Nos. 12-1182, 12-1183

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT STATES AND CITIES IN SUPPORT OF PETITIONERS

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INTRODUCTION

The States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, North Carolina, Rhode Island, and Vermont, the District of Columbia, and the Cities of Bridgeport, Chicago, New York, and Philadelphia, and the Mayor and City Council of Baltimore ("States and Cities"), all intervenor-respondents supporting the validity of the Transport Rule in the court of appeals, respectfully submit this brief in support of the petitions for a writ of certiorari filed by the Environmental Protection Agency (EPA Petition, No. 12-1182), and the American Lung Association, *et al.* (ALA Petition, No. 12-1183).

Respondent States and Cities support the grant of certiorari on each of the questions presented in the petitions, but focus in this brief on the second question presented in the EPA Petition (corresponding to the third question presented in the ALA Petition): where the Clean Air Act's "good neighbor" provision requires States to adopt state implementation plans (SIPs) that prohibit emissions that "contribute significantly" to air pollution problems in other States, *see* 42 U.S.C. § 7410(a)(2)(D)(i)(I), are States excused from compliance until the EPA has adopted a rule quantifying each State's interstate pollution obligations?

This question is of overriding importance to the States and Cities. Downwind States and Cities have imposed stringent and expensive emissions-reduction requirements in an effort to prevent the thousands of premature deaths and billions of dollars in increased health-care costs associated with air pollution and yet are still unable to meet and maintain compliance with

national air-quality standards that EPA has determined are necessary to protect public health. Effective interstate pollution controls are therefore crucial to the efforts of many downwind areas to achieve safe air quality.

The Clean Air Act's "good neighbor" provision was designed to make States jointly responsible for addressing air-quality problems regardless of whether the problems are caused by in-state or out-of-state sources. And real-world experience confirms Congress's judgment that States can model and determine their contribution to interstate air pollution to comply with their good-neighbor obligations. By exempting States from the independent, immediately enforceable good-neighbor obligations that the plain text of the Act imposes, the court of appeals excised a key compliance tool from the Act. If not corrected, the decision will deny downwind States and Cities the protection Congress intended to provide and fatally frustrate the Act's requirement of timely attainment of air-quality standards.

STATEMENT

1. This case concerns the decades-long struggle to address and remedy the harms of interstate air pollution. More than a century ago, in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), this Court recognized that the harms of air pollution are not limited to local effects. Pollution originating in one State can cause serious damage to the environment and public health in neighboring States. From the inception of the modern Clean Air Act in 1970, Congress has sought to address the problem of interstate air pollution and has strengthened States' obligations over time. EPA Pet. at 2-4. The applicable

section is known as the "good neighbor" provision because it has the aim of making States responsible for in-state emissions that cause out-of-state harm.

The current version of the good-neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), operates within the Clean Air Act's cooperative federalism model to require States to address their contributions to air pollution in out-of-state areas. Under the Act, EPA sets health-based national ambient air quality standards (NAAQS) for particular air pollutants and must also identify areas that meet and fail to meet each NAAQS. *Id.* § 7407(c), (d). States, however, retain the primary responsibility to regulate air pollution to achieve the NAAQS by adopting state implementation plans (SIPs) that contain appropriate emissions control measures. *Id.* § 7410(a).

2. Because the goal of the Clean Air Act is timely compliance with air-quality standards necessary to protect public health and welfare, the Act imposes a series of interlocking deadlines:

- To ensure that the NAAQS serve their intended protective function, EPA has a continuing obligation to review each NAAQS every five years and to revise the NAAQS if necessary to meet statutory requirements. *Id.* § 7409(d)(1).

- States must submit SIPs for EPA approval within three years of EPA's promulgation of a new or revised NAAQS. *Id.* § 7410(a)(1).

- States also face stringent deadlines for attaining full NAAQS compliance (generally no later than five

years from promulgation of NAAQS, except for the ozone NAAQS, where deadlines vary between three and twenty years). *Id.* §§ 7502(a)(2), 7511(a), (b).

If States fail to achieve timely NAAQS compliance, they face significant statutory penalties. *Id.* § 7509(b). Likewise, if EPA finds that a State has failed to submit a timely SIP after promulgation of a NAAQS, it must issue a federal implementation plan (FIP) for the State. *Id.* § 7410(c).

3. The purpose of the good-neighbor provision is "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." S. Rep. No. 95-127, at 42 (1977). Based on experience in implementing the Act, Congress found that upwind States would have little incentive to control emissions whose harm was felt elsewhere unless the Act effectively mandated that upwind States act as good neighbors and remedy the out-of-state harms of their in-state emissions. This equitable concern has both a public health and an economic component, as States unable to attain healthy air must not only respond to harm to their residents but also enact increasingly expensive controls on in-state sources in an attempt to compensate for poorly controlled upwind emission sources.

Thus, the Act's good-neighbor provision is part and parcel of States' SIP obligations. Just as the Act requires States to submit SIPs that will assure NAAQS attainment for in-state regions, 42 U.S.C. § 7410(a)(1), the good-neighbor provision imposes the parallel obligation on States to submit SIPs that prohibit and control in-state emissions that "contribute significantly to nonattainment"

of a NAAQS in "any other State" or that "interfere with [NAAQS] maintenance by[] any other State." *Id.* § 7410(a)(2)(D)(i)(I).

Good-neighbor controls are also necessary to the Act's goal of prompt NAAQS compliance. Interstate pollution remains a serious public health problem. Many downwind States and localities have by now imposed substantial emissions controls—in some cases, controls more stringent than required under federal law. But downwind States and cities cannot reduce or eliminate emissions from upwind States that harm air quality in downwind areas. Unchecked pollution from upwind States continues to account for more than three-quarters of local air pollution concentrations in many areas struggling to attain or maintain NAAQS compliance. *See* ALA Pet. at 6.

4. EPA has issued several regulations to assist States in meeting their good-neighbor obligations under the Clean Air Act—each subject to extensive litigation. In 2008, the court of appeals found fundamental flaws in the Clean Air Interstate Rule (CAIR), the predecessor to the rule at issue in this litigation. Among other flaws, the court noted that EPA had failed to align CAIR's requirements for upwind States' good-neighbor emissions reductions with downwind States' statutory deadlines to comply with the NAAQS for ozone and fine particulate matter. *North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008) (per curiam). Recognizing that even the legally insufficient emissions reductions provided by CAIR were important to downwind States, the court left CAIR in effect pending remand to EPA to develop a new rule that met the court's objections. *North Carolina v. EPA*, 550 F.3d 1176 (2008) (per curiam).

5. In 2011, EPA promulgated the Transport Rule in response to the remand in *North Carolina*. The rule covers the 1997 ozone and annual fine-particulate matter NAAQS addressed in CAIR as well as a new 2006 daily fine-particulate matter NAAQS issued after CAIR was promulgated. The Transport Rule follows the same basic two-step analysis to determine significant contribution under the good-neighbor provision that EPA adopted in its prior good-neighbor rulemakings. EPA first conducted a "screening analysis" based on air-quality modeling to exclude States from coverage based on their minimal contribution to air pollution concentrations in downwind nonattainment and maintenance areas. In the second "control analysis" portion of the evaluation, EPA established baseline emissions-control obligations for upwind States not excluded by the agency's screening analysis.

EPA projected that the Transport Rule would enable a number of downwind States to timely attain the ozone NAAQS and almost all of these States to timely attain the fine particulate matter NAAQS. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone (FIPs Rule), 76 Fed. Reg. 48,208, 48,307-08 (Aug. 8, 2011). The Transport Rule further aligns the deadlines for upwind States to comply with their good-neighbor obligations with the deadlines for downwind States to comply with the NAAQS. *Id.* at 48,214.

More than a year prior to promulgating the Transport Rule, EPA had published findings that twenty-nine States and territories had failed to submit SIPs addressing their good-neighbor obligations or had submitted SIPs which failed to contain adequate good-neighbor controls.

See Finding of Failure to Submit Section 110 State Implementation Plans, 75 Fed. Reg. 32,673 (June 9, 2010); FIPs Rule, 76 Fed. Reg. at 48,219. The disapprovals triggered EPA's statutory obligation to issue FIPs for those States, 42 U.S.C. § 7410(c), and EPA issued FIPs as part of the Transport Rule.

6. Several upwind States and private companies whose emissions would be subject to the Transport Rule petitioned in the court of appeals for review. A divided panel of the court vacated the Rule. The majority held that EPA's definition of significant contribution in the Transport Rule was contrary to the good-neighbor provision. EPA Pet. App. 21a-41a. The majority further held that EPA's issuance of FIPs in the Rule was improper because States have no independent duty to comply with the good-neighbor provision. *Id.* 42a-61a. The majority concluded that good-neighbor protections were contingent on EPA first defining the amount by which each upwind State contributed significantly to nonattainment or interference with maintenance of NAAQS attainment in other States. *Id.* 45a-48a. Only then, and only after States were given "reasonable time" to issue SIPs after EPA's rulemaking, would States have an obligation to address interstate pollution in their SIPs. *Id.* Thus, EPA could not invalidate the relevant SIPs here, because the SIPs were submitted before the Transport Rule was finalized, and so FIPs to enforce the good-neighbor requirements were also premature. *Id.* 42a-43a.

Judge Rogers, who was also on the panel for the *North Carolina* decision, dissented. She concluded first that the petitioners had waived any argument that States had no good-neighbor duties unless EPA first established

significant contribution amounts, because that argument was a collateral attack on EPA's prior, and generally unchallenged, determinations that the States had not met their good-neighbor duties. *Id.* 70a-82a. Even if the issue had been properly raised, Judge Rogers reasoned that nothing in the text of the Clean Air Act made good-neighbor protections contingent on EPA rulemaking, or relieved States of their primary obligation to comply with the good-neighbor provision. *See id.* 83a-95a. Therefore, the dissent concluded that EPA properly issued FIPs to enforce the long-overdue emission-reduction requirements. *Id.* 86a. Judge Rogers also explained that the petitioners had waived the argument that EPA's approach to determining significant contribution was unlawful. *Id.* 95a-110a. Even if the argument had been properly before the court, she would have concluded that the Transport Rule was consistent with the language of the good-neighbor provision and the court's prior decisions interpreting the provision. *Id.* 110a-114a.

THE PETITIONS FOR CERTIORARI SHOULD BE GRANTED

The Clean Air Act creates a federal-state partnership for implementation of air-quality standards. Congress carefully delineated the complementary responsibilities of EPA and the States under the Act. The court of appeals' decision, however, exempts States from their primary and independent responsibility under the good-neighbor provision, and by doing so, distorts the statutory scheme that Congress crafted and the division of responsibilities that Congress intended. This Court's review is necessary to avoid the widespread adverse consequences that the decision will cause.

Because the good-neighbor provision is central to the Clean Air Act's design and intended function, the implications of the court of appeals' error extend far beyond an ordinary case of technical statutory misinterpretation. Eliminating the independent obligation of States to remedy their significant contributions to air pollution in downwind areas disables a necessary mechanism for downwind States to attain timely NAAQS compliance. Instead, the court of appeals made good-neighbor protections contingent on rulemaking by EPA.

But the Clean Air Act does not require federal action to trigger good-neighbor obligations. The Act specifically makes each State responsible in the first instance for addressing its downwind impacts in a SIP, thus tying good-neighbor obligations to the Act's mandatory SIP-submission deadlines. The court of appeals' contrary ruling contorts the Act's calibrated scheme. Even if EPA could promulgate a rule that satisfies the court of appeals' criteria, the lengthy delay involved and the removal of States' independent obligations to control their downwind emissions fatally disrupts the interconnected series of compliance deadlines and attainment goals the Clean Air Act contemplates. *See* EPA Pet. at 16-17. The repercussions of that error are widespread and ongoing: downwind States and localities and EPA will have to search for alternative means to achieve Congress's statutory plan for achieving safe air quality—and such means may not be available. Those governmental and administrative efforts will implement a stopgap scheme that increasingly veers from the intended template of the Act and will not assure the full, robust protections that Congress provided under the good-neighbor provision.

A. The Clean Air Act Imposes Parallel Independent Obligations on States to Control Emissions That Cause In-State and Interstate Air Pollution.

The Clean Air Act makes States primarily responsible for regulating and controlling air pollution. *See* 42 U.S.C. §§ 7401(a)(3), 7407(a). While EPA is charged with setting and updating NAAQS under sections 108 and 109 of the Act, *id.* §§ 7408, 7409, the Act places the responsibility for achieving NAAQS compliance on the States. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). Thus, under section 110 of the Act, each State must submit a SIP that: (1) controls in-state emissions that degrade the State's own air quality; and (2) also contains adequate good-neighbor provisions to redress the State's significant contribution to pollution in other States. 42 U.S.C. §§ 7410(a)(1) & (a)(2)(D)(i)(I).

The Act sets forth these dual state obligations in equivalent terms, imposing parallel emissions-control requirements on the States. Section 110(a)(2) lists the thirteen fundamental requirements for a SIP. Twelve of those requirements—subparagraphs (A) through (C) and (E) through (M)—focus on in-state obligations. Subparagraph (D) sets forth the Act's good-neighbor provision, requiring a State to also control emissions that cause harm outside the State. The statute does not differentiate between the listed SIP obligations. All the requirements are subject to the same deadline: they must all be met in a SIP submitted within three years of EPA's promulgation of a NAAQS. *Id.* § 7410(a)(1).

The parallel nature of all the SIP obligations—to address both in-state and out-of-state harms of air

pollution—makes sense. Pollution has the same harmful effect regardless of its source, and Congress enacted the good-neighbor provision to ensure that States bore equal responsibility for the effect of air pollution caused by in-state sources—whether the harmful effect manifests within the State or in other areas outside state borders. *See* S. Rep. No. 95-127, *supra*, at 42.

B. The Court of Appeals Improperly Exempted States from Their Independent Good-Neighbor Obligations That Are Central to the Function, Design, and Timeframes Imposed by the Act.

The court of appeals, however, rewrote the express language of the Act, relieving States of their obligations to submit good-neighbor implementation plans until (and unless) EPA first defines the nature and scope of required emissions reductions. The court reasoned that because determining the level of emission reductions necessary to satisfy a State's good-neighbor obligations "is analogous to setting a NAAQS," EPA must first determine the amounts of States' significant contributions to downwind air pollution before statutory good-neighbor protections are triggered. EPA Pet. App. 53a.

The court of appeals' analogy to the NAAQS is inapt because section 110(a)(2)—including the good-neighbor provision—lists the obligations of the *States*—not the obligations of EPA—and therefore charges the *States* with responsibility for eliminating in-state emissions that contribute significantly to downwind air-quality problems. Section 110 requires that "[e]ach State shall . . . adopt" a SIP and that each SIP "shall . . . contain adequate provisions" addressing out-of-state impacts. 42 U.S.C. §§ 7410(a)(1)

& (a)(2)(D)(i). The statutory section addressing the NAAQS, by contrast, expressly directs the Administrator of EPA to promulgate the NAAQS. *Id.* § 7409(a)(1)(B).

Deviating from the express statutory language here, and from the statute's express delineation of State and EPA responsibilities, is especially dangerous because the Act establishes a coordinated strategy for achieving air-quality standards. Without the immediate protections of the good-neighbor provision, downwind States will not be able to meet air-quality standards and maintain their compliance with the NAAQS within the specific timetables that Congress imposed. The Clean Air Act establishes an interlocking series of deadlines, carefully crafted to maximize the potential for expeditious and comprehensive NAAQS attainment. See *supra* at 3-4. The only triggering event for States to adopt SIPs that address both in-state and out-of-state pollution by in-state sources is EPA's promulgation of a NAAQS, a federal requirement subject to defined statutory deadlines. 42 U.S.C. §§ 7408, 7409.

In place of a coordinated statutory framework where SIP obligations are triggered by adoption of a NAAQS, and where good-neighbor protections are aligned with downwind States' statutory deadlines for complying with the NAAQS, the court of appeals impermissibly imposed its own judicially invented requirements unmoored from the timeframes imposed by Congress. While the statute unambiguously imposes on downwind States specific air-quality compliance deadlines, under the court of appeals' interpretation of the statute, there is no statutory deadline *at all* for triggering good-neighbor protections—only the open-ended contingency that EPA might promulgate a rule to define upwind States' good-neighbor obligations. Even after EPA finished such a rulemaking and the rulemaking

survived judicial review, upwind States would have to be afforded "reasonable time" to adopt SIPs that address their contribution to out-of-state pollution. EPA Pet. App. 47a. Only then would the good-neighbor provision finally become enforceable.

But Congress did not draft the Clean Air Act to delay good-neighbor protections until EPA provides guidance, nor is the "reasonable time" limitation found anywhere in the text of the statute. Adding these additional hurdles, which Congress did not contemplate, fatally disrupts the statutory blueprint and flies in the face of this Court's directive in *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, that a court of appeals may not "engraft[ ] [its] own notions of proper procedures upon agencies entrusted with substantive functions by Congress." 435 U.S. 519, 525 (1978).

C. States Are Capable of, and Experienced in, Analyzing Their Contributions to Air-Quality Problems in Downwind Areas.

In imposing these extrastatutory requirements, the court of appeals assumed that States lack the capacity to conduct the same modeling or analysis that EPA conducts to determine their significant contributions to air quality problems in downwind States. EPA Pet. App. 89a (Rogers, J., dissenting). But that assumption is refuted by real-world experience demonstrating that States can meaningfully model and determine their contributions to interstate air pollution in the first instance.

States can and do perform complex air quality modeling, *id.* 89a-90a (Rogers, J., dissenting), and States can and do organize themselves into coalitions

that perform regional modeling of air pollution using the same methodology and forms of data as the EPA. *See*, *e.g.*, Approval and Promulgation of Air Quality Implementation Plans (IL, IN, MI, MN, OH, WI), 77 Fed. Reg. 45,992, 46,006 (Aug. 2, 2012) (modeling by regional state consortium); Approval and Promulgation of Implementation Plans (GA), 77 Fed. Reg. 38,501, 38,506 (June 28, 2012) (modeling by coalition of southeastern States). Delaware, for example, successfully modeled its downwind contributions to other States and gained EPA approval of a good-neighbor SIP revision for the 2006 fine-particulate matter NAAQS. *See* Approval and Promulgation of Air Quality Implementation Plans (DE), 76 Fed. Reg. 53,638 (Aug. 29, 2011). EPA has also approved interstate transport SIPs for Colorado and other States that conducted the necessary analysis to determine and redress their significant contributions to out-of-state air pollution (*see* EPA Pet. at 18).

In addition, States have also developed experience under section 126 of the Act, 42 U.S.C. § 7426(b), which gives States the ability to petition EPA for a finding that out-of-state sources are emitting air pollutants that significantly contribute to nonattainment of a NAAQS in a petitioning State. Section 126(b) gives downwind States a remedy based on a showing of significant contribution, the same analysis that upwind States must conduct under the good-neighbor provision. To make a prima facie case under section 126(b), a state must perform its own air pollution modeling demonstrating the significant contribution of the upwind source(s). *See* Final Response to Petition From New Jersey Regarding SO_2 Emissions from the Portland Generating Station, 76 Fed. Reg. 69,052, 69,057-58 (Nov. 7, 2011) (describing modeling performed by New Jersey in support of its section 126(b) petition);

see also North Carolina ex rel. Cooper v. TVA, 593 F. Supp. 2d 812, 825 (W.D.N.C. 2009) (relying on modeling and analysis submitted by North Carolina to conclude that certain out-of-state power plants in three upwind states "contribute significantly to ozone levels within numerous North Carolina counties"), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010).

The court of appeals' ruling, however, disempowers States, discouraging them from proactively identifying and addressing their air pollution, as the Act directs and as States have done in the real world, until EPA defines their responsibilities for them.

D. The Court of Appeals' Ruling Distorts the Function and Enforcement of the Clean Air Act and Delays Compliance with Air-Quality Standards, Thus Causing Serious Public Health and Economic Harm.

The cascading consequences of the court of appeals' ruling warrant immediate review by this Court. Delaying enforcement of the good-neighbor provision beyond the three-year SIP deadline set by Congress makes adherence to the coordinated timeframes imposed by the Clean Air Act virtually impossible. Enforcement will not be tied to any event with a clear statutory deadline, but will instead be based on events and timing contingencies divorced from the statute.

As EPA explains, the court of appeals' holding renders the Act's NAAQS attainment deadlines a practical nullity for downwind States. EPA Pet. at 29-30. An enormous expenditure of administrative effort will be necessary for EPA to issue new significant-contribution findings,

and EPA must then give States additional time, which the agency projects to be several more years, to develop a strategy to implement those findings through the SIP process. The court of appeals' rulings on exhaustion and restrictions on EPA's interpretation of "contribute significantly" will only make the rulemaking process more prolonged and complex. *See id.* at 18-28.

The court of appeals' holding inverts the Act's incentive structure to reward and encourage inaction and delay. Because States have no obligation to remedy their contribution to downwind air pollution until EPA acts first, the incentives for States to take action shift. While Congress enacted a three-year deadline for SIPs that required States to take timely proactive action to control their contributions to downwind air pollution, the court of appeals' decision encourages States (and regulated industrial parties) to follow "a maximum delay strategy." EPA Pet. App. 114a (Rogers, J., dissenting). As long as States and regulated sources can challenge and delay EPA rulemakings defining significant contribution under the good-neighbor provision, they can avoid the emissions reductions necessary to ensure NAAQS attainment in downwind States.

The result is a potentially endless loop of delay. The Transport Rule addresses three distinct NAAQS, two of which are already over fifteen years old. See *supra* at 6. The court of appeals' decision exempts upwind States from fully addressing their contribution to downwind nonattainment of those NAAQS. In the meantime, EPA has recently revised the applicable NAAQS for eight-hour ozone and annual fine particulate matter. EPA Pet. at 6 n.4. Those 2008 and 2013 revisions, however, will not

be fully enforceable within three years, as the statute contemplates. Under the court of appeals' ruling, States have no good-neighbor obligations for the new NAAQS until and unless an EPA rulemaking is completed and legal challenges settled, a period that could easily take five or more years, exceeding the deadlines for NAAQS attainment and resulting in the States working on complying with a NAAQS for a given pollutant even after EPA has already issued a new, more stringent NAAQS for that same pollutant.

Permitting EPA to enforce CAIR as an interim measure may mitigate some of the harm of exempting States from independently enforceable good-neighbor obligations, but the practical need for CAIR demonstrates why Congress would not—and did not—make enforcement of good-neighbor protections contingent on EPA action as a first and necessary step. If CAIR is too "intertwined with the regulatory scheme" to vacate fully, *North Carolina*, 550 F.3d at 1179 (Rogers, J., concurring), and if it unacceptably harms "environmental values" not to have enforceable good-neighbor protections in place, *id.* at 1178, then a statutory reading that leads to the same result—because it would leave the good-neighbor provision indefinitely unenforceable—should not be upheld.

The Court should settle this issue. Even if EPA and downwind States could take steps to prevent further delay and to reduce the harm from unremedied interstate air pollution, implementation of the Act would increasingly diverge from the coherent statutory framework Congress enacted. Without a firm statutory deadline for independent enforcement of the good-neighbor provision, the Act's deadlines for EPA to issue and revise NAAQS and for

States to achieve compliance would lack practical meaning. The timely attainment of air-quality standards would be significantly if not indefinitely postponed; the statutory framework and time-frames could remain forever out of step. Immediate intervention from this Court will prevent that harm, which will be almost impossible to cure at a later stage.

Review is also warranted because continued delay imposes an especially intolerable burden on downwind States and cities. These burdens include direct harm from fine particulate matter to residents of these States. Because the Transport Rule requires larger and more aggressive reductions in sulfur dioxide than CAIR requires, it would avoid many more premature deaths attributable to fine-particulate matter than CAIR does. *See* Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210, 45,217 (Aug. 2, 2010) (Table III.A-4).

Regarding ozone pollution, some areas of the country, especially in the northeast, continue to struggle to comply even with the 1997 NAAQS. For example, the Baltimore, Maryland area has ozone concentrations well above that 1997 NAAQS of 0.08 parts per million (ppm). *See* EPA, Design Values—Period Ending 2011, Ozone Detailed Information, Table 1a (showing 0.092 ppm concentration of ozone), *available at* http://epa.gov/airtrends/values.html. Ozone pollution has worsened in the Baltimore area despite the fact that Maryland passed legislation requiring the State's fossil-fueled power plants to cut their emissions of nitrogen oxides by nearly seventy percent from 2002 levels; this worsening ozone pollution is attributable in large part to upwind emissions. Other major metropolitan

areas, such as New York City, Philadelphia, the District of Columbia, and Chicago are in nonattainment of the updated ozone standards, and have seen average ozone levels in recent years—while CAIR has been in place—stay the same or even worsen. *See* EPA, Design Values, Ozone Detailed Information, *supra*, Table 3a, cols. K & L (showing average ozone concentrations in these areas have worsened or stayed the same from 2008 to 2011). Because ozone pollution in these areas, as in Baltimore, is attributable in large part to upwind emissions, delays in addressing transported pollution will translate into more premature death and illness. The health harms and attendant costs from downwind nonattainment with the NAAQS will persist for years under the court of appeals' decision because it defers meaningful interstate pollution controls in contravention of the Clean Air Act.

CONCLUSION

The petitions for writs of certiorari should be granted.

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