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

REPLY BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, NORTH CAROLINA, RHODE ISLAND, VERMONT, AND THE DISTRICT OF COLUMBIA, AND THE CITIES OF BALTIMORE, BRIDGEPORT, CHICAGO, NEW YORK, AND PHILADELPHIA AS RESPONDENTS IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Clean Air Act is unambiguous: States must adopt state implementation plans (SIPs) within three years of the promulgation or revision of a national ambient air quality standard (NAAQS); those SIPs must address States' good-neighbor obligations to limit the effects of their pollution on downwind States; and if the SIPs are inadequate, EPA must issue federal implementation plans (FIPs) that satisfy the States' obligations.

Ignoring the Clean Air Act's plain language, State and Local Respondents argue that the Act's good-neighbor provision does not apply to States at all until EPA tells them what that provision means by quantifying emissions reductions. But States can and do interpret federal laws, including the Clean Air Act, without such specific agency guidance. And they can and do calculate for themselves the emissions reductions necessary to meet their obligations under the Act.

The good-neighbor provision is no exception. Congress intended States to rely on their own judgment and expertise to adopt state implementation plans that address the effects of their downwind pollution. The Act thus carves out a three-year window of state autonomy to formulate and adopt such plans, and limits EPA's ability to overturn the States' policy judgments. At the same time, Congress empowered EPA to step in with its own implementation plan at the end of those three years if state efforts are inadequate, providing a federal backstop to ensure that state inaction will not delay attainment of air-quality standards. The structure of the statute thus gives States a choice between taking

the lead in regulating cross-state emissions or accepting the consequences of EPA's implementation of a FIP.

Respondents' position ignores this careful sequencing of state and federal responsibilities, giving EPA the initial authority to dictate emissions reductions rather than leaving States the opportunity to regulate cross-state emissions themselves. And Respondents' position further ignores the Clean Air Act's carefully defined deadlines, delaying implementation of pollution controls in upwind States while downwind States suffer the consequences. The plain language of the Act refutes Respondents' attempts to so rewrite the coordinated responsibilities of the States and EPA to limit interstate air pollution.

ARGUMENT

I. Nothing in the Clean Air Act's SIP Provisions Requires EPA to Quantify States' Good-Neighbor Obligations.

The Clean Air Act defines a straightforward process to timely implement the NAAQS: the Act gives States the initial opportunity to design and adopt measures to achieve those standards, and provides a federal backstop if the States' own measures prove inadequate. Br. of the States & Cities as Resps. in Support of Pets. (States' Opening Br.) 3-6, 18-22. Ignoring the Act's expressly defined procedures, Respondents posit an additional quantification step for EPA that appears nowhere in

the statute. Respondents assert that States have no responsibility to submit SIPs addressing the downwind effects of their air pollution until "*after* EPA has quantified the States' good-neighbor obligations" by "telling the States *how much* contribution to another State's air pollution would be deemed 'significant'" under the good-neighbor provision. Brief for the State and Local Respondents (Tex. Br.) 20, 39. And Respondents also assert that EPA may not issue FIPs, even after finding that a State did not address its good-neighbor obligations, until EPA waits a further "reasonable time period" for States to submit SIPs that satisfy EPA's quantifications. *Id.* at 56.

The plain language of the Clean Air Act forecloses Respondents' interpretation. The Act's sole trigger for the States' SIP obligations, including their responsibility to prohibit emissions that "contribute significantly to nonattainment [of a NAAQS] in . . . any other State," 42 U.S.C. § 7410(a)(2)(d), is EPA's promulgation or revision of that NAAQS, *not* EPA's quantification of the term "contribute significantly," *id.* § 7410(a)(1). Indeed, nothing in § 7410 requires EPA to act at all with respect to the States' good-neighbor obligations—let alone provide a specific number quantifying those obligations—before States must submit SIPs addressing a new or revised NAAQS.

Likewise, nothing in the Act delays EPA's FIP authority beyond the three years that Congress reserved for States to adopt their own SIPs. Once EPA disapproves a State's SIP submission, or finds that a State has failed to make a required SIP submission, it is authorized to issue a FIP "*at any*

time within 2 years" of the disapproval or finding. *Id.* § 7410(c)(1) (emphasis added). There is no textual support for Respondents' assertion that EPA must delay issuing a FIP for an additional and wholly undefined "reasonable time period" (Tex. Br. 56) after the three-year SIP deadline has expired, simply because the FIP addresses a State's good-neighbor obligations.

Respondents' interpretation also conflicts with the Act's plain language because it would subject only good-neighbor obligations to an EPA-quantification prerequisite. The structure of § 7410 does not support such unique treatment of this one aspect of States' SIP responsibilities. The good-neighbor provision is just one of thirteen substantive SIP requirements that must all be satisfied within three years of EPA's promulgation or revision of a NAAQS. *See* 42 U.S.C. § 7410(a)(2)(D). Nothing in the text of § 7410 delays a State's SIP responsibilities or EPA's FIP authority on the ground that a State's good-neighbor obligations do not arise until they are first quantified.

II. States Can and Do Determine Their Good-Neighbor Obligations Without EPA's Advance Quantification.

A. States Can Independently Interpret the Good-Neighbor Provision.

Lacking any textual support to counter a straightforward reading of § 7410(a)(2) as requiring States to address their good-neighbor obligations before EPA quantifies them, Respondents instead

assert that States cannot possibly "predict how EPA will interpret [the good-neighbor provision] before EPA announces its authoritative construction of that statute." Tex. Br. 49. That argument betrays a fundamental misunderstanding of the States' responsibilities under the Act.

1. Contrary to Respondents' assertions (*id.*), States are not required to "predict" how EPA will interpret the Act because their obligations under the Act are not synonymous with EPA's interpretation of those obligations. Instead, Congress gave States independent authority to determine and implement their federal duties. By providing a three-year window for States to formulate and adopt SIPs, Congress reserved for States the initial opportunity to select pollution controls that satisfy the Act's requirements. And States' decisions within this window are controlling: EPA has "*no authority* to question the wisdom of a State's choices" so long as a State's preferred pollution controls lead to attainment or maintenance of the relevant NAAQS. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (emphasis added). Respondents never square their EPA-first position with *Train*'s recognition that States can submit their SIPs without any prior assistance from EPA at all.

Respondents instead argue that the good-neighbor provision is exempt from the SIP process's State-first approach because the phrase "contribute significantly" is ambiguous, and EPA's authority to construe ambiguous statutory language under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), means that the

States "cannot decide the legal meaning of 'significant[]' contribution" themselves. Tex. Br. 52. But the fact that a *court* may not second-guess EPA's reasonable interpretation of an ambiguous statutory term does not mean that *States* have no role in construing the statute. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 411-12 (1999) (Thomas, J., concurring in part and dissenting in part) (finding no "principle of federal law that prohibits the States from interpreting and applying federal law").

To the contrary, this Court has repeatedly recognized that States play a crucial role in interpreting federal law under cooperative-federalism programs, and that there is "a range of permissible choices [available] to the States" when they do so. *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (upholding Wisconsin's interpretation of "spousal impoverishment" provisions of Medicare Catastrophic Coverage Act of 1988). Indeed, States have long interpreted ambiguous language in the Clean Air Act without waiting for EPA to tell them what that language means. Many of the provisions describing States' SIP responsibilities use terms that may be subject to agency interpretation.[1] Yet States regularly submit SIPs

[1] *See, e.g.*, 42 U.S.C. § 7410(a)(2)(A) (requiring "necessary" or "appropriate" emissions limitations); *id.* § 7410(a)(2)(E) (requiring States to demonstrate "adequate" resources to implement SIP); *id.* § 7410(a)(2)(L)(i) (requiring States to charge "reasonable costs" for permit applications).

reflecting their own reading of those terms[2]—including the language in the good-neighbor provision. See *infra* at 11-13. Congress's decision not to require EPA to provide advance guidance on this language, while expressly requiring that EPA do so elsewhere in the Act (*see* States' Opening Br. 25-26), confirms that it expected States to interpret for themselves their statutory SIP obligations.

Under Respondents' position, by contrast, States would be helpless in the face of ambiguous language in the Act until instructed by EPA. And that helplessness would extend not only to the States' good-neighbor obligations but also to their other ambiguously defined SIP responsibilities. Such a regime would vastly expand the time it takes for essential air pollution controls to be put in place, undermining Congress's clear directive for prompt implementation in accordance with the Act's interlocking deadlines. *See id.* at 27-28. And it would run counter to Congress's explicit direction that States—not EPA—have the first opportunity to make the policy judgments necessary to formulate a SIP, rather than being "consign[ed]" to the "ministerial tasks" of implementing federally defined policies. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting).

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[2] *See, e.g.*, *N.Y. State Implementation Plan for the Infrastructure Assessment for Ozone Under Sections 110(A)(1) and (2) of the Clean Air Act* 22-23 (March 2013), *available at* http://www.dec.ny.gov/chemical/94349.html (interpreting the term "reasonable costs" and determining which political subdivisions are "affected" by the plan).

2. Although the States have initial responsibility to determine and implement their SIP obligations, Congress gave EPA express authority to review SIPs and to supply its own approach when States do not adequately address their SIP responsibilities on their own. Such review authority is a feature of nearly every cooperative-federalism program. *See* States' Opening Br. 33-34. Respondents nonetheless assert that the unsurprising fact of federal review makes the States' initial responsibility to submit good-neighbor SIPs "a fool's errand" because EPA might disagree with the States' assessments. Tex. Br. 40.

But EPA's review capacity does not make the States' initial policy decisions meaningless, whether here or in any of the other cooperative-federalism programs that federal agencies oversee. For one thing, the Clean Air Act expressly cabins EPA's authority, thus preventing EPA from exercising "unlimited" power to implement any FIP of its choosing regarding any pollutant. *See id.* at 45. A FIP is limited to addressing only "attainment of the relevant [NAAQS]," 42 U.S.C. § 7602(y)—*i.e.*, the pollutant-specific air-quality standard that triggered the States' initial SIP responsibilities.[3] A FIP may overrule a State's SIP submission only to the extent that the SIP fails to provide for timely attainment or

[3] Contrary to Respondents' claims, this limitation prevents EPA from issuing FIPs that "impose[] requirements that have nothing to do with the Clean Air Act or the NAAQS" (Tex. Br. 45), or that attempt to implement "an entirely new NAAQS" announced for the first time in a FIP (*id.* at 46; *see also id.* at 38, 43; W. Va. Amicus Br. 3-4).

maintenance of the relevant NAAQS, and not, for example, solely because the State failed to adopt particular control measures that EPA favors. *Train*, 421 U.S. at 79; *see Texas v. EPA*, 690 F.3d 670, 684 (5th Cir. 2012). And EPA's disapproval of a SIP remains subject to the ordinary constraints on federal administrative action, including judicial review to determine whether the agency's decision was arbitrary or capricious. *See, e.g.*, *Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013).

Even when EPA properly disapproves a SIP, that outcome does not make the State's initial submission pointless. For example, EPA may approve a SIP submission in part or on condition that the State make certain revisions, thus retaining the state policy choices that are reflected in the approved portion of the SIP. 42 U.S.C. § 7410(k)(3)-(4); *see* 73 Fed. Reg. 21,418, 21,437 (Apr. 21, 2008) (noting that EPA's partial disapproval of a SIP preserved "various source-specific emission limits" that Montana had adopted). Moreover, EPA's initial decision to disapprove a SIP is not necessarily the final word: a State may "correct[] the deficiency" that formed the basis of the disapproval at any time before EPA promulgates a FIP, 42 U.S.C. § 7410(c)(1); or it may submit additional materials to persuade EPA that its SIP is adequate, as Delaware did prior to the final Transport Rule. *See* 76 Fed. Reg. 53,638 (Aug. 29, 2011); 76 Fed. Reg. 2,853, 2,855 (Jan. 18, 2011); see also *infra* at 12. Even if EPA wholly disagrees with a State's approach and cannot be persuaded otherwise, the State's SIP submission will at the very least require EPA to carefully consider the State's policy

judgments and provide a "reasoned explanation" for rejecting them. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). The need to provide such an explanation—and have it survive judicial review—is itself a meaningful constraint on EPA's review authority.[4]

B. States Are Capable of Studying and Addressing the Effects of Regional Cross-State Air Pollution.

Respondents and their *amici* separately argue that the States are incapable of quantifying their

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[4] As evidence that only EPA may interpret the good-neighbor provision, Respondents cite statements by EPA responding to unrelated comments in past rulemakings construing the provision. Tex. Br. 6, 53. But an agency's statements cannot change the meaning of unambiguous statutory language, *see MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), and here, Congress expressly directed States to determine and implement their SIP obligations in the first instance. See *supra* at 3-4. Moreover, EPA has repeatedly confirmed its view that the good-neighbor provision "places the primary responsibility" on upwind States to limit downwind emissions. 64 Fed. Reg. 28,250, 28,264 (May 25, 1999); *see also* 76 Fed. Reg. 19,662, 19,667 (Apr. 7, 2011); 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998).

In fact, in the sections of the NOx SIP Call and Clean Air Interstate Rule (CAIR) SIP Call that Respondents cite (Tex. Br. 6-7, 9), EPA confirmed that it expects States to address interstate transport in their SIPs under the Act. *See* 70 Fed. Reg. 25,162, 25,265 (May 12, 2005); 63 Fed. Reg. at 57,367-70. To the extent that EPA asserted authority to quantify States' good-neighbor obligations, it did so after States had failed to make initial submissions during the statutory three-year window, thereby triggering EPA's authority to weigh in.

significant contributions to downwind air-pollution problems due to the unique difficulties of analyzing and coordinating a response to the effects of regional pollutants such as ozone and fine particulate matter. *See, e.g.*, Tex. Br. 41; Br. of *Amici Curiae* State of West Virginia et al. in Support of Resps. (W. Va. Amicus Br.) 3, 10-27. But States *have* been able to address regional pollution independently of EPA. And even if Respondents were correct that regional pollutants pose unique difficulties, that argument would not justify rewriting the good-neighbor provision.

1. States have determined their good-neighbor obligations with respect to regional pollutants in a variety of contexts without prior EPA quantification. Contrary to Respondents' assertion that "Delaware's experience illustrates the problems" that arise when States attempt to "figure out their good-neighbor obligations on their own" (Tex. Br. 40-41, 49), Delaware in fact *successfully* determined and then satisfied its good-neighbor obligations with respect to the NAAQS at issue here, *see* 76 Fed. Reg. at 2,855-56. In 2009, Delaware submitted a good-neighbor SIP demonstrating that it had made the emissions reductions necessary to prevent its significant contributions to other States' nonattainment of the daily particulate-matter NAAQS. *Id.* at 2,856. When EPA nonetheless proposed to subject Delaware to the Transport Rule's distinct set of emissions reductions, Delaware objected, backing up its own analysis with "comprehensive documentation" and a "thorough explanation" of the differences between its approach and EPA's. *Id.* at 2,855. EPA ultimately agreed that

Delaware's own emissions reductions satisfied its good-neighbor obligations, approving Delaware's SIP and excluding Delaware from the final Transport Rule. 76 Fed. Reg. 53,638; *see* States' Opening Br. 14-15.

Delaware is not the only State that has successfully analyzed and satisfied its good-neighbor obligations. EPA has also approved SIPs from several States outside of the regions covered by the Clean Air Interstate Rule (CAIR) and the Transport Rule (such as Colorado, Idaho, North Dakota, New Mexico, and Oregon) after those States independently evaluated their good-neighbor obligations and determined that they did not significantly contribute to downwind air-quality problems due to their chosen pollution controls and other factors. Although these States could consult EPA's modeling in the Transport Rule and elsewhere in preparing their SIPs, they did not wait for EPA to tell them how much to reduce their cross-state air pollution. *See* 78 Fed. Reg. 45,457, 45,458 (July 29, 2013) (North Dakota); 78 Fed. Reg. 15,664, 15,667 (Mar. 12, 2013) (New Mexico) 76 Fed. Reg. 80,747, 80,748 (Dec. 27, 2011) (Oregon); 75 Fed. Reg. 72,705,72,707 (Nov. 26, 2010) (Idaho); *see also* States' Opening Br. 33 (discussing Colorado's SIP submission).

2. The mere fact that "cross-state air pollution is a multi-state issue" does not render States helpless to address the problem, as Respondents' *amici* contend. W. Va. Amicus Br. 9 (emphasis omitted); *see also* Tex. Br. 51. States have considerable experience modeling regional transport of air pollution and devising

regional approaches to address it, both in conjunction with other States and on their own.[5] For example, the eight-state Northeast States for Coordinated Air Use Management group collaborated to implement consistent state regulations governing gasoline volatility. *See* S. Rep. No. 101-228, at 51 (1989). And the twelve-state (plus the District of Columbia) Ozone Transport Commission (OTC) recently prepared multiple model air-quality rules for state-by-state adoption to reduce the polluting effects of consumer products, architectural coatings, and portable fuel containers.[6]

EPA often relies on such multistate collaborations when conducting its own rulemaking. For example, the "air quality modeling and recommendations" of the Ozone Transport Assessment Group—a consortium that included the thirteen OTC members and twenty-five States from the South and Midwest—"formed the basis for" the NOx SIP Call. 63 Fed. Reg. at 57,361. And the Transport Rule itself relies on a numerical inclusion threshold that was proposed by the OTC. *See* States' Opening Br. 13.

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[5] *See, e.g.*, 75 Fed. Reg. 55,494, 55,500 (Sept. 23, 2010) (noting information from Western Regional Air Partnership Technical Support System); 71 Fed. Reg. 25,328, 25,334 (Apr. 28, 2006) (noting transport study results from Southern Appalachian Mountains Initiative); 63 Fed. Reg. 56,292, 56,296 (Oct. 21, 1998) (noting transport study results from Northeast States for Coordinated Air Use Management).

[6] Ozone Transport Commission, Model Rules, *at* http://www.otcair.org/document.asp?fview=modelrules.

The section 126 proceedings that prompted EPA's prior interstate-transport rules provide further evidence that States can analyze and devise solutions for regional air-pollution problems without EPA's involvement. *See id.* at 31-32. The state petitions preceding the NOx SIP Call explicitly identified source categories and geographic areas to be regulated and demanded specific emissions limitations formulated by the petitioning States based on their own research and analyses. 64 Fed. Reg. at 28,254; 63 Fed. Reg. at 56,296. And North Carolina's section 126 petition, which sought to expedite the pollution controls that EPA had proposed in CAIR, relied not just on EPA's proposed CAIR modeling but also on extensive transport research from a regional coalition and North Carolina's own independent analyses. 71 Fed. Reg. at 25,334, 25,336. Thus, contrary to the assertions of Respondents' *amici*, it is far from "impossible for the States to quantify cross-state air pollution for regional pollutants." W. Va. Amicus Br. 3.

3. Even if Respondents and their *amici* were correct that the States are categorically unable to respond as a group to regional pollutants without federal help, that asserted fact would still not dictate rewriting the good-neighbor provision to add Respondents' EPA-quantification step. Section 7410(c)(1) authorizes EPA to issue a FIP to ensure that adequate pollution controls are in place regardless of the reason for a State's failure to submit an adequate SIP—whether an honest mistake in assessing the State's good-neighbor obligations, perceived resource constraints, difficulty coordinating with neighboring States, or any other reason. Nothing

in the statute makes the practical difficulties a State may face a basis for suspending the States' good-neighbor obligations or EPA's FIP authority. Indeed, Congress was well aware of the complexity of the interstate-transport problem when it amended the Clean Air Act in 1990 to define an ozone-transport region. *See* States' Opening Br. 32. Yet instead of requiring EPA to quantify the States' good-neighbor obligations in advance, Congress chose instead to *increase* the States' responsibilities to limit downwind air pollution and rejected an amendment that would have loosened the mandatory requirement that EPA issue a FIP within two years of disapproval. *See id.* at 7, 22.

Moreover, the narrow reasons that Respondents and their *amici* give for being unable to address cross-state air pollution do not justify the broad revision of SIP procedures that they demand. Respondents and their *amici* do not contend that *all* cross-state air pollution is too complex for States to collectively analyze and reduce. Instead, they primarily cite the unique difficulties of the Transport Rule, emphasizing the size of the region that the rule encompasses and the regional effects of the specific pollutants it covers. *See* Tex. Br. 3, 52; UARG Br. 22; W. Va. Amicus Br. 3, 17. But the good-neighbor provision also applies to the more straightforward effects of localized pollution "caused by emissions from a nearby source or a discrete group of nearby sources." Tex. Br. 3. Respondents and their *amici* cannot dispute that emissions reductions to address these simpler cross-state pollution problems can be initially quantified by States. *See, e.g.*, 76 Fed. Reg.

69,052, 69,057-59 (Nov. 7, 2011) (approving New Jersey's section 126 petition regarding pollution from a power plant in Pennsylvania). And regional groups have successfully agreed on emissions reductions to resolve more complex regional pollution problems as well. W. Va. Amicus Br. 17 (noting successful regional collaborations involving up to fifteen States). See *supra* at 13-14. Even if the problem addressed by the Transport Rule posed unusual challenges to States attempting to act on their own, such challenges would not justify rewriting statutory SIP procedures that apply to a broader class of cross-state pollution problems.

Respondents' *amici* claim that States have neither the resources nor the time to address regional cross-state air pollution on their own. W. Va. Amicus Br. at 19-26. But a State that chooses to devote, for example, only four employees and a few hundred thousand dollars for SIP planning (*id.* at 21) is limited in its ability to participate in the planning process by its own choice, and not by the action of EPA. And while *amici* point to many purported obstacles to timely action by the States, including data collection, modeling, development of a plan, and adoption of SIPs by their own frequently part-time legislatures, W. Va. Amicus Br. 23-25, *amici* do not explain how adding a step for EPA quantification would make it any easier for the States to comply with their three-year SIP submission deadline. Even under the regime they propose, it would still be necessary for the States to collect data, for that data to be used in modeling, and for States to develop and adopt SIPs. The addition of another step would do

little to alleviate most of those problems. The Act imposes short timelines in order to ensure expeditious action to control the effects of identified air pollutants. The unwillingness of a few States to devote the resources necessary to timely comply with their good-neighbor obligations does not justify relieving those States or any others of that unambiguous statutory duty.

C. Respondents' EPA-First Interpretation Undermines the States' Authority Under the Clean Air Act.

Respondents assert that inserting an EPA-quantification step into the Act's carefully defined SIP procedures protects the "statutory prerogatives that the Clean Air Act preserves for the States." Tex. Br. 56. But precisely the opposite is true.

Under Respondents' view, EPA must define the States' good-neighbor obligations in the first instance, depriving upwind States of any opportunity to determine for themselves the necessary level of emissions reductions. Respondents propose no statutory deadline for EPA to issue its quantifications, nor does the Act mention any. Upwind States would thus be expected to wait (perhaps indefinitely) for EPA to quantify specific emissions reductions before adopting SIPs, and their role would be limited to "implement[ing] EPA-announced good-neighbor obligations." Tex. Br. 60. During this period of delay, downwind States would remain subject to the Act's strict deadlines for attaining or maintaining the NAAQS, and their citizens' health would remain in jeopardy. Downwind States have already spent

billions of dollars to achieve additional in-state reductions in an attempt to compensate for upwind pollution—and often even those extraordinary efforts are not enough. States' Opening Br. 8-9 & n.6, 28-29.[7]

By contrast, the State-first interpretation of § 7410 that this Court endorsed in *Train* preserves the States' initial policymaking authority under the good-neighbor provision without disrupting the Act's coordinated deadlines for timely addressing cross-state pollution. States thus retain the option to forestall EPA regulation by first adopting their own measures to limit the downwind effects of their air pollution. Of course, States might decline to comply with the Act and accept the consequences of a FIP defining their good-neighbor obligations. But even then they can meaningfully affect the content of "EPA-announced good-neighbor obligations" (Tex. Br. 60).

First, States retain a significant role in regional coalitions that have historically influenced EPA's cross-state transport rules and related FIPs. See *supra* at 14. Second, a State that fails to submit a SIP within the three-year deadline may still do so later after EPA proposes to issue a FIP but before the FIP becomes final. Third, States can submit comments regarding the specific emissions reductions that EPA proposes in the FIP, including the allocation of those

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[7] *See also* C.A. App. 928 (noting that to comply with the Act, New York has required NOx reductions at ten times the cost threshold imposed by the Transport Rule).

reductions among sources within the State.[8] These options provide States with a meaningful opportunity to ensure that regulation in this area satisfies their interests. Indeed, despite objecting to EPA's FIPs, Respondents tellingly do not point to a single policy choice that they would have made differently. *See* Tex. Br. 20, 56.

Thus, the approach to § 7410 endorsed in *Train* preserves the States' option to act first to address their good-neighbor obligations without waiting for EPA's assistance, or to accept instead the consequences of EPA's issuance of a FIP. Respondents' position, by contrast, forecloses the States' option to act first, requiring them to play second fiddle to EPA even when they would prefer to chart their own course. It is that result, and not EPA's approach to the Transport Rule, that undermines the States' prerogatives under the Act.

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[8] More than three dozen States, including Respondents and their *amici*, submitted comments to EPA regarding the Transport Rule, its associated FIPs, and the data underlying the rule. *See, e.g.*, Pet App. 199a (updating the source inventory based on comments); *id.* at 219a (updating final modeling and data based on comments); *id.* at 210a (updating emissions data for Nebraska based on comments); W. Va. Amicus Br. 14. The States' numerous comments on the proposed Transport Rule and EPA's announcement of proposed FIPs well in advance of its issuance of the final plans, 75 Fed. Reg. 45,210, 45,299 (Aug. 2, 2010), belie Respondents' assertion that "[m]any upwind States had no idea that they needed to undertake any pollution-mitigation efforts" until the Transport Rule was finalized. Tex. Br. 13.

III. EPA Is Not Required to Delay Issuing a FIP When a State Fails to Address Its Good-Neighbor Obligations.

In addition to challenging the States' obligation to independently address their good-neighbor obligations within three years of the promulgation or revision of a NAAQS, Respondents also assert that EPA must delay issuing FIPs until some undefined period of time after it first quantifies the States' good-neighbor obligations. But Respondents' attempts to find support for such a delay are unavailing.

1. Respondents assert that the States' ability to "correct[] the deficiency" that led to EPA's disapproval of a SIP or finding of no submission, 42 U.S.C. § 7410(c)(1), mandates a waiting period between EPA's disapproval or finding and any resulting FIP. Tex. Br. 47-48. But while the statute invites States to correct deficiencies, it does not require EPA to wait for such correction. To the contrary, the statute expressly authorizes EPA to issue a FIP "at any time" after a disapproval or finding of no submission. 42 U.S.C. § 7410(c)(1).

Respondents complain that this authorization of immediate federal action makes the States' "opportunity to correct" a "meaningless gesture" (Tex. Br. 47), but that is simply not so. Because the Act gives EPA up to two years to issue a FIP after a disapproval or finding of no submission, *see* 42 U.S.C. § 7410(c)(1), as a practical matter States often do have time to correct their submissions. Here, for example, more than a year elapsed after EPA found that States had failed to submit SIPs regarding the 2006 particulate-

matter NAAQS before EPA issued the Transport Rule's FIPs. *See* States' Opening Br. 12-13.

At the same time, the requirement that EPA act within a specified time period helps to maintain the Act's strict timetable for downwind States to achieve the NAAQS. *See id.* at 27-28. Nothing in the Act justifies a court disrupting this balance by giving upwind States more time than the Act provides to correct deficiencies in their SIPs. *See Union Elec. Co. v. EPA*, 427 U.S. 246, 259 (1976).

2. Respondents concede that EPA was authorized and required to issue FIPs under § 7410(c)(1) as a result of its disapprovals and findings that States failed to submit SIPs. They assert, however, that EPA could issue only FIPs that implemented its "previously announced good-neighbor requirements"; FIPs implementing EPA's more recent assessments of good-neighbor obligations had to wait. Tex. Br. 19-20; *see also id.* at 61. But § 7410(c)(1) imposes no such limitation. Once the statutory prerequisites for a FIP have been satisfied (and Respondents acknowledge that they are satisfied here, *see* Tex. Br. 19), EPA is required to promulgate a plan that fully implements "enforceable emission limitations or other control measures, means or techniques" that will "provide[] for attainment of the relevant [NAAQS]." 42 U.S.C. § 7602(y). In other words, EPA must make the policy and technical determinations that the defaulting State should have made to address the State's SIP responsibilities, including its good-neighbor obligations. *See Cent. Az. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1541 (9th Cir. 1993) (EPA "stands in the shoes of the defaulting

State, and all of the rights and duties that would otherwise fall to the State accrue instead to EPA" (quotation marks omitted)); States' Opening Br. 21-22.

Nothing in the Act limits EPA to implementing old emissions targets when it issues a FIP, as Respondents contend. Such a limitation would preclude EPA from issuing a FIP altogether when the agency seeks to address a new NAAQS that was promulgated without any prior rulemaking that could supply preexisting emissions targets to attain or maintain that NAAQS. But even Respondents concede that such a result would violate the plain language of § 7410(c)(1), which (as they acknowledge) requires EPA to issue *some* sort of FIP to address the relevant NAAQS upon a SIP disapproval or finding of failure to submit. Tex. Br. 19-21. When prior emissions targets exist, Respondents' position would force EPA to implement pollution controls based on those possibly outdated assessments of the necessary measures to attain or maintain the relevant NAAQS—or, worse, require EPA to rely on a methodology that a court has declared illegal.[9] *See* Tex. Br. 61 (suggesting that EPA should have "imposed good-neighbor FIPs based on CAIR"). Nothing in the plain language of § 7410 or its

[9] The court of appeals permitted CAIR to remain in effect notwithstanding its decision in *North Carolina*, but only until CAIR was "replaced by a rule consistent with [the court's] opinion." *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

legislative history suggests that Congress intended such perverse results.

3. Respondents contend that the FIPs for the two 1997 NAAQS were invalid because EPA had previously approved good-neighbor SIPs for those NAAQS under CAIR, and EPA had no authority to revoke that approval without giving States a further opportunity to amend their earlier SIPs. Tex. Br. 25-26. But the Act expressly authorizes EPA to "revise" an earlier SIP approval "without requiring any further submission from the State" if EPA determines that its prior approval "was in error." 42 U.S.C. § 7410(k)(6). And the court of appeals' invalidation of CAIR in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam), provided an adequate basis for EPA to determine that it should not have approved the States' CAIR-based SIPs. *See* States' Opening Br. 25, n.17.

Respondents assert (Tex. Br. 29-31) that EPA was required to revoke its approval of the CAIR SIPs under the SIP-call provision of § 7410(k)(5), rather than the error-correction provision of § 7410(k)(6), but that argument fundamentally misunderstands the effect of a judicial decision finding that an agency's rule violates federal law. When a court interprets federal law, it declares "what the law *was*," not merely how the law should be applied going forward. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring) (emphasis added). Thus, when the court of appeals concluded in *North Carolina* that CAIR violated the Act, it effectively held that compliance with CAIR had *never* satisfied the States' good-neighbor obligations,

including when EPA approved the States' CAIR-based SIPs. Because EPA may approve a SIP only to the extent that it "meets all of the applicable requirements" of the Act, 42 U.S.C. § 7410(k)(3), the court of appeals' decision removed *ab initio* the premise on which EPA's SIP approvals had been based, thereby authorizing EPA to determine that its earlier approvals had been "in error" and required correction under § 7410(k)(6).

Rather than squarely confronting the effect of a judicial decision interpreting federal law, Respondents instead repeatedly invoke the specter of EPA "chang[ing] its interpretation of the good-neighbor requirements" as a basis to revoke previously approved SIPs under § 7410(k)(6). Tex. Br. 29; *see also id.* at 30-32, 36. But that is not what happened here. EPA's invocation of § 7410(k)(6) was not a response to a unilateral change in its own interpretation of the good-neighbor provision, nor did it reflect an attempt by EPA to retroactively "alter[] the past legal consequences of past actions," *Georgetown Univ.*, 488 U.S. at 219 (Scalia, J., concurring). Instead, EPA complied with a judicial decision declaring its previous interpretation illegal from its inception.

* * *

Respondents' misinterpretation of the good-neighbor provision and their proposed limits on EPA's FIP authority threaten to delay, for many more years, the relief from upwind air pollution that downwind States have long needed to ensure that air quality for their own citizens reaches standards that

EPA has found "*requisite* to protect the public health," 42 U.S.C. § 7409(b)(1) (emphasis added). Respondents' position would essentially grant upwind States an exemption from their obligation to limit their contributions to downwind States' air-quality problems, while downwind States would continue to suffer the health, welfare, and regulatory consequences of upwind States' disregard of their statutory obligations. Neither the plain language of the Act nor the principles of cooperative federalism that inform its structure authorize that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

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