation, *id.* at 678, the court also upheld EPA's decision to base states' NO_x emissions budgets primarily on the amount of emissions that could be controlled in a "highly cost-effective" manner (*i.e.*, by application of controls costing less than $2,000 per ton of NO_x reductions). See *id.* at 675-79; see also *id.* at 679 (upholding EPA's "decision to draw the

'significant contribution' line on a basis of cost differentials").

In 2005, EPA promulgated the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25162 (May 12, 2005), a rule that built upon the NO_x SIP Call and addressed, in addition to ozone, the contribution of upwind states' pollution to downwind states' unhealthful concentrations of fine particulate matter ($PM_{2.5}$). CAIR required reductions in upwind states' emissions of the pollutants – NO_x and sulfur dioxide ("SO_2") – that are precursors to fine particle concentrations downwind. CAIR required 28 eastern states and the District of Columbia to revise their implementation plans to reduce NO_x and SO_2 emissions.

The D.C. Circuit remanded CAIR in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008), largely because it determined that CAIR gave North Carolina insufficient protection from upwind pollution. The court did not disturb *Michigan's* acceptance of EPA's use of cost-effectiveness analysis to help determine each state's "significant contribution" to downwind nonattainment. See *id.* at 917. The court also concluded that EPA need not determine each state's individualized air quality impact on downwind states "relative to other upwind states." *Id.* at 908. The court found, however, that EPA had failed to explain how CAIR's formulation of emissions budgets based on allowance allocations from a different emissions trading program served the objectives of the Good Neighbor provision. See *id.* at 917-18. Furthermore, the court concluded that, due to features including CAIR's unconstrained

emissions trading system, the rule did not assure downwind states their congressionally prescribed protection. *Id.* The court also held that EPA had "ignored its statutory mandate" to harmonize CAIR with downwind states' statutory compliance deadlines. *Id.* at 908-12.

The court left CAIR in place as an interim measure, but required EPA to expeditiously remedy the "fundamental flaws" the court had identified. 550 F.3d at 1178.

D. EPA's Post-*North Carolina* Disapproval Actions

After the *North Carolina* decision, EPA took steps to ensure timely protection for downwind states. Section 110(a)(1) of the Act requires states to submit implementation plans (which must include adequate Good Neighbor measures) to EPA within three years after promulgation of a new or revised NAAQS. 42 U.S.C. 7410(a)(1), 7410(a)(2)(D). For the 1997 ozone and 2006 $PM_{2.5}$ air quality standards covered by the Transport Rule, adequate state plans were due in 2000 and 2009, respectively. See 76 Fed. Reg. at 48219. In 2010 and 2011, EPA found that many states had failed to submit state plans with adequate Good Neighbor measures, and determined, in other instances, that submitted state plan provisions on transport were inadequate. *E.g.*, 75 Fed. Reg. 32673 (June 9, 2010) (finding with respect to the 2006 $PM_{2.5}$ standard for 23 states, D.C., and certain territories); 76 Fed. Reg. at 48219 (summarizing these actions). EPA explained that "[t]his finding creates a 2-year deadline for the promulgation of a [federal implementation plan] by EPA for a

particular state or territory, unless that state or territory submits a SIP to satisfy these section 110(a)(2)(D)(i)(I) requirements, and EPA approves such submission prior to that deadline." 75 Fed. Reg. at 32674.

E. The Transport Rule

EPA promulgated the regulation at issue in direct response to *North Carolina*. 76 Fed. Reg. at 48211. The Transport Rule identified 27 states whose emissions of NO_x and SO_2 significantly affected the ability of downwind states to attain or maintain compliance with the applicable air quality standards for ozone and $PM_{2.5}$. *Id.* at 48208. EPA projected that the Transport Rule would allow a number of downwind states to meet, in accordance with statutory deadlines, their ozone attainment and maintenance obligations, and almost all to meet similar obligations for $PM_{2.5}$. *Id.* at 48210.

EPA estimated that the reductions in fine particle pollution under the Transport Rule would, starting in 2014,

> [A]nnually reduce between 13,000 and 34,000 PM2.5-related premature deaths, 15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma while also reducing 10 million days of restricted activity due to respiratory illness and approximately 1.7 million work-loss days.

Id. at 48309. EPA calculated that "the annual net benefit (social benefits minus social costs)" of the Transport Rule in 2014 would be $110 to $280

billion, with compliance costs totaling $1.85 billion in 2012 and less than $1 billion in 2014. *Id.* at 48313-14.

In formulating the Transport Rule, EPA performed a two-step analysis to determine which states were subject to the Rule, and for those states, to evaluate their "significant contributions" to downwind nonattainment. First, based on air pollution transport modeling and monitoring data, the agency excluded many states from regulation: if a state's contributions to air quality monitors in downwind nonattainment and maintenance areas never exceeded one percent of the relevant national ambient air quality standard, it was not subject to the Rule. *Id.* at 48211, 48236-37. Second, for the states not excluded, EPA applied cost-effectiveness and air quality factors to determine the amount of each state's significant contribution and abatement obligation. EPA then established emissions budgets incorporating safeguards (in response to *North Carolina*) to allow limited interstate trading consistent with ensuring timely reductions in interstate pollution. See *id.* at 48210-12, 48214, 48246-48.

Having previously found that states had not amended their implementation plans to meet their Good Neighbor obligations within the three-year statutory time period, EPA implemented the Rule via federal implementation plans pursuant to Section 110(c)(1) of the Act. Section 110(c)(1) provides that EPA "shall" promulgate a federal plan "within 2 years after" EPA either (1) finds that a state failed to submit an adequate state implementation plan that complies with statutory requirements; or (2)

disapproves a state's plan. See 76 Fed. Reg. at 48217. Beginning in 2014, the Rule allowed states to submit state implementation plans, for EPA's approval, that would modify or replace the federal implementation plans. See *id.* at 48327-28. In adopting federal plans, EPA explained that it lacked authority to extend Section 110(a)(1)'s three-year deadline for state plan submissions or alter Section 110(c)(1)'s unambiguous trigger for starting the two-year clock by which EPA must promulgate a federal plan. *Id.* at 48219-20. EPA also pointed to the *North Carolina* court's "emphasis on remedying CAIR's flaws expeditiously." *Id.* at 48210.

F. Proceedings on Judicial Review.

On August 21, 2012, a divided D.C. Circuit panel granted petitions for review from upwind states and industry and vacated the Transport Rule. The court interpreted the Act, *North Carolina* and *Michigan* as creating a set of "red lines" limiting EPA's authority under the Good Neighbor provision, App. 22a: (1) "once EPA reasonably delegates some level of contribution as 'insignificant' under the statute, it may not force any upwind State to reduce more than its own contribution to that downwind state minus the insignificant amount," App. 23a; (2) the "collective burden" of reducing interstate pollution "must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment," App. 25a; and (3) the "combined obligations of the various upwind States, as aggregated," must "not go beyond what is necessary for the downwind states to achieve the NAAQS." App. 27a.

The majority next concluded that the Rule crossed each of these statutory "red lines." The "most fundamental[]" problem was the possibility the restrictions imposed by the Rule in the second step of its methodology "could require upwind states to reduce emissions by more than the amount" EPA had used to exclude states from program coverage in the first step, App. 31a, 35a, *i.e.*, to require abatement of contributions that were less than 1% of the NAAQS in the relevant downwind state. App. 31a-36a. In a lengthy footnote, App. 32a-34a n.18, the majority rejected EPA's contention that this statutory argument was barred by 42 U.S.C. 7607(d)(7)(B) because no one raised it in the rulemaking comment period.

The majority next concluded that the Transport Rule violated "the statute's proportionality requirement," because, the opinion said, EPA had "made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems." App. 38a-39a. In addition, the majority concluded that the Rule "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." App. 39a.

The majority held that the Rule was invalid for a second, independent reason, namely, that EPA had implemented it "without giving the States an initial opportunity to implement the obligations themselves through State Implementation Plans." App. 42a. As noted above, after the *North Carolina* decision, EPA had found that none of the states subject to the

Transport Rule had submitted approvable Good Neighbor plans. *Supra*, pp. 10-11. As part of the Transport Rule, the agency adopted federal implementation plans for these states pursuant to 42 U.S.C. 7410(c)(1), which obligates the agency to "promulgate a [federal plan]" within two years of such findings. The majority nonetheless held that the states had no obligation to submit Good Neighbor plans until EPA "defines or quantifies" their obligations. App. 47a. The majority denied that the challenge was a collateral attack on EPA's earlier disapproval findings, and hence jurisdictionally barred under 42 U.S.C. 7607(b)(1), which limits courts' jurisdiction to challenges filed within 60 days of EPA's action. App. 61a-62a n.34.

Judge Rogers filed a comprehensive dissent faulting the majority for "disregard[ing] limits placed on its jurisdiction, the plain text of the Clean Air Act, and the Court's settled precedent interpreting the same statutory provisions at issue." App. 65a. She concluded that the majority's invalidation of EPA's method for determining upwind states' obligations violated the "clear command" of the Act's express exhaustion requirement, because "[n]o objection was made during the Transport Rule administrative proceedings to EPA's approach, let alone its statutory authority." App. 67a. Judge Rogers also concluded that the challengers could not collaterally attack EPA's prior, unchallenged actions disapproving the state plans for Good Neighbor deficiencies. App. 74a-78a. She rejected as contrary to the plain statutory text the majority's conclusion that states have no Good Neighbor obligations until the EPA defines them. App. 85a-87a.

The dissent insisted that the majority's reasons for entertaining statutory challenges to EPA's "significant contribution" methodology were invalid and that it had ignored the administrative record in finding a statutory violation based on possible "over-control." App. 95a-110a. Judge Rogers (who was on the panels that decided both *Michigan* and *North Carolina*) concluded that the majority badly misapplied both cases. App. 112a, 116a.

Petitions for rehearing en banc were denied.

REASONS FOR GRANTING CERTIORARI

Bypassing statutory limits on its own authority, the D.C. Circuit majority imposed a set of detailed requirements not found in the statute and poorly suited to the complex realities of the interstate air pollution problem as documented by the administrative record. The decision, if uncorrected, will deprive downwind states and their residents of badly needed relief from interstate air pollution and will create unjustified obstacles to EPA's and states' ability to give effect to the Good Neighbor provision. This Court's review is warranted.

I. THE PANEL VIOLATED CLEAR STATUTORY LIMITS ON JUDICIAL REVIEW BY RESTING ITS DECISION ON THEORIES NO PARTY HAD PRESENTED TO THE AGENCY DURING THE RULEMAKING.

As this Court has insisted, "'courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate*

under its practice,'" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1952); emphasis added in *Woodford*), and "[e]xhaustion concerns apply with particular force . . . when the agency proceedings in question allow the agency to apply its special expertise." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)).

In order to facilitate timely and orderly implementation of its requirements, the Clean Air Act explicitly limits judicial review to issues properly raised during the administrative proceedings. 42 U.S.C. 7607(d)(7)(B); *supra*, p. 5. The court of appeals flagrantly disregarded this limitation. The court lacked authority to address what it characterized as the Transport Rule's "most fundamental[]" statutory flaw, see App. 31a, because, as the dissent explained, "[n]o objection was made during the Transport Rule administrative proceedings to EPA's approach, let alone its *statutory authority*, to use different, unrelated measures of significance for inclusion and budget-setting." App. 67a. The question "is not *close*." App. 96a.

The majority never identified anything in the Transport Rule's docket that satisfies the Act's explicit requirement that objections be raised during the public comment period. None of the grounds offered in the majority's lengthy footnote, see App. 32a-34a n.18, withstands scrutiny. For example, that the prior interstate transport proceedings involved the question "whether EPA has complied with the basic statutory limits on its authority," did not excuse parties' failure to raise particular

"objections." Nor did standard remand language in *North Carolina* (see App. 32a n.18) suffice to excuse a failure to raise statutory objections to EPA's two-step methodology, which had not been challenged in, and expressly left "undisturbed" by *North Carolina*, see 531 F.3d at 916-17. (Judge Rogers, the only member of the *North Carolina* panel to sit on this case, was of the view that EPA's approach in the Transport Rule was fully consistent with *North Carolina*). The court also pointed to comments made years earlier in the CAIR proceeding, but the D.C. Circuit has made clear that comments from prior rulemakings are insufficient under 42 U.S.C. 7607(d)(7)(B), see *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001)). And the fact that EPA had considered but not adopted "two air quality only approaches'" (App. 33a n.18), by no means excused the challengers' failure to raise their different, *statutory* theories "during the period for public comment." 42 U.S.C. 7607(d)(7)(B). Section 7607(d)(7)(B) contains no futility exemption, and courts may "not read futility or other exceptions into statutory exhaustion requirement where Congress has provided otherwise." *Booth v. Churner,* 532 U.S. 731, 741 n.6 (2001).[2]

[2] The Court lastly cited two comments in the Transport rulemaking, one from Wisconsin that urged less reliance on costs to achieve *more stringent* regulation, and one from Tennessee that urged EPA to "consider" a lower cost threshold for states that can reduce their emissions below the contribution level EPA defined as significant. App. 34a n.18. Neither argued that the statute prohibited EPA's approach. See App. 98a-101a (dissent).

The diverse rationales in the court of appeals' footnote are far removed from the rule laid down in the statute, which is whether an objection was "raised with reasonable specificity during the period for public comment." 42 U.S.C. 7607(d)(7)(B). Left uncorrected, this grab-bag of excuses would provide ready means for parties to disrupt the administrative and judicial processes by raising on review issues they had failed to raise below. See App. 65a-66a, 115a-116a.

The circumstances here illustrate, in an especially vivid way, the hazards of bypassing statutory exhaustion requirements. The panel overturned EPA's rule not because it found that the agency's methodology *actually* required even a single upwind state to reduce emissions below the 1% threshold the majority regarded as a statutory "red line," App. 22a; rather, the majority deemed the mere *possibility* of such a result to be fatal. See, *e.g.*, App. 35a (EPA's budgets "*could* require upwind States to reduce emissions by more than the [initial threshold] amount") (emphasis added).

Precisely because no participant in the rulemaking raised the objection, EPA had no reason during the rulemaking to model whether, in fact, the court's "red line" would be exceeded for any state. Indeed, after the challengers first presented the issue in their opening briefs, EPA analyzed the record evidence on this newly-raised objection and explained that "data in the record suggest that, at the cost thresholds used in the Rule, such a scenario is extremely *unlikely* to occur." EPA CA Br. 33; see also *id.* 33-34 n.20. It is highly doubtful that any party would have had Article III standing to press

any "over-control" claim had the issue been timely raised during the rulemaking, and had EPA demonstrated then that none of the states subject to the Transport Rule would be required to reduce emissions below the 1% threshold. See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (discussing injury in fact requirement).

The court's departures from the statutory exhaustion requirements were not limited to the "over-control" issues. As the dissent noted, the challengers never (even in their briefs) raised the argument that the statute required "proportionality," App. 69a, and not a single commenter proposed the regime later invented by the majority as a supposed statutory requirement. Further, there was no agency record addressing the efficacy or feasibility of the majorit's approach.

For a court to prescribe, *sua sponte*, a set of untried rules on a highly technical matter like controlling multistate air pollution inverts the decisional structure created by Congress. *Cf. Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) ("the first decider under the Act is the expert administrative agency, the second, federal judges"). The D.C. Circuit's bypassing of the Act's exhaustion requirement to reach statutory claims that had not been presented to the agency warrants this Court's correction.

II. THE COURT OF APPEALS IMPOSED RIGID REQUIREMENTS ON EPA'S IMPLEMENTATION OF THE GOOD NEIGHBOR PROVISION THAT ARE NOT FOUND IN THE STATUTE AND THAT DISREGARD THE REALITIES OF INTERSTATE AIR POLLUTION.

The court of appeals departed sharply from the proper role of a federal court reviewing the actions of an agency to which Congress had granted authority to implement a federal statute. As this Court has repeatedly insisted, the agency's interpretation "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217-18 (2009) (citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–844 (1984)). In an uncommonly stark way, however, the court of appeals majority improperly "impose[d] its own construction on the statute," *Chevron,* 467 U.S. at 843, in place of the agency's reasonable construction. Its decision, which will improperly constrain EPA's efforts to give the intended effect to an important provision of the Act, calls for this Court's review.

The regulatory context here is especially ill-suited for such a judicial imposition. As the record in this proceeding shows, mitigating interstate air pollution problems – especially those involving multiple upwind and downwind states, with pollution resulting from dynamic emissions activity that

quickly shifts in response to changes in power demand or control costs – is unusually complex and technically demanding. See Regulatory Impact Analysis, JA 3192-98; 76 Fed. Reg. at 48352-61; "Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Am. Elec. Power Co.*, 131 S. Ct. at 2539-40. The statutory text requiring each state to develop "adequate" plan provisions that "prohibit[]" "any" emissions activity that "will . . . contribute significantly to nonattainment in . . . any other State," 42 U.S.C. 7410(a)(2)(D)(i)(I), manifestly calls upon administrative judgment and technical expertise.

In *Michigan*, the D.C. Circuit recognized that the statutory language is ambiguous and provides no "criterion for classifying 'emissions activity' as 'significant,' 213 F.3d at 674. The court upheld EPA's two–step approach as a permissible statutory construction, including the agency's "decision to draw the 'significant contribution' line on a basis of cost differentials." See *id.* at 679. In *North Carolina*, the Court sustained the same two-step approach to defining upwind states' "significant contributions." See 531 F.3d at 917 ("Again, we do not disturb this approach"). EPA relied on these holdings and adhered to same basic two-step approach to defining significant contributions. See 76 Fed. Reg. at 48270-71, 48303-04.

In a jarring change of direction, the majority here held that EPA's twice-approved two-step methodology violated *unambiguous statutory language* in multiple respects. The decision's statutory analysis is hampered by a repeated

inversion of statutory exhaustion rules, in which EPA was repeatedly faulted for failing to rebut objections never made, and by the majority's complete failure to demonstrate that EPA's own explanations regarding its "significant contribution" methodology were unlawful or arbitrary. Far from performing the deferential review *Chevron* prescribes, the majority never even engaged with the agency's explanation of why its methodology appropriately implemented the statute and conformed to the D.C. Circuit's interpretation in *Michigan* and *North Carolina*. See 76 Fed. Reg. at 48270-71.

"**Over-Control**" Although the majority declared that EPA "did not try to take steps to avoid . . . over-control," App. 40a, this conclusion is simply "unsupported by the record," App. 113a (Rogers, J.). In fact, EPA projected that, even when fully implemented, the Rule would not reduce emissions enough in some nonattainment areas. 76 Fed. Reg. at 48210, 48232, 48247-48; App. 114a (Judge Rogers, concluding that "there is no support for the court's conclusion that the Transport Rule resulted in collective over-control."); Technical Support Document, Air Quality Modeling, JA 2466, 2470 (five areas are projected to have 24-hour $PM_{2.5}$ issues post-implementation, while ten sites in two areas (Houston, TX and Baton Rouge, LA) will have ozone problems); Technical Support Document, Alternative Significant Contribution Approaches Evaluated ("Alternative Approaches TSD"), JA 2311 (criticizing alternative methodology as potentially producing "substantial over-control"). Significantly, neither the court, nor the challengers, identified any

instance in which the Rule required greater reductions than necessary to achieve attainment.

Nor is there any basis in the statutory text for the court's singular focus on a hypothetical danger of "over-control." The Good Neighbor provision is not a "blank check" authorizing EPA to reduce air pollution indiscriminately. App. 22a. But neither is the provision a wooden nickel; it is aimed at actually *achieving* necessary restrictions on upwind pollution transport that downwind states need to protect their citizens' health and well-being. The text prescribes that measures to address interstate pollution must be "adequate," and must "prohibit[]" "any" emissions that will contribute significantly to nonattainment "or" interfere with maintenance of standards in downwind states. See *North Carolina*, 531 F.3d at 908 (transport rule "must actually require elimination of emissions" that contribute significantly to downwind nonattainment). All this must be done "consistent with the provisions of this [Act]," including the statutory attainment deadlines downwind states must meet. *Id.* at 911-12.

Evaluating the risk that a given methodology will go *too far* in controlling interstate pollution and the risk it will *not go far enough* requires a "complex balancing," *Am. Elec. Power Co.*, 131 S. Ct. at 2539, that is the job of agency policymakers, not judges. Here, EPA considered these problems and resolved them in a reasoned way. The court's analysis did not demonstrate that the agency's work was unreasonable or arbitrary and capricious, or even seriously engage with the agency's reasoning. The court's erection of a series of formidable bulwarks against the merest possibility of over-control – even

if undocumented – is altogether out of step with Congress's repeated amendments to the statute to strengthen controls on transported pollution, and with the history of upwind states' persistent under-control of interstate air pollution.

Proportionality. Addressing another statutory argument that the challengers had not raised, see App. 111a (dissent), the court concluded that the statutory text includes a "fair share" requirement, under which abatement obligations "must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment." App. 25a; see also App. 26a-27a & n.15 (illustrated majority's proportionality rule with a numerical example involving how three upwind states contribute to nonattainment in one downwind state).

Nothing in the Act's language imposes any "proportionality" or particularized "fair share" requirement like that contained in the court's discussion.[3] To be sure, under the arbitrary and capricious standard, a claim of improper disparities among states' compliance obligations, if duly raised in comments, would demand a reasoned agency response. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). But judicial review of such a claim would require examining the legal and policy reasons given by the agency for its choices, its responses to

[3] In *North Carolina*, the D.C. Circuit rejected EPA's use of fairness as a regulatory rationale because "what is an 'equitable governmental approach to attainment' is not among the objectives of [the Good Neighbor provision]." 531 F.3d at 918.

objections properly raised in comments, and the feasibility and probable consequences of alternative approaches. The court below, in contrast, looked at none of this, casting its proportionality rule instead as a peremptory statutory requirement.

The majority did note that EPA had considered "a proportional approach that reflected many of the essential principles described above," but "ultimately chose not to adopt that approach." App. 40a n. 24 (citing Alternative Approaches TSD, JA 2311-12). Unmentioned by the majority, however, were the facts that (1) no commenter in the rulemaking advocated for that approach, let alone claimed that that such an approach was required by statute, see App. 107a-108a (dissent); (2) EPA rejected this approach for a variety of candidly explained reasons, pointing out, *inter alia*, the risk of overburdening states that had already adopted controls and noting that the proportionality concept breaks down whenever more than one downwind state is involved, JA 2311-12; and (3) EPA's reasons for rejecting the approach were not challenged by any party.

The court's proportionality rule fares poorly under real-world conditions. Unlike the court's hypothetical, upwind states frequently contribute to nonattainment in multiple downwind states. *E.g.*, 76 Fed. Reg. at 48242-44, Tables V.D-5, V.D-6. Indeed, in considering a methodology requiring upwind states to reduce their emissions "by an amount that is proportional to their contribution," EPA explained that "most upwind states contribute to multiple downwind monitors (in multiple states) and would have a different reduction percentage for each one." Alternative Approaches TSD, JA 2312.

The court of appeals did not mention EPA's explanation, let alone show why it was wrong.[4]

If the Good Neighbor provision incorporates a "fair share" norm requiring equitable treatment of states, that norm does not preclude EPA from considering how much effort different upwind states have already made to control pollution. Under a standard that required upwind states to reduce emissions by "the same percent reduction of existing emissions," EPA explained,

> states that had previously implemented stringent control programs might not be able to achieve the required reductions using existing control technologies, while others that had previously done little (and presumably have larger absolute contributions) would achieve their required reductions using significantly less than optimal control technologies.

Alternative Approaches TSD, JA 2312. Certainly nothing in the concept of "fair share" compelled EPA to adopt the majority's approach. Indeed, even if the statute had *expressly* directed EPA to identify upwind states' "fair share" of emissions reductions, that broad term could not reasonably be interpreted to dictate one particular approach. *Cf. Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 501 (2002) (statutory prescription of "just and

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[4] The majority suggested that some departures from proportionality might be tolerable where necessary to "ratchet back" emissions control reductions to avoid "over-control." See App. 29a. But there is no textual or logical basis for making only this departure, and the majority's proportionality rule fails whenever states' emissions contribute to nonattainment in more than one downwind state.

reasonable" rates leaves methodology "largely subject to [agency] discretion").

Reliance on Cost. In *Michigan*, the D.C. Circuit explicitly approved EPA's reliance on uniform cost levels as a means of fixing states' "significant contributions" to nonattainment, over objections that doing so resulted in an improper lack of proportionality. 213 F.3d at 679. The majority here recast *Michigan* as having merely upheld rules "prevent[ing] exorbitant costs from being imposed on certain upwind States." App. 27a.[5]

There is no basis in the statute for limiting consideration of control costs to avoiding "exorbitant" costs. In the Transport Rule, EPA did not rely upon cost to weaken the Act's public health protections, see *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 465 (2001). Instead, the agency used control costs as a tool for assigning abatement obligations among states jointly responsible for downwind pollution, concluding that cost thresholds corresponding to differing levels of pollution-control effort, combined with air quality considerations, achieved the necessary reductions in an effective and efficient manner. See 76 Fed. Reg. at 48256. EPA explained that basing emissions limits in part on control cost thresholds had the advantage of taking account of whether upwind states had already taken steps to reduce their transported pollution.

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[5] In fact, the NO_x SIP Call methodology relied on a uniform cost standard based on what were judged to be "highly cost effective controls" and did not require a particular showing of extreme burdens, as the *Michigan* court definitely recognized. *See* 213 F.3d at 675-79.

Alternative Approaches TSD, JA 2312. The agency explained that approaches using air quality considerations alone could lead to extreme obligations for a few states while still failing to achieve adequate reductions. See *id.*, JA 2309-10 (evaluating "air quality only" approach and finding that for certain upwind states (Indiana, Kentucky, Ohio, and Pennsylvania) it would require reductions of 90% or more of all SO_2 and NO_x emissions (not just power plant emissions) using a 1%-of-NAAQS threshold, and of 69% or more even if the threshold were increased more than threefold).

Given the dynamic, cost-driven realities of the electric power industry, an interstate transport rule is unlikely to achieve its goal if it is not designed with costs in mind, as EPA discussed extensively. Suppliers of electricity "bid" to supply power to the interstate electric grid based largely on their operating costs, and system operators dispatch power based on those bids. Installation and operation of environmental controls can affect operating costs and can cause emissions to shift to units with fewer controls, causing more pollution. See 76 Fed. Reg. at 48255 (discussing "shifting of emissions between states" due to "interconnected nature of the country's energy system").

EPA's mixed cost and air quality approach was based upon extensive consideration of those realities. In developing the Rule, EPA used both an air pollution transport model, CAMx, and a model developed for the electric industry, the Integrated Planning Model ("IPM"), to evaluate how pollution control costs would shift dispatch, and how downwind air quality would be affected. JA 2333.

The statute permitted EPA to adopt a methodology attuned to real-world conditions, rather than a static analysis of oversimplified hypotheticals.

III. THE D.C. CIRCUIT'S RULING THAT EPA MUST QUANTIFY THE GOOD NEIGHBOR OBLIGATIONS OF UPWIND STATES BEFORE THOSE STATES NEED TO REDUCE THEIR EMISSIONS LACKS ANY STATUTORY BASIS.

The court of appeals' ruling that states have no obligation to include Good Neighbor reductions in implementation plans until EPA has quantified their obligations, App. 45a-48a, was jurisdictionally barred, strayed far from the text of the Act, and disrupts settled state and EPA practice.

First, as the dissent explained, App. 69a-94a, the challenge to EPA's reliance on federal implementation plans was barred by the Act's express limits judicial review. Following the *North Carolina* decision, EPA disapproved state plans in all of the states covered by the Transport Rule because of the absence of adequate Good Neighbor measures. Those actions triggered an unambiguous statutory obligation to promulgate federal plans. 42 U.S.C. 7410(c)(1) (Administrator "shall promulgate" federal implementation plan "at any time within 2 years" after failure finding or SIP disapproval). States that sought to challenge EPA's conclusion that their plans were inadequate with respect to interstate transport, and that wished to stop the mandatory statutory deadline for federal plans had 60 days to challenge EPA's disapproval. See 42 U.S.C. 7607(b)(1). Only three parties (Georgia, Kansas, and a Kansas-based firm) filed such challenges, and their (still-pending)

challenges were not part of the challenge to the Transport Rule. See App. 74a & n.5 (dissent, citing these separate challenges). The majority lacked jurisdiction to entertain these collateral challenges in the instant case. See App. 73a-82a.

Second, the language of the Act does not support the court's ruling that EPA must quantify Good Neighbor obligations before the state planning process can begin. To the contrary, the text of the Good Neighbor provision puts the obligation directly on the state as part of its initial plan submission: "[E]ach [state implementation] plan shall . . . contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State[.]" 42 U.S.C. 7410(a)(2)(D)(i)(I). The majority noted that the states have no obligation to implement an ambient air quality standard until EPA has set the concentration level of such standard, and then analogized that states have no obligation to address pollution transport in their plans until EPA specifies the quantity that they must abate. App. 53a. But, as Judge Rogers explained, the analogy between states' interstate transport obligations and their obligations regarding new or amended air quality standards is unmoored from the "plain text." See App. 84a-86a. States' obligation to develop amendments to its implementation plan to eliminate "significant contribution" to downwind nonattainment of *previously established* air quality standards comes directly from the statute. *Id.* [6]

[6] The majority's argument that Section 126 of the Act, 42 U.S.C. 7426, supports its EPA-first approach, App. 54a-55a, also is unmoored from the text. As the dissent explained, "[t]he

As the dissent explained, "[t]he plain text [of 42 U.S.C. 7410(c)(1)] requires that within three years of EPA's promulgation of [an air quality standard], States *shall* submit SIPs, and those SIPS *shall* include adequate good neighbor provisions." App. 85a. Under the statute's plain language, States have a direct obligation to ensure that their implementation plans contain adequate provisions to prohibit significant contribution. They must submit such provisions for EPA approval or disapproval. 42 U.S.C. 7410(a)(1), (2). That obligation to adopt and submit measures to prevent significant contribution exists whether or not EPA has promulgated regulations quantifying "significant contribution."

The majority's ruling that EPA must first quantify the Good Neighbor obligations of states ignores the Act's explicit requirement that states "provide for . . . performance of such air quality modeling as [EPA] may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant" covered by an air quality standard. 42 U.S.C. 7410(a)(2)(K). Pursuant to this requirement, states have regularly performed the type of quantification analysis that the majority assumed they cannot do. See, *e.g.*, 76 Fed. Reg. 53638 (Aug. 29, 2011) (approving a Good Neighbor plan from Delaware). States have also formed regional coalitions in order to perform complex air quality modeling. See 77 Fed. Reg. 45992, 46004 (Aug. 2,

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majority's "comparison of section 110 to section 126 . . . conflates direct federal regulation of *sources* with EPA's statutory authority to enforce requirements that *States* comply with their 'good neighbor' SIP obligations[.]" App. 85a, n.9.

2012). Like EPA, States analyze power sector emissions using sophisticated computer programs. See*, e.g.*, 77 Fed. Reg. 38501, 38506 (June 28, 2012) (southeastern states conducted "air quality modeling" and "generated future-year emissions inventories for the electric generating sector of the contiguous United States using [IPM]").

The majority's conclusion that upwind states have no Good Neighbor obligations until EPA specifies a numerical standard is contradicted by the statutory text (which says otherwise) and by common sense. The majority managed to abandon a statute containing an unambiguous "shall" obligation because it believed language of the Good Neighbor provision, like a traffic sign that says "drive 'carefully,'" does not provide sufficiently "precise guidance" to upwind states, App. 51a; but laws that establish general, but still obligatory, norms are ubiquitous, from common-law negligence and nuisance to statutory prohibitions against "unreasonable restraints of trade." "Good neighbors" do not have to be told exactly how many decibels they may blast their stereos before becoming a nuisance – even though, if necessary, the police officer will tell them. Neither the fact of interstate pollution nor the means of abating it are impenetrable mysteries; abatement frequently involves well recognized techniques such as requiring high-emitting sources to operate installed pollution controls. See 76 Fed. Reg. at 48250-52. States (including the many states that have never been covered by EPA's regional transport rules) regularly prepare plans addressing transport. See, *e.g.*, 77 Fed. Reg. 1027 (Jan. 9, 2012) (approval of

Colorado interstate transport plan); 72 Fed. Reg. 41629 (July 31, 2007) (approval of Arizona interstate transport plan).

The ruling imposes a regulatory hurdle that does not exist in the Act, and places the resulting burden of inertia on the downwind states and their residents, compounding the delays and under-control of interstate pollution the Good Neighbor provision was intended to remedy. This Court's review is warranted.

IV. THE CASE PRESENTS ISSUES OF VITAL NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S REVIEW

The Transport Rule was crafted to provide downwind states with relief from cross-border pollution that interferes with their ability to meet and maintain health-based air quality standards. The stakes for public health are high. EPA found that the Rule would save tens of thousands of lives annually, and avoid hundreds of thousands of serious illnesses. See *supra*, p. 11.[7]

The subject-matter of this case makes this Court's intervention particularly important. States injured by trans-border pollution rightfully expect the federal government to bear "the duty of providing a remedy," *Missouri,* 180 U.S. at 241, for harms the downwind states themselves are without power to address. Interstate pollution misdirect the forces of interstate competition; states favored by geography

[7] Designed to remedy the predecessor rule's flaws, the Transport Rule provides greater health benefits than CAIR. See Dec. of David Schoengold, Ex. A to Intervenors' Dec. 1, 2011, Stay Opp. (D.C. Cir. Doc. 1345215).

or wind patterns can export the social costs of their economic activity, securing an advantage over neighboring states (and companies located there). Some downwind states are unable, due to interstate pollution, to meet air quality standards even after imposing abatement obligations upon local sources far more demanding than upwind states have imposed.[8] Downwind states stymied by interstate pollution are not excused from the Act's attainment deadlines. See *Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002); *Sierra Club v. EPA*, 311 F.3d 853, 860 (7th Cir. 2002); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002).

The decision below has left the law governing the pivotal Clean Air Act provision in disarray. The effect of the decision is to restore a prior rule, CAIR, that the D.C. Circuit, in *North Carolina*, has declared to have "fundamental flaws," including its failure to provide downwind states with adequate protection within the statutorily mandated deadlines. Both the prior rule, and this one, were crafted (by successive Administrations) in efforts to conform to the D.C. Circuit's guidance.

The D.C. Circuit's commands to EPA as to how the statute is supposed to work now point in opposite directions: In *North Carolina*, the court faulted EPA for failing to ensure that emission reductions from upwind states would occur in time for downwind states to meet their statutory nonattainment

[8] See Conn. Dept. of Envtl. Prot., Comments (JA 1227-29); Md. Dep't of the Envt., Comments (JA 586); N.Y.S. Dep't of Envtl. Cons., Comments (JA 928).

deadlines – an interest that EPA strove to satisfy with the timing of its rule. The court here, however, laid out a set of substantive strictures and procedural rules that give no weight to the central statutory goal of providing speedy relief for downwind states. See App. 93a-94a, 114a (dissent). While the majority did not purport to overturn the prior D.C. Circuit decisions approving regional transport programs based in part on cost considerations, the court's various methodological strictures appear to eliminate EPA's ability to do so in practice. The majority's instructions on proportionality conflict not only with *Michigan*'s explicit rejection of the same argument, 213 F.3d at 679, but, in a large class of cases, with basic arithmetic. See *supra*, p. 26. Its lack of consideration for the practical and legal concerns that led EPA to support its two-step methodology will unduly complicate the agency's ability to give effect to the statute going forward.

Heightening the importance of the case are the many ways in which EPA's transport rules are interwoven with the air quality planning processes of upwind and downwind states, and with the implementation of other federal and state programs. Moreover, the air quality standards to which the Good Neighbor provision is tied must be periodically reviewed and revised, 42 U.S.C. 7409(d)(1); see *Am. Trucking Ass'ns*, 531 U.S. at 463, and new nonattainment areas designated. See 77 Fed. Reg. 30088 (May 21, 2012) (designating 45 areas (including 7 multistate areas) as nonattainment for the 2008 ozone NAAQS); see also 77 Fed. Reg. 34221 (June 11, 2012) (additional designations); 78 Fed.

Reg. 3086 (Jan. 15, 2013) (revised standard for $PM_{2.5}$). The questions with which the D.C. Circuit has struggled for more than a decade will recur.

The court of appeals' repeated bypass of statutory exhaustion requirements – and its embrace of numerous easily manipulated theories to excuse a failure to present objections – are also of broad public significance. The D.C. Circuit is the sole forum for judicial review of national Clean Air Act rulemakings, 42 U.S.C. 7607(b)(1), and has a singular role reviewing rulemakings under a host of major regulatory statutes with exhaustion requirements.[9] The decision here is apt to encourage "blindsiding" of agencies, see App. 114a, and the majority's long menu of rationales for bypassing clear limits on judicial review, App. 32a-34a n.18, *supra*, pp. 17-18, injects costly uncertainty into rules that form the foundation of administrative law.

The court of appeals' violation of bedrock rules of administrative procedure, its disregard of the agency's own analysis (even as the majority took up objections not presented to the agency), and its willingness to impose detailed methodological requirements on EPA without any examination of their feasibility are ironic given the long and unhappy background of *judicial* efforts to handle the chronic problem of interstate pollution:

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[9] See, *e.g.*, 47 U.S.C. 405(a)(2) (Communications Act); 15 U.S.C. 77i(a) (Securities Act of 1933); 15 U.S.C. 78y(c)(1) (Securities Exchange Act of 1934); 29 U.S.C. 160(e) (National Labor Relations Act); 29 U.S.C. 210(a) (Fair Labor Standards Act); *Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 700 (D.C. Cir. 2008) (such provisions are "common" in "many regulatory statutes").

> History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. In *Missouri v. Illinois*, 200 U.S. 496, 520—522 (1906), Justice Holmes was at pains to underscore the great difficulty that the Court faced in attempting to pronounce a suitable general rule of law to govern such controversies.

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 501 (1971). See also *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981) ("[D]ifficult" "technical problems" associated with water pollution control were "doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise."). The court of appeals forgot these important lessons, at great cost to downwind states and their millions of residents.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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