No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Air Act, 42 U.S.C. 7401 *et seq.* (Act or CAA), requires the Environmental Protection Agency (EPA) to establish National Ambient Air Quality Standards (NAAQS) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years" of "promulgation of a [NAAQS]," each State must adopt a state implementation plan (SIP) with "adequate provisions" that will, *inter alia*, "prohibit[]" pollution that will "contribute significantly" to other States' inability to meet, or maintain compliance with, the NAAQS. 42 U.S.C. 7410(a)(1), (2)(D)(i)(I). If a State fails to submit a SIP or submits an inadequate one, the EPA must enter an order so finding. 42 U.S.C 7410(k). After the EPA does so, it "shall promulgate a [f]ederal implementation plan" for that State within two years. 42 U.S.C. 7410(c)(1).

The questions presented are as follows:

1. Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

2. Whether States are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

3. Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States Environmental Protection Agency and Acting EPA Administrator Robert Perciasepe.

Respondents who were petitioners in the court of appeals are: City of Ames, Iowa; City of Springfield, Illinois, Office of Public Utilities, doing business as City Water, Light & Power; Louisiana Department of Environmental Quality; Louisiana Public Service Commission; Mississippi Public Service Commission; Public Utility Commission of Texas; Railroad Commission of Texas; 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; Texas Commission on Environmental Quality; Texas General Land Office; AEP Texas North Co; Alabama Power Co.; American Coal Co.; American Energy Corp.; Appalachian Power Co.; ARIPPA; Big Brown Lignite Company LLC; Big Brown Power Company LLC; Columbus Southern Power Co.; 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 Corp.; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Environmental Energy Alliance of New York, LLC; GenOn Energy, Inc.; Georgia Power Co.; Gulf Power Co.; Indiana Michigan Power Co.; 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 Co.; Kenamerican Resources, Inc.; Kentucky Power Co.; Lafayette Utilities System; Loui-

siana Chemical Association; 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 Association; Midwest Ozone Group; Mississippi Power Co.; Municipal Electric Authority of Georgia; Murray Energy Corp.; National Mining Association; National Rural Electric Cooperative Association; Northern States Power Co. (a Minnesota corporation); Oak Grove Management Company LLC; Ohio Power Co.; Ohio Valley Coal Co.; Ohio American Energy, Inc.; Peabody Energy Corp.; Public Service Company of Oklahoma; Sandow Power Company LLC; South Mississippi Electric Power Ass'n; Southern Company Services, Inc.; Southern Power Co.; Southwestern Electric Power Co.; Southwestern Public Service Co.; Sunbury Generation LP; Sunflower Electric Power Corp.; Utility Air Regulatory Group; United Mine Workers of America; Utah American Energy, Inc.; Westar Energy, Inc.; Western Farmers Electric Cooperative; Wisconsin Cast Metals Association; Wisconsin Electric Power Co.; Wisconsin Paper Council, Inc.; Wisconsin Manufacturers and Commerce; Wisconsin Public Service Corp.

Respondents who were intervenors in support of the court of appeals petitioners are: San Miguel Electric Cooperative; City of New York (Nos. 11-1388 and 11-1395 only); State of New York (Nos. 11-1388 and 11-1395 only).

Respondents who were intervenors in support of the court of appeals respondents are: American Lung Association; Calpine Corporation; Clean Air Council; Environmental Defense Fund; Exelon Corporation; Natural Resources Defense Council; Public Service Enterprise Group, Inc.; Sierra Club; City of Bridgeport, Connecti-

cut; City of Chicago; City of New York (all but Nos. 11-1388 and 11-1395); City of Philadelphia; Mayor and City Council of Baltimore; State of Connecticut; State of Delaware; District of Columbia; State of Illinois; State of Maryland; Commonwealth of Massachusetts; State of New York (all but Nos. 11-1388 and 11-1395); State of North Carolina; State of Rhode Island; State of Vermont.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency (EPA) and the Acting Administrator of the EPA, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-116a) is reported at 696 F.3d 7. The final rule of the EPA (App. 117a-1458a) is reported at 76 Fed. Reg. 48,208.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (App. 1459a-1462a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 1463a-1498a.

STATEMENT

1. a. The Clean Air Act (CAA, or the Act), 42 U.S.C. 7401 *et seq.*, creates a federal-state partnership to control air pollution in the United States. The Act requires the EPA to establish National Ambient Air Quality Standards (NAAQS) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. The Act then obligates States to adopt state implementation plans (SIPs) that, *inter alia*, assure both that States will meet the NAAQS within their own borders and that they will not emit pollutants in amounts that "contribute significantly" to other States' NAAQS nonattainment or inability to maintain compliance with NAAQS. 42 U.S.C. 7410(a)(2)(D)(i)(I). If the EPA finds that a State has failed to adopt a SIP meeting these or other CAA requirements, the EPA "shall" issue a federal implementation plan (FIP) for that State within two years of that finding. 42 U.S.C. 7410(c)(1).

This case involves the interstate component of these SIP requirements, commonly referred to as the "good neighbor" provision. 42 U.S.C. 7410(a)(2)(D)(i)(I). The original version of that provision required only that SIPs include provisions for "intergovernmental cooperation" to assure that emissions would not interfere with attainment or maintenance of the NAAQS in other States. 42 U.S.C. 1857c-5(a)(2)(E) (1970). Because this "cooperation" approach proved ineffectual, Congress amended the CAA in 1977 to require, more directly, that all SIPs contain provisions prohibiting emissions from particular stationary sources that "will * * * prevent"

attainment or maintenance of the NAAQS in downwind States. 42 U.S.C. 7410(a)(2)(E) (Supp. II 1977). In adding these (and related) new provisions in 1977, Congress recognized that upwind States had little incentive to control pollution whose effects would be felt principally in other States, and Congress made clear its intent that the burdens of air pollution control be shared more equitably among upwind and downwind States.[1]

In 1990, Congress decided that even the strengthened interstate-pollution provision in the CAA had been inadequate.[2] In particular, the EPA had found in sever-

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[1] For example, a House report concluded that existing law was "an inadequate answer to the problem of interstate air pollution." H.R. Rep. No. 294, 95th Cong., 1st Sess. 330 (1977), *reprinted in* 4 *A Legislative History of the Clean Air Amendments of 1977* (1977 Legis. Hist.), at 2797 (1978). The report stressed that one of the problems under the existing law was that its effectiveness depended largely on "prevention or abatement" by upwind States that in reality had little "incentive and need to act." *Ibid.* Similarly, a Senate report criticized the lack of effective "interstate abatement procedures" and "interstate enforcement actions" under existing law, which it viewed as "resulting in serious inequities among several States, where one State may have more stringent implementation plan requirements than another State." S. Rep. No. 127, 95th Cong., 1st Sess. 41-42 (1977), *reprinted in* 3 1977 Legis. Hist., at 1415. Accordingly, the new provisions were "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." *Id.* at 1416.

[2] See S. Rep. No. 228, 101st Cong., 1st Sess. 48 (1989), *reprinted in* 5 *A Legislative History of the Clean Air Act Amendments of 1990* (1990 Legis. Hist.), at 8388 (1998); see also 136 Cong. Rec. 6420 (1990), *reprinted in* 1 1990 Legis. Hist., at 1106 (statement of Sen. Lautenberg) ("In New Jersey, the Department of Environmental Protection says that on some days even if we shut down the entire State, we would be in violation of some health standards because of pollution coming over from other States."); S. Rep. No. 228, 101st

al decisions that pollution contributions by particular upwind sources could not be shown to have "prevent[ed]" NAAQS attainment downwind. See *Michigan* v. *EPA*, 213 F.3d 663, 674 (D.C. Cir. 2000) (per curiam) (discussing this history), cert. denied, 532 U.S. 903, 904 (2001).

For these reasons, Congress in 1990 revised a number of provisions relating to interstate pollution transport, including (as relevant here) 42 U.S.C. 7410(a)(2)(D). That amendment made the good neighbor provision stronger and more flexible by extending its reach beyond a single stationary source to cover multiple sources, and by requiring States to prohibit emissions that "contribute significantly" to downwind nonattainment or maintenance problems, whether or not those emissions could be shown, on their own, to "prevent" attainment. See App., *infra*, 25a n.14; 42 U.S.C. 7410(a)(2)(D)(i)(I). The good neighbor provision now requires SIPs to contain measures "(i) prohibiting * * * 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 [NAAQS]." 42 U.S.C. 7410(a)(2)(D)(i)(I); see App., *infra*, 8a ("To put it colloquially, the good neighbor provision requires upwind States to bear responsibility for their fair share of the mess in downwind States.").

b. Following enactment of the 1990 amendments, the EPA began a series of rulemakings to address the revised interstate pollution transport requirements. The

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Cong., 1st Sess. 49 (1989), *reprinted in* 5 1990 Legis. Hist., at 8389 (similar statement regarding New York City).

first was the "NO_x SIP Call," which in 1998 established a cap-and-trade program[3] for nitrogen oxide (NO_x) emissions to address ozone nonattainment. 63 Fed. Reg. 57,356 (Oct. 27, 1998). The NO_x SIP Call was upheld by the D.C. Circuit in most significant respects in *Michigan*.

In 2005, the EPA issued the Clean Air Interstate Rule (CAIR), which extended the basic approach of the NO_x SIP Call to "reduce or eliminate the impact of upwind sources on out-of-state downwind nonattainment of NAAQS for fine particulate matter ('$PM_{2.5}$')" and ozone. *North Carolina* v. *EPA*, 531 F.3d 896, 903 (D.C. Cir. 2008) (*North Carolina*) (per curiam); see 70 Fed. Reg. 25,162 (May 12, 2005). CAIR was initially vacated by the D.C. Circuit in *North Carolina*. In a later decision on rehearing, however, the court modified the remedy to remand without vacatur, thus allowing the EPA to continue to administer CAIR pending further rulemaking. *North Carolina* v. *EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

c. The EPA rule at issue in this case is the Cross-State Air Pollution Rule, commonly referred to as the Transport Rule. App. 117a-1458a. The Transport Rule

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[3] In simple terms, a cap-and-trade program establishes an aggregate emission "cap" for each set of covered sources and provides regulated entities significant flexibility to determine how the cap is met. Sources comply by holding allowances equal to their emissions, and they can purchase allowances from other sources that are able to reduce their emissions less expensively. Allowances are traded much like other commodities. This gives sources the flexibility to secure required emission reductions in the most feasible and least expensive manner, while still assuring that the overall pollution-control targets are met. General information about the EPA's clean air markets programs can be found at EPA, *Clean Air Markets* (2010), http://www.epa.gov/airmarkets/progsregs/index.html.

responded to the remand in *North Carolina* and addressed the emission of pollutants in 28 upwind States that significantly contribute to downwind States' problems attaining or maintaining the NAAQS for ozone and fine particulate matter ($PM_{2.5}$).[4] For each State subject to the Transport Rule, the EPA had previously made a finding (in separate administrative proceedings) that the State either had failed to submit a SIP addressing the good neighbor requirement, or had submitted an inadequate one, thus triggering the statutory requirement for the EPA to promulgate a FIP within two years. 42 U.S.C. 7410(c)(1); see App. 171a-172a. In the Transport Rule, the EPA therefore promulgated FIPs for those States.

d. While the NO_x SIP Call, CAIR, and the Transport Rule varied somewhat in their details, all three rules were premised on the same basic framework, using a two-part analysis that considered both air quality and cost factors. The first step was the Screening Analysis, in which the EPA identified those States potentially subject to the rule (pending further analysis). The Screening Analysis used air quality modeling to determine whether each State's emissions increased ambient

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[4] The Transport Rule actually addressed three distinct NAAQS: (1) the 1997 $PM_{2.5}$ annual NAAQS; (2) the 2006 $PM_{2.5}$ daily NAAQS; and (3) the 1997 8-hour ozone NAAQS. App. 168a. Because the differences in the EPA's analysis for the two $PM_{2.5}$ NAAQS are largely irrelevant to the issues addressed in this petition, the petition refers simply to the $PM_{2.5}$ NAAQS except as specifically noted. In 2008, the 8-hour ozone NAAQS was revised to be somewhat more stringent, *id.* at 169a, and in January 2013, the EPA revised its suite of PM NAAQS, making the annual $PM_{2.5}$ more stringent but retaining the same standard for daily $PM_{2.5}$. 78 Fed. Reg. 3086 (Jan. 15, 2013). The Transport Rule does not address either of these recently revised NAAQS.

concentrations of pollutants by greater than a defined threshold level in at least one downwind area with a NAAQS nonattainment or maintenance problem. App. 255a.

In the second part of the analysis (the Control Analysis), the EPA established the emission-control obligations for each upwind State that had been made subject to the rule by the Screening Analysis. The obligations of each such State were defined by reference to the amount of emission reductions that can be achieved in that State at a specific cost threshold. The cost thresholds were selected by evaluating how much emission control is necessary to address the upwind component of downwind nonattainment and maintenance problems. In this way, the agency considered both the air quality impacts and the cost to the regulated community of increasingly stringent levels of emission control. App. 316a-323a.

EPA's rationale for using this two-part approach is largely based on the nature and technical complexity of the interstate pollution problem. For decades, air quality modeling has shown that ozone and $PM_{2.5}$ nonattainment and maintenance problems are caused by the *collective* contribution of NO_x and sulfur dioxide (SO_2) from numerous upwind States to particular downwind areas, combined with local emissions from the affected downwind areas themselves.[5] Further complicating matters

[5] The underlying chemical mechanisms are complex but can be summarized in general terms as follows. In the case of ozone pollution, emissions of NO_x and volatile organic compounds (VOCs) mix in the atmosphere in the presence of sunlight to form ozone. Accordingly, ozone nonattainment is primarily a seasonal, warm-weather problem. Because VOC emissions generally are local in nature, the interstate component of ozone pollution is due primarily to NO_x emissions that can be transported in the atmosphere over very long distances (hundreds of miles or more). App. 185a-187a. Fine particulate mat-

is the fact that many States that are upwind contributors to pollution problems in other States also have NAAQS nonattainment and maintenance problems of their own (*i.e.*, they are both "upwind" and "downwind"), and most upwind States contribute, in varying degrees, to nonattainment and maintenance problems in many downwind areas. In short, at least in the eastern half of the United States (which for demographic and meteorological reasons is the portion of the country most affected), the interstate pollution problem is best understood as a dense, spaghetti-like matrix of overlapping upwind/downwind "linkages" among many States, rather than a neater and more limited set of linkages among just a few.

To illustrate these points more concretely, the EPA's air quality modeling for the Transport Rule evaluated 2479 potential contribution linkages among 37 upwind States and 67 ozone and $PM_{2.5}$ downwind nonattainment and maintenance areas. Of these linkages, 565 were above the one-percent threshold for the rule's Screening Analysis (88 for ozone and 477 for $PM_{2.5}$). For each downwind nonattainment and maintenance area, between 25 and 32 upwind States contribute some amount of pollution, with between five and 12 (and a mean of eight) being substantial enough to exceed the screening threshold. For ozone, four out of 25 contributing States are both upwind contributors and downwind receptors,

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ter (*i.e.*, $PM_{2.5}$) can be emitted directly or formed secondarily in the atmosphere. The interstate air pollution component of $PM_{2.5}$ pollution is primarily attributable to the formation of sulfates from SO_2 emissions from power plants and industrial facilities and nitrates from NO_x emissions from power plants, automobiles, and other combustion sources. These precursors, as well as the fine particles themselves, also can be transported long distances in the atmosphere. 69 Fed. Reg. 4566, 4575 (Jan. 30, 2004).

while for $PM_{2.5}$, this figure is nine out of 23. Many upwind States, especially those located in the industrial Midwest, make downwind contributions exceeding the screening threshold to a large number of downwind areas. For example, Kentucky contributes above the threshold to 40 out of 41 downwind receptor areas for the daily $PM_{2.5}$ NAAQS, and to all 16 downwind receptors for the annual $PM_{2.5}$ NAAQS.[6]

2. a. In *Michigan*, the D.C. Circuit reviewed the NO_x SIP Call and upheld the EPA's two-step analytical approach. 213 F.3d at 677-680. The court held that the term "significant" (as used in the good neighbor provision) is ambiguous, and that the EPA can permissibly determine the amount of a State's "significant" contribution by reference to the amount of emissions reductions achievable through application of "highly cost-effective" controls. *Id.* at 677-679. The court observed that "[t]he term 'significant' does not in itself convey a thought that significance should be measured in only one dimension—here, in the petitioners' view, health alone." *Id.* at 677.

The EPA used the same basic analytical approach for CAIR, which was the subject of the D.C. Circuit's decision in *North Carolina*. Although the court of appeals ultimately remanded CAIR on other grounds, the court reaffirmed *Michigan*'s general acceptance of a cost-effectiveness analysis to help determine the amount of each State's "significant" contribution, and it expressly

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[6] The figures discussed in this paragraph are derived from data in the EPA's air quality modeling technical support document (Air Quality TSD) for the Transport Rule, which was part of the administrative record for the Rule. See EPA, *Air Quality Modeling Final Rule Technical Support Document*, Appendices D, E, and F (2011), http://www.epa.gov/airtransport/pdfs/AQModeling.pdf.

declined to disturb the agency's basic two-step analytical approach. *North Carolina*, 531 F.3d at 916-917.

b. In the order at issue here, the EPA again used the same basic analytical approach, but a divided panel of the court of appeals rejected it. App., *infra*, 1a-116a.[7]

The court of appeals concluded for three reasons that the Transport Rule was unambiguously foreclosed by the good neighbor provision. First, the court found that the rule could theoretically result in a State being compelled to reduce emissions below the threshold level for determining whether that State was subject to the Transport Rule. Second, the court believed that, where multiple upwind States contribute to a common downwind nonattainment problem, the rule did not sufficiently assure that upwind States' emission reduction obligations were proportional to their share of modeled downwind contribution. Third, the court concluded that the rule did not sufficiently assure that cumulative upwind-State obligations would be no more than the minimum amount necessary to enable affected downwind areas to meet the NAAQS. App., *infra*, 31a-41a.

The court of appeals also held that the EPA lacked statutory authority to promulgate FIPs under the circumstances presented here. The EPA is required to

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[7] To the extent that the EPA's two-step regulatory approach for the Transport Rule differed in any significant way from that used in the NO_x SIP Call and CAIR, it was to place *greater* emphasis on air quality factors. Most notable in this respect was the agency's decision to create two different cost thresholds for SO_2 controls to apply to different groups of States depending on the severity of the associated downwind $PM_{2.5}$ nonattainment problems. See App. 314a, 316a-323a. Where the downwind problems were less severe, upwind States were required only to make reductions available at $500 per ton, a relatively low cost threshold compared to the $2000 per ton threshold used in the NO_x SIP Call and CAIR.

promulgate a FIP only when it has made a finding that a State has breached its obligation to submit an adequate SIP in a timely fashion. In the court's view, no such state non-compliance had been demonstrated because no State was obligated to submit a SIP addressing interstate transport until the EPA had defined that State's significant contribution to nonattainment or interference with maintenance in other States. App., *infra*, 42a-61a.

Judge Rogers dissented. She concluded that the court did not have jurisdiction to decide either the significant-contribution or FIP question. On the merits, she would have held that the Transport Rule was a permissible exercise of the EPA's authority under the CAA. App., *infra*, 65a-116a; see *id.* at 114a ("The court ignores Congress's limitations on the court's jurisdiction and decades of precedent strictly enforcing those limitations and proceeds to do violence to the plain text of the CAA and EPA's permissible interpretations of the CAA."). "The result," Judge Rogers concluded, "is the endorsement of a 'maximum delay' strategy for regulated entities." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals committed a series of fundamental errors that, if left undisturbed, will gravely undermine the EPA's enforcement of the Clean Air Act. As Judge Rogers explained in dissent, the court should not even have decided either question presented. The court of appeals' determination that the EPA could not pass judgment on SIPs until it had quantified States' good neighbor obligations was, in substance, a collateral invalidation of separate orders not before the court. Those challenging the Transport Rule likewise had waived any statutory objection to the agency's approach to "signifi-

cant contribution" by failing to raise it in the administrative proceedings.

The court of appeals' merits holdings were likewise erroneous. The court disregarded mandatory statutory deadlines for States to adopt SIPs with good neighbor provisions and for the EPA to issue FIPs when it finds that a State has failed to do so (or has done so inadequately). The court then read several statutory commands of its own invention into the ambiguous term "significant contribution" and faulted the EPA for not complying with those directives.

If not corrected, the decision below will have serious adverse consequences. Its imposition of non-textual barriers to implementation of the good neighbor provision could delay by years the ability of downwind States to comply with NAAQS, and could in some cases make it impossible for those States to meet statutory deadlines for doing so. Because the EPA had planned to use the Transport Rule as a model for enforcement of additional NAAQS, the court's decision also creates serious uncertainty about implementation of other CAA requirements. Most fundamentally, the court of appeals' errors will seriously impede the EPA's ability to deal with a grave public health problem. The petition for a writ of certiorari should be granted.

A. The Court Of Appeals Both Exceeded Its Jurisdiction And Erred On The Merits By Effectively Invalidating Prior SIP Orders

1. In June 2010 and July 2011 (before the Transport Rule had calculated any State's good neighbor obligations), EPA issued final orders finding that 29 States and territories had failed to satisfy their statutory obligation to submit SIPs with good neighbor provisions for the 2006 24-hour $PM_{2.5}$ NAAQS. App., *infra*, 71a-73a &

n.2 (Rogers, J., dissenting). No party sought judicial review of those orders. *Id.* at 73a (Rogers, J., dissenting). Also in July 2011, EPA issued separate final orders disapproving as inadequate the good neighbor provisions of SIPs submitted by ten other States. See *id.* at 73a & n.3 (Rogers, J., dissenting). Only three of those States sought judicial review (two in the D.C. Circuit and one in the Sixth Circuit), and those petitions were not consolidated with the case below. See *id.* at 73a-74a & n.3 (Rogers, J., dissenting).

The court of appeals in this case held that "EPA's many SIP disapprovals and findings of failure to submit share one problematic feature: EPA made all of those findings *before* it told the States what emissions reductions their SIPs were supposed to achieve under the good neighbor provision." App., *infra*, 49a. That statement starkly demonstrates that the Court's invalidation of the Transport Rule rested on its conclusion that the EPA's antecedent June 2010 and July 2011 final orders were premature and therefore erroneous. But the proper avenue for challenging the prior orders was via direct petitions for review of those orders, not through a later challenge to the Transport Rule. As Judge Rogers explained, "[i]f a State wished to object that under section [7410(a)] it had no obligation to include 'good neighbor' provisions in its SIP until EPA quantified its 'significant contribution' in emission reduction budgets, then the CAA required it to do so at the time EPA found it had not met its SIP 'good neighbor' obligation." *Id.* at 75a.[8]

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[8] Indeed, in the 2011 order disapproving the good neighbor provision of Indiana's SIP, EPA rejected the very argument on which the court below later relied in invalidating the Transport Rule, *i.e.*, that "EPA 'should provide [the State] the opportunity to revise its [] SIP once the Transport Rule is completed.'" App., *infra*, 77a (Rogers, J.,

To obtain judicial review of EPA action under the CAA, a challenger must file a petition for review within 60 days after that action is published in the *Federal Register*. 42 U.S.C. 7607(b). The court of appeals therefore exceeded its jurisdiction by permitting those challenging the Transport Rule to collaterally attack separate final orders for which the time to seek review had passed. See App., *infra*, 65a-66a, 70a-82a (Rogers, J., dissenting). In determining the propriety of the Transport Rule, the court below therefore was required to accept as valid the antecedent SIP disapprovals and findings of failure to submit.

2. Even if the court of appeals had been authorized to review the June 2010 and July 2011 orders, the court's determination that the orders were invalid conflicts with the text of the Act. See App., *infra*, 83a-95a (Rogers, J., dissenting). The CAA's "plain text and structure establish a clear chronology of federal and State responsibilities" that do not include the extra steps mandated by the court of appeals. *Id.* at 86a (Rogers, J., dissenting).

The CAA provides:

> Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, *within 3 years* (or such shorter period as the Administrator may prescribe) *after the promulgation of a national primary ambient air quality standard* (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such

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dissenting) (quoting 76 Fed. Reg. 43,175, 43,177 (July 20, 2011)). Indiana did not file a petition for review to challenge that conclusion. *Id.* at 78a (Rogers, J., dissenting).

> primary standard in each air quality control region (or portion thereof) within such State.

42 U.S.C. 7410(a)(1) (emphases added).

The Act further provides:

> Each such [state implementation] plan shall * * *
>
> (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).

If a State fails to submit a SIP, or submits an inadequate one, the EPA must make a finding of failure to submit or disapprove the submission. 42 U.S.C 7410(k). The EPA is then required to promulgate a FIP within two years of making such a finding or disapproval unless the State has addressed the problem and the EPA has approved the SIP. 42 U.S.C. 7410(c). As noted above, for every State for which the EPA promulgated a Transport Rule FIP, the agency either had found that the State's submission was overdue or had disapproved a submitted SIP. Under the plain terms of the statute, the EPA therefore had a mandatory duty to promulgate FIPs for those States. *Ibid.*

Notwithstanding the clear statutory mandate, the court of appeals held that the EPA lacked authority to promulgate the FIPs because, in that court's view, States have no obligation under the good neighbor pro-

vision to submit SIPs addressing interstate transport until after the EPA has defined their significant contribution. App., *infra*, 42a-61a. The court did not find that the language of Section 7410(a)(1)—*i.e.*, that States "shall" submit a SIP within three years after the EPA has promulgated a NAAQS—makes a State's obligation to act contingent on its receipt of guidance from the EPA. Rather, the court thought that "contextual and structural factors" supported its approach. *Id.* at 54a.

The court of appeals' analysis violated the core principle of statutory interpretation that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) (citation omitted). The statutory language here could not be clearer. Under the Act, each State "*shall*" submit a SIP to the EPA within three years after the promulgation of a new or revised NAAQS, and "[e]ach such plan *shall*" contain adequate provisions to control emissions from the State that significantly contribute to nonattainment or interfere with maintenance in another State. 42 U.S.C. 7410(a)(2) (emphases added). Nothing in the CAA makes that obligation contingent on prior action by the EPA to define a particular State's contribution to downwind nonattainment. "The Act does not require EPA to promulgate a rule or issue guidance regarding the specific requirements of section [7410(a)(2)(D)(i)(I)] in advance of the SIP submittal deadline, much less require EPA to promulgate such a rule a specific amount of time before the SIP submittal deadline." App. 175a.

The court of appeals' interpretation is also inconsistent with the statute's emphasis on timely attainment of the NAAQS. The statute establishes specific dead-

lines by which the NAAQS must be achieved, which can be as short as three years after an area is designated as nonattainment. 42 U.S.C. 7511(a)(1). As Congress recognized in enacting and then strengthening the interstate transport provision of the Act, some States need emission reductions from upwind States (in conjunction with emission reductions within their own borders) in order to achieve attainment. Thus, the timely submission of interstate transport SIPs and the consequent implementation of control measures are integral to the ability of all States to achieve the statutory deadlines for attainment. By effectively eliminating the statutory deadline for the submission of transport SIPs, the court of appeals' decision disrupts this integrated statutory scheme for achieving attainment. By contrast, the EPA's Transport Rule, which included statutorily-mandated FIPs but stressed that States were free to replace them by later submitting SIPs to the EPA for approval, see App. 669a-682a, was true to the statutory design.

Finally, the court of appeals erred in asserting that States are incapable of submitting transport SIPs until the EPA has established their significant contribution. The court cited nothing to support this assumption except statements by the EPA to the effect that determining interstate contribution is complex. App., *infra*, 51a-52a. In implementing the CAA, however, States routinely undertake technically complex air quality determinations. SIPs addressing in-state emissions are based on complex modeling to predict how emissions of numerous pollutants will interact with atmospheric conditions to create, often in areas far from the sources, concentrations of ozone and $PM_{2.5}$. States are capable of producing the air quality modeling and inform-

ation needed to submit transport SIPs. See *id.* at 89a-95a (Rogers, J. dissenting); see also 42 U.S.C. 7410(a)(2)(K)(i) (States must "perform[] * * * 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 for which [EPA] has established a [NAAQS]."). In addition, the necessary emissions information from all States is publicly available, see App., *infra*, 90a & n.12 (Rogers, J., dissenting), and States not covered by CAIR or the Transport Rule have complied with the requirement to submit transport SIPs. *E.g.*, 77 Fed. Reg. 1027 (Jan. 9, 2012) (EPA approval of Colorado's interstate transport SIP).

B. The Court Of Appeals Erred In Adjudicating Unpreserved Challenges To The EPA's "Significant Contribution" Analysis, And In Failing To Defer To The Agency's Reasonable Interpretation Of Ambiguous Statutory Terms

The court of appeals also erred in invalidating the Transport Rule based on its conclusion that the EPA's "significant contribution" analysis was foreclosed by the CAA. No statutory objection to that effect was made in the administrative proceedings. In any event, the EPA's analysis of that issue reflected a reasonable construction of the CAA's broad and ambiguous terms.

1. The CAA specifies 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." 42 U.S.C. 7607(d)(7)(B). That statutory requirement codifies long-recognized exhaustion rules. Enforcement of such rules helps to ensure that an agency will have the opportunity to modify its proposed course of action if it concludes that particular objections have merit; enables the agen-

cy to explain why it views particular objections as unmeritorious if it reaches that conclusion; and promotes better-informed judicial review by allowing the court to focus on the agency's actual responses to actual objections. See, *e.g.*, *DOT* v. *Public Citizen*, 541 U.S. 752, 764-765 (2004); *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 553-554 (1978). "Exhaustion concerns apply with particular force when," as here, "the agency proceedings * * * allow the agency to apply its special expertise." *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992).

The court below failed to honor Section 7607(d)(7)(B)'s requirement that objections to EPA action must be "raised with reasonable specificity" during the administrative proceedings in order to be preserved for judicial review. See App., *infra*, 95a-110a (Rogers, J., dissenting); see also *id.* at 96a (noting that the waiver "question is not *close*"). In concluding that the EPA's methodology was inconsistent with the CAA, the court of appeals expressed concern that the EPA's Control Analysis could theoretically require a State to reduce its emissions below the air quality threshold used for the Screening Analysis (*i.e.*, one percent of the applicable NAAQS for at least one upwind-to-downwind linkage). *Id.* at 31a-38a. Such a result, the court believed, would exceed the EPA's statutory authority to regulate only "significant" contributions. See *ibid.*

As Judge Rogers's dissent thoroughly demonstrated, however, this statutory objection was not asserted in any rulemaking comments. App., *infra*, 98a-101a. Because of that failure, there was no evidence before the court of appeals that the factual scenario the court hypothesized would ever actually occur. *Id.* at 95a & n.15 (Rogers, J., dissenting). Likewise, the court of appeals'

conclusion that the CAA required a strictly proportional approach to upwind States' emission-reduction obligations was not even advanced in the court of appeals by those challenging the Transport Rule. *Id.* at 111a (Rogers, J., dissenting). The court nevertheless viewed those questions as properly before it because concerns of this sort had been raised in the years-old and separate *CAIR* rulemaking, and because EPA had discussed (but proposed not to pursue) alternative regulatory approaches in the Transport Rule proposal. *Id.* at 32a n.18. The court therefore believed that the agency was sufficiently "on notice that its disregard of the significance floor was a potential legal infirmity in its approach." *Ibid.*

Under the plain language of the CAA's judicial review provision, however, the relevant question is not whether the EPA was *aware* of a potential issue or objection, but whether the objection asserted in court was "raised with reasonable specificity during the period for public comment" on the particular agency action that is the subject of the petitioner's challenge. 42 U.S.C. 7607(d)(7)(B). The court of appeals' casual approach to waiver and exhaustion issues would require agencies to intuit unstated objections to proposed rules based on any issue of which a court might later find the agency was "on notice." In particular, the court's approach would require agencies to guess whether objections raised in one agency proceeding, but never asserted as a ground for judicial review of the resulting agency action, must be addressed again in a subsequent rulemaking even though no commenter has pressed them. The court's approach also permits courts to adjudicate very complex regulatory issues without the benefit of agency responses to focused rulemaking comments. Indeed, the manner in which the court of appeals proceeded to ana-

lyze the significant contribution claims in this case is a striking illustration of this problem. See pp. 21-28, *infra*.

2. On the merits, the court of appeals erred in invalidating the EPA's approach to the "significant contribution" question.

Agencies are entitled to deference in construing statutes they administer. *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984). If Congress has "directly spoken to the precise question at issue," that intent must be given effect. *Id.* at 842-843. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11.

In 2000, the D.C. Circuit held that the term "significant" is ambiguous as used in the statutory phrase "contribute significantly to nonattainment," 42 U.S.C. 7410(a)(2)(D)(i)(I). *Michigan* v. *EPA*, 213 F.3d 663, 677-680 (D.C. Cir. 2000), cert. denied, 532 U.S. 903, 904 (2001). The court further held that it was reasonable for the EPA to determine the "significan[ce]" of particular state contributions by reference to the amount of highly cost-effective pollution controls available in each upwind State, and without regard to the amount of each State's downwind contribution. *Ibid.*; see *North Carolina* v. *EPA*, 531 F.3d 896, 916-917 (D.C. Cir. 2008) (declining to disturb CAIR's similar approach to significant contribution). In this case, however, the court below changed

course and held that the EPA's approach violated the CAA's plain terms.

a. In particular, the court of appeals perceived a strict statutory requirement that the emission-reduction obligations for each upwind State be "proportional" to its modeled amount of downwind air quality contributions. App., *infra*, 31a-41a. The court did not make clear whether it found these to be unambiguous statutory requirements (*Chevron* step one) or merely a necessary component of any "permissible" construction of the statute (*Chevron* step two). The court of appeals erred in either event because Congress did not address these specific issues, and the EPA's approach is reasonable.

The court of appeals' proportionality requirement is an unrealistically simplistic response to a highly complex problem. To illustrate, first consider a downwind nonattainment area (Area A) that receives relatively equal amounts of pollution contributions from three upwind States, X, Y, and Z. A strict proportionality requirement would compel the EPA to identify the portion of the problem attributable to each upwind State and then divide the upwind share among States X, Y, and Z "in proportion to the size of their contributions to the downwind State's nonattainment." App., *infra*, 25a.

In reality, however, interstate pollution transport problems are far more complex. In the scenario described above, for example, assume that States Y and Z also contribute relatively higher amounts to nonattainment in other areas (Areas B and C, respectively), while State X contributes a relatively small (but still "significant") amount to nonattainment in a fourth area (Area D). These facts may require States Y and Z to make relatively larger emission reductions to address their contributions to Areas B and C. With respect to Area A,

however, where States Y and Z constitute two-thirds of the upwind contribution, the likely result of such larger reductions would be some degree of incidental "overcontrol," as well as a lack of "proportionality" among States X, Y, and Z. Similarly, because State X is a relatively small contributor to nonattainment in Area D, the relatively larger reductions it would have to make to satisfy its share of the upwind contribution to Area A would likely cause some lack of proportionality and some over-control with respect to Area D.

As discussed above, further technical complications and cost implications arise out of other typical real-world circumstances, such as the fact that many downwind nonattainment areas are also upwind contributors, and that there is often a wide disparity among the States with regard to the pollution-control investments they have already made (and the consequent disparities in expenditures needed to make additional emission reductions). Moreover, in a typical real-world case, a downwind area will have far more than the three upwind contributors used in the above examples; these upwind contributions will vary widely in degree; and each upwind State will typically contribute in varying amounts to downwind nonattainment and maintenance problems in numerous areas, not just one or two.

Especially when viewed against this background, Congress is unlikely to have intended—and it surely did not unambiguously determine—to impose the court of appeals' simplistic and inflexible quantitative proportionality restrictions on the EPA (and the States) in addressing this sprawling and complex problem. Rather than prescribing a specific regulatory solution, Congress instead simply required each State's SIP to prohibit emissions in amounts that "contribute significantly" to

downwind nonattainment or maintenance problems, 42 U.S.C. 7410(a)(2)(D)(i)(I), without specifying any technical or policy factors that the EPA should take into account in enforcing this requirement. This is a classic delegation of gap-filling authority warranting *Chevron* deference in a highly technical area that demands specialized expertise. *Chevron*, 467 U.S. at 843; *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 339 (2002).

b. The EPA's construction of the CAA to allow its mixed air-quality and cost-effectiveness approach to the "contribute significantly" criterion, unencumbered by the restrictions enunciated by the court of appeals, is a reasonable one. As the D.C. Circuit had previously recognized, see *Michigan*, 213 F.3d at 677, the term "significant," in and of itself, does not dictate an exclusive or even primary focus on air quality impacts to the exclusion of costs. Nor is such a focus required by the CAA's references to the "amounts" of emissions that "contribute significantly," as the court below appeared to believe. See App., *infra*, 22a-23a; 42 U.S.C. 7410(a)(2)(D)(i)(I).

To be sure, the statutory reference to "amounts" can be read as an indication that Congress expected SIPs to address the interstate transport requirement through quantitative emission limits; but the Transport Rule did that. It is the term "contribute significantly" that guides the *substance* of those limits, however, and that key term was not defined by Congress. While the EPA's approach may not be the *only* permissible way to define the "significant" amount of upwind emissions, it is (for all the reasons discussed above) *one* permissible approach, as it achieves the air quality results desired by

Congress in a simpler, more feasible, and less costly manner than other alternatives.

The EPA's approach to significant contribution is also consistent with applicable guidance from this Court. The Court has recently stressed that, except where consideration of costs is expressly precluded by statute, the EPA and other agencies should be allowed to consider costs in construing broad qualitative standards similar to that at issue here, in order to allow the agency to identify the most efficient and least burdensome mechanisms to achieve a statutory goal. See *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (considering a Clean Water Act "best technology available" standard and observing that, while the technology that achieves the maximum environmental benefit could be viewed as the "best," the term also could be used to describe the technology that is "*most efficient[]*" from a cost-benefit perspective). And, citing *Michigan*, this Court has specifically noted the D.C. Circuit's conclusion that Section 7410(a)(2)(D)(i)(I), unlike the Act's NAAQS provisions, does *not* preclude the consideration of costs. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 469 n.1 (2001).

c. The court of appeals also erred in opining that its proportionality requirement was necessary to assure that upwind contributors were required to do no more than their "fair share" to address downwind nonattainment problems. App., *infra*, 25a. To begin with, the CAA itself does not specify any single most equitable and appropriate manner to divide emission-control responsibility among multiple upwind and downwind contributors. In the absence of any such statutory specification, the responsibility of balancing the relevant equi-

ties is a quintessential policy judgment on which the EPA should be afforded deference.

In the D.C. Circuit's view, each upwind contributor's "fair share" must be measured exclusively by its modeled air quality contribution to a single downwind nonattainment area, relative to other upwind contributors to the same area. App., *infra*, 25a. The court of appeals even specified a proportionality *formula* (illustrated with a hypothetical example involving three upwind contributors to a single downwind area) that it believed the statute required. *Id.* at 25a-26a & n.15. The hypothetical foundation of this formula bears so little resemblance to reality that it would be difficult if not impossible to apply even in the single-area context on which it is premised.[9] More importantly, however, most States subject to the rule are contributors to *multiple* downwind nonattainment and maintenance problems, with their relative degree of air quality culpability for each

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[9] For example, the court's hypothetical was premised on an invented and otherwise-unknown unit of measure—so-called NAAQS "units"—which the court used to describe *both* the quantity of upwind and downwind emissions and the air quality of the affected downwind area. The court depended on this unrealistic device to create an artificial world in which its mathematical construct could easily be applied. App., *infra,* 26a (assuming that the NAAQS is "100 units," the downwind area has air quality of "150 units," the downwind State contributes "90 units" and three upwind States contribute "20 units" each). In reality, of course, emissions are measured in actual quantities (*e.g.*, tons per year), and the effect of any given quantity of emissions on air quality and NAAQS attainment in downwind areas is highly variable and can be accurately estimated only through sophisticated computer modeling that takes into account geographic, meteorological, and a host of other technical factors—not through simple addition and subtraction as the court of appeals suggests. See note 5, *supra* (discussing formation of ozone and $PM_{2.5}$ from precursor NO_x and SO_2 emissions).

upwind-to-downwind linkage varying considerably. The court of appeals therefore was hopelessly unrealistic in assuming that each State could be assigned a precise air quality-based "fair share" with respect to *all* of its "significant" linkages.[10]

d. The court of appeals' fair-share policy rationale also does not take into account a separate but highly relevant consideration, namely that different States (both upwind and downwind) had made widely varying pollution-control investments at the time the Transport Rule was promulgated. To illustrate, again consider the simple hypothetical discussed above, where States X, Y, and Z contribute equal amounts to downwind nonattainment in Area A. Under the court of appeals' proportional approach, each of the three States must be required to make one-third of the total needed "upwind" emission reductions with respect to Area A. However, if States X and Y already have made substantial pollution-control

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[10] The decision below also creates a possible conflict with another CAA interstate transport provision, 42 U.S.C. 7426. *Inter alia*, that provision allows a downwind State to petition the EPA to make a finding that a specific source (or multiple sources) in upwind States violate the prohibition on significant contribution in Section 7410(a)(2)(D)(i)(I) with respect to the downwind State. 42 U.S.C. 7426(b). The statute requires the EPA to respond to any such petition within 60 days, while authorizing the EPA to extend that deadline for up to six months. *Ibid.*; 42 U.S.C. 7607(d)(10). Under the court of appeals' view of Section 7410(a)(2)(D)(i)(I), however, the EPA would typically be unable to quantify the emissions of upwind sources that contribute significantly to NAAQS nonattainment or maintenance problems unless it first undertook a full-blown, multi-state air quality modeling analysis that addressed the court's proportionality requirements with respect to all other potential contributors. Such an onerous requirement is incompatible with Congress's express expectation that the EPA could act, and act relatively quickly, on Section 7426 petitions.

investments, but State Z's investments have to date been negligible, the EPA could reasonably take that fact into account in defining each State's obligations, even if the effect of that approach was to reduce State Z's emissions by somewhat more than one-third of the total upwind contributions to Area A. This is especially true since, in the real world, State Z would likely contribute to NAAQS nonattainment and maintenance problems in other downwind areas as well, and might even have NAAQS nonattainment and maintenance problems of its own. In this respect, the EPA's cost-effectiveness approach provides a rough but objective means of equitably distributing pollution-control burdens among a crisscrossing patchwork of upwind and downwind States.

e. Finally, the court of appeals expressed concern that the Transport Rule "could require upwind States to reduce emissions by more than the amount" of pollution that subjected them to the rule in the first place. App., *infra*, 34a-35a. That concern, however, was entirely hypothetical. The court cited no basis in the record for believing that such a scenario was a realistic possibility, see *id.* at 95a n.15 (Rogers, J., dissenting), and because no party advanced that argument in the administrative proceedings, the EPA did not address it in the rulemaking. If such a scenario ever occurs, it will provide at most a basis for a targeted challenge by the affected State; but it affords no sound justification for facial invalidation of the Transport Rule.

C. The Court Of Appeals' Decision Will Seriously Disrupt The EPA's Implementation Of The CAA, And It Threatens Serious Harm To The Public Health

Review of the court of appeals' decision is warranted because it creates a substantial impediment to the EPA's ability to implement the CAA. In particular, it

hobbles the agency with respect to the aspect of the Act's administration (regulation of interstate pollution that upwind States often have little incentive to police on their own) where the need for a strong federal role is the most critical.

1. The court of appeals' decision will substantially delay emission reductions by upwind States that are necessary for downwind States to attain and maintain the NAAQS. Indeed, the compliance dates in the Transport Rule were "aligned with the attainment deadlines for the relevant NAAQS." App. 449a. That rule and its compliance dates are now vacated, but the attainment deadlines remain.

If the decision below is not corrected, the EPA will be required to determine each State's significant contribution in accordance with the new restrictions announced by the court of appeals. That task would presumably be undertaken through notice and comment rulemaking that would likely take at least two years, and that might itself be subject to judicial review. The EPA would then be required to give each affected State an opportunity, probably again for a period of years, to develop a strategy for implementing the requirements in the State through its SIP process. The resulting SIPs would then be submitted to the EPA for review. If a State fails to submit a SIP, or if the EPA disapproves a SIP submission, the EPA would promulgate a FIP, again through notice-and-comment rulemaking. Only then would the EPA be back at the point it had previously reached by promulgating the Transport Rule. Cumulatively, these processes would likely take many years to complete, and would no doubt generate time-consuming legal challenges of their own. Under the court of appeals' decision, the time required for controls to be implemented in

upwind States would extend far beyond that contemplated by the CAA, to the detriment of the public health in downwind States.

2. In addition to establishing extra-textual procedural obstacles for the EPA to surmount, the court of appeals placed onerous and unwarranted restrictions on the manner in which the agency may permissibly identify "significant" contributions to downwind nonattainment. As discussed above, given the multiple, overlapping linkages involved in the interstate pollution problem, it may well be nearly impossible to meet the court's proportionality requirement with respect to all upwind-to-downwind linkages.

To be sure, the court of appeals' opinion acknowledges that the EPA has "some discretion" in applying these requirements when it faces "truly unavoidable" technical complications, App., *infra*, 28a, and that the agency has some additional degree of discretion to consider costs (but, in the court of appeals' view, only to *reduce* regulatory burdens), *id.* at 27a. This may leave the EPA enough latitude to at least attempt to craft a new regulatory approach that meets the court's requirements. Because the EPA's ability to consider cost-effectiveness and the impact of collective contributions in crafting such a rule would be vastly diminished, however, any resulting rule would likely be much more costly and burdensome in its application to certain States. There is no basis in the statute to require such an inflexible and unwise result.

3. The court of appeals' decision also severely impedes the EPA's efforts to combat the serious health risks posed by fine particles and ozone. Fine particles "are associated with a number of serious health effects including premature mortality, aggravation of respirato-

ry and cardiovascular disease, * * * lung disease, * * * asthma attacks, and certain cardiovascular problems." App. 165a; see *id.* at 165a-166a (discussing negative impact on environment and agriculture). Short-term exposure to ozone at sufficient concentrations "can irritate the respiratory system" and aggravate asthma, while long-term exposure "can inflame and damage the lining of the lungs, which may lead to permanent changes in lung tissue and irreversible reductions in lung function." *Id.* at 166a-167a; see *id.* at 167a (discussing negative impact on environment and agriculture).

An EPA analysis on which the agency relied in issuing the Transport Rule estimated that "1 in 20 deaths in the U.S. is attributable to $PM_{2.5}$ and ozone exposure." App. 602a; see *ibid.* ("This same analysis attributed almost 200,000 non-fatal heart attacks, 90,000 hospital admissions due to respiratory or cardiovascular illness, 2.5 million cases of aggravated asthma among children, and many other human health impacts to exposure to these two air pollutants."). The EPA estimated that the Transport Rule would "annually reduce between 13,000 and 34,000 $PM_{2.5}$-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 the rule's "annual ozone related health benefits" would include "160,000 fewer days with restricted activity levels, and 51,000 fewer days where children are absent from school due to illnesses." *Id.* at 602a-603a. By vacating the Transport Rule, while impeding any EPA effort to replace it, the court of appeals' decision will directly and negatively affect the public health.

4. Because the opinion below broadly interprets the requirements of Section 7410(a), it will affect the EPA's

ability to address transported pollution with respect to all NAAQS, not just those directly at issue here. Indeed, when it issued the Transport Rule, the agency described the Rule as "a precedent for quantifying upwind state emission reduction responsibilities with respect to potential future NAAQS." App. 138a; see *id.* at 310a, 314a. Because the analysis that produced the Transport Rule was intended to serve as a model for future efforts to limit interstate pollution, its importance transcends the rulemaking at issue here. Review is warranted for that reason as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1302

EME HOMER CITY GENERATION, L.P., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS

SAN MIGUEL ELECTRIC COOPERATIVE, ET AL.,
INTERVENORS

Consolidated with 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395

Argued: Apr. 13, 2012
Decided: Aug. 21, 2012

On Petitions for Review of a Final Rule of the Environmental Protection Agency

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Before: ROGERS, GRIFFITH, and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH, with whom *Circuit Judge* GRIFFITH joins.

Dissenting opinion filed by *Circuit Judge* ROGERS.

KAVANAUGH, *Circuit Judge*: Some emissions of air pollutants affect air quality in the States where the pollutants are emitted. Some emissions of air pollutants travel across State boundaries and affect air quality in downwind States. To deal with that complex regulatory challenge, Congress did not authorize EPA to simply adopt limits on emissions as EPA deemed reasonable. Rather, Congress set up a federalism-based system of air pollution control. Under this cooperative federalism approach, both the Federal Government and the States play significant roles. The Federal Government sets air quality standards for pollutants. The States have the primary responsibility for determining how to meet those standards and regulating sources within their borders.

In addition, and of primary relevance here, upwind States must prevent sources within their borders from emitting federally determined "amounts" of pollution that travel across State lines and "contribute significantly" to a downwind State's "nonattainment" of fed-

eral air quality standards. That requirement is sometimes called the "good neighbor" provision.

In August 2011, to implement the statutory good neighbor requirement, EPA promulgated the rule at issue in this case, the Transport Rule, also known as the Cross-State Air Pollution Rule. The Transport Rule defines emissions reduction responsibilities for 28 upwind States based on those States' contributions to downwind States' air quality problems. The Rule limits emissions from upwind States' coal-and natural gas-fired power plants, among other sources. Those power plants generate the majority of electricity used in the United States, but they also emit pollutants that affect air quality. The Transport Rule targets two of those pollutants, sulfur dioxide (SO_2) and nitrogen oxides (NO_x).

Various States, local governments, industry groups, and labor organizations have petitioned for review of the Transport Rule. Although the facts here are complicated, the legal principles that govern this case are straightforward: Absent a claim of constitutional authority (and there is none here), executive agencies may exercise only the authority conferred by statute, and agencies may not transgress statutory limits on that authority.

Here, EPA's Transport Rule exceeds the agency's statutory authority in two independent respects. *First*, the statutory text grants EPA authority to require upwind States to reduce only their own significant contributions to a downwind State's nonattainment. But under the Transport Rule, upwind States

may be required to reduce emissions by more than their own significant contributions to a downwind State's nonattainment. EPA has used the good neighbor provision to impose massive emissions reduction requirements on upwind States without regard to the limits imposed by the statutory text. Whatever its merits as a policy matter, EPA's Transport Rule violates the statute. *Second*, the Clean Air Act affords States the initial opportunity to implement reductions required by EPA under the good neighbor provision. But here, when EPA quantified States' good neighbor obligations, it did not allow the States the initial opportunity to implement the required reductions with respect to sources within their borders. Instead, EPA quantified States' good neighbor obligations and *simultaneously* set forth EPA-designed Federal Implementation Plans, or FIPs, to implement those obligations at the State level. By doing so, EPA departed from its consistent prior approach to implementing the good neighbor provision and violated the Act.

For each of those two independent reasons, EPA's Transport Rule violates federal law. Therefore, the Rule must be vacated.

In so ruling, we note that this Court has affirmed numerous EPA clean air decisions in recent years when those agency decisions met relevant statutory requirements and complied with statutory constraints. *See, e.g.*, *National Environmental Development Association's Clean Air Project v. EPA*, No. 10-1252 (D.C. Cir. July 20, 2012); *API v. EPA*, No. 10-1079 (D.C. Cir.

July 17, 2012); *ATK Launch Systems, Inc. v. EPA*, 669 F.3d 330 (D.C. Cir. 2012); *NRDC v. EPA*, 661 F.3d 662 (D.C. Cir. 2011); *Medical Waste Institute & Energy Recovery Council v. EPA*, 645 F.3d 420 (D.C. Cir. 2011); *American Trucking Ass'ns v. EPA*, 600 F.3d 624 (D.C. Cir. 2010). In this case, however, we conclude that EPA has transgressed statutory boundaries. Congress could well decide to alter the statute to permit or require EPA's preferred approach to the good neighbor issue. Unless and until Congress does so, we must apply and enforce the statute as it's now written. Our decision today should not be interpreted as a comment on the wisdom or policy merits of EPA's Transport Rule. It is not our job to set environmental policy. Our limited but important role is to independently ensure that the agency stays within the boundaries Congress has set. EPA did not do so here.[1]

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[1] The dissent argues that petitioners' challenge to EPA's approach to the significant contribution issue is not properly before us because that issue was not sufficiently raised before the agency in the rulemaking proceeding. We fundamentally disagree with the dissent's reading of the record on that point.

The dissent also claims that petitioners' challenge to EPA's issuance of the FIPs is not properly before us because the affected States should have raised such a challenge earlier in the process. We again disagree. The dissent's analysis on the FIPs issue conflates (i) EPA's rejection of certain States' SIPs and (ii) EPA's decision in the Transport Rule to set States' "good neighbor" obligations and emissions budgets and simultaneously issue FIPs.

The States here are challenging only the latter issue, and they have done so in a timely fashion. Indeed, they could not have done

I

A

Under the Clean Air Act, the Federal Government sets air quality standards, but States retain the primary responsibility (if the States want it) for choosing how to attain those standards within their borders. *See Train v. NRDC*, 421 U.S. 60, 63-67 (1975); *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir. 1997). The Act thus leaves it to the individual States to determine, in the first instance, the particular restrictions that will be imposed on particular emitters within their borders. (If a State refuses to participate, the Federal Government regulates the sources directly.)

To spell this out in more detail: The Clean Air Act charges EPA with setting National Ambient Air Quality Standards, or NAAQS, which prescribe the maximum permissible levels of common pollutants in the ambient air. *See* 42 U.S.C. § 7409(a)-(b). EPA must choose levels which, "allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1).

After a lengthy process, the details of which are not relevant here, EPA designates "nonattainment" areas—that is, areas within each State where the level

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so until EPA, in the Transport Rule, simultaneously set the States' individual emissions budgets and issued FIPs.

We will explain both points more below. Suffice it here to say that, much as we might like to do so, we respectfully do not believe we can avoid the merits of this complex case, as the dissent urges.

of the pollutant exceeds the NAAQS. *See* 42 U.S.C. § 7407(d).

Once EPA sets a NAAQS and designates nonattainment areas within the States, the lead role shifts to the States. The States implement the NAAQS within their borders through State Implementation Plans, or SIPs. (As the experienced reader knows, there is no shortage of acronyms in EPA-land.) In their SIPs, States choose which individual sources within the State must reduce emissions, and by how much. For example, a State may decide to impose different emissions limits on individual coal-burning power plants, natural gas burning power plants, and other sources of air pollution, such as factories, refineries, incinerators, and agricultural activities.

States must submit SIPs to EPA within three years of each new or revised NAAQS. *See* 42 U.S.C. § 7410(a)(1). Section 110(a)(2) of the Act lists the required elements of a SIP submission.

Section 110(a)(2)(D)(i)(I), the "good neighbor" provision at issue in this case, is one of the required elements of a SIP. The good neighbor provision requires that SIPs:

> (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).

The good neighbor provision recognizes that emissions "from 'upwind' regions may pollute 'downwind' regions." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001). To put it colloquially, the good neighbor provision requires upwind States to bear responsibility for their fair share of the mess in downwind States. By placing the good neighbor requirement in Section 110(a)(2), Congress established the upwind State's SIP as the vehicle for implementing the upwind State's good neighbor obligation. Of course, an upwind State will not know what it needs to do to meet its good neighbor obligation until it learns the level of air pollution in downwind States, and further learns how much it is contributing to the problems in the downwind States. EPA plays the critical role in gathering information about air quality in the downwind States, calculating each upwind State's good neighbor obligation, and transmitting that information to the upwind State. With that information, the upwind State can then determine how to meet its good neighbor obligation in a new SIP or SIP revision. *See* 42 U.S.C. § 7410(k)(5).

After EPA quantifies a State's good neighbor obligation, if a State does not timely submit an adequate SIP (or an adequate SIP revision) to take account of the good neighbor obligation as defined by EPA, responsibility shifts back to the Federal Government.

Within two years of disapproving a State's SIP submission or SIP revision, or determining that a State has failed to submit a SIP, EPA must promulgate a Federal Implementation Plan to implement the NAAQS within that State. *See* 42 U.S.C. § 7410(c)(1).

B

The good neighbor provision—and EPA's attempts to implement it—are familiar to this Court from past cases.

In *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), we considered a challenge to EPA's 1998 NO_x Rule, commonly referred to as the NO_x SIP Call, which quantified the good neighbor obligations of 22 States with respect to the 1997 ozone NAAQS. *See* 63 Fed. Reg. 57,356, 57,358 (Oct. 27, 1998).

The 1998 NO_x Rule did not define "amounts which will . . . contribute significantly to nonattainment" solely on the basis of downwind air quality impact, as one might have expected given the statutory text. Rather, EPA also considered how much NO_x could be eliminated by sources in each State if those sources installed "highly cost-effective" emissions controls. *See Michigan*, 213 F.3d at 675. On review, some States argued that the statutory text required EPA to order reductions based on air quality impact alone, not cost of reduction. But the *Michigan* Court found no "clear congressional intent to preclude consideration of cost." *Id.* at 677 (citation omitted). The Court thus held that EPA may "consider differences in cutback costs, so that, after reduction of all that could be cost-effectively eliminated, any remain-

ing 'contribution' would not be considered 'significant.'" *Id.* at 677; *see also id.* at 677-79. In other words, EPA could use cost considerations to lower an upwind State's obligations under the good neighbor provision.[2]

In *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), we considered a challenge to EPA's 2005 Clean Air Interstate Rule, or CAIR. *See* 70 Fed. Reg. 25,162 (May 12, 2005). CAIR built on the 1998 NO_x Rule and defined 28 States' good neighbor obligations with respect to the 1997 ozone NAAQS and the 1997 NAAQS for annual levels of fine particulate matter, or annual $PM_{2.5}$. *See id.*

CAIR employed two different formulas—both of which incorporated cost considerations—to quantify each State's obligations for the pollutants covered by CAIR, SO_2 and NO_x. The *North Carolina* decision held that the formulas went beyond *Michigan*'s authorization to use cost and that the formulas therefore exceeded EPA's statutory authority. EPA may use cost to "require termination of only a subset of each state's contribution," the Court explained, but "EPA can't just pick a cost for a region, and deem 'signifi-

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[2] Judge Sentelle dissented. In his view, the statutory text unambiguously "set forth one criterion: the emission of an amount of pollutant sufficient to contribute significantly to downwind nonattainment." *Id.* at 696 (Sentelle, J., dissenting); *cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 467 (2001) ("We have 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.").

cant' any emissions that sources can eliminate more cheaply." 531 F.3d at 918 (citation, emphasis, and some internal quotation marks omitted). The Court also held that "section 110(a)(2)(D)(i)(I) gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions. Each state must eliminate its own significant contribution to downwind pollution." *Id.* at 921. The Court emphasized that EPA "may not require some states to exceed the mark." *Id.*

North Carolina thus articulated an important caveat to *Michigan*'s approval of cost considerations. The statute permits EPA to use cost to lower an upwind State's obligation under the good neighbor provision. *See Michigan*, 213 F.3d at 675, 677. But EPA may not use cost to increase an upwind State's obligation under the good neighbor provision—that is, to force an upwind State to "exceed the mark." *North Carolina*, 531 F.3d at 921. Put simply, the statute requires every upwind State to clean up at most *its own* share of the air pollution in a downwind State—not other States' shares.

C

The *North Carolina* Court remanded CAIR without vacatur, leaving CAIR in place "until it is replaced by a rule consistent with our opinion." *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (on rehearing).

The Transport Rule is EPA's attempt to develop a rule that is consistent with our opinion in *North Carolina*. EPA proposed the Transport Rule in August

2010 and finalized it in August 2011. *See* 75 Fed. Reg. 45,210 (Aug. 2, 2010) (proposed); 76 Fed. Reg. 48,208 (Aug. 8, 2011) (final). The Transport Rule addresses States' good neighbor obligations with respect to three NAAQS: the 1997 annual $PM_{2.5}$ NAAQS, the 1997 ozone NAAQS, and the 2006 24-hour $PM_{2.5}$ NAAQS. *See id.* at 48,209.[3]

The Transport Rule contains two basic components. First, the Rule defines each State's emissions reduction obligations under the good neighbor provision. Second, the Rule prescribes Federal Implementation Plans to implement those obligations at the State level. We describe each component here in some detail.

EPA began by quantifying the "amounts" of pollution that each State must prohibit under the good neighbor provision—that is, "amounts which will . . . contribute significantly to nonattainment" or "interfere with maintenance" of the three NAAQS in other States. 42 U.S.C. § 7410(a)(2)(D)(i).[4]

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[3] The 2006 24-hour $PM_{2.5}$ NAAQS post-dated and therefore was not covered by CAIR.

[4] EPA bases different aspects of the Transport Rule on distinct sources of statutory authority. EPA relied on its general rulemaking authority under Section 301(a)(1) of the Clean Air Act, 42 U.S.C. § 7601(a)(1), to construe Section 110(a)(2)(D)(i)(I) and to quantify the States' obligations to reduce emissions. *See* Transport Rule, 76 Fed. Reg. at 48,217; *see also Michigan*, 213 F.3d at 687. EPA relied on its authority under Section 110(c)(1), 42 U.S.C. § 7410(c)(1), to issue the Transport Rule FIPs. *See* Transport Rule, 76 Fed. Reg. at 48,217.

EPA used a two-stage approach to quantify each State's obligations under the good neighbor provision.

In the first stage, EPA determined whether a State emits "amounts which will . . . contribute significantly" to a downwind State's nonattainment of any of the three NAAQS. EPA identified the significantly contributing upwind States based on "linkages" between each upwind State and specific downwind "nonattainment" or "maintenance" areas—that is, downwind areas that EPA modeling predicted would not attain, or absent regulation would not maintain, the NAAQS. Transport Rule, 76 Fed. Reg. at 48,236. An upwind State was linked to a downwind nonattainment or maintenance area for a given NAAQS if EPA modeling showed that the upwind State's contribution to that downwind area exceeded a numerical "air quality threshold"—that is, a specific amount of air pollution sent from the upwind State into the downwind State's air. *Id.* EPA set the air quality threshold for each pollutant at an amount equal to 1% of the relevant NAAQS. The resulting thresholds were (i) 0.8 ppb for ozone, (ii) 0.15 $\mu g/m^3$ for annual $PM_{2.5}$, and (iii) 0.35 $\mu g/m^3$ for 24-hour $PM_{2.5}$. *Id.* If modeling showed that an upwind State would send more than those amounts into a downwind State's air, as measured at a receptor site in a downwind State, the upwind State was deemed a "significant contributor" to the downwind State's air pollution problem.

Those numerical air quality thresholds determined which upwind States had to reduce their SO_2 and NO_x emissions and which upwind States did not—that is,

the thresholds determined which upwind States' emissions "contribute significantly" to downwind States' air pollution problems. Upwind States "whose contributions are below these thresholds," EPA found, "do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS" in downwind States. *Id.* Because their emissions did not "contribute significantly," those States were not required to cut their emissions for purposes of the good neighbor provision.

As one would expect, this "significant contribution" threshold produced some close cases at the margins. For example, Maryland and Texas were covered for annual $PM_{2.5}$ based on downwind contributions of 0.15 and 0.18 $\mu g/m^3$, respectively—just barely meeting the 0.15 $\mu g/m^3$ threshold. *See id.* at 48,240. And Texas exceeded the annual $PM_{2.5}$ threshold at just a single downwind receptor, in Madison, Illinois. *See id.* at 48,241.[5] By contrast, Minnesota and Virginia, with maximum downwind contributions of 0.14 and 0.12 $\mu g/m^3$, respectively, just missed being covered for annual $PM_{2.5}$. *See id.* at 48,240.

For annual $PM_{2.5}$, a total of 18 States[6] exceeded the threshold and were therefore deemed "significant

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[5] Texas also narrowly exceeded the 0.35 $\mu g/m^3$ threshold for 24-hour $PM_{2.5}$; its maximum downwind contribution was 0.37 $\mu g/m^3$. *See* Transport Rule, 76 Fed. Reg. at 48,242.

[6] Those States were: Alabama, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, West

contributors." For 24-hour $PM_{2.5}$, a total of 22 States[7] exceeded the threshold. *See id.* at 48,241-42. Those States were thus included in the Rule's reduction programs for SO_2 and annual NO_x, pollutants that contribute to $PM_{2.5}$ formation. *See id.* at 48,210. For ozone, a total of 26 States[8] exceeded the threshold. *See id.* at 48,245. Those States were thus included in the Rule's reduction program for ozone-season NO_x, which contributes to ozone formation. *See id.* at 48,210; *see also* 76 Fed. Reg. 80,760 (Dec. 27, 2011) (finalizing six States' inclusion in the Transport Rule for ozone-season NO_x).

At the second stage, however, EPA abandoned the air quality thresholds—that is, the stage one standard for whether an upwind State's emissions "contribute significantly" to a downwind State's nonattainment of air quality standards. Instead, at stage two, EPA used a cost-based standard: EPA determined how much pollution each upwind State's power plants could

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Virginia, and Wisconsin. *See* Transport Rule, 76 Fed. Reg. at 48,240.

[7] Those States were: Alabama, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See* Transport Rule, 76 Fed. Reg. at 48,242.

[8] Those States were: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. *See* Transport Rule, 76 Fed. Reg. at 48,245.

eliminate if the upwind State's plants applied all controls available at or below a given cost per ton of pollution reduced. The cost-per-ton levels applied without regard to the size of each State's "significant contribution" at stage one. In other words, how much pollution each upwind State was required to eliminate was not tied to how much the upwind State contributed to downwind States' air pollution problems.

EPA predicted how far emissions would fall if power plants throughout the State were required to install controls available at or below various cost levels. The cost levels, or thresholds, were expressed in terms of cost per ton of pollutant reduced, with the idea being that plants would install all controls that cost less than the designated threshold.[9]

EPA then added up the emissions from all of the covered States to yield total regionwide emissions figures for each pollutant, at each cost threshold. *See*

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[9] For example, a technology that cost $1,000 to install and eliminated 2 tons of NO_x from a power plant's emissions would cost $500/ton. In effect, EPA predicted how far emissions would fall if plants installed all of the controls from $1/ton to $500/ton.

EPA used a computer model to predict the reductions that would occur in each State at various cost thresholds. *See* EPA, Documentation for EPA Base Case v.4.10, at 2-1 (Aug. 2010), J.A. 2339. For example, for annual NO_x, EPA modeled cost levels of $500, $1,000, and $2,500/ton. *See* Transport Rule, 76 Fed. Reg. at 48,249-50. EPA went as high as $5,000/ton for ozone-season NO_x. *See id.* at 48,250. For SO_2, EPA modeled emissions at cost levels of $500, $1,600, $2,300, $2,800, $3,300, and $10,000 per ton. *See id.* at 48,251. At a later stage in the process, EPA used those predictions to decide how much each State would have to cut.

Transport Rule, 76 Fed. Reg. at 48,250-53. The higher the cost level selected, the greater the reduction of emissions, but also the greater the costs and burdens imposed on sources within the States.

Next, EPA used computer modeling to estimate the downwind air quality effects of imposing different cost-per-ton levels on the upwind States. *Id.* at 48,253. EPA modeled the air quality effects of applying a $500/ton cost level for NO_x and ascending cost-per-ton levels for SO_2. *See id.* At 48,255; EPA, Analysis to Quantify Significant Contribution Technical Support Document 15 & n.9 (July 2010), J.A. 2177.

Armed with those two sets of modeling data, EPA proceeded to choose which regionwide cost-per-ton threshold to apply for each of the three pollutants—SO_2, annual NO_x, and ozone-season NO_x. EPA consulted both its cost-of reduction modeling and its air quality modeling and identified what it termed "significant cost thresholds"—that is, cost-per-ton levels at which steep drops in upwind emissions or jumps in downwind air quality would occur. Transport Rule, 76 Fed. Reg. at 48,255; *see also id.* at 48,255-56. EPA then weighed both air quality and cost concerns in a "multi-factor assessment" to choose the final cost-per-ton levels. *Id.* at 48,256. The "multi-factor assessment" did not employ any hard formula to weigh those factors.

In the end, EPA settled on a single $500/ton threshold for ozone-season and annual NO_x. *See id.* at 48,256-57.

For SO_2, instead of using a single cost threshold for all of the SO_2 States, EPA divided the upwind States into two groups for the 2014 program year (that is, the emissions cuts required in 2014). EPA modeling showed that applying a $500/ton cost threshold resolved the attainment problems in the downwind areas to which seven upwind States were linked. *See id.* at 48,257. Those seven upwind States became the Group 2 States, which were subject to a $500/ton threshold for SO_2. *See id.* But $500/ton did not resolve attainment problems in the downwind areas to which 16 other upwind States were linked. Those 16 upwind States became the Group 1 States, which were subject to a stricter $2,300/ton cost threshold for SO_2. *See id.* at 48,259.

EPA determined the amount of SO_2, annual NO_x, or ozone-season NO_x that each covered State could eliminate if its power plants installed all cost-effective emissions controls—that is, those controls available at or below the applicable cost-per-ton thresholds. *See id.* at 48,260. EPA then used those figures to generate 2012, 2013, and 2014 emissions "budgets" for each upwind State, for each pollutant for which that State was covered. *See id.* at 48,259-63. The budget is the maximum amount of each pollutant that a State's power plants may collectively emit in a given year, beginning in 2012.[10]

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[10] States may augment their budgets somewhat by buying out-of-state allowances. *See* Transport Rule, 76 Fed. Reg. at 48,263-68.

EPA did not stop there and leave it to the States to implement the required reductions through new or revised State Implementation Plans, or SIPs. *Cf.* 42 U.S.C. § 7410(k)(5). Instead, EPA simultaneously promulgated Federal Implementation Plans, or FIPs.

The FIPs require power plants in covered upwind States to make the SO_2 and NO_x reductions needed to comply with each upwind State's emissions budget, as defined by EPA. The FIPs also create an interstate trading program to allow covered sources to comply as cost-effectively as possible. *See* Transport Rule, 76 Fed. Reg. at 48,271.

The FIPs convert each State's emissions budget into "allowances," which are allocated among power plants in the State. Under the FIPs, it is EPA, and not the States, that decides how to distribute the allowances among the power plants in each State. *See id.* at 48,284-88.[11]

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[11] Each power plant is "required to hold one SO_2 or one NO_x allowance, respectively, for every ton of SO_2 or NO_x emitted" during the relevant year. Transport Rule, 76 Fed. Reg. at 48,271; *see also id.* at 48,296-97 (describing penalties for noncompliance). Sources were required by the Rule to begin complying with the annual SO_2 and NO_x requirements by January 1, 2012 for the 2012-13 budgets and by January 1, 2014 for the post-2014 budgets. *See id.* at 48.277. (This Court stayed the Rule before it took effect.) The ozone-season NO_x requirements would kick in on May 1 of those years. *See id.* EPA chosethose compliance deadlines in light of this Court's holding in *North Carolina* that the deadlines must be "consistent with the provisions in Title I mandating [NAAQS] compliance deadlines for downwind states." 531 F.3d at 912; *see also* Transport Rule, 76 Fed. Reg. at 48,277-78.

The Rule retains a limited, secondary role for SIPs. States have the option of submitting SIPs that modify some elements of the FIPs. *See id.* at 48,327-28. The first program year for which States can submit such SIPs is 2014. *See id.* States may also seek to replace the FIPs wholesale, as long as the SIP prohibits the amounts of NO_x and SO_2 emissions that EPA specified. *See id.* at 48,328. EPA says it would "review such a SIP on a case-by-case basis." *Id.* But, importantly, the States do not have a post-Rule opportunity to avoid FIPs by submitting a SIP or SIP revision: The FIPs "remain fully in place in each covered state until a state's SIP is submitted and approved by EPA to revise or replace a FIP." *Id.*

Since it issued the final rule in August 2011, EPA has taken several subsequent regulatory actions related to the Transport Rule. *See* 76 Fed. Reg. 80,760 (Dec. 27, 2011) (finalizing six States' inclusion in the Rule for ozone-season NO_x); 77 Fed. Reg. 10,324 (Feb. 21, 2012) (making technical adjustments to modeling and delaying assurance penalty provisions until 2014); 77 Fed. Reg. 34,830 (June 12, 2012) (revising budgets for 13 States).

The FIPs use allowance trading to enable covered plants within the States to comply as cost-effectively as possible. The program creates four allowance trading markets: one for annual NO_x, one for ozone-season NO_x, one for Group 1 SO_2 States, and one for Group 2 SO_2 States. *See* Transport Rule, 76 Fed. Reg. at 48,271. Power plants in Group 1 SO_2 States may not purchase Group 2 SO_2 allowances, and vice versa. *See id.* at 48,271-72. Otherwise, interstate trading is generally permitted.

D

An array of power companies, coal companies, labor unions, trade associations, States, and local governments petitioned for review of EPA's Transport Rule.

On December 30, 2011, this Court stayed the Rule pending a decision on the merits. *See* Order, No. 11-1302, slip op. at 2 (D.C. Cir. Dec. 30, 2011). The Court's order instructed EPA to "continue administering the Clean Air Interstate Rule pending the court's resolution of these petitions for review." *Id.*

In Part II of this opinion, we address whether the Rule exceeds EPA's authority to order upwind States to reduce "amounts which will . . . contribute significantly to nonattainment" in downwind States. In Part III, we address whether the statute permits EPA to issue FIPs without giving the States an initial opportunity to implement the required reductions through SIPs or SIP revisions. In Part IV, we consider the remedy.

II

In this Part, we analyze petitioners' argument that EPA exceeded its statutory authority under the "good neighbor" provision. Under the statute, EPA is limited to ordering upwind States to reduce "amounts which will . . . contribute significantly to nonattainment" in downwind States. 42 U.S.C. § 7410(a)(2)(D)(i).

A

The Transport Rule defines States' obligations under Section 110(a)(2)(D)(i)(I) of the Clean Air Act, a provision sometimes described as the "good neighbor" provision. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I); *Michigan v. EPA*, 213 F.3d 663, 671 (D.C. Cir. 2000). The good neighbor provision requires that a State Implementation Plan, or SIP:

> (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). The good neighbor provision recognizes that not all air pollution is locally generated: Some ambient air pollution "is caused or augmented by emissions from other states. Emissions from 'upwind' regions may pollute 'downwind' regions." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001).

Although the statute grants EPA significant discretion to implement the good neighbor provision, the statute's text and this Court's decisions in *Michigan* and *North Carolina* establish several red lines that cabin EPA's authority. Those red lines are central to our resolution of this case.

First, and most obviously, the text of Section 110(a)(2)(D)(i)(I) tells us that the "amounts which will . . . contribute" to a downwind State's nonattainment are at most those amounts that travel beyond an upwind State's borders and end up in a downwind State's nonattainment area.[12] The statute is not a blank check for EPA to address interstate pollution on a regional basis without regard to an individual upwind State's actual contribution to downwind air quality.

Moreover, the statutory text and this Court's decision in *North Carolina v. EPA* demonstrate that EPA may not force a State to eliminate more than its own "*significant*" contribution to a downwind State's nonattainment area—that is, to "exceed the mark," as we put it in *North Carolina*. 531 F.3d 896, 921 (D.C. Cir. 2008). Thus, once EPA reasonably designates 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.[13]

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[12] At oral argument, EPA's counsel refused to concede this point.

[13] For example, suppose that EPA determined that any upwind State whose contribution to a downwind State was less than 3 units did not "contribute significantly to nonattainment." That would mean EPA had established 3 units as the significance floor. Other upwind contributors to that downwind State could not be required to reduce their downwind contributions below that floor. So an upwind State whose contribution to that downwind State is 30 units could be required to reduce its contribution by *at most* 27 units.

Of course, that is not the *only* constraint on EPA's authority to force the State to reduce its emissions. The other legal con-

Second, under the terms of the statute and as we explained in *North Carolina*, the portion of an upwind State's contribution to a downwind State that "contribute[s] significantly" to that downwind State's "nonattainment" necessarily depends on the relative contributions of that upwind State, of other upwind State contributors, and of the downwind State itself. Each upwind State may be required to eliminate only its own "amounts which will . . . contribute significantly" to a downwind State's "nonattainment." As explained in *North Carolina*, EPA may not require any upwind State to "share the burden of reducing other upwind states' emissions." *Id.* In other words, the statutory text—which refers to "amounts" which will "contribute significantly" to a downwind State's "nonattainment"—contains not just an absolute component (meaning that an upwind State's insignificant amounts are not covered) but also a relative component (meaning that each State's relative contribution to the downwind State's nonattainment must be considered).

Moreover, the end goal of the statute is attainment in the downwind State. EPA's authority to force reductions on upwind States ends at the point where the affected downwind State achieves attainment.

Therefore, if the downwind State would attain the NAAQS but for upwind States' contributions—that is, if the entire above-NAAQS amount is attributable to upwind States' emissions—then the upwind States'

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straints described in this Part can further lower a State's maximum obligation.

combined share is the entire amount by which the downwind State exceeded the NAAQS. And as we said in *North Carolina*, when EPA allocates that burden *among* the upwind States, EPA may not force any upwind State to "share the burden of reducing other upwind states' emissions." *Id.* Each upwind State must bear its own fair share. Therefore, the "significance" of each upwind State's contribution cannot be measured in a vacuum, divorced from the impact of the other upwind States. Rather, the collective burden must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment. Otherwise, EPA would violate the statute and our decision in *North Carolina*.[14]

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[14] Before Congress adopted the current text in the Clean Air Act Amendments of 1990, the statutory text targeted amounts from an upwind State that would "*prevent* attainment" in a downwind State. 42 U.S.C. § 7410(a)(2)(E) (1988) (emphasis added); *cf.* Pub. L. No. 101-549, § 101(b), 104 Stat. 2399, 2404 (1990). Under the "prevent attainment" standard, none of the three upwind States in that hypothetical would by itself be a but-for cause of the downwind State's nonattainment. By moving from "prevent attainment" to "contribute significantly to nonattainment," the 1990 Amendments dropped the requirement that an individual upwind State's emissions *on their own* prevent downwind attainment or maintenance. *See* S. REP NO. 101-228, at 21 (1989) ("Since it may be impossible to say that any single source or group of sources is the one which actually prevents attainment, the bill changes 'prevent attainment or maintenance' to 'contribute significantly to nonattainment or interfere with maintenance by,' thus clarifying when a violation occurs."). Instead, it now suffices if EPA identifies upwind emissions that, *together with emissions from other upwind contributors*, push a given downwind maintenance area above the NAAQS.

A specific example helps illustrate that point. Suppose the NAAQS is 100 units, but the downwind State's nonattainment area contains 150 units. Suppose further that the downwind State contributes 90 units, and three upwind States contribute 20 units each. Because the upwind States are responsible for the downwind State's exceeding the NAAQS by 50 units, the downwind State is entitled to at most 50 units of relief from the upwind States so that the downwind State can achieve attainment of the NAAQS. Distributing those obligations in a manner proportional to their contributions, each of the three upwind States' significant contribution would be, at most, 16 ⅔ units. Or suppose instead that the three upwind States contribute 10, 20, and 30 units respectively. Distributing those obligations in a manner proportional to their contributions, those three States' significant contributions would be at most 8 ⅓, 16 ⅔, and 25 units, respectively, leading to the combined reduction of 50 units needed for the downwind State to reach attainment.[15]

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[15] If the downwind State's contribution alone would push it above the NAAQS, then the entire above-NAAQS amount cannot be attributed *only* to upwind States. The downwind State is responsible for its own share of the above-NAAQS amount. In that scenario, upwind States that contribute to the downwind State are collectively on the hook for that share of the above-NAAQS amount that is attributable to upwind States' contributions. And, again, that collective burden must be allocated among the upwind States in proportion to the size of their contributions to the downwind State. Otherwise, one upwind State would be forced to

In addition, our decisions in *Michigan* and *North Carolina* establish that EPA may consider cost, but only to further lower an individual State's obligations. *See Michigan*, 213 F.3d at 675; *North Carolina*, 531 F.3d at 918. Under *Michigan*, moreover, EPA may do so in a way that benefits some upwind States more than others. *See* 213 F.3d at 679. In other words, in order to prevent exorbitant costs from being imposed on certain upwind States, EPA may lower the obligations imposed on those States.

Third, to conform to the text of the statute, EPA must also 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.

Even when EPA carefully conforms to the above limits on its authority, the possibility of over-control in downwind States still arises because multiple upwind States may affect a single downwind State and, con-

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"share the burden of reducing other upwind states' emissions," in violation of the statute. *North Carolina*, 531 F.3d at 921.

An example helps illustrate that point. Suppose the NAAQS is 100 units, and the downwind State's air contains 180 units. The downwind State contributes 120 units, and three upwind States contribute 20 units each. The downwind State is 80 units over the NAAQS—but 20 units of that is its own responsibility. The upwind States must therefore provide at most 60 units of relief. Distributing those obligations proportionally, each of the three upwind States' significant contribution would be, at most, 20 units.

versely, a single upwind State may affect multiple downwind States. The requirement to prevent such over-control comes directly from the text of the statute: The good neighbor provision of the statute targets those emissions from upwind States that "contribute significantly *to nonattainment*" of the NAAQS. EPA may require only those reductions that are necessary for downwind States to attain the NAAQS. 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. Therefore, if modeling shows that a given slate of upwind reductions would yield more downwind air quality benefits than necessary for downwind areas to attain the NAAQS, EPA must attempt to ratchet back the upwind States' obligations to the level of reductions necessary and sufficient to produce attainment in the downwind States.[16]

To be sure, as even petitioners acknowledge, there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States' emissions enough

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[16] For example, suppose that under the proportional approach explained above, State A would have to cut 5,000 tons of NO_x to achieve its largest downwind obligation, while State B would have to cut 2,000 tons to achieve its largest downwind obligation. If EPA modeling showed that all downwind nonattainment would be resolved if those two upwind States' combined reduction obligations were, say, 10% lower, EPA would have to ratchet back the upwind States' reduction obligations by a total of 10%. That would ensure that upwind States were only forced to prohibit those emissions that "contribute significantly to nonattainment."

to meet the NAAQS in other downwind States. *See* Industry & Labor Reply Br. 11 n.2. For those reasons, EPA must have some discretion about how to reasonably avoid such over-control. Moreover, because multiple upwind States may affect a single downwind State, and because a single upwind State may affect multiple downwind States, it may not be possible to accomplish the ratcheting back in an entirely proportional manner among the upwind States. Our cases recognize as much. *See Michigan*, 213 F.3d at 679; *North Carolina*, 531 F.3d at 908. But the point remains: EPA must avoid using the good neighbor provision in a manner that would result in unnecessary over-control in the downwind States. Otherwise, EPA would be exceeding its statutory authority, which is expressly tied to achieving attainment in the downwind States.

B

We now apply those principles to the EPA Transport Rule. "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); *see also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("EPA is a federal agency —a creature of statute," and may exercise "only those authorities conferred upon it by Congress."). An agency may not exceed a statute's authorization or violate a statute's limits. If a statute is ambiguous, an agency that administers the statute may choose a reasonable interpretation of that ambiguity—but the

agency's interpretation must still stay within the boundaries of the statutory text. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-44 (1984).[17]

In the Transport Rule, EPA used a two-stage approach to define "amounts which will . . . contribute significantly" to downwind attainment problems. The first stage identified those upwind States that were "significant contributors" to downwind attainment problems. EPA determined that a State's contribution to a downwind nonattainment or maintenance area was significant if it exceeded a numerical "air quality threshold" of 0.8 ppb for ozone, 0.15 $\mu g/m^3$ for annual $PM_{2.5}$, and 0.35 $\mu g/m^3$ for 24-hour $PM_{2.5}$. Transport Rule, 76 Fed. Reg. 48,208, 48,236 (Aug. 8, 2011). States "whose contributions are below these thresholds," EPA found, "do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." *Id.* Those upwind States were off the hook altogether.

But an upwind State that exceeded the significance threshold at even one downwind State's receptor was drawn wholesale into the Rule's second stage—cost-based emissions reductions. At that second stage,

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[17] We set aside EPA's action here if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." The standard we apply "is the same" under the judicial review provision of the Clean Air Act, 42 U.S.C. § 7607(d)(9), as under the Administrative Procedure Act, 5 U.S.C. § 706(2). *Motor Vehicle Manufacturers Ass'n v. EPA*, 768 F.2d 385, 389 n.6 (D.C. Cir. 1985).

EPA abandoned the previous measure of significance —the numerical air quality thresholds, which were based on the quantity of pollution an upwind State sent to a downwind area. Instead, EPA switched over to relying on cost of reduction alone. EPA required each State's power plants to cut all of the emissions they could eliminate at a given cost per ton of pollution reduced—regardless of the "amounts" of the State's emissions EPA deemed to "contribute significantly" at stage one and regardless of the relative contributions of the other upwind States and the downwind State.

We perceive at least three independent but intertwined legal flaws in EPA's approach to the good neighbor provision. Those flaws correspond to the three requirements we outlined above that come from the statutory text.

First, and most fundamentally, the Transport Rule is flawed because the requirement that EPA imposed on upwind States was not based on the "amounts" from upwind States that "contribute significantly to nonattainment" in downwind States, as required by the statute and our decision in *North Carolina*.

Petitioners claim that the initial stage of EPA's analysis—the numerical air quality thresholds, which used a bright-line test for whether a State's downwind emissions "contribute significantly"—created a "'floor' below which any contribution is, by definition, viewed as insignificant." Industry & Labor Br. 20. Petitioners argue that EPA has no statutory authority to compel States to reduce amounts of pollution that are "insignificant." Therefore, petitioners contend that

EPA could not ignore that floor at the later stage, when it calculated each State's "significant contribution" based on cost.[18]

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[18] The dissent contends that this point was not preserved for judicial review and that the agency was not aware of this issue during the agency proceedings. *See* 42 U.S.C. § 7607(d)(7)(B). For several reasons, we are convinced EPA had more than "adequate notification of the general substance" of petitioners' argument. *NRDC v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009) (quoting *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006)). Indeed, one of the central questions in the long history of EPA's efforts to implement the good neighbor provision has been whether EPA has complied with the basic statutory limits on its authority. So it is here.

First, the Transport Rule proceeding arose out of this Court's decision in *North Carolina*, on which petitioners' argument relies. *See* Transport Rule, 76 Fed. Reg. at 48,211 ("EPA is promulgating the Transport Rule in response to the remand of the Clean Air Interstate Rule (CAIR) by the U.S. Court of Appeals for the District of Columbia Circuit"). In *North Carolina v. EPA*, this Court explained the applicable statutory limitations and instructed EPA on remand to craft a new rule "consistent with our opinion." 550 F.3d 1176, 1177 (D.C. Cir. 2008) (on rehearing). Instructing EPA to proceed in a manner "consistent with" *North Carolina* presupposes that EPA is *aware* of the Court's opinion. And the opinion made clear that once EPA defines each upwind State's "significant contribution," it may not "require some states to exceed the mark." 531 F.3d at 921. In sum, EPA knew from the beginning that it was required to comply with *North Carolina*, including that part of the Court's holding on which petitioners rely here.

Second, EPA considered—and rejected—precisely the same argument in CAIR. EPA first acknowledged the comment: "Some commenters stated, more broadly, 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." CAIR, 70 Fed. Reg. 25,162, 25,176-77 (May 12, 2005). It then dismissed that argument: "Most important for present purposes, as long as the controls yield downwind benefits needed to reduce the extent of nonattainment, the controls should not be lessened simply because they may have the effect of reducing the upwind State's contribution to below the initial threshold." *Id.* at 25,177. EPA's rejection of the same argument in a prior rulemaking—indeed, in a prior rulemaking that is the direct progenitor of the current one—is highly relevant to whether the argument is preserved here. *See, e.g.*, *American Petroleum Institute v. EPA*, 52 F.3d 1113, 1120 n.1 (D.C. Cir. 1995); *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (en banc); *see also Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) ("The purpose of the exhaustion requirement is to ensure that the agency is given the first opportunity to bring its expertise to bear on the resolution of a challenge to a rule."). EPA's prior rejection of the same argument in CAIR, together with this Court's opinion in *North Carolina*, show that EPA "had notice of this issue and could, or should have, taken it into account." *NRDC*, 824 F.2d at 1151.

Third, EPA's statements at the proposal stage indicated EPA was not open to reconsidering CAIR's earlier rejection of petitioners' argument. *See* Proposed Transport Rule, 75 Fed. Reg. 45,210, 45,299 (Aug. 2, 2010) ("EPA evaluated a number of alternative approaches to defining significant contribution and interference with maintenance in addition to the approach proposed in this rule. Stakeholders suggested a variety of ideas. EPA considered all suggested approaches. . . . EPA is not proposing any of the alternative approaches listed here."). By that point, EPA had already dismissed the two air quality-only approaches it considered and had indicated its firm commitment to the cost-based approach. *See* EPA, Alternative Significant Contribution Approaches Evaluated Technical Support Document 7 (July 2010) (EPA, Significant contribution TSD), J.A. 2312 (uniform cost-per- ton approach "has been successfully implemented before, with excellent environmen-

We agree with petitioners. The Transport Rule includes or excludes an upwind State based on the amount of that upwind State's significant contribution to a nonattainment area in a downwind State. That much is fine. But under the Rule, a State then may be required to reduce its emissions by an amount grea-

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tal results"); *see also id.* at 3-7, J.A. 2308-12. In light of the indications that EPA was aware of their objection but had no intention to revisit its approach (and indeed had already rejected the objection), the specificity of commenters such as Wisconsin and Tennessee was "reasonable" under the circumstances. 42 U.S.C. § 7607(d)(7)(B); *see, e.g.*, Wisconsin Cmt., J.A. 1293 ("EPA needs to primarily depend on air quality results instead of control costs in defining" significant contributions); Tennessee Cmt., J.A. 556 ("A lower cost threshold should be considered for any State that can reduce their contribution below 1% significance using cost thresholds below the maximum values ($2,000/ton for SO_2 and $500/ton for NO_x), if applicable. . . . We would like to see a summary for each State and pollutant that indicates, independently of cost, the amounts necessary to eliminate the significant contribution and interference with maintenance from upwind States."); Delaware Cmt., J.A. 1756 (challenging EPA's decision to depart from the air quality thresholds used for inclusion and to quantify States' significant contributions based on cost considerations, not air quality); *see also Appalachian Power*, 135 F.3d at 817 ("the word 'reasonable' cannot be read out of the statute in favor of a hair-splitting approach"); *id.* at 818 (an objection need not be "phrased in exactly the same way in each forum"); *South Coast*, 472 F.3d at 891 (petitioners have "some leeway in developing their argument" on review).

In sum, we are confident here that EPA had more than "adequate notification of the general substance of the complaint." *South Coast*, 472 F.3d at 891. EPA was plainly on notice that its disregard of the significance floor was a potential legal infirmity in its approach.

ter than the "significant contribution" that brought it into the program in the first place. That much is not fine.

Put more plainly, EPA determined that a State was subject to the good neighbor provision if it contributed at least a certain threshold amount to air pollution in a downwind State. But EPA then imposed restrictions based on regionwide air quality modeling projections; those restrictions could require upwind States to reduce emissions by more than the amount of that contribution.

EPA's approach poses a fundamental legal problem —one that derives from the text of the statute and from our precedents. Our decision in *Michigan* held that EPA may use cost considerations to require "termination of only a subset of each state's contribution." 213 F.3d at 675. And our decision in *North Carolina* made clear that EPA may not use cost to force an upwind State to "exceed the mark." 531 F.3d at 921.[19]

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[19] The Court in *North Carolina* reached these conclusions in its discussion of EPA's use of power plant fuel mix to distribute NO_x reduction obligations among the CAIR States. *See* 531 F.3d at 904, 918-21. EPA claims that the reasoning of that analysis is not relevant here because it did not relate to "general significant contribution issues," but rather to the manner of calculating each State's emissions budget. EPA Br. 23.

That is a distinction without a difference. The fuel mix analysis increased some States' obligations and reduced others'. EPA's argument overlooks that no step in its analysis—however the step is labeled—may impose burdens on States or private entities unless those burdens are anchored in statutory authority. Under the statute, States are required to prohibit only those "amounts which

By using a numerical threshold at the initial stage—and thereby creating a floor below which "amounts" of downwind pollution were not significant—EPA defined the "mark," to use the term employed in *North Carolina*. EPA could not then ignore that mark and redefine each State's "significant contribution" in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State.[20]

EPA now claims that the Rule's air quality thresholds were established for a "limited analytical purpose" and "otherwise say nothing about what part of each State's contribution should be considered 'significant.'" EPA Br. 33. That claim rings hollow. EPA itself said in the final rule that "states whose contributions are below these thresholds do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." Transport Rule, 76 Fed. Reg. at 48,236. EPA therefore acknowledged that amounts below the threshold are not

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will . . . contribute significantly to nonattainment" or "interfere with maintenance." 42 U.S.C. § 7410(a)(2)(D)(i); *see also North Carolina*, 531 F.3d at 919.

[20] This particular issue was not presented in *Michigan*. In the 1998 NO_x Rule, EPA balanced various air quality factors using a "weight-of-evidence approach." 63 Fed. Reg. 57,356, 57,381 (Oct. 27, 1998). Unlike the Transport Rule, the 1998 NO_x Rule did not employ a numerical threshold, nor any other "bright line criterion," to screen out States at the first stage. *Id.* at 57,383.

"amounts which will . . . contribute significantly" to downwind attainment problems.[21]

In short, EPA used the air quality thresholds to establish a floor below which "amounts" of air pollution do not "contribute significantly."[22] The statute requires a State to prohibit at most those "amounts" which will "contribute significantly"—and no more. If amounts below a numerical threshold do not contribute significantly to a downwind State's nonattainment, EPA may not require an upwind State to do more. The Transport Rule does not adhere to that

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[21] EPA cannot avoid *North Carolina* by declining to quantify the "amount" of each State's downwind contribution, "beginning its analysis with cost," 531 F.3d at 918, and simply designating the output of that cost-based analysis each State's "significant contribution." The statutory term "amounts which will . . . contribute significantly" is not so elastic. *See id.* at 920 ("When 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."). As explained above, "amounts which will . . . contribute" logically cannot exceed the amount of a pollutant that leaves a State's borders and reaches a nonattainment area. And insignificant amounts must be excluded. Moreover, the "significance" of an upwind State's emissions for a downwind area's attainment problem cannot be divorced from the relative impact of other States' contributions to that problem.

[22] EPA protests that it used the numerical thresholds only to determine "which upwind State contributions to downwind problems are so small as to warrant exclusion." EPA Br. 31. But that must mean those "amounts" that are "so small as to warrant exclusion" are not "significant." (It would be illogical to carve out a de minimis exception for emissions that are statutorily "significant.")

basic requirement of the statutory text and our precedents.[23]

Second, EPA's Transport Rule also runs afoul of the statute's proportionality requirement as described in our decision in *North Carolina*: EPA has "no authority to force an upwind state to share the burden of reducing other upwind states' emissions." 531 F.3d at 921; *see* Industry & Labor Br. 33 (in imposing SO_2 budgets, EPA "did not even consider the *relative* contributions of the various States"). EPA's "redistributional instinct may be laudatory," *North Carolina*, 531 F.3d at 921, but it cannot trump the terms of the statute. Under the statute, each upwind State that contributes to a downwind nonattainment area is responsible for no more than its own "amounts which will . . . contribute significantly" to the downwind State's pollution problem. To be sure, under *Michigan*, EPA may rely on cost-effectiveness factors in order to allow some upwind States to do *less* than their full fair share. *See* 213 F.3d at 675; *cf.* Petitioning States' Br. 17, *Michigan*, 213 F.3d 663 (No. 98-1497).

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[23] EPA seems reluctant to acknowledge any textual limits on its authority under the good neighbor provision. At oral argument, EPA suggested that "reasonableness" is the only limit on its authority to use cost-effectiveness to force down States' emissions. Tr. of Oral Arg. at 44-45. EPA would not rule out the possibility that under the good neighbor provision, it could require a State to reduce *more than the State's total emissions that go out of State*. *See id.* at 43-45. But such a claim of authority does not square with the statutory text—"amounts" of pollution obviously cannot "contribute" to a downwind State's pollution problem if they don't even reach the downwind State.

But when EPA asks one upwind State to eliminate *more* than its statutory fair share, that State is necessarily being forced to clean up another upwind State's share of the mess in the downwind State. Under the statute and *North Carolina*, that is impermissible.

Here, EPA's Transport Rule violated the statute because it 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.

In the same vein, EPA's Transport Rule failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS. *See* Industry & Labor Br. 24-25. How "significantly" an upwind State contributes to a downwind State's nonattainment also depends in part on how much of the above-NAAQS amount comes from the downwind State itself. As we explained above, EPA therefore must factor in the downwind State's own contribution, alongside those of the various upwind States. But EPA did not do that here.

Third, and relatedly, EPA also failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary overcontrol in the downwind States. EPA's statutory authority, once again, is limited to attaining the NAAQS in the downwind States. EPA may not require upwind States to do more than necessary for the down-

wind States to achieve the NAAQS. Here, EPA did not try to take steps to avoid such over control.[24]

In sum, EPA's authority derives from the statute and is limited by the statutory text.[25] EPA's reading of Section 110(a)(2)(D)(i)(I)—a narrow and limited provision—reaches far beyond what the text will bear.

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[24] At the proposal stage in the proceeding that culminated in the Transport Rule, EPA considered a proportional approach that reflected many of the essential principles described above. *See* EPA, Significant Contribution TSD at 6-7, J.A. 2311-12. Under that approach, the upwind contributors to a given downwind area would collectively have to provide a "defined air quality improvement" to the downwind State, in the amount by which the downwind State exceeded the NAAQS. *Id.* at 6, J.A. 2311. And the upwind States' individual shares of that collective duty would be defined "in direct proportion to their original contribution[s]" to the downwind State. *Id.* EPA ultimately chose not to adopt that approach, however.

[25] The statute also requires upwind States to prohibit emissions that will "interfere with maintenance" of the NAAQS in a downwind State. "Amounts" of air pollution cannot be said to "interfere with maintenance" unless they leave the upwind State and reach a downwind State's maintenance area. To require a State to reduce "amounts" of emissions pursuant to the "interfere with maintenance" prong, EPA must show some basis in evidence for believing that those "amounts" from an upwind State, together with amounts from other upwind contributors, will reach a specific maintenance area in a downwind State and push that maintenance area back over the NAAQS in the near future. Put simply, the "interfere with maintenance" prong of the statute is not an open-ended invitation for EPA to impose reductions on upwind States. Rather, it is a carefully calibrated and commonsense supplement to the "contribute significantly" requirement.

Although the statutory text alone prohibits EPA's Rule the statutory context provides additional support for our conclusion. The Supreme Court, in analyzing Section 109 of the Clean Air Act, rejected the premise that Congress would "alter the fundamental details of a regulatory scheme" in "ancillary provisions"—in other words, that Congress would "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The good neighbor provision is one of more than 20 SIP requirements in Section 110(a)(2). It seems inconceivable that Congress buried in Section 110(a)(2)(D)(i)(I)—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." Such a reading would transform the narrow good neighbor provision into a "broad and unusual authority" that would overtake other core provisions of the Act. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). We "are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

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States are obligated to prohibit only those "amounts" of pollution "which will . . . contribute significantly" to downwind attainment problems—and no more. Because the Transport Rule exceeds those limits, and indeed does not really try to meet those requirements, it cannot stand.

III

There is a second, entirely independent problem with the Transport Rule. EPA did not stop at simply quantifying each upwind State's good neighbor obligations. Instead, in an unprecedented application of the good neighbor provision, EPA also simultaneously issued Federal Implementation Plans, or FIPs, to implement those obligations on sources in the States. EPA did so without giving the States an initial opportunity to implement the obligations themselves through their State Implementation Plans, or SIPs.

The Clean Air Act ordinarily gives States the initial opportunity to implement a new air quality standard on sources within their borders; States do so by submitting SIPs. *See* 42 U.S.C. §§ 7407(a), 7410(a)(1). Here, by preemptively issuing FIPs, EPA denied the States that first opportunity to implement the reductions required under their good neighbor obligations. EPA justifies its "FIP-first" approach by pointing to its earlier findings that the States had failed to meet their good neighbor obligations. But those findings came *before* the Transport Rule quantified the States' good neighbor obligations. EPA's approach punishes the States for failing to meet a standard that EPA had not yet announced and the States did not yet know.

Under the Act, EPA has authority to set standards, but the statute reserves the first-implementer role for the States. That division of labor applies not just to the NAAQS but also to the good neighbor provision, Section 110(a)(2)(D)(i)(I), as EPA itself has recognized several times in the past. When EPA defines States'

good neighbor obligations, it must give the States the first opportunity to implement the new requirements.

A

"Under the Clean Air Act, both the Federal Government and the States exercise responsibility for maintaining and improving air quality." *American Trucking Ass'ns v. EPA*, 600 F.3d 624, 625 (D.C. Cir. 2010). The Act sets forth a basic division of labor: The Federal Government establishes air quality standards, but States have primary responsibility for attaining those standards within their borders. *See Train v. NRDC*, 421 U.S. 60, 63-67 (1975); *American Trucking*, 600 F.3d at 625-26; *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir. 1997); *see also* 42 U.S.C. § 7401(a) ("The Congress finds . . . that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments. . . . "); 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .")[26]

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[26] The 1970 Amendments, which "sharply increased federal authority" in *setting* air quality standards, at the same time "explicitly preserved the principle" of State primacy in *implementing* pollution controls. *Train*, 421 U.S. at 64. The 1990 Amendments, which enacted the current text of Section 110(a)(2)(D)(i)(I), "did not alter the division of responsibilities between EPA and the states in the section 110 process." *Virginia*, 108 F.3d at 1410.

That statutory division of authority is strict. This Court has described the *Train-Virginia* line of cases as erecting a statutory "federalism bar" under Section 110 of the Act. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1046 (D.C. Cir. 2001) (citing *Train*, 421 U.S. 60; *Virginia*, 108 F.3d 1397); *Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000). That statutory federalism bar prohibits EPA from using the SIP process to force States to adopt specific control measures. *See Michigan*, 213 F.3d at 687; *Virginia*, 108 F.3d at 1410.

In *Train*, the Supreme Court invoked that statutory division of labor in holding that the Clean Air Act gives EPA "no authority to question the wisdom of a State's choices of emission limitations," so long as the State's SIP submission would result in "compliance with the national standards for ambient air." 421 U.S. at 79. The Court stated:

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, *it is relegated by the Act to a secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.

Id. (emphasis added); *see also Union Electric Co. v. EPA*, 427 U.S. 246, 256, 269 (1976) (EPA may not reject a SIP on grounds of technical or economic infeasibility; that "would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly

left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

Similarly, in *Virginia*, this Court held that EPA had no authority under Section 110 to condition its approval of northeastern States' SIPs on the States' adoption of California's vehicle emission control measures. *See* 108 F.3d at 1401-10. The Court relied on the basic principle that the States, not EPA, are the primary implementers under Section 110. *See id.* at 1410 ("section 110 does not enable EPA to force particular control measures on the states").

In sum, Title I of the Act establishes a "partnership between EPA and the states." *NRDC v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). The terms of that partnership are clear: EPA sets the standards, but the States "bear primary responsibility for attaining, maintaining, and enforcing these standards." *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998).

B

With that basic structure in mind, we consider the question presented here: whether EPA may use its rulemaking authority to quantify States' obligations under Section 110(a)(2)(D)(i)(I) and *simultaneously* issue Federal Implementation Plans, without giving the States a first opportunity to comply.

We begin by briefly describing the set of statutory provisions on which EPA relies here.

EPA is the first mover in regulating ambient air pollution in Title I of the Clean Air Act. Section 109 requires EPA to promulgate NAAQS for common air pollutants. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 462 (2001) (citing 42 U.S.C. § 7409(a)). But once EPA sets a NAAQS, "responsibility under the Act shifts from the federal government to the states." *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1137 (D.C. Cir. 1980).

Section 110 governs State Implementation Plans. Section 110(a)(1) requires States to submit SIPs to implement each new or revised NAAQS. *See* 42 U.S.C. § 7410(a)(1). Section 110(a)(2) lists many elements that a SIP must contain in order to ensure that the Plan will be comprehensive enough to enable the State to attain the NAAQS. *See* 42 U.S.C. § 7410(a)(2).[27] The good neighbor provision, Section 110(a)(2)(D)(i)(I), is one of those required elements.

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[27] *See, e.g.*, 42 U.S.C. § 7410(a)(2)(A) (SIP shall "include enforceable emission limitations and other control measures," "as well as schedules and timetables for compliance"), 7410(a)(2)(B) (SIP shall provide for means to "monitor, compile, and analyze data on ambient air quality" and provide the data to EPA upon request), 7410(a)(2)(C) (SIP shall "include a program to provide for the enforcement of" the control measures required by subparagraph (A)), 7410(a)(2)(E) (SIP shall provide assurances that State and local authorities "will have adequate personnel, funding, and authority" under State and local law "to carry out such implementation plan"), 7410(a)(2)(F) (SIP shall require "the installation, maintenance, and replacement of equipment" by "stationary sources to monitor emissions from such sources").

Section 110(c)(1) creates a federal backstop if the States fail to submit adequate SIPs. When EPA finds that a State "has failed to make a required submission" or "disapproves a State implementation plan submission in whole or in part" because of a SIP "deficiency," EPA must "promulgate a Federal implementation plan" within two years, "unless the State corrects the deficiency" in the meantime in a manner approved by EPA. 42 U.S.C. § 7410(c)(1). In essence, the issue here is whether a State's implementation of its good neighbor obligation can be considered part of the State's "required submission" in its SIP (or whether the SIP can be deficient for failing to implement the good neighbor obligation) even before EPA quantifies the State's good neighbor obligation. We think not. EPA's quantifying of a State's good neighbor obligation and setting of a State's emissions budget is what "require[s]" the State to make a "submission" implementing that obligation on sources within the State. After EPA has set the relevant emissions budgets for each State, EPA may require States to submit new SIPs under Section 110(a)(1) or to revise their SIPs under Section 110(k)(5). That is the approach EPA has used in the past. In short, once EPA defines or quantifies a State's good neighbor obligation, the State must have a reasonable time to implement that requirement with respect to sources within the State.[28]

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[28] Section 110(k)(5), the SIP call provision, authorizes EPA to "establish reasonable deadlines" not to exceed 18 months for SIP revisions, once notice is given. 42 U.S.C. § 7410(k)(5); *cf.* 1998 NO_x Rule, 63 Fed. Reg. at 57,451 (12-month deadline).

In short, the triggers for a FIP are EPA's finding that the SIP fails to contain a "required submission" or EPA's disapproving a SIP because of a "deficiency." But logically, a SIP cannot be deemed to lack a required submission or be deemed deficient for failing to implement the good neighbor obligation until after EPA has defined the State's good neighbor obligation. Once it defines the obligation, then States may be forced to revise SIPs under Section 110(k)(5) or to submit new SIPs under Section 110(a)(1). Only if that revised or new SIP is properly deemed to lack a required submission or is properly deemed deficient may EPA resort to a FIP for the State's good neighbor obligation.

C

1

In light of Section 110(c)(1), EPA here made "a finding of failure to submit and/or disapproved a SIP submission" for each State with respect to each NAAQS for which that State would be covered. EPA Br. 44 (citing 42 U.S.C. § 7410(c)(1)); *see also* EPA, Status of CAA 110(a)(2)(D)(i)(I) SIPs Final Rule Technical Support Document (July 2011) (EPA, SIPs TSD), J.A. 3167.[29] On the basis of those findings,

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[29] EPA was cognizant of another potential obstacle: its own past approval of CAIR SIPs. CAIR covered the 1997 ozone and annual $PM_{2.5}$ NAAQS, two of the three NAAQS at issue here. *See* 70 Fed. Reg. 25,162, 25,165 (May 12, 2005). Many covered States had submitted and received EPA approval of CAIR SIPs. *See* EPA, SIPs TSD, J.A. EPA apparently was concerned that those

EPA asserted authority to issue the Transport Rule FIPs.

But EPA's many SIP disapprovals and findings of failure to submit share one problematic feature: EPA made all of those findings *before* it told the States what emissions reductions their SIPs were supposed to achieve under the good neighbor provision. *See* EPA, SIPs TSD, J.A. 3167.

EPA sees no problem with that. In EPA's view, there is no difference between a State's obligation to comply with the NAAQS and a State's good neighbor

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approved CAIR SIPs might deprive EPA of authority under Section 110(c)(1) to issue Transport Rule FIPs for those two NAAQS.

EPA tried to address this in the final rule. It claimed that because *North Carolina* invalidated CAIR, approved CAIR SIPs no longer fulfilled States' Section 110(a)(2)(D)(i)(I) obligations. *See* Transport Rule, 76 Fed. Reg. 48,208, 48,219 (Aug. 8, 2011). It bears noting, however, that EPA continued to approve CAIR SIPs after *North Carolina*. *See, e.g.*, 74 Fed. Reg. 65,446 (Dec. 10, 2009).

But to try to make sure, in the final Transport Rule EPA retrospectively "corrected" its past approvals of CAIR SIPs, to clarify its view that an approved CAIR SIP did not shield a State from the Transport Rule FIPs. *See* 76 Fed. Reg. at 48,219; *see also* 42 U.S.C. § 7410(k)(6) (EPA may "revise" any approval the Administrator determines "was in error"). EPA made those "corrections" without using notice and comment rulemaking, despite the statutory requirement that EPA make any corrections "in the same manner as the approval." 42 U.S.C. § 7410(k)(6).

Because the Transport Rule must be vacated in any event, we need not address here whether EPA's "corrections" of CAIR SIP approvals exceeded its authority under Section 110(k)(6).

obligation: States must submit SIPs addressing both within three years of a NAAQS or face FIPs.

But there is a difference—a glaring one—between the two obligations. A NAAQS is a clear numerical target. For example, the NAAQS for annual $PM_{2.5}$ is 15 μ g/m^3. Every State knows precisely what numerical goal its SIP must achieve. If a State misses that clear numerical target, it has only itself to blame.

By contrast, the good neighbor obligation is not a clear numerical target—far from it—until EPA defines the target. Even after EPA sets a NAAQS, an upwind State's good neighbor obligation for that pollutant is nebulous and unknown. The statutory standard is "amounts" of pollution which will "contribute significantly to nonattainment" or "interfere with maintenance" of the new NAAQS in a downwind State. There is no way for an upwind State to know its obligation without knowing levels of air pollution in downwind States and then apportioning its responsibility for each downwind State's nonattainment. Therefore, the upwind State's obligation remains impossible for the upwind State to determine *until EPA defines it*.[30]

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[30] As EPA itself has recognized in the past: "The precise nature and contents of such a submission is [sic] not stipulated in the statute. EPA believes that the contents of the SIP submission required by section 110(a)(2)(D)(i) may vary depending upon the facts and circumstances related to the specific NAAQS." EPA, Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards 3 (Aug. 15, 2006) (EPA, 2006 Guidance).

Without further definition by EPA, a prohibition on "amounts which will . . . contribute significantly" is like a road sign that tells drivers to drive "carefully." The regulated entities—here, the upwind States—need more precise guidance to know how to conform their conduct to the law. A SIP logically cannot be deemed to lack a "required submission" or deemed to be deficient for failure to meet the good neighbor obligation before EPA quantifies the good neighbor obligation.

EPA faults the States for not hitting that impossible-to-know target with their SIP submissions. In effect, EPA's view is that the only chance States have to hit the target is *before* EPA defines the target. By the time EPA makes the target clear, it's already too late for the States to comply.

Interestingly, outside of this litigation, EPA has itself recently and repeatedly recognized that it makes no sense for States to act until EPA defines the target. Just a few weeks ago, for example, in a separate proceeding EPA said that while some elements of a SIP submission are "relatively straightforward," "others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS." 77 Fed. Reg. 46,361, 46,363 (Aug. 3, 2012). "For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking

by EPA in order to determine such basic points as what constitutes significant contribution." *Id.* at n.7. Thus, EPA has said that the good neighbor provision "clearly require[s] interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS." *Id.*; *see also, e.g.*, 77 Fed. Reg. 45,320, 45,323 & n.7 (July 31, 2012) (same); 77 Fed. Reg. 43,196, 43,199 & n.7 (July 24, 2012) (same); 77 Fed. Reg. 22,533, 22,536 & n.7 (Apr. 16, 2012) (same); 76 Fed. Reg. 40,248, 40,250 & n.5 (July 8, 2011) (same).

In this litigation, however, EPA insists that the text of Section 110(c)(1) compels its FIP-first approach. But EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where EPA defines the target *after* the States' chance to comply with the target has already passed. *Cf. FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *id.* ("regulated parties should know what is required of them so they may act accordingly"); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance. . . .").

We take a different view. Statutory text "cannot be construed in a vacuum. It is a fundamental canon

of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)).

Title I's core two-step process is that the Federal Government sets end goals and the States choose the means to attain those goals. *See Michigan*, 213 F.3d at 687; *see also Virginia*, 108 F.3d at 1410. EPA's theory—that EPA can define the end goals for the good neighbor provision and *simultaneously* issue federal plans to implement them—upends that process and places the Federal Government firmly in the driver's seat at both steps. The FIP-first approach is incompatible with the basic text and structure of the Clean Air Act.

In our view, determining the level of reductions required under Section 110(a)(2)(D)(i)(I) is analogous to setting a NAAQS. And determining the level of reductions under the good neighbor provision triggers a period during which States may submit appropriate SIPs under Section 110(a)(1) or SIP revisions under Section 110(k)(5).

That approach fits comfortably within the statutory text and structure. In both situations—setting a NAAQS and defining States' good neighbor obligations —EPA sets the numerical end goal. And in both cases, once the standards are set, "determining the particular mix of controls among individual sources to attain those standards" remains "a State responsibil-

ity." 1998 NO_x Rule, 63 Fed. Reg. 57,356, 57,369 (Oct. 27, 1998).

2

Other contextual and structural factors also support our conclusion that Section 110(a)(2)(D)(i)(I) preserves the basic principle that States, not the Federal Government, are the primary implementers after EPA has set the upwind States' good neighbor obligations.

Section 110's particular function in the statutory scheme is to give the States the first opportunity to implement the national standards EPA sets under Title I. *See* 42 U.S.C. § 7410(a)-(c); *see also Train*, 421 U.S. at 79; *Virginia*, 108 F.3d at 1410; *Michigan*, 213 F.3d at 686-87. The good neighbor requirement's placement in Section 110(a)—a provision calling for State-level regulation—strongly suggests that Congress intended *States* to implement the obligations set forth in Section 110(a)(2)(D)(i)(I). By contrast, if EPA's FIP first interpretation were to prevail, Section 110(a)(2)(D)(i)(I) would not fit well in Section 110(a).

Moreover, Title I contains a separate provision, Section 126, that explicitly contemplates direct EPA regulation of specific sources that generate interstate pollution. *See* 42 U.S.C. § 7426(b)-(c); *see also Appalachian Power*, 249 F.3d at 1046. Section 126(b) permits a State to petition EPA for a finding that a source in a neighboring State emits pollution in violation of Section 110(a)(2)(D)(i).[31] *See* 42 U.S.C.

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[31] Section 126(b)'s text refers to "section 7410(a)(2)(D)(ii)." 42 U.S.C. § 7426(b). This Court has identified the cross-reference to

§ 7426(b). Section 126(c) gives EPA discretion to impose severe sanctions, including "emission limitations and compliance schedules," on a source for which a finding has been made. 42 U.S.C. § 7426(c); *see also* 42 U.S.C. § 7509. The fact that Congress explicitly authorized EPA to use direct federal regulation to address interstate pollution suggests it did not contemplate direct Federal regulation in Section 110(a)(2)(D)(i)(I). *Cf. Whitman*, 531 U.S. at 467-68; *General Motors Corp. v. United States*, 496 U.S. 530, 541 (1990). And as this Court has previously held, that Section 126 imposes "extrinsic legal constraints" on State autonomy "*does not affect a state's discretion under § 110.*" *Appalachian Power*, 249 F.3d at 1047 (emphasis added).

In sum, the text and context of the statute, and the precedents of the Supreme Court and this Court, establish the States' first-implementer role under Section 110. We decline to adopt a reading of Section 110(a)(2)(D)(i)(I) that would blow a hole in that basic structural principle.[32]

3

The novelty of EPA's approach underscores its flaws. In the past, EPA has applied the good neigh-

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paragraph (ii), instead of paragraph (i), as scrivener's error. *See Appalachian Power*, 249 F.3d at 1040-44.

[32] We conclude that EPA's interpretation on the FIPs issue is contrary to the text and context of the statute (a *Chevron* step 1 violation), in the alternative is absurd (a *Chevron* step 1 violation), and again in the alternative is unreasonable (thus failing *Chevron* step 2 if we get to step 2).

bor provision in the States-first way we have outlined here.

The 1998 NO_x Rule (which we addressed in *Michigan*) quantified each State's good neighbor obligation but then gave the States 12 months to submit SIPs to implement the required reductions. *See* 63 Fed. Reg. at 57,358, 57,450-51; 42 U.S.C. § 7410(k)(5). Indeed, EPA explicitly assured States that the Rule did not intrude on their authority to choose the means to achieve the EPA-defined end goal. *See* 1998 NO_x Rule, 63 Fed. Reg. at 57,369. EPA then explained, persuasively, why it made sense not to deviate from Title I's standard division of labor in the good neighbor context:

> The task of determining the reductions necessary to meet section 110(a)(2)(D) involves allocating the use of the downwind States' air basin. This area is a commons in the sense that the contributing State or States have a greater interest in protecting their local interests than in protecting an area in a downwind State over which they do not have jurisdiction and for which they are not politically accountable. Thus, in general, it is reasonable to assume that *EPA may be in a better position to determine the appropriate goal*, or budget, for the contributing States, *while leaving [it] to the contributing States' discretion to determine the mix of controls* to make the necessary reductions.

Id. at 57,370 (emphases added).

In *Michigan*, this Court held that the 1998 Rule did not transgress the *Train-Virginia* federalism bar.

But the terms of the *Michigan* Court's approval highlight how flagrantly the new Transport Rule crosses that line. We said: "EPA does not tell the states how to achieve SIP compliance. Rather, EPA looks to section 110(a)(2)(D) and *merely provides the levels to be achieved by state-determined compliance mechanisms*." 213 F.3d at 687 (emphasis added). We emphasized that States had a "real choice" how to implement the required reductions. *Id.* at 688.

Like the 1998 NO_x Rule, the 2005 Clean Air Interstate Rule gave States the first crack at implementing the reductions required by EPA. *See* 70 Fed. Reg. 25,162, 25,263 (May 12, 2005) (requiring SIPs within 18 months). When EPA issued CAIR FIPs in April 2006, about a year after it promulgated CAIR, it clarified that it intended the FIPs to serve as a "Federal backstop" to the ongoing SIP process, and did not intend to "take any other steps to implement FIP requirements that could impact a State's ability to regulate their sources in a different manner" until "a year after the CAIR SIP submission deadline." *See* CAIR FIPs, 71 Fed. Reg. 25,328, 25,330 (Apr. 28, 2006). That timetable, EPA assured the States, would allow EPA "to approve timely SIPs *before* implementation of FIP requirements occurs." *Id.* at 25,331 (emphasis added).

In both the 1998 NO_x Rule and the 2005 CAIR, EPA was therefore careful not to infringe the States' first-implemented role. EPA's own past practice and statements illustrate the anomaly of its new FIP-first approach.

D

On a separate tack, EPA does not concede that it denied the States their rightful chance to implement their good neighbor obligations. It contends States *did* have an opportunity to submit SIPs. In EPA's view, once it issued the 2006 24-hour $PM_{2.5}$ NAAQS, States had three years under Section 110(a)(1) to seek and obtain EPA approval of SIPs addressing their good neighbor obligations.

But to reiterate, the problem is that the three-year period expired *before* EPA issued the Transport Rule and defined the good neighbor obligations of upwind States. EPA has an answer for that—one we find extraordinarily unpersuasive. In its view, each State should have come up with (i) its own definition of "amounts which will . . . contribute significantly" and (ii) its own modeling and methodology for applying that definition. *See* EPA Br. 48 ("EPA has never stated that its methodology is the only way") (emphasis omitted).

In effect, EPA claims the statute requires each State to take its own stab in the dark at defining "amounts which will . . . contribute significantly" to a downwind State's nonattainment. The State would then have to apply that homemade definition using its own homemade methodology.[33]

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[33] EPA points to guidance documents it issued in 2006 and 2009. Those documents further undermine EPA's contention that the stab in the dark was a realistic opportunity for States to avoid being pulled into the Transport Rule FIPs.

Of course, once a State takes its stab, EPA could disapprove it—especially if the State defined its own

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The 2006 document, published after CAIR but before *North Carolina*, did not apply to CAIR States. *See* EPA, 2006 Guidance at 4. It told non-CAIR States that "EPA anticipates, based upon existing information developed in connection with the CAIR, that emissions from sources in States not covered by the CAIR do not contribute significantly to nonattainment or interfere with maintenance of the 8-hour ozone or $PM_{2.5}$ NAAQS in any other State." *Id.* at 5.

The 2009 guidance document concerned the 2006 24-hour $PM_{2.5}$ NAAQS, which was not covered by CAIR. The seven-page document included three paragraphs of vague guidance on "significant contribution" under Section 110(a)(2)(D). *See* EPA, Guidance on SIP Elements Required Under Sections 110(a)(l) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) 3 (Sept. 25, 2009) (EPA, 2009 Guidance) ("The state's conclusion must be supported by an adequate technical analysis. Information to support the state's determination with respect to significant contribution to nonattainment might include, but is not limited to, information concerning emissions in the state, meteorological conditions . . . , monitored ambient concentrations . . . , the distance to the nearest area that is not attaining the NAAQS in another state, and air quality modeling."); *cf.* 1998 NO_x Rule, 63 Fed. Reg. at 57,370 (if EPA does not identify the "acceptable level of NO_x reductions, the upwind State would not have guidance as to what is an acceptable submission").

The 2009 document ordered the States, equipped with that vague guidance, to submit SIPs to address Section 110(a)(2)(D)(i)(I) for 24-hour $PM_{2.5}$. But in the same breath, it warned them that EPA itself intended to "complete a rule to address interstate pollution transport in the eastern half of the continent and United States." EPA, 2009 Guidance at 3. EPA did not say what would happen if a State's approach did not coincide with the approach EPA was developing for its own rule, but experience tells the tale.

obligation to be less than what EPA deemed it to be. Experience appears to bear that out: Petitioners point out that every Transport Rule State that submitted a good neighbor SIP for the 2006 24-hour $PM_{2.5}$ NAAQS was disapproved. *See* State & Local Br. 29-31; State & Local Reply Br. 5-7.

That should not come as a surprise. In the 1998 NO_x Rule, EPA acknowledged that pre-Rule stabs in the dark were bound to fail. "Without determining an acceptable level of NO_x reductions," EPA warned, "the upwind State would not have guidance as to what is an acceptable submission." Fed. Reg. at 57,370. And States would incur significant costs developing those SIP submissions.

As EPA repeatedly reminds this Court, interstate pollution is a collective problem that requires a comprehensive solution. *See* EPA Br. 5 ("Absent effective federal control, individual States often have little economic or political incentive to self-impose regulatory controls (and attendant costs) within their States solely to address air quality problems in other States."). And EPA itself has recognized that having each State independently guess at its own good neighbor obligations is not a plausible solution to interstate pollution: "It is most efficient—*indeed necessary*—for the Federal government to establish the overall emissions levels for the various States." 1998 NO_x Rule, 63 Fed. Reg. at 57,370 (emphasis added).

Yet EPA now encourages us to suspend disbelief and conclude that under the statute, a State's only chance to avoid FIPs is to make a successful stab in

the dark—a feat that not one Transport Rule State managed to accomplish. EPA clearly does not believe the stab-in-the-dark approach would really permit States to avoid FIPs—its own past statements show that. But EPA's authority to issue these FIPs rests on our accepting its rickety statutory logic.

We decline the invitation. Our duty is to "interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted). EPA's FIP-first approach fails that test.

When EPA quantifies States' good neighbor obligations, it must give the States a reasonable first opportunity to implement those obligations. That approach reads Section 110(a)(2)(D)(i)(I) in harmony with the rest of Section 110. It preserves Title I's Federal-State division of labor—a division repeatedly reinforced by the Supreme Court and this Court. And it accords with the commonsense notion that Congress did not design the good neighbor provision to set the States up to fail.[34]

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[34] The dissent contends that the States' challenge on this issue comes too late. We disagree. The dissent conflates (i) EPA's prior disapproval of certain States' SIPs and (ii) EPA's decision to quantify the good neighbor obligation and to simultaneously issue FIPs rather than to issue a SIP call for SIP revisions (or to allow new SIPs). Petitioners are challenging only the latter point. And EPA announced its final decision to proceed that way in the Transport Rule itself. Put another way, the statute says that

IV

The decision whether to vacate a flawed rule "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted); *see also Davis County Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997).

Here, we have no doubt that the agency chose incorrectly. The Transport Rule stands on an unsound foundation—including EPA's flawed construction of the statutory term "amounts which will . . . contribute significantly to nonattainment." 42 U.S.C. § 7410(a)(2)(D)(i). That deficiency is too fundamental to permit us to "pick and choose portions" of the rule to preserve. *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). And as with the Clean Air Interstate Rule, the Transport Rule's "fundamental flaws foreclose EPA from promulgating the same standards on remand." *Id.* (internal quotation marks omitted). EPA's chosen manner of implementing the

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EPA must issue a FIP within two years after a State fails to make a "required submission" or submits a deficient SIP. But a State cannot be "required" to implement its good neighbor obligation in a SIP "submission"—nor be deemed to have submitted a deficient SIP for failure to implement the good neighbor obligation—until it knows the target set by EPA. In this case, EPA set the relevant target in the Transport Rule. Petitioners' challenge to the Transport Rule's FIPs is entirely timely.

Rule—issuing FIPs without giving the States a post-Rule opportunity to submit SIPs—also rests on a misreading of the statute.

We therefore vacate the Transport Rule rulemaking action and FIPs, and remand to EPA.

The remaining question is the status of CAIR. In *North Carolina*, this Court initially held that CAIR's "fundamental flaws" required vacatur. 531 F.3d at 929. On rehearing, the Court reconsidered its initial decision and modified its order to remand CAIR without vacatur. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). The Court noted that under our precedents, it is appropriate to remand without vacatur "where vacatur would at least temporarily defeat the enhanced protection of the environmental values covered by the EPA rule at issue." *Id.* (internal quotation marks, brackets, and ellipsis omitted). The Court was "convinced that, notwithstanding the relative flaws of CAIR, allowing CAIR to remain in effect until it is replaced by a rule consistent with our opinion would at least temporarily preserve the environmental values covered by CAIR." *Id.*

In accordance with our Order granting the motions to stay the Transport Rule, EPA has continued to administer CAIR. *See* Order, No. 11-1302, at 2 (D.C. Cir. Dec. 30, 2011); *see also* http://www.epa.gov/cair. Vacating CAIR now would have the same consequences that moved the *North Carolina* Court to stay its hand—and indeed might be more severe now, in light of the reliance interests accumulated over the intervening four years. We therefore conclude, as did the

Court in *North Carolina*, that the appropriate course is for EPA to continue to administer CAIR pending its development of a valid replacement.[35]

* * *

We vacate the Transport Rule and the Transport Rule FIPs and remand this proceeding to EPA. EPA must continue administering CAIR pending the promulgation of a valid replacement.

So ordered.

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[35] The *North Carolina* Court did "not intend to grant an indefinite stay of the effectiveness" of its decision. 550 F.3d at 1178. We likewise expect that EPA will proceed expeditiously on remand.

ROGERS, *Circuit Judge*, dissenting: To vacate the Transport Rule, the court disregards limits Congress placed on its jurisdiction, the plain text of the Clean Air Act ("CAA"), and this court's settled precedent interpreting the same statutory provisions at issue today. Any one of these obstacles should have given the court pause; none did. The result is an unsettling of the consistent precedent of this court strictly enforcing jurisdictional limits, a redesign of Congress's vision of cooperative federalism between the States and the federal government in implementing the CAA based on the court's own notions of absurdity and logic that are unsupported by a factual record, and a trampling on this court's precedent on which the Environmental Protection Agency ("EPA") was entitled to rely in developing the Transport Rule rather than be blindsided by arguments raised for the first time in this court.

Congress has limited the availability of judicial review of challenges to final rules promulgated by the EPA in two ways that are relevant here. Under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1), petitions for judicial review must be filed within sixty days of promulgation of a final rule, and under CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), "[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." The court has, until today, strictly enforced these requirements, which exist for two important reasons: to enforce repose so that the rulemaking process is not crippled by surprise challenges to mat-

ters that were rightfully presumed settled, and to guarantee an agency's expert consideration and possible correction of any flaws in its rules *before* the matter reaches a court. Instead the court casts aside both jurisdictional provisions, upending these two fundamental principles. In so doing, the court thus fails to "maintain uniformity of the court's decisions" on these "question[s] of exceptional importance." FED. R. APP. P. 35(a)(1) & (2).

As one basis underlying its vacatur of the Transport Rule, the court permits a collateral attack on prior final rules in which EPA disapproved state implementation plan ("SIP") submissions with respect to the "good neighbor provision," CAA § 110(a)(2)(D)(i)(I), 42 U.S.C. § 7410(a)(2)(D)(i)(I), or found States failed to submit such a SIP at all. In those Final SIP Rules, EPA unambiguously stated its interpretation that States had an independent obligation under section 110(a) to submit "good neighbor" SIPs regardless of whether EPA first quantified each State's emission reduction obligations. Under section 307(b)(1), States had sixty days to seek judicial review of those Final SIP Rules to challenge EPA's interpretation of section 110(a). EPA's authority to promulgate the federal implementation plans ("FIPs"), pursuant to section 110(c), in the Transport Rule was *triggered* by EPA having published those Final SIP Rules, and under section 307(b)(1) States may not collaterally attack the propriety of those Final SIP Rules now. This is not a mere technicality—EPA developed and promulgated the Transport Rule with the knowledge that all but three States did not seek judicial review of

its interpretation of section 110(a) and in light of this court's opinion in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). The court therefore lacks jurisdiction under section 307(b)(1) to consider States' belated challenge to EPA's interpretation of section 110(a) as part of its review of the Transport Rule; the petitions challenging the Final SIP Rules filed by three States are not consolidated with the petitions challenging the Transport Rule, as they involve separate provisions of the CAA and different final rules. The court glosses over the plain text and structure of section 110 to avoid that reality, and in the process rewrites sections 110(a) and 110(c), altering the triggering mechanism for States' obligations to submit "good neighbor" SIPs and EPA's obligation to promulgate FIPs, based on its own speculative conclusion that the process Congress adopted is "impossible" for States to follow. To reach its conclusion, the court today holds that the CAA *requires* what it previously held the CAA ambiguously *permits* EPA to do.

As another ground to vacate the Transport Rule, the court concludes that, under EPA's two-step approach to defining "significant contribution" under the "good neighbor" requirement in section 110(a)(2)(D)(i)(I), a State "may be required to reduce its emissions by an amount greater than the 'significant contribution' that brought it into the program in the first place." Op. at 34. No 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. Acknowledging this,

the court reaches beyond the Transport Rule administrative record, despite section 307(d)(7)(B)'s clear command, to find jurisdiction. But the three reasons it offers do not add up. By suggesting that EPA acted inconsistently with *North Carolina* in adopting a two-step approach, with different, unrelated measures of "significant contribution" for inclusion and budget-setting, the court ignores that in *North Carolina* this court expressly declined to disturb that same approach. 531 F.3d at 916-17. In relying on a comment expressing a policy preference made during the administrative proceedings of the predecessor of the Transport Rule (to which petitioners failed to alert the court until *rebuttal* oral argument), the court ignores that the comment does not challenge EPA's statutory authority to pursue its two-step approach, and the fact that no one petitioned the court in *North Carolina* for judicial review based on that comment, which is why the court in *North Carolina* left that approach undisturbed, *see id.* The court also ignores that the prior rulemaking docket was not incorporated into the Transport Rule administrative proceedings. Together, these "ignored" facts demonstrate that EPA had no reason to suspect any party before it in the Transport Rule administrative proceedings subscribed to the objection stated in the old comment, nor even to locate and consider that comment. Finally, EPA's rejection on technical grounds of alternative approaches for measuring "significant contribution" based solely on air quality, not cost and air quality, during the Transport Rule administrative proceedings says nothing about whether EPA would have refused to entertain

petitioners' new objection in this court that EPA was statutorily required to modify its two-step approach by making the inclusion threshold of step-one a floor for reductions under the cost approach of step-two. The alternative approaches EPA considered and rejected are not even the approaches petitioners now endorse, and, in any event, cannot excuse a failure to state their objection with "reasonable specificity" during the Transport Rule administrative proceedings.

The court's remaining reasons for vacatur lack merit. First, the court concludes EPA violated the "good neighbor" provision's "proportionality" requirement, but petitioners presented no such statutory authority argument in their briefs, instead challenging EPA's grouping of States for purposes of SO_2 reduction as arbitrary and capricious. Even if they had, the court lacks jurisdiction because the argument is premised on speculation that EPA's two-step approach to measuring "significant contribution" might require States to reduce emissions by *more* than the amount that triggered their inclusion in the Transport Rule in the first place—the same argument over which the court lacks jurisdiction due to petitioners' failure to challenge EPA's statutory authority for its approach during the Transport Rule administrative proceedings. On the merits, the court's "proportionality" conclusion contradicts the court's opposite conclusion in *North Carolina* that EPA's measurement of a State's "significant contribution" did not have to correlate directly with its air quality impact "relative to other upwind states." 531 F.3d at 908 (citing *Michigan v. EPA*, 213 F.3d 663, 679 (D.C. Cir. 2000)). Similarly, the court's holding

that EPA failed to consider the effect of in-state emissions is likewise premised on the subthreshold argument. Further, the court's "in-State emissions" and its "over-control" conclusions are contradicted by the Transport Rule administrative record.

I.

Section 307(b)(1) of the CAA, 42 U.S.C. § 7607(b)(1), requires a petition for judicial review of EPA final actions to be filed within sixty days of publication in the Federal Register. "The filing period in the Clean Air Act 'is jurisdictional in nature'; if the petitioners have failed to comply with it, we are powerless to address their claim." *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998)).

> The Supreme Court has explained that "judicial review provisions are jurisdictional in nature and must be construed with strict fidelity to their terms. This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, mandatory and jurisdictional, and are not subject to equitable tolling."

Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 682 (D.C. Cir. 2001) (quoting *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 405 (1995) (internal quotation marks, alterations, and citation omitted)). Accordingly, in *Medical Waste* this court dismissed a challenge to a final rule for lack of jurisdiction where petitioners failed to seek judicial review when EPA "*first use[d]*"its statutory approach, 645 F.3d at 427

(emphasis added). "An objection is considered a collateral attack only if 'a reasonable [petitioner] . . . would have perceived a very substantial risk that the [rule] meant what the [agency] now says it meant." *S. Co. Servs., Inc. v. FERC*, 416 F.3d 39, 45 (D.C. Cir. 2005) (internal quotations marks, citation, and alterations omitted).

The Transport Rule, responding to States' failures to submit adequate "good neighbor" SIPs, is a FIP that addresses the interstate transport of emissions in twenty-seven States in the eastern United States for three national ambient air quality standards ("NAAQS"): the 1997 8-hour ozone NAAQS, the 1997 annual $PM_{2.5}$ NAAQS, and the 2006 24-hour $PM_{2.5}$ NAAQS.[1] *See* Transport Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011). In the Transport Rule, EPA determined that the same level of emission reduction obligations would apply for each of these three NAAQS. *See id.* at 48,264. Over a year prior to promulgating the Transport Rule, EPA promulgated Final SIP Rules publishing findings that twenty-nine States and

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[1] Section 110(a)(1) of the CAA provides that States must submit SIPs within three years (or less, if set by EPA) of promulgation of a NAAQS. Section 110(a)(2)(D), in turn, requires States to submit SIPs with "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—
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> (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)(i)(I).

territories had failed to submit SIPs with the required "good neighbor" provisions for the 2006 24-hour $PM_{2.5}$ NAAQS.[2] *See* Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. 32,673 (June 9, 2010); Tennessee Failure to Submit Good Neighbor SIP Finding, 76 Fed. Reg. 43,180 (July 20, 2011). In these Final SIP Rules, EPA stated:

> This finding establishes a 2-year deadline for promulgation by EPA of a FIP, in accordance with section 110(c)(1), for any state that either does not submit or EPA cannot approve a SIP as meeting the attainment and maintenance requirements of [the "good neighbor" provision] for the 2006 24-hour $PM_{2.5}$ NAAQS. . . . This action . . . does not pertain to . . . a SIP Call pursuant to section 110(k)(5).

Id. at 32,674; *see also* 76 Fed. Reg. at 43,180-81 (Tennessee). The Final SIP Rules further state that the findings of failure to submit were of nationwide scope

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[2] The States and territories were: Alaska, Colorado, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. *See* Failure to Submit Good Neighbor SIP Findings, 75 Fed. Reg. at 32,674. (On July 20, 2011, EPA published an additional finding that Tennessee had failed to submit a "good neighbor" SIP for the 2006 24-hour $PM_{2.5}$ NAAQS. *See* Tennessee Failure to Submit Good Neighbor SIP Finding, 76 Fed. Reg. 43,180 (July 20, 2011). Tennessee is not a petitioner here.

and effect, and therefore pursuant to section 307(b)(1), 42 U.S.C. § 7607(b)(1), a petition for judicial review had to be filed with the D.C. Circuit within sixty days of the publication of the findings in the Federal Register. *See* Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. at 32,675-76; Failure to Submit Good Neighbor SIP Finding (Tennessee), 76 Fed. Reg. at 43,182-83. No State filed a petition for judicial review.

Other States submitted 2006 24-hour $PM_{2.5}$ SIPs with "good neighbor" provisions, but EPA disapproved that portion of the SIP submissions of ten States covered by the Transport Rule: Alabama, Georgia, Indiana, Kansas, Kentucky, Missouri, New Jersey, New York, North Carolina, and Ohio.[3] In the Final SIP Rules, EPA rejected objections that States had no obligation to submit SIPs until EPA had quantified the States' amount of "significant contribution" and that EPA was required to permit States to revise their SIPs prior to imposing a FIP pursuant to 42 U.S.C. § 7410(c)(1).[4] The Final SIP Rules disapproving the

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[3] *See* Approval and Promulgation of Air Quality Implementation Plan; Alabama; Disapproval of Interstate Transport Submission for the 2006 24-Hour $PM_{2.5}$ Standards, 76 Fed. Reg. 43,128 (July 20, 2011); 76 Fed. Reg. 43,159 (Georgia); 76 Fed. Reg. 43,175 (Indiana & Ohio); 76 Fed. Reg. 43,143 (Kansas); 76 Fed. Reg. 43,136 (Kentucky); 76 Fed. Reg. 43,156 (Missouri); 76 Fed. Reg. 43,153 (New Jersey & New York); 76 Fed. Reg. 43,167 (North Carolina).

[4] *See* 76 Fed. Reg. at 43,131-33 (Alabama); 76 Fed. Reg. at 43,162-64 (Georgia); 76 Fed. Reg. at 43,176-79 (Indiana & Ohio); 76 Fed. Reg. at 43,145-47 (Kansas); 76 Fed. Reg. at 46,139-41 (Kentucky); 76 Fed. Reg. at 43,170-72 (North Carolina). No comments

"good neighbor" SIP submissions alerted the affected States that "petitions for judicial review must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011," *see, e.g.*, 76 Fed. Reg. at 43,136 (Alabama), the sixty day deadline prescribed by CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1). Only Georgia, Kansas, and Ohio filed petitions for judicial review of EPA's disapproval action and their petitions are not consolidated with the petitions now under review, as they challenge different final rules.[5]

A.

Now that EPA has, as it warned, promulgated FIPs for States covered by the Transport Rule, State petitioners contend that EPA lacked authority to do so for

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were submitted to the proposed disapproval of Missouri's "good neighbor" SIP submission, *see* 76 Fed. Reg. at 43,156, and only one unrelated comment was submitted to New York and New Jersey's proposed disapproval, *see* 76 Fed. Reg. at 43,154. None of these three States is a petitioner here.

[5] *See Ohio v. EPA*, No. 11-3988 (6th Cir.); *Westar Energy, Inc. v. EPA*, No. 11-1333 (D.C. Cir.); *Kansas v. EPA*, No. 12-1019 (D.C. Cir.); *Georgia v. EPA*, No. 11-1427 (D.C. Cir.). The court consolidated the two Kansas cases (Nos. 11-1333 and 12-1019) on January 10, 2012. *See* Order Case No. 12-1019 (Jan. 10, 2012). The court also severed from Kansas's Transport Rule petition, Case No. 11-1329, its challenge to EPA's disapproval of its "good neighbor" SIP submission. *See id.* On January 10, 2012, the Sixth Circuit granted the parties' joint motion to hold the case in abeyance pending the outcome of the instant case. On January 18, 2012, the D.C. Circuit issued orders holding the Kansas and Georgia cases in abeyance pending the outcome of the appeal in the present case.

the 2006 24-hour $PM_{2.5}$ NAAQS because "a FIP can cure a deficiency only in a *required* submission, and States were not required to include SIP provisions to eliminate 'significant contributions' not yet defined by EPA legislative rule." State Petrs' Br. at 31. If a State wished to object that under section 110(a) it had no obligation to include "good neighbor" provisions in its SIP until EPA quantified its "significant contribution" in emission reduction budgets, then the CAA required it do so at the time EPA found it had not met its SIP "good neighbor" obligation. State petitioners offer no response in their reply brief to EPA's position that this argument is a collateral attack barred by section 307(b)(1). *See* Resp.'s Br. at 46-47.

Ignoring the plain terms of section 307(b)(1) as well as this court's long-settled precedent, the court reaches the merits of this issue despite its lack of jurisdiction. In the Final SIP Rules finding States had failed to submit "good neighbor" SIPs, EPA put covered States on unambiguously "sufficient notice" that it interpreted the CAA as placing an independent obligation on each State to include adequate "good neighbor" provisions in its SIP regardless of whether EPA had prospectively quantified its amount of "significant contribution." *S. Co. Servs.*, 416 F.3d at 44. By the very nature of the Final SIP Rules, EPA was informing States that they had not met their obligation to submit "good neighbor" SIPs, an obligation States now contend they never had. Furthermore, EPA warned that its findings of failure to submit triggered the two-year FIP clock of section 110(c)(1), and not the SIP Call provision of section 110(k)(5). *See* Failure to

Submit Good Neighbor SIP Finding, 75 Fed. Reg. at 32,673-74; Failure to Submit Good Neighbor SIP Finding (Tennessee), 76 Fed. Reg. at 43,180-81. In alerting States to the judicial review deadline, EPA reiterated that States had sixty days to file "*any* petitions for review . . . related to [] findings of failure to submit SIPs *related to the requirements of* [the 'good neighbor' provision]." Failure to Submit Good Neighbor SIP Finding, 75 Fed. Reg. at 32,676; Failure to Submit Good Neighbor SIP Finding (Tennessee), 76 Fed. Reg. at 43,183 (emphases added). Not having sought judicial review of the Final SIP Rules determining that they failed to submit *required* "good neighbor" SIPs, States may not now object that they were *not required* to submit "good neighbor" SIPs until EPA first quantified their reduction obligations. "The sixty day window provided by statute has long since closed, and we may not reopen it and entertain a belated challenge . . . now." *Med. Waste*, 645 F.3d at 427. Therefore, the court lacks jurisdiction over the collateral attacks by petitioners Louisiana, Michigan, Nebraska, Oklahoma, Virginia, and Wisconsin, as part of the Transport Rule petitions, on EPA's interpretation of section 110(a) stated in the Final SIP Rules finding they failed to submit required "good neighbor" SIPs.

Similarly on notice, neither Alabama nor Indiana petitioned for judicial review of EPA's disapproval of their SIP submissions. In the Final SIP Rule disapproving Alabama's SIP submission, EPA quotes one commenter as stating:

> EPA has not stated the amount of reduction they believe is needed to satisfy the transport requirements. . . . [T]he finish line isn't even knowable (because EPA refuses to inform the states how much reduction is enough to satisfy the requirements). EPA seems to say that it has to be whatever the final Transport Rule says, even though there is no final Transport Rule.

76 Fed. Reg. at 43,131. EPA responded that "the state obligation stems from the CAA itself. . . . *States had an opportunity to conduct their own analyses regarding interstate transport*." *Id.* (emphasis added). EPA also warned that it was obligated to promulgate a FIP within two years of disapproving Alabama's SIP, *see id.* at 43,132, and rejected comments that the SIP Call revision process of section 110(k)(5) should apply, because, in its view, that provision applies only where there is an existing, approved SIP, *see id.* at 43,133. In its summary of Indiana's comments on the proposed disapproval of its SIP submission, EPA noted that Indiana took the position that EPA "should provide [the State] the opportunity to revise its [] SIP once the Transport Rule is completed" and that a "FIP is [] contrary to the spirit of the CAA by unnecessarily limiting [S]tate authority." 76 Fed. Reg. at 43,177. EPA responded, relying on the CAA's plain text, that Indiana was required by section 110(a) to submit SIPs with adequate "good neighbor" provisions, and that upon disapproving its submission, EPA had a legal obligation under the CAA to promulgate a FIP. *See id.* Alabama and Indiana's comments, along with EPA's responses, demonstrate that the two

States were on clear notice of EPA's interpretation of the CAA as imposing an independent obligation on the States to submit "good neighbor" SIPs, even in the absence of EPA-quantified amounts of "significant contribution." Yet neither Alabama nor Indiana sought judicial review of EPA's Final SIP Rules disapproving their SIP submissions, and their attempt now to collaterally attack those Final SIP Rules is barred. *See Med. Waste*, 645 F.3d at 427.

Given EPA's clear statements in its Final SIP Rules disapproving States' SIP submissions and finding they failed to submit required "good neighbor" SIPs, there is no basis to conclude that State petitioners might *not* have perceived a substantial risk that EPA *meant* what it *said*. *See S. Co. Servs.*, 416 F.3d at 45. The instant case, involving consolidated petitions challenging the Transport Rule, is therefore not the appropriate forum to decide whether, under section 110(a), States have an independent obligation to submit "good neighbor" SIPs when EPA has not first quantified amounts of "significant contribution." EPA promulgated Final SIP Rules in which it made its interpretation clear; judicial challenge to those rules is the proper forum to decide the question.[6]

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[6] The same is true for Ohio, Georgia, and Kansas, which petitioned for judicial review of EPA's disapproval of their "good neighbor" SIP submissions. The court's "review in th[e] [instant] case is limited to" the Transport Rule, and the court thus "lack[s] jurisdiction over" challenges to those States' SIP disapprovals premised on whether they have an independent obligation to submit "good neighbor" SIPs. *Coalition for Responsible Regulation*,

Indeed, the court itself forecasts this conclusion: "EPA's many SIP disapprovals and findings of failure to submit share one problematic feature: EPA made all of those findings *before* it told the States what emission reductions their SIPs were supposed to achieve under the "good neighbor" provision." Op. at 47 (emphasis in original). However "problematic" the court views this "feature" of those Final SIP Rules, this is a "problem" this three-judge panel is powerless to resolve because it lacks jurisdiction under CAA section 307(b)(1) to entertain State petitioners' "back-door challenge" to EPA's interpretation of section 110(a) stated in those Final SIP Rules. *Natural Res. Def. Council v. EPA*, 824 F.2d 1146, 1150 (D.C. Cir. 1987) (internal quotation marks omitted).

Inc. v. EPA, 684 F.3d 102, 149 (D.C. Cir. 2012). The petitions filed by those States challenging their SIP disapprovals are not consolidated with the petitions before the court today, *see supra* n.5, and Ohio's petition is pending in the Sixth Circuit. The court must therefore "decline [State] [p]etitioners' invitation to rule on the merits of cases which are properly before different panels." *Id.* This is all the more important here, where EPA has not yet been afforded the opportunity to assert an improper venue defense in the two cases pending before the D.C. Circuit. *See Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996); 42 U.S.C. § 7607(b)(1) (petitions for review of SIP disapprovals may be brought only in the court of appeals "for the *appropriate* circuit") (emphasis added). If Georgia, Kansas, and Ohio wish to avoid enforcement of the Transport Rule FIPs because they contend EPA's SIP disapprovals were in error, the proper course is to seek a stay of EPA's disapprovals in their pending cases; if granted, a stay would eliminate the basis upon which EPA may impose FIPs on those States. *See* 42 U.S.C. § 7410(c)(1)(B).

The court responds that the dissent "conflates" State petitioners' collateral attack on the Final SIP Rules announcing their Section 110(a) SIP obligations with State petitioners' supposedly distinct argument that EPA cannot promulgate a FIP simultaneously with its quantification of a State's emission reduction obligations. *See* Op. at 8 n.1, 58 n.34. This response misleadingly quotes the statute, and in the process, proves the dissent's point. The court states "the statute says that EPA must issue a FIP within two years after a State fails to make a 'required submission' or submits a deficient SIP. But a State cannot be 'required' to implement its "good neighbor" obligation in a SIP 'submission' . . . until it knows the target set by EPA." *Id.* at 58 n.34.[7] That is *not* what the statute says. Section 110(c) provides that:

> (1) The 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;

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[7] Notice the circularity in the court's statement. The court says State petitioners' "simultaneity" argument can be "[p]ut another way," Op. at 58 n.34, as an argument that States had no section 110(a) SIP requirements until EPA quantified their emission reduction budgets. Under section 307(b)(1), that is exactly the argument that States were required to make in petitions for judicial review of the Final SIP Rules setting forth EPA's section 110(a) interpretation.

> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, *before* the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1) (emphases added). EPA's FIP obligation is therefore not triggered, without more, by a State's mere failure to submit a SIP required by section 110(a), but instead by an *explicit* EPA Final Rule *finding* that the State either failed to submit a required SIP or an adequate SIP. A challenge to EPA's interpretation of section 110(a) must therefore be brought as a petition for judicial review of those Final SIP Rules announcing that States failed to meet their section 110(a) "good neighbor" SIP obligations. *See Med. Waste*, 645 F.3d at 427. Under the plain terms of the CAA, EPA's obligation (and authority) to promulgate a FIP is *triggered* by those Final SIP Rules, and the process by which EPA must promulgate a FIP is governed by section 110(c), not, as the court posits, by section 110(a). The court therefore, and not the dissent, does the conflating by turning what should be a challenge to EPA's FIP authority under section 110(c) into a collateral attack on EPA's interpretation of section 110(a) set forth in the prior Final SIP Rules.

The plain text of section 110(c)(1) obligates EPA to promulgate a FIP "at any time" within two years of disapproving a SIP submission or finding a State failed to submit a SIP. 42 U.S.C. § 7410(c)(1). Moreover, nothing in section 110(c) requires EPA to reveal to States the *content* (i.e., the emission reduction budg-

ets) it intends to include in its FIP *prior* to *proposing* a FIP. Although the CAA allows States to submit SIPs to "correct[] the deficiency," they must do so "before" EPA's promulgation of a FIP, which may occur "at any time" within two years. *Id.*

The court thus rewrites section 110(c)(1)'s unambiguous grant of authority to EPA (and ultimate obligation of EPA) to promulgate a FIP *at any time* within the two year window to read: "~~unless~~ *but not until* the State corrects the deficiency and the Administrator approves the [SIP] or [SIP] revision, ~~before~~ *may* the Administrator promulgates such [FIP]." "[A]s the Supreme Court has emphasized time and again, courts have no authority to rewrite the plain text of a statute." *Kay v. FCC*, 525 F.3d 1277, 1279 (D.C. Cir. 2008). Because the CAA "means what it says," EPA was required, after publishing disapprovals and findings of failure to submit SIPs, to promulgate FIPs within two years, and it was not required to wait for States first to submit SIPs. *Landstar Express Am. v. Fed. Maritime Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009). The court's attempt to ferret out an argument about "simultaneity" as a distinct challenge properly brought against the Transport Rule based on EPA's interpretation of section 110(a) is thus a straw man for its endorsement of State petitioner's collateral attack on EPA's interpretation of section 110(a) in the Final SIP Rules. Its rewriting of section 110(c) is made all the more remarkable by its recognition that "we must apply and enforce the statute as it's now written." Op. at 8.

B.

Even if the court had jurisdiction over State petitioners' challenge to their independent obligation to submit "good neighbor" SIPs under CAA section 110(a), its statutory analysis proceeds with no regard for the plain text and structure of the CAA or for the deference owed to permissible agency interpretations of statutes they administer where Congress has left a gap for the agency to fill or the statute is ambiguous.

"As in all statutory construction cases," the court must "begin with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 461-62 (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal quotation marks and citation omitted)). Thus, under *Chevron U.S.A. Inc v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984), the first step in statutory interpretation requires a determination of "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the mater; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," *id.* If, after applying traditional tools of statutory construction, the court determines "the statute is silent or ambiguous with respect to the specific issue," then, under step two, the court will defer to an agency's statutory interpretation

if it "is based on a permissible construction of the statute." *Id.* at 843.

The questions regarding States' obligations to submit "good neighbor" SIPs are straightforward: (1) Do States have an independent obligation to submit SIPs with adequate "good neighbor" provisions; (2) if so, what triggers that obligation; (3) if there is an obligation, what is the deadline for the SIP submission; and (4) must EPA prospectively quantify each States' amount of "significant contribution" to downwind nonattainment? The plain text of the statute provides equally straightforward answers: (1) Yes; (2) promulgation of a NAAQS; (3) within three years of promulgation of a NAAQS (unless the EPA Administrator prescribes a shorter deadline); and (4) no, but EPA *may* do so if it chooses.

Section 109 of the CAA requires EPA to promulgate NAAQS, a national health-based standard. *See* 42 U.S.C. § 7409. Section 110, in turn, provides that

> (a)(1) Each State *shall* . . . adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) *after the promulgation of a national primary air quality standard* (or any revision thereof) . . . a plan which provides for implementation, maintenance, and enforcement of such [] standard . . . within such State.
>
> (2) Each implementation plan submitted by a State under this chapter . . . *shall*
>
> . . .

> (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 [NAAQS].

Id. §§ (a)(1) & (a)(2)(D)(i)(I) (emphases added). The plain text requires that within three years of EPA's promulgation of a NAAQS, States *shall* submit SIPs, and those SIPs *shall* include *adequate* "good neighbor" provisions. This is the unambiguous obligation and chronology established by Congress. EPA has the first duty to set the NAAQS, and then States have series of follow-up duties, listed in section 110(a), to ensure attainment of the NAAQS. Among the duties clearly assigned to States is the inclusion in SIPs of adequate "good neighbor" provisions.

The court views this "interpretation"—that is, *reading the actual text of the statute*—as a scene from *Alice in Wonderland*. *See* Op. at 50. It concludes that "[i]n our view, determining the level of reductions required under Section 110(a)(2)(D)(i)(I) is analogous to setting a NAAQS. And determining the level of reductions under the "good neighbor" provision triggers a period during which States may submit SIPs." *Id.*

at 51. Even if the court's analogy were sound,[8] the premise of its analogy does not support its conclusion that EPA's determination of emission reduction obligations triggers States' obligations to submit "good neighbor" SIPs. Rather, the court rewrites a decades-old statute whose plain text and structure establish a clear chronology of federal and State responsibilities. Nowhere does the CAA place a requirement on EPA to quantify each State's amount of "significant contribution" to be eliminated pursuant to the "good neighbor" provision, let alone include any provision relieving States of their "good neighbor" SIP obligations in the event EPA does not first quantify emission reduction obligations.[9] The court's "view" that EPA "determining the level of reductions under the "good neighbor" provision triggers the period

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[8] NAAQS are determined based on what is "requisite to protect the public health" and "public welfare," 42 U.S.C. §§ 7409(b)(1) & (2), and are a uniform national standard. The "good neighbor" provision, on the other hand, is not a separate national standard, but instead is simply one of the CAA's State-specific mechanisms to ensure attainment of the NAAQS. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

[9] The court's comparison of section 110 to section 126, *see* Op. at 52, conflates direct federal regulation of *sources* with EPA's statutory authority to enforce requirements that *States* comply with their "good neighbor" SIP obligations. Given that Congress included a *specific* provision obligating EPA to promulgate FIPs if States fail to submit adequate SIPs within three years of promulgation of a NAAQS, *see* CAA § 110(c)(1); 42 U.S.C. § 7410(c)(1), and EPA relies on it in the Transport Rule, section 126's federal authorization to regulate specific *sources* of emissions has no bearing on the statutory analysis here.

during which States may submit SIPs" is irrelevant in view of the unambiguously plain text of section 110(a)(1) and (a)(2)(D)(i)(I), and, if the statute were ambiguous, the court would be required to defer to EPA's interpretation that States have an independent obligation to submit "good neighbor" SIPs within three years of promulgation of the NAAQS because that interpretation is permissible under the statute, *see Chevron*, 467 U.S. at 843. The court's "role is 'not to 'correct' the text so that it better serves the statute's purposes'; nor under *Chevron* may [the court] 'avoid the Congressional intent clearly expressed in the text simply by asserting that [the court's] preferred approach would be better policy. The Congress has spoken plainly. . . . " *Virginia Dep't of Med. Assistance Servs. v. Dep't of Health & Human Servs.*, 678 F.3d 918, 926 (D.C. Cir. 2012) (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

Furthermore, the court's holding is entirely at odds with the holding in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), *see LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc). In *Michigan*, State petitioners contended that EPA violated the CAA by prospectively informing States what their nitrogen oxides (NO_x) emission reduction budgets needed to be to adequately eliminate their amounts of "significant contribution" under the "good neighbor" provision, thus acknowledging their independent obligation to submit adequate "good neighbor" SIPs, *see* 213 F.3d at 686-87. State petitioners in *Michigan* argued that EPA had *no authority* to do what the

State petitioners now before the court contend EPA has *no authority* ***not to do***. In *Michigan* the court deferred, pursuant to *Chevron* step two, to EPA's interpretation it could set State emissions budgets prospectively, given section 110's "silence" on the question, as a permissible exercise of EPA's general rulemaking authority under CAA section 301(a)(1), 42 U.S.C. § 7601(a)(1).[10] Inverting *Michigan*'s analysis of section 110, the court holds that under *Chevron* step one, *see* Op. at 53 n.32, section 110 itself *unambiguously requires* EPA to prospectively inform States of their "good neighbor" emission reduction requirements. *See id.* at 46-53. Nothing in section 110, section 301, or any other section of the CAA requires EPA to do this. Instead the court today turns "may" into "must," and holds that if EPA does not exercise its general rulemaking authority in the manner of the court's design, then section 110(a)(1)'s and 110(a)(2)(D)(i)(I)'s mandatory, unambiguous requirements that States submit adequate "good neighbor" SIPs within three years of the promulgation of a NAAQS are *erased from the statute* by judicial fiat —relieving States of the duty Congress imposed.[11]

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[10] Section 301(a)(1) of the CAA provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. § 7601(a)(1).

[11] Suffice it to say, it is extraordinarily unusual for a court to conclude, at *Chevron* step one, that it must delete mandatory obligations from a statute in order to accord with Congress's plain intent. *See* Op. at 53 n.32. It is all the more unusual to suggest

The court offers no explanation for how its holding can be squared with *Michigan* in this regard.

The court's rationale for rewriting the CAA's plain text is its *own* conclusion that "the upwind State's obligation remains *impossible* for the upwind State to determine *until EPA defines it.*" *Id.* at 48 (first emphasis added). In its words, the statute "requires each State to take its own stab in the dark . . . [and] apply [a] homemade definition using its own homemade methodology." *Id.* at 55. The court concludes EPA's interpretation (that is, following the statute's plain text) produces absurd results, *see id.* at 53 n.32. Pretermitting whether there is a shred of record evidence to show such an impossibility, a statutory outcome is absurd [only] if it *defies rationality*[;] . . . an outcome *so contrary to perceived social values* that Congress could not have intended it." *Landstar Express*, 569 F.3d at 498-99 (internal quotation marks and citations omitted) (emphases added). To the extent the court's rationale hinges on its speculation that States lack technical capability and information, this blinks at reality. As counsel for EPA emphasized at oral argument, *see* Tr. Oral Arg. at 59, 61, without contradiction by any petitioners' counsel during rebuttal oral argument, States are fully capable of measuring interstate transport of emissions by conducting modeling, and they have done so before and continue to do so: "The states can make that effort, and they can submit SIPs to EPA. Again, that is how

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that an agency's interpretation is "impermissible" at *Chevron* step two when the interpretation parrots the text of the statute.

the process works in the states that aren't included in these transport regions." *Id.* at 61. Indeed, as this court has recognized, States are charged with operating air quality monitors; "[e]xhaustive technical specifications regulate the States' operation of a network of air monitors that collect air quality data for any given area." *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 30 (D.C. Cir. 2009); *cf. ATK Launch Sys. v. EPA*, 669 F.3d 330, 334 (D.C. Cir. 2012). The air quality monitoring data collected by the States is publically available in the National Emissions Inventory.[12] That is, State air quality divisions are no strangers to complex air quality and meteorological modeling of interstate transport of emissions.[13]

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[12] *See* U.S. EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, *available at* http://www.epa.gov/ttnchie1/eiinformation.html (last visited July 23, 2012); *see also* U.S. EPA, Technology Transfer Network Clearinghouse for Regulatory Atmospheric Modeling, *available at* http://www.epa.gov/ttn/scram/aqmindex.htm (last visited July 23, 2012) (providing modeling tools).

[13] To cite one example: the State of Texas. The Texas Council on Environmental Quality ("TCEQ") has published an extensive description of its air quality modeling activities and capabilities on its website. "The TCEQ uses state of the art computer models to simulate the meteorological conditions and chemical reactions that contribute to the formation of air pollutants." TCEQ, Introduction to Air Quality Modeling, *available at* http://m.tceq.texas.gov/airquality/airmod/overview/am_intro.html (last visited July 23, 2012). Furthermore, "TCEQ uses state-of-the-science, four-dimensional computer models that incorporate atmospheric physical laws and measured observations to predict weather conditions over space and time." TCEQ, Introduction to Air Quality Model-

No petitioner suggests that States lack the capability to measure their interstate emissions of pollutants or to access that information from other States to independently determine emission reduction budgets, much less that they have not had time to do so; rather their reason for not doing so appears to stem from insistence (supported by industry sources) that their reduction of emissions not be one iota greater than is necessary for downwind States to attain and maintain NAAQS and that it is easier (and presumably less costly, *see* Oral Arg. Tr. 58) for EPA to figure this out than it is for the individual States to do so, working cooperatively and using any EPA guidance. This may be so but it does not demonstrate that Congress's scheme, protecting States' choices about how to meet NAAQS requirements, in part by independently determining ways to meet their "good neighbor" obligation as the States argued in *Michigan*, is absurd.

It is true, as the court notes, *see* Op. at 53-55, that in two previous "good neighbor" rulemakings EPA afforded States the opportunity to submit SIPs after announcing emission reduction budgets. But an agency is not forever restricted to its previous policy choices or statutory interpretations; instead, it may change course provided it acknowledges it is doing so, pre-

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ing: Meteorological Modeling, http://m.tceq.texas.gov/airquality/airmod/overview/am_met.html (last visited July 23, 2012. Indeed, TCEQ uses the same model EPA used to model emission contributions—CAMx. EPA notes in its brief that Texas provided some of the technical data that led to its inclusion in the final Transport Rule. *See* EPA Br. at 109. These are far from "homemade" methodologies. *See* Op. at 55.

sents "good reasons" for doing so, and its approach is "permissible under the statute." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Agencies "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id.* The discretion agencies enjoy in modifying their policy approaches is particularly expansive where the agency declines to exercise its *discretionary* rulemaking authority, as EPA did here. "It is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking." *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981).

Here, EPA acknowledged its previous approach, *see* Transport Rule, 76 Fed. Reg. at 48,217; NPRM, 75 Fed. Reg. at 45,222-223, and explained its decision in response to comments requesting States be given time to submit SIPs before EPA imposed the Transport Rule FIPs. EPA stated, first, that it had no authority to alter the statutory deadlines for SIP submissions and that the CAA did not require it to issue a rule quantifying States' "good neighbor" obligations, *see* Transport Rule, 76 Fed. Reg. at 48,220; second, that the court in *North Carolina*, in remanding rather than vacating CAIR, "emphasized EPA's obligation to remedy [CAIR's] flaws expeditiously" and thus "EPA d[id] not believe it would be appropriate to establish a lengthy transition period to the rule which is to replace CAIR," Transport Rule, 76 Fed. Reg. at 48,220; and third, that in *North Carolina* this court also required EPA to align upwind States' emission reduction dead-

lines with the NAAQS attainment dates of "2015 or earlier," *see North Carolina*, 531 F.3d at 930.[14] EPA's decision to adhere to the plain text of the statute, and not to exercise its discretionary general rulemaking authority, *see Michigan*, 213 F.3d at 686-87, was thus well-explained by the time pressures imposed *by this court*. *See Fox Television*, 556 U.S. at 515. Inasmuch as those time pressures were animated as well by concern for the public health and welfare—Congress required that attainment with the NAAQS occur "as expeditiously as practicable." 42 U.S.C. §§ 7502(a)(2)(A) & 7511; *see North Carolina*, 531 F.3d at 930—the instant case is particularly ill-suited for overturning EPA's exercise of its discretion in not adding an additional rulemaking step to the process. Given that the court "will overturn an agency's deci-

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[14] That EPA may, under different circumstances, view it as preferable to prospectively quantify States' emission reduction obligations, *see* Op. at 49, is irrelevant to whether EPA's stated reasons for departing, in the Transport Rule from its previous approach are adequate, given the court's instruction in *North Carolina* to expeditiously replace the flawed CAIR and align NAAQS attainment dates. The context of the federal register citations is, EPA's points out, EPA's review of a submitted SIP; the preamble does not state EPA must engaged in detailed interstate transport analysis before States must meet their statutory SIP obligations. Furthermore, consistent with the federal register citations noted by the court, EPA has traditionally issued guidance to States on calculating their "good neighbor" emission reduction obligations and it did so here, *see*, *e.g.*, EPA Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) (Sept. 25, 2009).

sion not to initiate a rulemaking only for compelling cause," and one of those few compelling reasons is when the decision *declining* to promulgate a rule exacerbates "grave health and safety problems for the intended beneficiaries of the statutory scheme," *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004) (internal quotation marks and citation omitted), it hardly makes sense for the court to *require* EPA to promulgate a rule when the effect will be to *delay* health benefits. Indeed, the court is *most* reluctant to require agencies to promulgate rules "when the interests at stake are primarily economic," *id.,* and the court's view that it is "impossible" for States to comply with their independent "good neighbor" obligation under section 110(a) is animated by the burdens that obligation imposes on States and industry sources, *see* Oral Arg. Tr. 58.

In sum, the court's conclusion that it would have been a "homemade" "stab in the dark" for the States to submit adequate "good neighbor" SIPs prior to promulgation of the Transport Rule lacks a basis in fact, and the court's speculation that EPA would have inevitably disapproved such submissions, *see* Op. at 56-57, is just that—speculation. And if that happened, States could judicially challenge the disapprovals, seeking a stay to avoid application of the Transport Rule FIPs. Absent record evidence to suggest that the plain text of the CAA's "good neighbor" SIP obligation on States leads to "an outcome *so contrary to perceived social values* that Congress could not have intended it," *Landstar Express*, 569 F.3d at 498-99 (internal quotation marks and citations omitted) (em-

phasis added), the court is bound, in view of the host of responsibilities placed on States in the CAA, to enforce the statute as Congress wrote it in plain terms, to give deference to EPA's permissible interpretations where the CAA is silent or ambiguous, and to adhere to the court's interpretation of EPA's authority in *Michigan*, as well as acknowledge, as the expert agency has advised without contradiction, that States have demonstrated competence to satisfy their plain statutory "good neighbor" obligations.

II.

The court also is without jurisdiction to hold that EPA lacked statutory authority to use a different measure of "significant contribution" for setting emission reduction budgets, unrelated to its measure of "significance" for purposes of threshold inclusion of individual States in the Transport Rule. Op. at 34-37. Petitioners contended that there was a hypothetical possibility that "application of cost-effective controls [] could drive a State's emissions below the point that, under phase one, would have excluded the State from any regulation whatsoever." State Petrs' Br. at 35; Industry & Labor Petrs' Br. at 22-24.[15] Because no

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[15] As EPA responded, nothing in the record suggests this hypothetical possibility actually would occur as a result of the Transport Rule, *see* Resp.'s Br. at 33-34 & n.20; *id.* at 32 n.18, and the point of choosing a "cost" that is "effective" for each State assumes only a reasonable subset of emissions will be reduced. *See* Oral Arg. Tr. at 44-46. Furthermore, contrary to the court's suggestion, *see* Op. 37 n.23, EPA explained that selecting a cost below $500/ton of emissions would permit States to stop operating existing controls,

objection was made during the Transport Rule administrative proceedings to EPA's statutory authority to adopt its two-step approach, the court thus lacks jurisdiction to decide this issue. *See* CAA § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B). The jurisdictional question is not *close*; the court's effort to avoid this court's well-settled precedent fails clearly.

A.

Section 307(d)(7)(B) of the CAA provides 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." 42 U.S.C. § 7607(d)(7)(B) (emphasis added). The court has "'strictly' enforce[d] this requirement," *Mossville Envtl. Action Now v. EPA*, 370 F.3d 1232, 1238 (D.C. Cir. 2004) (quoting *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998)); *see also Natural Res. Def. Council v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009). The court also has made clear that "[r]easonable specificity requires something more than a general challenge to EPA's approach." *Mossville*, 370 F.3d at 1238 (internal quotation marks and alteration omitted). The court's enforcement of this requirement has been most strict in the context of statutory authority objections:

> While there are surely limits on the level of congruity required between a party's arguments before an administrative agency and the court, respect for

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thus increasing, rather than decreasing, pollution. *See* Transport Rule, 76 Fed. Reg. at 48,256-57.

> agencies' proper role in the *Chevron* framework requires that the court be *particularly careful* to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum.

Cement Kiln Recycling v. EPA, 255 F.3d 855, 860 (D.C. Cir. 2001) (quoting *Natural Res. Def. Council, Inc. v. EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994)) (emphasis added). Consistently, until now, the court has held that failure to object specifically to EPA's lack of *statutory authority* is grounds for dismissal of such objections in this court. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 559 F.3d 561, 563-64 (D.C. Cir. 2009); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1097 (D.C. Cir. 1996); *Ohio v. EPA*, 997 F.2d 1520, 1528 (D.C. Cir. 1993); *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1308 (D.C. Cir. 1991); *Natural Res. Def. Council v. Thomas*, 805 F.2d 410, 427 (D.C. Cir. 1986).

Notably on point, in *Cement Kiln* the court held that comments stating a policy preference to EPA were insufficient to preserve for judicial review objections that the preferred approach was statutorily required, 255 F.3d at 860-61. "[T]hese comments merely argued that EPA could permissibly *consider* [the approach], not (as petitioners now argue) that [the CAA] *requires* [the approach]." *Id.* at 860 (internal quotation marks and citation omitted) (emphases in original). And "the parties were not saved by the fact that they had made other technical, policy, or legal arguments before the agency. Indeed, if such were the rule, a party could never waive a legal claim as

long as the party in fact appeared and argued *something* before the agency." *Nat. Res. Def. Council*, 25 F.3d at 1074 (internal quotation marks omitted) (emphasis added).

Petitioners rely on two comments in an attempt to show a challenge to EPA's statutory authority to the approach it adopted was presented during the Transport Rule administrative proceedings. *See* Industry & Labor Petrs.' Reply Br. at 6, n.1. Neither is sufficient. Tennessee commented that "[a] lower cost threshold should be considered for any State that can reduce their contribution below 1% significance using cost thresholds below the maximum values ($2,000/ton for SO_2 and $500/ton for NO_x), if applicable." Tennessee Comments on 2010 Proposed Transport Rule, Attachment 1, at 1 (Aug. 27, 2010). But this comment does not suggest that EPA is statutorily barred from following its approach. *See Cement Kiln*, 255 F.3d at 860-61; *Natural Res. Def. Council*, 25 F.3d at 1073-74. Furthermore, Tennessee's comment does not even suggest a policy preference that the one percent of NAAQS threshold level be a floor. Rather, Tennessee's comment specifically mentions States reducing contributions *below* the threshold without suggesting that result would violate the CAA. Thus, the only thing Tennessee commented on with "reasonable specificity" was that EPA consider not using a uniform cost threshold for all States.

Wisconsin's comment also does not demonstrate the statutory authority challenge now advanced by petitioners in this court was preserved. First, Wisconsin

stated that it "support[ed] the 1% contribution threshold . . . for identifying states that are significant contributors to downwind state's air quality nonattainment and maintenance problems." Wisconsin Comments, at 1 (Oct. 1, 2010). Wisconsin further stated:

> State final emission budgets (2014) need to be set with a stronger linkage to residual air quality impact from the [electricity generating unit ("EGU")] on downwind sites compared to the current proposed linkage of limiting emission reductions by an *arbitrarily low cost threshold*. EPA has set which states have contribution reduction responsibility based on air quality impact, but appears to default to a modeling of the most efficient regional EGU control program based exclusively on cost-effectiveness.
>
> In defining significant contribution, EPA *should* place a *greater emphasis* on air quality impact (contribution) remedy than the assessed state-by-state marginal control cost-effectiveness of proposed remedy in the setting of the 2014 state budgets for EGU reductions. Issues are both legal and a concern for some level of EGU system control installation equity between nearby states and between facilities with differing coal types which are dispatched within the same electricity markets.

Id. at 7 (emphases added). Wisconsin nowhere suggested that EPA is statutorily required to use the one percent inclusion threshold as a floor for emission reductions; it simply urged that EPA "should" put a

"greater emphasis" on air quality impacts at the *individual EGU* level. Indeed, Wisconsin commented that the cost threshold was *too low*, the exact opposite of what petitioners now claim. *See* Industry & Labor Petrs.' Br. at 31-34. The closest Wisconsin comes to raising a statutory authority argument is its statement that the "issues are [] legal;" but that vague comment is in a sentence indicating the State's preference that EPA regulate at the EGU, rather than the State level, in order to achieve "EGU system control installation equity." Wisconsin Comments, at 7.

Consequently, neither Tennessee's nor Wisconsin's comments argued "with reasonable specificity" that EPA was statutorily required to treat the threshold inclusion level in its two-step approach to defining "significant contribution" as a floor in calculating emission reduction requirements.[16] Nor do they even present a policy preference for such an approach and, indeed, can be interpreted as *supporting* sub-threshold reductions. Even if the comments *implied* a challenge, which they do not, an implied challenge is insufficient because

> that is not the way the regulatory system is structured. Such a standard would require agencies to

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[16] The court adds a cite, *see* Op. at 34 n.18, to a comment from Delaware: "It is Delaware's opinion that an upwind state's emissions contribution is significant . . . based on the emissions and their effect on air quality, and is independent of cost considerations." This is not a statutory authority objection to the two-step approach, and in any event EPA's rejection of Delaware's "opinion" was sustained in *Michigan*, 213 F.3d at 679.

> review perpetually all of the 'implied' challenges in any challenge they receive. We will not impose such a burden on the agency. All that [petitioner] had to do was draft one sentence that specifically challenged EPA's decision. It did not, and that specific challenge is thus not preserved.
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> . . .
>
> [T]he only way [the comments] could be read as placing the EPA on notice is to place the burden on EPA to cull through all the letters it receives and answer all of the possible implied arguments. Such a rule would defeat the statutory requirement for "reasonable specificity."

Mossville, 370 F.3d at 1239-40. None of the comments during the Transport Rule administrative proceedings approaches the level of "reasonable specificity" required for this court to have jurisdiction over petitioners' new statutory authority argument.

B.

Acknowledging this, the court nonetheless concludes that it has jurisdiction to address this new issue because "EPA was on notice that its disregard of the significance floor was a potential legal infirmity in its approach." Op. at 34 n.18. None of the three reasons the court offers for its conclusion that there need not be objections raised "with reasonable specificity during the period for public comment," 42 U.S.C. § 7607(d)(7)(B), is convincing.

First, the court states that EPA was required "to craft a new rule consistent with [*North Carolina*]," Op.

at 32 n.18 (internal quotation marks and citation omitted), and thus should have been alerted to petitioners' new objection, raised for the first time now in this court. But in *North Carolina* the court specifically permitted the exact same approach in CAIR. Discussing this approach, the court explained:

> [S]tate SO_2 budgets are *unrelated* to the criterion (the "air quality factor") by which EPA included states in CAIR's SO_2 program. Significant contributors, *for purposes of inclusion only*, are those states EPA projects will contribute at least 0.2 μ/m^3 of $PM_{2.5}$ to a nonattainment area in another state. While we would have expected EPA to require states to eliminate contributions above this threshold, EPA claims to have used [as its] measure . . . emissions that sources within a state can eliminate by applying "highly cost-effective controls." EPA used a similar approach in deciding which states to include in the NO_x SIP Call, which *Michigan* did not disturb since "no one quarrel[ed] either with its use of multiple measures, or the way it drew the line at" the inclusion stage. 213 F.3d at 675. Likewise here, the SO_2 Petitioners do not quarrel with EPA drawing the line at 0.2 μ/m^3 or its *different measure* of significance for determining states' SO_2 budgets. Again, *we do not disturb this approach.*

North Carolina, 531 F.3d at 916-17 (emphases added). There is no basis to conclude that EPA acted inconsistently with *North Carolina* by replicating the approach the court left undisturbed. It is true that in

North Carolina the court rejected EPA's use of fuel factors in allocating allowances for the CAIR trading program because doing so redistributed reduction responsibilities to the benefit of States with more coal-fired electricity generation, *see id.* at 920-21. The court stated that EPA

> may not require some states to *exceed the mark*. Because the fuel-adjustment factors shifted the burden of emission reductions *solely* in pursuit of equity among upwind states—an improper reason —the resulting state budgets were *arbitrary and capricious.*

Id. at 921 (emphases added). But a holding that EPA had acted *arbitrarily* in designing its trading program cannot fairly be deemed to alert EPA that it might exceed its *statutory authority* in using an approach to measuring "significant contribution" that the court *specifically* declined to disturb. *Cf. Natural Res. Def. Council v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009) ("EPA cannot be expected to take [an] argument, raised in support of one specific objection, and apply it sua sponte to another provision."). EPA was entitled, in the absence of objection in the Transport Rule administrative proceedings, to rely in promulgating the Transport Rule upon the court's decision not to disturb its approach. And the fact that after *North Carolina* no comment in the Transport Rule administrative proceedings objected that EPA was exceeding its statutory authority in adopting its approach underscores the fact that EPA was not acting inconsistently with

North Carolina in light of a few sentences about fuel factors plucked out of context.

Second, reaching farther afield, the court points to a comment submitted during the CAIR rulemaking that it deems sufficient, when combined with the holding in *North Carolina*, to "show that EPA 'had notice of this issue and could, or should have, taken it into account.'" Op. at 33 n.18 (quoting *Natural Res. Def. Council v. EPA*, 824 F.2d at 1146, 1151 (D.C. Cir. 1987)).[17] The CAIR comment stated "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." CAIR, 70 Fed. Reg. 25,162, 25,176-77 (May 12, 2005). This comment, which was not cited in any petitioners' brief to this court but first mentioned by industry petitioners during rebuttal oral argument, cannot carry the weight the court assigns to it particularly in light of the holding in *North Carolina*. The court generally does not entertain arguments raised for the first time in a reply brief, *see Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011); *North Carolina*, 531 F.3d at 924 n.6, let alone for the first time at oral argument, *see Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1181 (D.C. Cir. 2011); *Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108 n.4 (D.C.

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[17] Remarkably, the court quotes a case in which the common law exhaustion doctrine, rather than CAA section 307(d)(7)(B), applied: the rule at issue was promulgated prior to enactment of section 307(d)(7)(B). *See Natural Res. Def. Council*, 824 F.2d at 1150-51.

Cir. 2003), much less during *rebuttal* oral argument, *see Coalition of Battery Recyclers Ass'n*, 604 F.3d at 623; *Old Dominion Dairy Products, Inc. v. Sec. of Defense*, 631 F.2d 953, 961 n.17 (D.C. Cir. 1980). The reason is simple: "in order to prevent 'sandbagging of appellees and respondents,' we do not consider arguments that were raised neither in the opening brief nor by respondents." *S. Coast Air Quality Mgmt. Dist. v. EPA*, 554 F.3d 1076, 1081 n.* (D.C. Cir. 2009) (quoting *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000)). Here that reason has particular resonance because EPA was relying on the court's decision in *North Carolina*, 531 F.3d at 916-17, to "not disturb" its two-step approach to defining "significant contribution," and no one referenced the CAIR comment during the Transport Rule administrative proceedings.

Even setting aside the starkly novel forfeiture standard the court has chosen to apply to industry petitioners, the cited CAIR comment is insufficient to establish that the issue of EPA's statutory authority was properly preserved for the court to have jurisdiction to address it. The court relies on a footnote in *American Petroleum Institute v. EPA*, 52 F.3d 1113, 1120 n.1 (D.C. Cir. 1995), for the proposition that it is "highly relevant" if an agency previously "reject[ed] [] the same argument in a prior rulemaking," Op. at 33 n.18. Although the CAIR comment communicates a policy preference, this court has distinguished between comments presenting policy preferences and those presenting statutory authority objections, *see, e.g.*, *Cement Kiln*, 255 F.3d at 860-61, and technical and

policy arguments are insufficient to preserve objections to EPA's statutory authority. *See Nat. Res. Def. Council*, 25 F.3d at 1074. The CAIR comment that EPA rejected in the other rulemaking is therefore not "the same argument" that petitioners belatedly attempt to raise now. Furthermore, in *American Petroleum*, the court concluded that the jurisdictional question was "close" inasmuch as EPA had *explicitly* incorporated the docket from the previous rulemaking in the second rulemaking, and the previous rulemaking had been aborted, such that there was no intervening opportunity for judicial review. *See Am. Petroleum*, 52 F.3d at 1120 n.1. Neither of those factors that made *American Petroleum* a close case is present here. The Transport Rule was promulgated to replace CAIR, but the CAIR docket was never incorporated into the Transport Rule docket—perhaps because of the court's instruction in *North Carolina* that EPA "redo its analysis from the ground up." 531 F.3d at 929. EPA would have had no reason to reexamine the voluminous CAIR docket in search for objections that were not raised before the court in *North Carolina*. Also, unlike the aborted rule whose docket EPA incorporated in *American Petroleum*, in CAIR there was an intervening opportunity for judicial review. Yet no one sought judicial review of CAIR on the basis of the CAIR comment now relied on by the court. This precise circumstance was relied upon by the court in *North Carolina* in declining to disturb EPA's approach. *See id.* at 917; *see Med.*

Waste, 645 F.3d at 427.[18] Once the court in *North Carolina* declined to disturb EPA's approach, because no objection to EPA's authority to adopt its approach had been raised to the court, petitioners were required to inform EPA during the Transport Rule administrative proceedings that they objected to EPA's statutory authority to pursue that approach. *See* 42 U.S.C. § 7607(d)(7)(B). If *American Petroleum* presented a "close" jurisdictional question, then the jurisdictional question here is easily decided.

Third, the court concludes that "EPA's statements at the proposal stage indicated EPA was not open to reconsidering CAIR's earlier rejection of petitioners' argument," and that because EPA had dismissed "the two air quality-only approaches it considered," the comments of Tennessee, Wisconsin, and Delaware

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[18] The fact that Kansas, Nebraska, and Oklahoma were *not* regulated under CAIR, and thus would have a newly ripened claim, *see Coalition for Responsible Regulation*, 684 F.3d at 129-32, does not mean that those States are relieved from *making* that claim during the Transport Rule administrative proceedings, as CAA section 307(d)(7)(B) requires. This is all the more true here because the petitioners who *were* subject to CAIR *abandoned* the CAIR comment now relied on by the court when they sought judicial review. To suggest that EPA should have foreseen that Kansas, Nebraska, and Oklahoma, despite *not making* an objection to the proposed Transport Rule on this ground, secretly *did* object on the basis of a comment made during a rulemaking to which they were not parties, and was abandoned on judicial review by those who made it, distorts the ripeness and CAA exhaustion doctrines beyond recognition and "give[s] parties to Clean Air Act proceedings a powerful weapon for delaying and sandbagging Agency action." *Lead Indus. Ass'n Inc. v. EPA*, 647 F.2d 1130, 1173 (D.C. Cir. 1980).

were "'reasonable' under the circumstances," Op. at 33, n.18. But there was no such "earlier rejection of petitioners' argument" in CAIR because the CAIR comment did not suggest that EPA *exceeded its statutory authority* by following its two-step approach to defining "significant contribution." *See Cement Kiln*, 255 F.3d at 860-61. Furthermore, industry petitioners acknowledge in their Reply Brief that they "are not advocating an 'air quality-only' approach," but instead a cost-based approach with a floor for emission reduction obligations. Industry & Labor Petrs' Reply Br. at 10. So, EPA's rejection of two alternative air quality only approaches has no bearing on whether EPA would have been willing to entertain an objection during the Transport Rule administrative proceedings that the "good neighbor" provision required it to use the threshold level for a State's inclusion in the Transport Rule as a floor for emission reduction obligations.

Nothing in this court's precedent on CAA section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), supports the court's tortured efforts to avoid the jurisdictional limits in the CAA and seize jurisdiction where petitioners clearly fall far short of preserving their claim by objecting to EPA's statutory authority during the Transport Rule administrative proceedings with "reasonable specificity." The court does not acknowledge this court's precedent setting a strict standard for preservation of statutory authority objections, which demonstrates the inconsistency of the court's exercise of jurisdiction today. *See, e.g.*, *Natural Res. Def. Council*, 559 F.3d at 563-64; *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 538 (D.C. Cir. 2009); *Natural*

Res. Def. Council v. EPA, 571 F.3d 1245, 1259 (D.C. Cir. 2009); *Mossville*, 370 F.3d at 1238; *Cement Kiln*, 255 F.3d at 860-61; *George E. Warren Corp. v. EPA*, 159 F.3d 616, 629 (D.C. Cir. 1998); *Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 462; *Natural Res. Def. Council*, 25 F.3d at 1074; *Ohio v. EPA*, 997 F.2d at 1528-29; *Natural Res. Def. Council v. EPA*, 937 F.2d 641, 647-48 (D.C. Cir. 1991); *Linemaster Switch Corp.*, 938 F.2d at 1308; *Thomas*, 805 F.2d at 425-27; *Lead Indus. Ass'n*, 647 F.2d at 1173.

Rather than confront the force of this precedent, the court relies on phrases from a few opinions suggesting a more flexible standard, *see* Op. at 31-34 n.18, but tellingly omits any discussion of the analyses or outcomes in those cases. This is because even where the court has mentioned flexibility, the comments at issue were either significantly more specific than the comments of Tennessee and Wisconsin, and were thus sufficient, or were more specific but nonetheless deemed Wanting. For example, in *Natural Resources Defense Council v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009), the court suggested there is "leeway" but concluded, in words that resonate here, that "EPA cannot be expected to take [an] argument, raised in support of one specific objection, and apply it sua sponte to another provision." *Id.* at 1259-60. The irony in the court's reliance on this case is that it expects EPA to read *North Carolina* in precisely the opposite manner—it concludes EPA should have taken a holding about "exceeding the mark" in the CAIR trading allowance program and *sua sponte* applied it to the methodology for calculating "significant contribu-

tion," even though the court explicitly declined to disturb that methodology. *See supra* Pt. II.B. In *Appalachian Power*, 135 F.3d 791, 817 (D.C. Cir. 1998), the court concluded the "argument . . . during the comment period [was]—in substance, if not in form, the same objection" raised before the court, whereas here the comments of Tennessee and Wisconsin did not raise the statutory authority objection now urged upon the court in either form *or* substance. The court also relies on *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1150-51 (D.C. Cir. 1987) (en banc), which involved common law exhaustion, not CAA section 307(d)(7)(B), and in that case the issue was "explicitly raised . . . in comments" before the EPA, *id.* at 1151. And although observing in *South Coast Air Quality Management District v. EPA*, 472 F.3d 882, 891-92 (D.C. Cir. 2009), that petitioners have "some leeway," the court concluded that leeway did not permit the petitioner to rely upon a general procedural preference stated in a cover letter to its comments to alert EPA to the details of the objections to a final rule.

None of the court's proffered reasons for ignoring section 307(d)(7)(B)'s jurisdictional limitations has merit on its own, nor in combination. "[Z]ero plus zero [plus zero] equals zero." *U.S. v. Clipper*, 313 F.3d 605, 609 (D.C. Cir. 2002).

III.

The court's remaining reasons for vacating the Transport Rule are also either beyond its jurisdiction or unpersuasive.

First, the court concludes that EPA violated the CAA by not calculating the required emission reductions "on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems." Op. at 38. This is so, the court says, because in *Michigan* the court only permitted cost to be considered as a way "to allow some upwind States to do *less* than their full fair share," not more. *Id.* Petitioners have not argued that EPA violated the CAA by not calculating emission reductions on a proportional basis, as the court suggests. *See Anna Jaques Hosp. v. Sebelius*, 583 F.3d 1, 7 (D.C. Cir. 2009). The statement in industry petitioners' brief that the court quotes, *see* Op. at 37, instead maintains that EPA was *arbitrary and capricious* in the way it grouped States for 2014 sulfur dioxide (SO_2) budgets because, they claimed, EPA did so without "consider[ing] *relative* contributions of the various States," Industry & Labor Petrs' Br. at 33. This challenge is limited to the asserted *arbitrariness* of how certain States were categorized for one pollutant's budget for one year. The court lacks jurisdiction to consider *sua sponte* an objection to EPA's statutory authority not raised by petitioners within the sixty day period required under CAA section 307(b)(1), 42 U.S.C. § 7607(b)(1); *see Med. Waste*, 645 F.3d at 427. As this court has previously said, "[t]o rely on relief plaintiffs never requested on a claim they never made would be to conclude that zero plus zero equals more than zero." *NAACP, Jefferson Cnty. Branch v. U.S. Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996).

Second, even if petitioners *had* raised a "proportionality" statutory authority objection, this objection and the court's conclusion are premised on the speculative possibility that the Transport Rule might require States to reduce emissions to a level below the one percent of NAAQS inclusion threshold of EPA's two-step approach to defining "signification contribution," and thus *more* than their statutory fair share —an argument over which the court also lacks jurisdiction. *See supra* Part II. Further, the court's conclusion is at odds with *North Carolina* where the court concluded that EPA's measure of significant contribution need not "directly correlate with each State's individualized air quality impact on downwind nonattainment *relative to other upwind states*." 531 F.3d at 908 (emphasis added); *see LaShawn A.*, 87 F.3d at 1395. It also ignores that in *Michigan* the court expressly permitted the use of uniform cost thresholds to measure "significance," and likewise permitted the "ineluctabl[e]" result of small and large contributors being required to make the same amount of reductions. 213 F.3d at 679. Without jurisdiction to reach an argument on whether the Transport Rule requires States to reduce *more* than their statutory fair share, *Michigan* requires the conclusion that EPA's choice of cost thresholds in the Transport Rule was permissible.

Next, the court concludes that EPA failed to consider the effect of in-State emissions of downwind States on their own nonattainment and interference with maintenance problems, *see* Op. at 38. Petitioners conceded at oral argument that this "in-State con-

tribution" contention was "not actually an independent statutory authority argument," Oral Arg. Tr. at 32, but merely a repackaged version of the objection to the possibility of reductions below the one percent of NAAQS inclusion threshold, an argument over which the court lacks jurisdiction, *see supra* Part II. Even if the court had jurisdiction to address it, the court's conclusion is unsupported by the record. EPA examined the various cost threshold for each State, and in so doing considered

> how much air quality improvement in downwind states result[ed] from upwind state emission reductions at different levels; whether, considering upwind emission reductions and *assumed local (in-state) reductions*, the downwind air quality problems would be resolved; and the components of the remaining downwind air quality problem (e.g., whether it is *a predominantly local or in-state problem*, or whether it still contains a large upwind component).

Transport Rule, 76 Fed. Reg. at 48,256 (emphases added); *see id.* at 48,259 (concluding remaining nonattainment problem in Liberty-Clairton was the result of local emissions). EPA thus in fact examined the contribution of downwind States to their own nonattainment problems.

Finally, the court concludes that EPA "did not try to take steps to avoid" collective over-control, Op. at 39. This conclusion too is unsupported by the record. The Transport Rule was not projected to achieve attainment of all downwind nonattainment and mainte-

nance problems attributed to upwind States. *See id.* at 48,210, 48,232, 48,247-48; Resp.'s Br. at 38 n.24. Because EPA's analysis demonstrated instances of "remaining downwind air quality problems," Transport Rule, 76 Fed. Reg. at 48,256, there is no support for the court's conclusion that the Transport Rule resulted in collective overcontrol.

IV.

The Transport Rule, as EPA observes, represents "the culmination of decades of Congressional, administrative, and judicial efforts to fashion a workable, comprehensive regulatory approach to interstate air pollution issues that have huge public health implications." Resp.'s Br. at 12. The legislative history to amendments of the CAA documents Congress's frustration with the upwind States' historic failure to take effective action on their own to curtail their contributions to problems of pollution in downwind States, leading to amendments to strengthen EPA's hand. The court ignores Congress's limitations on the court's jurisdiction and decades of precedent strictly enforcing those limitations and proceeds to do violence to the plain text of the CAA and EPA's permissible interpretations of the CAA, all while claiming to be "apply[ing] and enforc[ing] the statute as it's now written." Op. at 8. The result is the endorsement of a "maximum delay" strategy for regulated entities, rewarding States and industry for cloaking their objections throughout years of administrative rulemaking procedures and blindsiding the agency with both a collateral attack on its interpretation of section 110(a)

and an objection raised for the first time in this court, despite the court's previous decisions declining to disturb the approach EPA adopted in the Transport Rule.

To reach the result—vacating the Transport Rule—the court does several remarkable things. It seizes jurisdiction over the issue of States' independent "good neighbor" obligation by allowing States to pursue a collateral attack on Final SIP Rules from which they either failed timely to file petitions for review or their petitions challenging those rules have not been consolidated with the petitions challenging the Transport Rule that are before this three-judge panel. It asserts jurisdiction over industry's challenge to EPA's two-step approach to defining "significant contribution" by excusing industry from its failure to preserve the issue by first presenting it to EPA and then resting jurisdiction on a comment in another rulemaking that was first cited by industry in *rebuttal* oral argument and cannot bear the weight the court assigns to it because it did not challenge EPA's statutory authority to adopt its two-step approach. All this is contrary to Congress's limitations on the court's jurisdiction and this court's precedent enforcing those limitations. The rest of the court's analysis recalibrates Congress's statutory scheme and vision of cooperative federalism in the CAA. Along the way, the court abandons any consideration that an agency is entitled to repose, absent objection during its administrative proceedings, when a court, here on *two* occasion, expressly leaves undisturbed its two-step approach to enforcing a statute it administers and no objection is raised during the

Transport Rule administrative proceedings. Then, in dictum, the court offers suggestions as to how EPA might fix the problems the court has created upon rewriting the CAA and trampling on this court's precedent in *North Carolina* and *Michigan*.

None of this is to suggest that EPA should be excused from the statutory limits on its authority or any material procedural missteps under the CAA or the APA. But neither can the court ignore jurisdictional limits or substantive provisions that Congress wrote in clear terms and EPA's permissible interpretations of the CAA in addressing statutory silence or ambiguity. Rather it underscores why, as a programmatic and public health matter, Congress concluded there are important reasons for jurisdictional limits and administrative exhaustion that this court heretofore has steadfastly acknowledged in recognizing both the limits of its jurisdiction and of its role in enforcing the CAA as Congress wrote it.

Accordingly, I respectfully dissent.