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.

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

BRIEF FOR THE STATE AND LOCAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Clean Air Act ("CAA") effects a system of cooperative federalism under which the Environmental Protection Agency ("EPA") defines the air-quality obligations that the States must meet, and the States then have a chance to meet those obligations in the manner they see fit. *See Train v. NRDC*, 421 U.S. 60, 78-87 (1975). Consistent with that framework, the court of appeals held that EPA could not define the amounts of pollution that "contribute significantly," 42 U.S.C. § 7410(a)(2)(D)(i)(I), to air-quality problems in downwind States and, at the same time, find that upwind States had failed to abate those newly defined contributions. The court of appeals also concluded that the upwind States aggrieved by the rule implementing that unprecedented approach could not have raised their challenge before the rule was promulgated.

The questions addressed in this brief are:

1. Whether the court of appeals lacked jurisdiction over the federalism challenge because it was not presented until after EPA promulgated the rule that simultaneously defined the States' obligations and dictated how they must be met.

2. Whether the court of appeals erred in holding that EPA must give States included in a section-7410(a)(2)(D)(i)(I) regional program a chance to devise their own plans to satisfy EPA's requirements before EPA imposes federal plans of its own design.

The industry and labor respondents' opposition addresses the remaining questions presented.

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INTRODUCTION

The CAA's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), is EPA's primary tool for regulating air pollution that crosses state lines. Although the petitioners assert that the enactment of that provision in 1990 strengthened the agency's ability to ensure compliance with national ambient air quality standards ("NAAQS") in downwind States, *see* EPA Pet. 3-4, they do not claim that any statutory amendment licensed EPA to override the Act's structure of cooperative federalism. That core feature of the Act has remained a constant throughout all of the legislative changes that the petitioners note. *See* Pet. App. 43a n.26. As the court of appeals correctly held, the Act continues to give States the first opportunity to satisfy the emissions-reduction obligations that EPA mandates. *Id.* at 4a, 42a-61a; *see Train*, 421 U.S. at 78-87.

The rule at issue here, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (the "Transport Rule"), is not EPA's first attempt to implement the current version of section 7410(a)(2)(D)(i)(I). EPA previously promulgated two rules under that provision, each of which acknowledged the Act's system of cooperative federalism and appropriately gave upwind States designated for inclusion in a multi-state regional program a reasonable chance to meet the new requirements that EPA announced. *See* Pet. App. 55a-57a. But the Transport Rule departed from that approach. It simultaneously announced new requirements for the upwind States and mandated how those requirements must be met, cutting the

States included in EPA's new Transport Rule region out of the implementation process entirely. *See id.* at 42a-54a.

The States do not question EPA's ultimate goal of improving downwind air quality. But to achieve that goal, EPA must work within the parameters that Congress has set. Although the petitioners claim that the Transport Rule did so, their description of the rule contains several important omissions, their legal argument ignores key statutory language and this Court's confirmation of the Act's core structure, and their claims about the health-related impact of denying the petitions incorrectly assume that the Transport Rule's vacatur left interstate transport of air pollution unregulated. For these and the additional reasons that follow, further review is unwarranted.

STATEMENT

1. a. Under the CAA, the prevention of air pollution has always been "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). As the Court explained in 1975, "[t]he Act gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)]." *Train*, 421 U.S. at 79. The same is true today: EPA sets air-quality requirements, but the States are given the first opportunity to determine how best to meet those requirements through state implementation plans ("SIPs"). *See* 42 U.S.C. §§ 7407(a), 7410(a).

The process begins with EPA's promulgation of a NAAQS and its subsequent designation of areas as "nonattainment," "attainment," or "unclassifiable." *Id.* §§ 7407(c)–(d), 7409. Those designations inform the types of provisions that SIPs must contain. *See, e.g.*, *id.* § 7502(c) (describing plan provisions required for States with "nonattainment" areas). States then have up to three years to submit SIPs that "provide[] for implementation, maintenance, and enforcement" of the NAAQS on an appropriate compliance schedule. *Id.* § 7410(a)(1), (2)(A). After a SIP is submitted, EPA reviews it for technical completeness and compliance with the Act's requirements. *Id.* § 7410(k)(1)-(4).

If a SIP "as a whole . . . meets all of the applicable requirements of [the CAA]," EPA "shall approve" it. *Id.* § 7410(k)(3). If EPA concludes that a SIP it previously approved is "substantially inadequate to attain or maintain the relevant [NAAQS]" or otherwise fails to "comply with any requirement of [the CAA]," EPA "shall require the State to revise the [SIP] as necessary to correct such inadequacies." *Id.* § 7410(k)(5) (the "SIP call" provision).

EPA may promulgate a federal implementation plan ("FIP") only if a State fails to submit an approvable SIP—that is, only if a State "has failed to make a required submission" or EPA disapproves such a submission, and the State fails to correct the deficiency before a FIP issues. *Id.* § 7410(c)(1). By definition, a FIP may not impose requirements that a State has not yet had a chance to meet. *See id.*

§ 7602(y) (defining a FIP as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP]").

b. The Transport Rule attempted to implement 42 U.S.C. § 7410(a)(2)(D)(i)(I), which requires SIPs to

> contain adequate provisions—
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source . . . 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 [NAAQS].

The statute does not define "contribute significantly" or "interfere" either generally or with respect to specific NAAQS. And although relatively simple atmospheric-dispersion modeling can relate local emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x") to local ground-level concentrations of those pollutants, relating those emissions to the formation of fine particulate matter ("$PM_{2.5}$") and ozone—the two pollutants at issue here—is much more complex.

As the petitioners note, SO_2 and NO_x emissions can be transported great distances, transforming into particles that contribute to $PM_{2.5}$ concentrations hundreds of miles downwind. Similarly, NO_x emitted in an upwind State can interact with

sunlight and volatile organic compounds to form ozone that is transported to downwind States. *See* EPA Pet. 7-8 n.5 (describing how ozone and $PM_{2.5}$ can result from precursor emissions far upwind).

As explained below, EPA has attempted to develop a framework through legislative rulemaking to address, under the current version of section 7410(a)(2)(D)(i)(I), SO_2 and NO_x emissions in light of their impact on $PM_{2.5}$ and ozone concentrations in downwind States. The outcome of those rulemaking proceedings, which identified the States included in EPA's latest multi-state region and their interdependent emissions-reduction obligations, remained unknown until each final rule was promulgated.

2. a. The first rule that EPA promulgated under the current version of the statute was the 1998 NO_x SIP Call, which applied to a group of 23 States that, according to EPA's analysis, contributed significantly to downwind nonattainment of EPA's one-hour and eight-hour ozone NAAQS. 63 Fed. Reg. 57,356, 57,356, 57,358 (Oct. 27, 1998). As its name suggests, the NO_x SIP Call was not promulgated as a series of FIPs. It was a SIP call that gave the States identified in that rulemaking proceeding 12 months to submit SIPs specifying the particular mix of controls appropriate to abate the significant contributions that EPA had defined. *Id.* at 57,362, 57,367, 57,369-70, 57,451; *see* 42 U.S.C. § 7410(k)(5) (authorizing EPA to establish reasonable deadlines,

not to exceed 18 months after notice is given, for SIP revisions).

Citing *Train*, EPA explained in the NO_x SIP Call that "[d]etermining the overall level of air pollutants allowed to be emitted in a State [under section 7410(a)(2)(D)(i)(I)] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility." 63 Fed. Reg. at 57,369.

On judicial review, the D.C. Circuit vacated the NO_x SIP Call in part based on EPA's failure to give adequate notice of some elements of the rule. *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000) (per curiam), *cert. denied*, 532 U.S. 903, 904 (2001). But after confirming that the CAA gives States "the primary responsibility to attain and maintain NAAQS within their borders" through SIPs, the court held that the NO_x SIP Call, which "merely provide[d] the levels to be achieved by state-determined compliance mechanisms," was in keeping with EPA's statutory role. *Id.* at 671, 687. The court explained that EPA had given States "real choice" regarding how to comply with EPA's requirements, allowing them to "choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels." *Id.* at 687-88.

b. EPA's next regional section-7410(a)(2)(D)(i)(I) rule was the 2005 Clean Air Interstate Rule ("CAIR"). 70 Fed. Reg. 25,162 (May 12, 2005). CAIR covered 28 upwind States that EPA identified through its rulemaking process as significantly contributing to downwind nonattainment of the 1997 $PM_{2.5}$ and ozone NAAQS. *Id.* at 25,162. The rule did not impose any independent obligations to satisfy section 7410(a)(2)(D)(i)(I)'s "interfere with maintenance" language. Instead, it provided that the covered States would fully satisfy their section-7410(a)(2)(D)(i)(I) obligations by adopting SIPs that implemented the required reductions, which EPA derived by considering impacts only on downwind areas actually in nonattainment. *Id.* at 25,193 & n.45.

Like the NO_x SIP Call, CAIR required States to revise their SIPs, and it gave them the full 18 months to do so. *Id.* at 25,162, 25,263; 42 U.S.C. § 7410(k)(5). Only if a State failed to submit an approvable SIP could EPA impose a CAIR FIP. And although EPA did propose and ultimately finalize certain FIPs, those FIPs "in no way preclude[d] a State from developing its own SIP . . . ." 71 Fed. Reg. 25,328, 25,339 (Apr. 28, 2006). EPA explained that it had "considered the timing of each element of the FIP process to make sure to preserve each State's freedom to develop and implement SIPs." *Id.* at 25,340.

On judicial review, the D.C. Circuit held that CAIR's significant-contribution analysis was invalid.

North Carolina v. EPA, 531 F.3d 896, 917-21 (D.C. Cir. 2008) (per curiam). The court also found that EPA had impermissibly failed to give independent effect to section 7410(a)(2)(D)(i)(I)'s "interfere with maintenance" language. *Id.* at 909-10, 929. The court initially vacated CAIR and remanded the matter for EPA to cure "fundamental flaws" that would require re-evaluation of CAIR "from the ground up." *Id.* at 929, 930. But on rehearing, it granted EPA's request for remand without vacatur, preserving the environmental benefits of CAIR while EPA worked to promulgate a replacement. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

3. The 2011 Transport Rule was EPA's intended replacement for CAIR. 76 Fed. Reg. at 48,211. But rather than issuing a section-7410(k)(5) SIP call, EPA imposed the Transport Rule as a series of FIPs governing 27 upwind States' obligations under the 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and the 1997 ozone NAAQS. *See* Pet. App. 12a; *see also* 76 Fed. Reg. at 48,212; 70 Fed. Reg. at 25,167 (reflecting that the subset of States covered by the Transport Rule differed from the subset of States covered by CAIR). Simultaneously, EPA, rather than the States, decided how to implement the rule's new emissions budgets by allocating "allowances" to individual sources within the covered States. 76 Fed. Reg. at 48,208, 48,212, 48,219-20; *see* Pet. App. 19a-20a & n.11 (explaining the purpose and function of allowances).

Although the Transport Rule provided that "[e]ach state has the option of replacing these [FIPs] with [SIPs] to achieve the required amount of emission reductions from sources selected by the state," 76 Fed. Reg. at 48,209; *see* EPA Pet. 17; American Lung Association, et al. ("ALA") Pet. 13, it explained that States could not do so for the 2012 control year. 76 Fed. Reg. at 48,328. The rule did permit States to make allowance allocations beginning one year into the program (for the 2013 control year), but it restricted those SIP revisions to ones that were "narrower in scope than the other SIP revisions states can use to replace the FIPs." *Id.* at 48,212 n.8. The rule did not allow a full SIP to replace a Transport Rule FIP until the 2014 control year. *Id.* at 48,327.

4. a. On judicial review, the D.C. Circuit concluded that the Transport Rule was fatally flawed for several reasons. First, as explained in the industry and labor respondents' brief in opposition, the court found that EPA exceeded the authority granted by section 7410(a)(2)(D)(i)(I) in multiple independent ways by requiring emissions reductions without regard either to the "insignificance" threshold that EPA drew for a State's inclusion in its new multi-state program or to whether those reductions were more than needed to bring about downwind NAAQS attainment. Pet. App. 3a-4a, 21a-41a. Second, as discussed below, the court of appeals found that EPA exceeded its statutory authority in simultaneously defining the covered States'

significant contributions and imposing FIPs to abate those contributions. *Id.* at 4a, 42a-61a.

Based on those flaws, the court of appeals vacated both the Transport Rule and its FIPs, remanding the matter to EPA. *Id.* at 62a-64a. But consistent with its final decision in *North Carolina*, the court ordered EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* at 63a-64a.

b. Judge Rogers dissented, asserting that the challenges to EPA's significant-contribution analysis had not been preserved at the administrative level and criticizing several other holdings on the merits. *Id.* at 65a, 67a-70a, 95a-114a. Judge Rogers also asserted that the federalism challenge was an impermissible collateral attack on prior EPA orders, adding that, in her view, the challenge failed on the merits under the text of the Act. *Id.* at 65a-67a, 70a-95a.

5. EPA (in No. 12-1182) and ALA and four other environmental groups that intervened on EPA's behalf below (in No. 12-1183) filed petitions for a writ of certiorari. Subsequently, briefs in support of certiorari were filed by a group of States and cities (led by New York) and two corporations (Calpine and Exelon), all of which likewise supported EPA as intervenors in the court of appeals. Together, these parties assert that the court of appeals lacked jurisdiction to rule on some of the grounds it did and that some of the court of appeals' conclusions on each of those grounds were erroneous. The industry and

labor respondents' brief in opposition addresses the issues surrounding the court of appeals' analysis of section 7410(a)(2)(D)(i)(I)'s substantive limits, and this brief addresses the issues surrounding the court of appeals' analysis of EPA's FIP authority.

REASONS TO DENY THE PETITIONS

Unable to identify a circuit split, the petitioners attempt to show that the court of appeals erroneously invalidated an EPA rule of broad importance. That assertion fails for the reasons noted below. But the petitioners' request for review is also marred by threshold questions that, far from providing a basis for granting certiorari, stand as obstacles to review of the primary questions presented. For each of those reasons, and for the additional reasons identified in the industry and labor respondents' brief in opposition, the petitions for a writ of certiorari should be denied.

I. THERE IS NO CIRCUIT SPLIT, AND THE WAIVER AND UNTIMELINESS ARGUMENTS CHALLENGE FACTBOUND APPLICATION OF SETTLED LAW.

1. Where, as here, a lower court's opinion neither creates nor deepens a split of authority on an important point of federal law, a certiorari petition will occasionally succeed by showing that the lower court "decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." *Id.* R. 10.

The petitioners do not contend that the court of appeals misstated the settled law that governs their threshold issues regarding waiver and untimeliness. Rather, they assert that the court misapplied the properly stated rules of law that govern those issues. EPA Pet. 12-14, 18-21; ALA Pet. 16-20, 30-31. That assertion only undermines their request for certiorari.

2. The petitioners' arguments on the merits fare no better. As the industry and labor respondents explain in their brief in opposition, the petitioners' waiver argument fails for a variety of reasons. And as explained below, the petitioners' untimeliness argument fails not only because it mischaracterizes the relief that the upwind States requested and obtained in the D.C. Circuit, but also because it overlooks key portions of the record.

a. In the court of appeals, the States' first issue asked whether EPA exceeded its authority in the Transport Rule by imposing FIPs to implement section-7410(a)(2)(D)(i)(I) obligations that EPA had not previously defined. State & Local Petitioners' CA Br. 2 (CADC Doc. 1364206). The petitioners' untimeliness argument depends on the notion that the States were actually asking something different: whether, in separate final actions taken before the Transport Rule was promulgated, EPA improperly (1) found that some States had failed to submit SIPs addressing their interstate-transport obligations

under the program in place before the Transport Rule's promulgation and (2) disapproved SIPs that other States had adopted to meet those preexisting obligations. EPA Pet. 12-14; ALA Pet. 30-31; *accord* Pet. App. 70a-82a (Rogers, J., dissenting); *see* 42 U.S.C. § 7410(c)(1)(A)–(B).

The petitioners' argument fails because, in this proceeding, the States did not challenge, and the court of appeals did not invalidate, any EPA action that predated the Transport Rule. Rather, the court of appeals invalidated the Transport Rule's simultaneous identification of the States regulated under that rule, definition of those States' section-7410(a)(2)(D)(i)(I) obligations, and imposition of FIPs to implement the new requirements. Pet. App. 42a-61a. The court also specifically addressed and rejected the untimeliness argument that the petitioners now advance. *Id.* at 61a-62a n.34.

The issue here is not, and has never been, whether 42 U.S.C. § 7410(c) authorizes EPA to issue FIPs if States fail to submit approvable section-7410(a)(2)(D)(i)(I) SIPs. Nor is it whether the earlier findings of failure and SIP disapprovals that the petitioners reference were proper under the standards applicable before the Transport Rule's promulgation. Rather, the issue is what type of FIP EPA was authorized to issue, and the answer is a FIP implementing only the requirements of those earlier programs, not a FIP implementing the Transport Rule's new requirements. *See* State & Local Petitioners' CA Br. 2, 20-31 (CADC Doc.

1364206); State & Local Petitioners' CA Reply Br. 2-10 (CADC Doc. 1364210).

The Transport Rule's rulemaking docket was the first and only place to comment on whether EPA could bypass the SIP process and impose FIPs for a wholly new multi-state program at the same time it defined covered States' section-7410(a)(2)(D)(i)(I) obligations under that program. In comments, several parties urged EPA to adhere to the statute and implement the program through SIPs. *See, e.g.*, Ohio EPA, Comments on Proposed Transport Rule 11 (Oct. 1, 2010) (D.C. Circuit Joint Appendix (CADC Doc. 1363545 ("CAJA")) 1241); Utility Air Regulatory Group, Comments on Proposed Transport Rule 23-24 (Oct. 1, 2010) (CAJA 1019-20) ("UARG Cmts."). But EPA rejected those comments and elected to adopt a final rule both creating the new program and simultaneously implementing it through FIPs. 76 Fed. Reg. at 48,208.

Only after EPA rejected, through promulgation of the final Transport Rule itself, the SIP-related comments filed in the underlying rulemaking proceeding could the respondents challenge EPA's decision to promulgate Transport Rule FIPs; the issue could not have been resolved in challenges to EPA's earlier SIP disapprovals and findings of failure under earlier programs. Although the disapprovals referenced the "proposed Transport Rule," *e.g.*, 76 Fed. Reg. 43,143, 43,144 (July 20, 2011), the findings of failure did not, *see, e.g.*, 75 Fed. Reg. 32,673 (June 9, 2010), and none of those earlier

actions discussed the debate about EPA's FIP authority that would remain unresolved until the Transport Rule was finalized.

Judicial review of those earlier actions would have required the court of appeals to assume that EPA, in the final Transport Rule, would impose FIPs for each covered State and, in so doing, reject the numerous comments urging EPA to respect the statutorily mandated SIP process. Because those comments aligned with binding precedent, the D.C. Circuit would also have had to assume that EPA would violate the law. *See, e.g.*, *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir. 1997); *Michigan*, 213 F.3d at 687-88.

In any event, the court of appeals' precedent on standing and ripeness would not have allowed the respondents to challenge EPA's earlier actions based on speculation about the content of a future rule. *See, e.g.*, *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205-07 (D.C. Cir. 1998); *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1383-85 (D.C. Cir. 1996). That observation is especially pertinent here because the subset of States subject to the Transport Rule changed between the rule's proposal and finalization. *Compare* 76 Fed. Reg. at 48,212-14 *with* 75 Fed. Reg. 45,210, 45,215 (Aug. 2, 2010).

The industry and labor respondents likewise could not have challenged the Transport Rule's unlawful circumvention of the SIP process until the final rule was promulgated. But those respondents

did suffer harm by being cut out of the process. *See* 42 U.S.C. § 7410(a)(1) (providing for reasonable notice and public hearings before adoption of a SIP); *id.* § 7410(*l*) (same, for SIP revisions). And like the States, the industry and labor respondents properly raised this issue in their challenge to the Transport Rule. *See, e.g.*, Industry & Labor Petitioners' CA Br. 17 n.6 (CADC Doc. 1357526); Petitioner GenOn's Nonbinding Statement of Issues to be Raised in CA 2 (CADC Doc. 1335597); UARG Cmts.

Despite Judge Rogers's suggestions in dissent, Pet. App. 70a-71a, adjudication of the respondents' challenge to the Transport Rule's FIP-before-SIP approach did not ignore or alter the jurisdictional character of 42 U.S.C. § 7607(b)(1) and similar provisions specifying the timing of judicial review. The court of appeals merely applied the law to the particular facts of this case, in which EPA simultaneously determined which States would be subject to a new section-7410(a)(2)(D)(i)(I) rule, quantified their significant contributions, and imposed FIPs to abate those contributions. *Id.* at 4a, 42a-43a, 48a-49a, 55a-57a, 61a n.34.

b. Regardless, even assuming the petitioners and Judge Rogers are correct that some of the States forfeited their challenge to the Transport Rule's FIP-before-SIP approach by failing to challenge EPA's pre-Transport Rule findings of failure and disapprovals with respect to the 2006 24-hour $PM_{2.5}$ NAAQS, *see id.* at 71a-74a (Rogers, J., dissenting), their argument does not reach several other States

covered by the Transport Rule for the 1997 NAAQS. Before the Transport Rule was promulgated, EPA took no final action on Texas's interstate-transport SIP revision as to the 1997 NAAQS, and it *approved* eight other States' submissions. *E.g.*, 72 Fed. Reg. 55,659, 55,659 (Oct. 1, 2007).

For those eight States, the first 1997-NAAQS SIP *disapprovals* came through the Transport Rule itself, in the form of purported "corrections" under 42 U.S.C. § 7410(k)(6) that were not even noticed for public comment. *See* 76 Fed. Reg. at 48,219-20; Pet. App. 48a-49a & n.29; *cf.* EPA Pet. 6 (erroneously stating that all of the SIP disapprovals were made "in separate administrative proceedings"). Although the Transport Rule asserted that *North Carolina*'s invalidation of CAIR automatically nullified EPA's prior approvals of those States' SIPs, 76 Fed. Reg. at 48,219, the agency's own actions belie that assertion. EPA continued to approve CAIR SIPs *after North Carolina* was decided. *E.g.*, 74 Fed. Reg. 53,167, 53,167 (Oct. 16, 2009). That is how EPA found itself in the awkward position that precipitated its unlawful use of section 7410(k)(6).

There could be no question that a petition for review of the Transport Rule was the first vehicle any of the States subject to this treatment had to challenge the rule's simultaneous definition of their significant contributions and its retroactive disapproval of their SIPs with respect to the 1997 NAAQS. Like Judge Rogers below, the petitioners do not argue otherwise. Indeed, they fail even to

mention this conspicuous gap in their untimeliness argument, let alone the D.C. Circuit's skepticism about EPA's use of section 7410(k)(6) to "correct" the earlier SIP approvals. *See* Pet. App. 49a n.29.

And because, under the Transport Rule, States' section-7410(a)(2)(D)(i)(I) obligations are intertwined with, and contingent upon, other States' obligations for both the 1997 and 2006 NAAQS, *see, e.g.*, *id.* at 11a-19a; EPA Pet. 8-9, 22-23, the Transport Rule's FIPs are not severable. *See North Carolina*, 531 F.3d at 929 (noting that the components of CAIR, another regional section-7410(a)(2)(D)(i)(I) program, "must stand or fall together"). For that reason, as long as even one party properly presented a challenge to its Transport Rule FIP—and here, several parties did so even under the petitioners' logic—the FIP-before-SIP issue was properly before the court of appeals.

3. Finally, it is well settled that "federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). For that reason, if the Court agrees with the petitioners' two threshold assertions, it would be unable to reach the additional issues the petitions present. The Court's work would instead be limited to error correction on factbound issues in a case with a detailed and voluminous record—a function well "outside the mainstream of the Court's functions." E. GRESSMAN ET AL., SUPREME COURT PRACTICE

§ 5.12(c)(3), at 351 (9th ed. 2007). Accordingly, the portions of the petitions that question whether the court of appeals correctly applied the CAA's settled rules regarding administrative exhaustion and the timing of judicial review are obstacles to review of the other issues that the petitioners claim warrant a grant of certiorari.

II. ON THE MERITS, THE D.C. CIRCUIT'S ANALYSIS COMPORTS WITH THIS COURT'S PRECEDENT, THE STATUTORY TEXT, AND EPA'S ADMISSIONS.

In rejecting the Transport Rule's imposition of FIPs before allowing for SIPs, the court of appeals accurately observed that States could not know whether they would be included in a newly proposed regional program and, if they were, what their significant contributions to downwind States would be, until EPA revealed the final rule resolving those issues. Pet. App. 8a-9a. The court explained how the CAA's overarching provisions governing the balance of state and federal responsibility, its specific provisions governing SIPs and FIPs, and this Court's precedent construing those provisions precluded the Transport Rule's approach. *Id.* at 42a-61a. For several reasons, the petitioners' challenges to that reasoning fail.

1. This Court has repeatedly confirmed the cooperative federalism at the heart of the CAA. As noted in *Train*,

> [t]he [CAA] gives [EPA] no authority to question the wisdom of a State's choices of

> emission limitations if they are part of a [SIP] which satisfies the standards of [42 U.S.C. § 7410(a)(2)], and [EPA] may devise and promulgate a specific [FIP] of its own only if a State fails to submit [a SIP] which satisfies those standards. [42 U.S.C. § 7410(c)].

421 U.S. at 79; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470 (2001) ("It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources. *See* 42 U.S.C. §§ 7407(a), 7410 (giving States the duty of developing [SIPs])."); *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent."); *accord Virginia*, 108 F.3d at 1406-10.

The petitioners do not challenge that precedent. Rather, they claim that the Transport Rule States could have, and should have, predicted the obligations that EPA would define through legislative rulemaking for each of the States ultimately covered by its latest section-7410(a)(2)(D)(i)(I) regional program—and that the covered States' failure to do so in SIPs required EPA to promulgate the Transport Rule's FIPs. *E.g.*, EPA Pet. 15-16. But as explained below, both the statutory text and EPA's admissions outside of this litigation defeat that claim.

2. The problems with the petitioners' statutory construction begin with the CAA's definition of a FIP. The statute defines a FIP as a plan to "fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP]." 42 U.S.C. § 7602(y); *see also* H.R. REP. 101-490, pt. 1, at 219 (1990) (reflecting that a FIP focuses exclusively on a "deficiency" in implementing an EPA rule that a State has "fail[ed] to correct"). For that reason, EPA's FIP authority cannot exceed a State's SIP obligation.

That fundamental point resurfaces in the CAA provision governing EPA's FIP power:

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

42 U.S.C. § 7410(c).

As the court of appeals explained, this provision creates a "federal backstop if the States fail to submit adequate SIPs." Pet. App. 47a. Section 7410(c) comes into play only if a State fails to meet its initial obligation to submit an adequate SIP

under section 7410(a), and a State cannot fail to meet an obligation that EPA has not yet defined. *See id.* at 46a-48a, 50a-51a; *see also id.* at 53a-55a (explaining why this reading of section 7410(a) and (c), in contrast to EPA's, comports with both the text and structure of the CAA).

For that reason, and contrary to the petitioners' reasoning, *see, e.g.*, *id.* at 75a-76a, 80a-82a (Rogers, J., dissenting), the only SIP submissions "required" under section 7410(c)(1)(A) are ones for which EPA has disclosed the requirements, and EPA cannot properly "disapprove[]" a SIP under section 7410(c)(1)(B) unless the SIP contains a deficiency that a State could have identified and avoided on its own. The court of appeals accordingly focused on whether the section-7410(a)(2)(D)(i)(I) obligations that the Transport Rule attempted to implement were among those that States were "required" to satisfy in pre-Transport Rule submissions. *Id.* at 47a. And because EPA defined those obligations for the first time in the Transport Rule, in accordance with the D.C. Circuit's earlier order to redo the necessary analysis "from the ground up," *North Carolina*, 531 F.3d at 929, they could not have been "required," 42 U.S.C. § 7410(c)(1)(A), before the Transport Rule was promulgated.

Section 7410(k)(5), the SIP-call provision, allows the process to work as intended in this context. *See* Pet. App. 47a. When EPA concludes through legislative rulemaking that a State's emissions are making a quantified significant contribution to

downwind nonattainment, it is concluding that the State's existing SIP is "substantially inadequate" under the new rule's analysis. 42 U.S.C. § 7410(k)(5); *see, e.g.*, 76 Fed. Reg. at 48,219 (Transport Rule finding that CAIR SIPs "were not adequate to satisfy . . . the statutory mandate of section [74]10(a)(2)(D)(i)(I)"). Section 7410(k)(5) explains that, in this scenario, EPA "shall require the State to revise the [SIP] as necessary" to address its newly defined significant contribution, determine which sources in the State must control emissions and to what extent, and establish a schedule for implementing the new requirements.

Section 7410(k)(5)'s mandate applies to all of the States that were unlawfully subjected to Transport Rule FIPs. With respect to some of those States, EPA attempted to avoid that mandate through use of section 7410(k)(6), which allows EPA to correct "error[s]" in past final actions. 76 Fed. Reg. at 48,219-20. Accordingly, EPA's assertion that, for each of the States covered by the Transport Rule's FIPs, EPA had either made a finding of failure to submit a SIP or disapproved the SIP that the State had submitted, EPA Pet. 15, not only erroneously assumes that those earlier actions cleared the way for some of the Transport Rule's FIPs. It also ignores EPA's unlawful treatment of the States that had submitted SIPs that EPA *approved* and then retroactively *disapproved* through use of section 7410(k)(6) in the Transport Rule itself.

That omission is no mere oversight. Both the States' prior briefing and the court of appeals' opinion questioned the Transport Rule's use of section 7410(k)(6). *See, e.g.*, Pet. App. 49a n.29. EPA simply has no valid response. If EPA could avoid section 7410(k)(5) by deeming its prior approval of a CAIR SIP an "error" capable of correction on the same day a FIP issues, section 7410(k)(5) would be superfluous. EPA could always unlock its FIP power by invalidating any of its own prior SIP approvals, thereby removing any role even for States that had, according to EPA itself, done everything that EPA asked them to do.

The petitioners' failure to mention the Transport Rule's use of section 7410(k)(6) also undermines EPA's central argument about the circumstances under which section 7410(c) requires imposition of a FIP. EPA does not assert that, under the CAA's system of cooperative federalism, it may simultaneously disapprove a SIP that it had previously approved and impose a FIP to correct the newly identified "deficiency" or "inadequacy." 42 U.S.C. §§ 7410(c)(1), 7602(y). Rather, based on its prior findings of failure and disapprovals, EPA attempts to show (albeit erroneously) that it followed the statute's proper order of operations. EPA Pet. 15.

But if EPA were to acknowledge the Transport Rule's use of section 7410(k)(6) to correct "errors" that materialized only upon promulgation of the final Transport Rule, it would either have to (1) concede

that the rule impermissibly imposed FIPs before giving several of the covered States a chance to submit SIPs addressing newly identified deficiencies or (2) make the untenable assertion that the statute authorizes that approach. Either way, its argument could not sustain the integrated, nonseverable Transport Rule.

Finally, to the extent the petitioners fault the court of appeals for construing the statute as a whole, EPA Pet. 16; *see* Pet. App. 54a (noting the "contextual and structural factors" supporting the court of appeals' analysis), they overlook not only the general principle that supports the court of appeals' approach, *see, e.g.*, *Roberts v. Sea–Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012), but also this Court's specific application of that principle when construing the CAA. *Train*, 421 U.S. at 78. For all of these reasons, the court of appeals' statutory analysis is correct, and the petitioners' analysis is fatally flawed.

3. a. Outside of this litigation, EPA has reflected its understanding of the constraints on its FIP authority in the context of regional section-7410(a)(2)(D)(i)(I) rulemaking. *See, e.g.*, Pet. App. 51a. Those admissions further undermine the petitioners' present claims.

In support of the dissenting opinion's statutory construction, the petitioners contend that the court of appeals' reasoning is based on a flawed analogy between the act of promulgating a NAAQS and the act of defining a newly selected group of States'

significant contributions. ALA Pet. 31; *accord* NY Br. in Support of Cert. 11. But the analogy is EPA's own. In the NO_x SIP Call, EPA explained that

> [d]etermining the overall level of air pollutants allowed to be emitted in a State [included in a section-7410(a)(2)(D)(i)(I) multi-state program] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility.

63 Fed. Reg. at 57,369; *see id.* at 57,370 (finding it "necessary" for EPA "to establish the [States'] overall emissions levels" under section 7410(a)(2)(D)(i)(I)). As previously noted, the States covered by the NO_x SIP Call were given 12 months to prepare SIPs after EPA placed them in the program and defined their significant contributions, *see id.* at 57,451—a period that gave them "real choice" in deciding how to achieve the required reductions. *Michigan*, 213 F.3d at 688; *see* Pet. App. 56a-57a.

Similarly, CAIR gave the States included in that program 18 months to implement emissions budgets through SIPs, and EPA assured the States that its FIPs would not interfere with the SIP process. *See* 70 Fed. Reg. at 25,263; 71 Fed. Reg. at 25,330-31; Pet. App. 57a. And after EPA had defined the covered

States' obligations under section 7410(a)(2)(D)(i)(I) in the NO_x SIP Call and CAIR, the States performed their function under section 7410, developing SIPs to address those obligations. *See, e.g.*, 74 Fed. Reg. 65,446, 65,446 (Dec. 10, 2009); 66 Fed. Reg. 27,459, 27,459 (May 17, 2001).

It was the Transport Rule, not the court of appeals' opinion, that departed from the core CAA requirements that EPA acknowledged and followed in those two prior rules. In allowing no time between EPA's decision to include States in the Transport Rule and the issuance of FIPs to implement their newly defined obligations, 76 Fed. Reg. at 48,208, 48,219-20, the rule made it impossible for the covered States to formulate and adopt SIPs as contemplated by section 7410. *See* Pet. App. 48a-55a. And contrary to the petitioners' argument, EPA Pet. 15-16; *accord* Pet. App. 88a (Rogers, J., dissenting); NY Br. in Support of Cert. 9, the court of appeals' opinion did not relieve States of their section-7410 duties. As reflected in the EPA guidance documents that the court of appeals cited, Pet. App. 50a n.30, 58a-59a n.33, section 7410(a)(1) did require States to submit SIPs addressing their section-7410(a)(2) obligations independent of the regional-transport obligations that EPA defined for the first time in the Transport Rule. *See* 77 Fed. Reg. 46,361, 46,362-63 & n.7 (Aug. 3, 2012).

Like EPA's guidance documents, the court of appeals recognized that the States could not go further, and specify precise emissions-reduction

requirements for in-state sources, until EPA told them which States were covered by the Transport Rule and what overall reductions were required. As EPA has explained, while a "detailed and substantive" section-7410(a)(2)(D)(i)(I) SIP submission may be possible

> when existing data and analyses already provide the requisite information[, i]n other instances, the submission may be more preliminary and simplified, as when there is currently insufficient information to support a determination that there are interstate transport impacts, *or when other later regulatory actions are prerequisites to making such a determination.*

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) (emphasis added); *accord* Pet. App. 50a-51a.

The petitioners' reference to what States that were not part of a regional program could do, *e.g.*, EPA Pet. 17-18; *see* Pet. App. 89a-90a (Rogers, J., dissenting) (quoting CA Tr. of Oral Arg. 61), is irrelevant to States that were included in such a program. *See infra* pp. 29-33. And any assertion that the court of appeals' opinion *disturbs* the Act's system of cooperative federalism, *see* NY Br. in Support of Cert. 8-9, is not credible. States that have made the policy decision to impose no greater

burdens on in-state sources than those EPA will mandate can control in-state sources in the first instance, *id.* at 13, only after they know the overall reductions EPA will require.

The court of appeals thus confirmed that EPA need do nothing more than perform its initial, and essential, role in the section-7410 process—just as EPA did in both the NO_x SIP Call and CAIR. Importantly, EPA has recently and repeatedly acknowledged that quantifying States' significant contributions is something only it can do. *E.g.*, 77 Fed. Reg. at 46,363 & n.7 (EPA's confirmation that section 7410(a)(2)(D)(i) "contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution") (quoted in Pet. App. 51a-52a, notwithstanding EPA's contrary suggestion, *see* EPA Pet. 17); *see also* EPA Pet. 12 (describing "significant contribution" as an "ambiguous term"); Pet. App. 50a (observing that a State's section-7410(a)(2)(D)(i)(I) obligation remains "nebulous and unknown" until EPA defines it). Neither the petitioners nor the dissenting opinion offers any response to this point, which confirms that the court of appeals' understanding of EPA's and the States' respective roles under section 7410(a)(2)(D)(i)(I) matches the view that EPA has consistently taken outside of this litigation.

b. Despite EPA's admissions, the petitioners now assert that States covered by a new regional section-7410(a)(2)(D)(i)(I) program such as the Transport

Rule need not await EPA's identification of the covered States and its definition of their significant contributions because States can perform those tasks themselves. *E.g.*, EPA Pet. 17-18; ALA Pet. 32-33; *accord* 89a-90a (Rogers, J., dissenting). That assertion fails for several reasons.

First of all, and as already noted, *North Carolina* required EPA to revisit the criteria for determining States' significant contributions and other key elements of CAIR and to create an entirely new multi-state program. 531 F.3d at 929. Whether a State's SIP addressing section 7410(a)(2)(D)(i)(I) would require any emissions reductions at all would depend on whether the State would or would not be part of the new Transport Rule region. *See, e.g.*, 76 Fed. Reg. 2,853, 2,856-58 (Jan. 18, 2011) (reflecting that Delaware's SIP would be approved if Delaware was ultimately excluded from the Transport Rule program, *see* ALA Pet. 32; NY Br. in Support of Cert. 14, and that the exact same SIP would be disapproved, and a Transport Rule FIP imposed, if Delaware was ultimately included in the program).

EPA, however, did not determine which States would be part of the Transport Rule region until the final rule was promulgated. The proposed rule reflected that Connecticut, Delaware, Massachusetts, Oklahoma, and the District of Columbia would be covered by the final rule, even though none was, and that Texas would be excluded from the final rule's annual $PM_{2.5}$ program, even though it was ultimately

included in that program. *Compare* 76 Fed. Reg. at 48,212-14 *with* 75 Fed. Reg. at 45,215.

And as to their substantive emissions-reduction obligations, States could do all the measurements, calculations, and predictions they wanted before the Transport Rule was promulgated, but only *EPA's* measurements, calculations, and predictions announced in the final rule informed what reductions, if any, were required in any particular State. Again, if a State was outside of the program, EPA approved its SIP without reductions; if a State was covered by the program, EPA disapproved its SIP and imposed the Transport Rule's reduction obligations. *See, e.g.*, 76 Fed. Reg. 53,638, 53,638 (Aug. 29, 2011) (final Delaware approval); 76 Fed. Reg. at 43,143 (final Kansas disapproval).

For a regional section-7410(a)(2)(D)(i)(I) program, EPA's complex emissions-transport modeling relies on numerous evolving input assumptions, many of which require subjective judgment that can alter the final output. *See* 76 Fed. Reg. at 48,263 (introducing an unproposed "emissions leakage" theory under which EPA's determination of whether some States had significant contributions to ozone nonattainment depended on predictions about how other States would react if they were covered by the final Transport Rule); Calpine Br. in Support of Cert. 26-28; *see also* EPA Primary Response to Comments on the Proposed Transport Rule, EPA-HQ-OAR-2009-0491-4513, at 470 (June 2011) (CAJA 1779) (reflecting that "EPA made numerous updates and

corrections to its significant contribution analysis" between the proposed and final versions of the Transport Rule). Indeed, EPA made additional revisions to the Transport Rule nearly ten months *after* its promulgation. 77 Fed. Reg. 34,830 (June 12, 2012).

Moreover, even assuming States could track the moving target of EPA's emissions modeling, they would still be unable to ensure that their own calculations of required reductions would match EPA's because EPA's analysis ultimately turned on subjective policy judgments regarding cost-effectiveness. *See* 76 Fed. Reg. at 48,248; Pet. App. 15a-18a. In defining the required reductions in the Transport Rule, EPA developed "cost curves," or estimates of the amounts of reductions available at certain cost thresholds. 76 Fed. Reg. at 48,248. It then estimated the effect, at different cost-per-ton levels on its cost curves, that the contributing States' "combined reductions" would have on downwind air quality and identified "significant cost thresholds," or "point[s] along the cost curves where a noticeable change occurred in downwind air quality." *Id.* at 48,249. So to accurately determine their reduction obligations, the covered States would have had to guess not only what EPA's cost curves would look like, but also what changes on those curves would be most "noticeable" to EPA.

The complexity of the linkages between emissions from an upwind State and nonattainment in downwind States that the petitioners mention, EPA

Pet. 8, 22, only further decreases the likelihood of matching EPA's analysis. And because downwind States are also required to control their own emissions, *see* 76 Fed. Reg. at 48,252, and may voluntarily choose to impose stricter controls than EPA requires, upwind States would also have to make accurate guesses about what controls those downwind States would implement.

The combination of all of these variables and the discretionary nature of EPA's consideration of them belie any claim that States could anticipate EPA's final rulemaking judgments. The court of appeals therefore correctly recognized that States could not know whether, or what, section-7410(a)(2)(D)(i)(I) reductions would have to be provided for in SIPs until EPA decided whether they were in or out of its multi-state program and, if they were in, what their specific reduction obligations were. *See* Pet. App. 50a-61a.

III. UNDER THE D.C. CIRCUIT'S OPINION, EPA CAN STILL IMPLEMENT THE STATUTE, AND THE CLAIMS OF HEALTH IMPACT ARE EXAGGERATED.

The petitioners attempt to bolster the importance of this case by arguing that the court of appeals' decision will make EPA's task of developing section-7410(a)(2)(D)(i)(I) regional programs more difficult and that denying the petitions will negatively affect public health. *E.g.*, EPA Pet. 11, 28-32; ALA Pet. 3-4; NY Br. in Support of Cert. 15-19. Each of those arguments is flawed.

1. On the first point, EPA does not assert that following the statute's proper order of operations is impossible in this context. *See* EPA Pet. 28-29; *accord* NY Br. in Support of Cert. 15, 18. After all, both the NO_x SIP Call and CAIR reflect that EPA can honor the CAA's cooperative-federalism structure when promulgating regional rules under section 7410(a)(2)(D)(i)(I).

EPA nonetheless claims that meeting NAAQS attainment deadlines has now become more difficult or even "could[,] in some cases[,] [be] impossible." EPA Pet. 12, 16-17, 29-30. That assertion overlooks a point that the industry and labor respondents' brief in opposition highlights: most downwind areas identified in the Transport Rule as nonattainment areas or areas with maintenance problems are already in attainment under CAIR and other emissions-reduction programs. Moreover, to the extent that inability to meet attainment deadlines as a result of interstate transport remains a problem, it is a problem of EPA's own creation, resulting from the agency's unprecedented embrace of an unlawfully aggressive view of its FIP power. Finally, at this stage, the potential inability to meet NAAQS attainment deadlines would not be resolved even if the Court granted review and reversed the court of appeals' judgment based on the subset of challenges to the Transport Rule at issue here.

All along, EPA has had a duty to perform its task under the CAA's system of cooperative federalism in a timely manner, so that the rest of the process could

unfold on time. And the difficulty of complying with a statute does not license an agency to violate it. If EPA is dissatisfied with the current state of its section-7410(a)(2)(D)(i)(I) program, it can either formulate a new regional program under that provision or seek to advance its regulatory objectives through one of the other tools that the CAA provides. If EPA believes that the Act's cooperative-federalism structure would unduly hinder either of those approaches, its proper audience is Congress, not the Court.

2. The petitioners' health claims are based on a false premise: that the Transport Rule's vacatur left interstate transport of air pollution unregulated. *See, e.g.*, EPA Pet. 31 (citing health data based on that premise); ALA Pet. 11 (same). But as explained in the industry and labor respondents' brief in opposition, the court of appeals' judgment leaves CAIR in effect, *see* Pet. App. 64a, and the combination of CAIR and other measures to improve air quality has resulted in widespread NAAQS attainment. Once again, EPA is the one empowered to build upon the health benefits of CAIR to the extent necessary and appropriate under the CAA by taking swift action to define States' section-7410(a)(2)(D)(i)(I) obligations in a manner consistent with the statutory framework, so that States can meet their obligations to satisfy any requirements EPA lawfully sets.

IV. ALTERNATIVE GROUNDS TO AFFIRM MAKE THIS CASE A POOR CANDIDATE FOR FURTHER REVIEW.

Further review is unwarranted even assuming the petitioners' statutory analysis is correct because the court of appeals' judgment is subject to affirmance on alternative grounds. The most prominent of these is the court's express rejection of EPA's erroneous view of its authority under section 7410(a)(2)(D)(i)(I). Pet. App. 3a-4a, 21a-41a (holding that EPA's implementation of section 7410(a)(2)(D)(i)(I) was flawed in three independent respects). Both the upwind States and the industry and labor respondents asserted that the Transport Rule was invalid for that reason alone, State & Local Petitioners' CA Br. 31-37 (CADC Doc. 1364206); Industry & Labor Petitioners' CA Br. 19-26 (CADC Doc. 1357526), and the upwind States support the industry and labor respondents' brief in opposition addressing that issue here.

But there are several other grounds supporting the court of appeals' judgment that were asserted below but not reached, and a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Two grounds addressed in the upwind States' briefs to the court of appeals fall into that category.

1. First, the Transport Rule attempted to follow *North Carolina*'s mandate to give independent meaning to "interfere with maintenance" in section 7410(a)(2)(D)(i)(I). 531 F.3d at 909-10, 929; 76 Fed. Reg. at 48,227-28; *see* Pet. App. 40a n.25. But the only difference between its significant-contribution and interference methodologies involved the identification of downwind air-quality monitors. *See* 76 Fed. Reg. at 48,211, 48,233-36 (explaining how EPA labeled monitors "nonattainment" or "maintenance" based solely on its emissions projections for each three-year period in 2003-2007).

The Transport Rule's ultimate emissions-reduction methodology was the same for both nonattainment and maintenance monitors. *Id.* at 48,236. For each, EPA used modeling to identify States whose maximum downwind contributions exceeded an "insignificance" threshold of 1% of the relevant NAAQS, then imposed emissions budgets reflecting the amount those States could emit after imposing cost-effective controls. *Id.* at 48,246-64. In failing to draw any true distinction between "contribute significantly to nonattainment" and "interfere with maintenance," 42 U.S.C. § 7410(a)(2)(D)(i)(I), EPA violated both the statutory text and *North Carolina*, and the rule is invalid for that reason alone.

2. EPA also violated the CAA's notice-and-comment requirements, 42 U.S.C. § 7607(d), by promulgating a final Transport Rule that was far from a "logical outgrowth," *Long Island Care at*

Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), of the version of the rule it proposed. For example, the final rule "linked" States to monitors in different downwind areas, *compare, e.g.*, 76 Fed. Reg. at 48,241-44, 48,246 (Tables V.D–2-3, 5-6, 8-9) *with* 75 Fed. Reg. at 45,257-70 (Tables IV.C–14-21), reduced individual States' proposed emissions budgets by as much as 50%, *compare, e.g.*, 76 Fed. Reg. at 48,269-70 (Tables VI.F–1-3) *with* 75 Fed. Reg. at 45,291 (Tables IV.E.–1-2), and reversed the proposed rule's conclusion that Texas would be excluded from the Transport Rule's annual SO_2 and NO_x programs. *Compare* 76 Fed. Reg. at 48,269 *with* 75 Fed. Reg. at 45,215-16, 45,282-84.

Had EPA provided adequate notice, the States and other interested parties would have submitted comments that would have required alteration of the final rule in several significant respects. For that additional reason, the rule would remain invalid even if the petitioners prevailed on the issues they present here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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May 2013

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