No. 12-1183

IN THE

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

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

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INTRODUCTION

EPA designed the Transport Rule to conform to statutory requirements and to a recent D.C. Circuit decision pronouncing the agency's predecessor rule too lax and slow in achieving congressionally-mandated pollution reductions. The record shows that EPA strove to provide downwind States timely relief while limiting compliance burdens for upwind States. As our opening brief demonstrated, the decision vacating the Rule contravened basic norms of judicial review.

Respondents' effort to defend the court of appeals' "red lines" fails. They offer no reason—let alone any basis in statutory text—for believing that Congress intended the rules imposed by the panel majority below. On the contrary, those "rules" are unworkable; they reflect a fundamental misunderstanding of the problem and the realities of the electric generating sector; they contravene Congress's expressed preferences for efficiency and trading rules; and they achieve less pollution reduction at far greater cost. Indeed, the only thing the decision below would reliably accomplish would be to further postpone required relief for downwind States and millions of their residents, in an area of Clean Air Act administration already marked by chronic delay and under-enforcement. There is nothing in the statute—certainly not in the word "amounts"—that mandates a specific approach to allocating responsibility among joint upwind contributors or forecloses EPA's equity- and efficiency-promoting approach. Nor is there any merit to the objection some respondents now advance (but did not present to the agency or the

court below), based on a fundamentally mistaken analogy to *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

Also unavailing are the State respondents' highly abstract federalism arguments—all rooted in a supposed "right" to advance notice of federal requirements applicable only to States that have already failed to abate interstate pollution. As a practical matter, the demands the Transport Rule makes of sources in upwind States are modest; these States' claims of helplessness in the absence of a predicate EPA rule are overstated; and even if States had a strong interest in creating their own plans in this context, they already enjoyed the right and opportunity to do so and remain able to replace federal plans with SIPs.

State respondents misunderstand the text and aims of the Good Neighbor provision and of the agency's role vis-à-vis the States. Their appeals to federalism come at the expense of contrary, plain statutory language, which directs EPA to act if States do not—and of this Court's precedent, which recognizes EPA's authority and responsibility to do so. They also ignore the need for *timely* relief for downwind States in order to comply with *statutory* attainment deadlines—an imperative that the D.C. Circuit, in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), on reh'g, 550 F.3d 1176 (D.C. Cir. 2008), emphasized in remanding CAIR with pointed instructions to replace it expeditiously. Respondents' arguments overlook that when EPA acts, it does so on behalf of downwind States that, in the federal system, cannot protect their own

interests. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236-38 (1907).

The practical effect of the Transport Rule is to require electric generating units in States that contribute to neighboring States' air quality problems to operate pollution controls that are already in widespread use throughout much of the country. The Rule's modest requirements (in most instances, requiring abatement only of pollution that can be eliminated for $500 per ton or less) represent a small fraction of the effort that is being exerted in many downwind States struggling with attainment problems. A State that requires its sources to install widely used, cost-effective controls—or merely requires sources to operate pollution controls already in place—has generally satisfied its neighborly duties under EPA's approach.

What the majority below called a "narrow and limited" provision is, in fact, the Act's central remedy for a serious problem—interstate pollution—that not only harms public health, but also confounds the Act's State-focused system for implementing health-based air quality standards. That problem was a key concern of Congress when it enacted and amended the Act to include a robust and flexible measure to protect downwind States and their residents. EPA has reasonably implemented the Good Neighbor provision here.

I. RESPONDENTS' ATTACKS ON EPA'S METHODOLOGY ARE MERITLESS

A. The Act Does Not Prohibit EPA from Taking Account of Control Costs in Apportioning Abatement Responsibilities Among States that Contribute to Interstate Pollution Problems

Certain respondents now claim, for the first time, that the Act prohibits EPA from considering control costs in determining States' Good Neighbor obligations. Brief of Industry and Labor Respondents 22-36 ("I/L Br."). They did not present that objection during the rulemaking—instead they remained mum about this putative fundamental flaw while the agency and scores of stakeholders embarked upon a massive administrative proceeding to implement a D.C. Circuit mandate and address problems affecting a sizeable portion of the country. Respondents' briefs in the D.C. Circuit (and briefs in opposition) did not even cite *American Trucking*, which they accuse *petitioners* of "largely ignoring." I/L Br. 25. While respondents told the D.C. Circuit they were "*not* advocating an 'air quality-only' approach," Industry/Labor C.A. Reply Br. 10 (emphasis added), they now claim the statute mandates such an approach, see I/L Br. 23.

Respondents' new position—that the Act compels EPA to disregard differences in control costs in different States—contradicts six Administrations' consistent understanding of the 1977 and current versions of the Good Neighbor provision. See Institute for Policy Integrity Amicus Brief 17-20 ("IPI Amicus"). It would condemn all of EPA's regional transport rules and prohibit the agency

from developing rules in a way that is effective but that also reduces burdens on sources in upwind States. See Brief of Respondent Utility Air Regulatory Group 28 n.6 (separate brief of electric utility trade association, declining to support other industry respondents' position) ("UARG Br.").

Belatedness, procedural irregularity, and dramatic consequences aside, respondents' argument is without merit. EPA's use of cost thresholds in the Transport Rule bears no resemblance to what was rejected in *American Trucking*. There, the Court considered "whether implementation costs should moderate national air quality standards," 531 U.S. at 468, promulgated under Section 109(b) of the Act, which requires EPA to set standards at a level "requisite to protect the public health" with an "adequate margin of safety," 42 U.S.C. 7409(b). Approving longstanding D.C. Circuit precedent that economic considerations "play no part in the *promulgation* of ambient air quality standards," 531 U.S. at 464 (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980)) (emphasis added), *American Trucking* "held that the text of § 109 of the Clean Air Act, 'interpreted in its statutory and historical context ... unambiguously bars cost considerations' in setting air quality standards under that provision." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (quoting *American Trucking*, 531 U.S. at 471).

In contrast, here EPA is not *setting* health standards, but rather providing a mechanism to allow downwind States to attain and maintain those standards (including the 1997 ozone NAAQS upheld long ago in *American Trucking*) after upwind States

have failed to act on their own. As *American Trucking* observed, implementing standards "intelligently" would be "impossible ... without considering which abatement technologies are most efficient, and most economically feasible." 531 U.S. at 470. Under the Transport Rule (as under the predecessor rules), the agency's consideration of relative pollution abatement costs operates not to weaken health-based standards, but as a means for allocating clean-up responsibilities among jointly responsible parties. EPA never claimed any "general authority" to impose whatever emission reductions it finds to be efficient. I/L Br. 1. The agency's methodology, instead, seeks to remedy demonstrated interstate pollution problems in a carefully calibrated manner. See Pet.App. 349a-351a; Brief for Petitioners American Lung Association, *et al.*, 42-45 ("ALA Br.").

The Good Neighbor provision requires that "each implementation plan submitted by a state" contain "adequate" provisions concerning interstate pollution, 42 U.S.C. 7410(a)(2), but does not specify how States or EPA are to determine States' relative obligations when the emissions from multiple States (and sources in downwind States) contribute to downwind air quality problems. *Cf. Entergy*, 556 U.S. at 222 (statute was "silent" as to factors agency could consider in selecting "best" control technology).[1] Congress has not "directly spoken to

[1] Respondents insist the word "amounts" prohibits EPA from considering cost in determining abatement obligations, I/L Br. 28, 31; see also Pet.App. 41a. But the instruction that plans must prohibit "amounts" of pollution from "source[s]" or "emissions activity," 42 U.S.C. 7410(a)(2)(D)(i)—requirements

th[is] precise question," and EPA's approach is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) ("as a general rule, agencies have authority to fill gaps where the statutes are silent").

Numerous features of the text confirm EPA's discretion to craft a workable approach that reasonably balances upwind and downwind States' respective obligations. A State's plan provisions concerning interstate pollution must be "adequate." 42 U.S.C. 7410(a)(2)(D). When reviewing such plans, this at least allows EPA to decide whether measures will be effective and administrable, and the use of the future tense, *id.* 7410(a)(2)(D)(i) ("will … contribute"), recognizes the role of predictive judgments concerning emissions and air quality. As the D.C. Circuit emphasized in disapproving CAIR, the requirement that interstate pollution plan provisions be "consistent with" the other provisions of Subchapter I, 42 U.S.C. 7401-7515, requires, *inter alia*, that upwind States' Good Neighbor obligations reflect the statutory attainment deadlines that downwind States must satisfy. See *North Carolina*, 531 F.3d at 911-12. And, as the same court emphasized in upholding the NO_x SIP Call, the phrase "contribute significantly" supports agency authority to consider compliance costs. *Michigan v. EPA*, 213 F.3d 663, 677-78 (D.C. Cir. 2000); ALA Br. 35-36.

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the Rule indisputably satisfies—does not address how those "amounts" are to be determined.

That Section 7410(a)(2)(D) addresses inter*state* relations makes the industry respondents' position especially implausible. *Any* allocation of abatement responsibilities necessarily bears upon the interests of both the affected upwind and downwind States. The economic and competitive inequities caused by interstate pollution were a central impetus for the Good Neighbor provision, see ALA Br. 8-9 (discussing 1977 amendment), and by the time the provision took its current form in 1990, EPA had long interpreted the predecessor provision to allow consideration of abatement costs. See IPI Amicus 17-20 & n.6; *cf. Zuni Pub. School Dist. v. Dep't of Educ.*, 550 U.S. 81, 90-91 (2007) (upholding agency interpretation left intact by subsequent legislation).[2]

Cost thresholds measure incremental pollution control effort; they take into account how difficult it would be for States contributing to downwind pollution (some of whom may have already imposed relatively stringent control requirements) to achieve emissions reductions within the time needed to facilitate attainment in downwind States. See ALA Br. 44 (noting that control effort required under different States' regulations can differ greatly); Brief for New York, *et al.* 8 & n.6. It is profoundly implausible that Congress meant silently to forbid EPA from considering the burdens that different

[2] EPA construed the "prevent attainment" standard under the 1977 amendments to apply when upwind States made a "significant contribution" to downwind nonattainment and applied a multi-factor analysis that included "the relative costs of pollution abatement between sources that contribute to a violation." 49 Fed. Reg. 34,851, 35,859 (Sept. 4, 1984); 49 Fed. Reg. 48,152, 48,156 (Dec. 10, 1984) ("relative cost of pollution abatement among contributing sources"). See IPI Amicus 18.

abatement requirements would impose upon States. See *Michigan*, 213 F.3d at 678-79. Respondents have not met their burden to demonstrate that Congress intended to impose strictures with these jarring consequences.

The Act insists upon timely achievement of air quality standards, but also evinces congressional concern with reducing the cost of achieving those standards. See *American Trucking*, 531 U.S. at 467. Congress's express authorization, as part of the 1990 amendments, of the use of "economic incentives," including "marketable permits" in both state and federal implementation plans, 42 U.S.C. 7410(a)(2)(A); *id.* 7602(y), provides an example of this concern. The central objective of such measures is to facilitate least-cost approaches to achieving emissions reductions. See IPI Amicus 14-16 (minimizing implementation costs is the "whole point of authorizing trading"). The Transport Rule's structure and its provisions for trading further these congressional objectives. See Brief of Respondents Calpine Corp. and Exelon Corp. in Support of Petitioners 12-15, 38-40 ("Calpine/Exelon Br.").

EPA's methodology rested upon ample experience, including extensive consultation with affected States and interstate organizations. See ALA Br. 11-12; IPI Amicus 16-20. When regulating power plants selling electricity into regional wholesale markets, consideration of cost is critical to ensuring that the desired air quality results are achieved. See, *e.g.*, Pet.App. 384a (EPA discussing emissions leakage); Calpine/Exelon Br. 10-11, 32-33; Amicus Brief of Benjamin F. Hobbs, *et al.* 24-31. The Rule is carefully fitted to the operational

realities of the electric generation sector, which is marked by production that shifts rapidly from plant to plant based largely upon changes in operating costs (including pollution control costs). See Calpine/Exelon Br. 16-26, 32-33. Particularly with such "technical, complex, and dynamic" problems, *NCTA*, 534 U.S. at 339, agencies may make "policy choices" and take account of "everyday realities," *Chevron*, 467 U.S. at 865-66.

EPA examined alternative approaches, including various versions of "air quality only" approaches that some respondents suddenly purport to favor. See C.A.App. 2306-20. As EPA explained, the effect of adopting an "air quality only" approach would be to require extremely large reductions in certain States. See C.A.App. 2310 (table indicating total State-wide NO_x and SO_2 emissions would require reductions from *all* sources of 76% in Indiana; 75% in Ohio; 70% in Kentucky; and 69% in Pennsylvania); C.A.App. 2030. No participant in EPA's rulemaking advocated any of those approaches or questioned the soundness of the agency's reasons for rejecting them. See ALA Br. 30; Primary Response to Comments at 733-34 (June 2011), Docket No. EPA-HQ-OAR-2009-0491-4513 (addressing comments concerning alternative approaches). Respondents provide no reason, let alone a statutory one, to disturb EPA's judgment now.

B. Respondents' Arguments Would Annul the Clean Air Act's Exhaustion Requirement and Undermine the Administrative Process

The court of appeals' central rulings sustained objections not raised during the administrative process, bypassing the express statutory exhaustion

requirement that undergirds the integrity of the administrative process. ALA Br. 28-35; Brief of Petitioner EPA 34-42 ("EPA Br."); see Amicus Brief of Law Professors on Issue Exhaustion 7-9 ("Law Professors' Amicus"). Respondents' rejoinders lack merit.

Respondents seek to evade Section 7607(d)(7)(B); denying its importance for the Act's carefully drawn judicial review regime. Their suggestion that statutory claims need not be exhausted, UARG Br. 35-39, would create a gaping exemption to Section 7607(d)(7)(B)'s categorical language; contradicts precedent, see, *e.g.*, *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 860 (D.C. Cir. 2001); and would upend judicial review under *Chevron*, which ensures that statutory ambiguities will be first resolved "not by the courts but by the administering agency," *City of Arlington*, 133 S. Ct. at 1868; see *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011). The submission that courts are free to entertain unexhausted *non-procedural* objections, I/L Br. 44, is contrary to the letter and purposes of the exhaustion provision.

Respondents also suggest that, regardless of whether the exhaustion requirement was met, this Court should proceed to address the merits issues since the D.C. Circuit ruled on them. I/L Br. 53-54. But that approach would undermine an important, structural feature of the Act and ill serve Congress's pointed insistence on the importance of exhaustion in rulemaking under the Act. It also would invite parties to "sandbag" the agency and other interested parties by withholding objections during the administrative process, then presenting them in

court. Law Professors' Amicus 14. At the very least, if the Court does address the merits, it should not, as respondents do, fault the agency for its "failure" to answer objections that were not made. See, *e.g.*, I/L Br. 20-21, 40 (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and urging the Court to disregard EPA's responses to their unexhausted arguments).[3]

C. The Court of Appeals' "Red Lines" Are Not Statutory Requirements

Respondents' efforts to defend the D.C. Circuit majority's "red lines" only emphasize the degree to which the court departed from settled standards for reviewing agency action.

Collective Overcontrol. In their unidirectional focus on "overcontrol," I/L Br. 16-22; UARG Br. 18, respondents ignore the Good Neighbor provision's central mandate to prohibit pollution that impedes other States' ability to meet each of the health-based national air quality standards. These standards are the core of the Act, and violation of them causes thousands of avoidable deaths and serious illnesses each year. ALA Br. 51-52; Amicus Brief of American Thoracic Society 21 ("ATS Amicus"). When confronted with a regional air pollution problem, EPA must—as it did here—craft a rule that balances

[3] Respondents have unearthed no comments making the relevant objections. See I/L Br. 50-51. Tennessee's comment claims no statutory violation and attests that "the [Rule's] emissions reductions … are necessary in order for Tennessee and other States to attain and maintain compliance with the [applicable] NAAQS." C.A.App. 556. Neither it, nor Wisconsin's comment, C.A.App. 1293, raises the one percent threshold objection with "reasonable specificity," 42 U.S.C. 7607(d)(7)(B).

the prospect of "overcontrol" against that of "undercontrol."

Respondents allege that "[t]he record shows that EPA massively overcontrolled," I/L Br. 18, when, in fact, it shows that the Transport Rule falls short of resolving all the $PM_{2.5}$ and ozone nonattainment and maintenance problems in the covered region. See EPA Br. 53. Respondents disregard these persistent problems and premise their overcontrol argument on metrics such as air quality averaged across *all* downwind receptors and air quality at the "substantial *majority* of locations." I/L Br. 18. These metrics have no statutory basis and are contrary to Congress's directive that *every* State must achieve the health-based national air quality standards within statutory deadlines—or earlier if practicable. See 42 U.S.C. 7410(a)(1), 7502(a)(2)(A), 7511; see also *Union Electric Co. v. EPA*, 427 U.S. 246, 249 (1976); *North Carolina*, 531 F.3d at 911, 930.

Just before arguing that the Act prohibits consideration of cost, industry respondents' brief faults EPA for not adopting *lower* cost thresholds, though lower thresholds would have resulted in more locations with residual attainment problems. I/L Br. 16. Moreover, they point to EPA's projections for *annual* $PM_{2.5}$ air quality levels in 2014 as evidence of "massive overcontrol," *id.* at 18, while disregarding the Transport Rule's "undercontrol" for the *24-hour* $PM_{2.5}$ standard. See, *e.g.*, C.A.App. 2965 (showing post-remedy 24-hour $PM_{2.5}$ nonattainment and maintenance problems in several counties). The two $PM_{2.5}$ standards are directed at different types of exposure (chronic versus acute) to the same pollutants, with the same precursors. (NO_x is a

precursor for all three NAAQS at issue here.) The additional emissions reductions necessary to ensure attainment of the daily $PM_{2.5}$ NAAQS also reduce predicted levels of $PM_{2.5}$ measured annually. See Atmospheric Scientists and Air Quality Modeling Experts Amicus Brief 28 ("Atmospheric Scientists Amicus"). "Undercontrolling" for daily $PM_{2.5}$ to avoid "overcontrolling" for annual $PM_{2.5}$ would violate the Act's directive that *all* air quality standards be timely attained.

Respondents also claim that an upwind State is "overcontrolled" if the sole downwind location to which it is linked for the purpose of triggering inclusion in the program will attain and maintain the NAAQS based upon the projected Good Neighbor reductions of other upwind States. See I/L Br. 19. But the Transport Rule's projected air quality benefits for Madison, Illinois, for example, do not result from Texas's being "overcontrolled," but rather are incidental benefits from the cumulative emissions reductions made by Texas's co-contributors acting simultaneously to enable timely NAAQS compliance. See Atmospheric Scientists Amicus 28. The statute's text does not support giving certain upwind States an exemption in these circumstances. See also 42 U.S.C. 7410(a)(2)(D)(i) ("[e]ach" state plan must contain "adequate" provisions "prohibiting" "any" source or emissions activity that contributes significantly to downwind air quality problems). Moreover, given that States have the primary Good Neighbor obligation, respondents' approach would provide each upwind State with an incentive (indeed a legal basis) to omit Good Neighbor protections from its State plan while relying on other States to fix problems to which they

all contribute. See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 975 (1997) (describing "holdout" and "free-rider" problems inherent in the interstate pollution problem); see also EPA Br. 4-5 (describing amendments to Good Neighbor provision to address contributions from multiple sources).

Finally, respondents rely on extra-record ozone and $PM_{2.5}$ data from 2009-2011 to argue that the Transport Rule's reductions are not necessary to achieve downwind attainment of the NAAQS. I/L Br. 20. Even if these data were properly before the Court, more recent EPA data refute the assumption of a persistent improving air quality trend that obviates the need for further federal action. See ATS Amicus 24-26.

One Percent Threshold. Contrary to respondents' claims, I/L Br. 13, 38; UARG Br. 31, EPA did not present its one percent threshold as the agency's "definition" of "significant contribution." Had that been so, EPA would have had a statutory obligation to require States to "prohibit[]" *all* contributions above one percent, see 42 U.S.C. 7410(a)(2)(D)—a position EPA did not take, and which respondents do not advocate. See C.A.App. 2309-10 (discussing extreme consequences of fixed air quality threshold approaches). Instead, EPA defined significant contributions by the entirety of its two-step analysis. Pet.App. 350a-351a. Assuming, contrary to the evidence, that the Transport Rule *did* reduce some States' emissions below the initial screening threshold, the statute would not be violated. Nor is there any principle of law or logic that requires a regulator, having

established a coverage threshold (*e.g.*, tons of pollution emitted, number of persons employed), to grant exclusions to entities for the portion of their action that falls below the threshold.

Proportionality. Respondents make no serious attempt to defend what the court of appeals called "the statute's proportionality requirement." Pet.App. 38a-39a. This is no surprise, because the purported statutory "red line" has no textual basis and indeed is outright *impossible* under the real-world conditions EPA confronted, which involve multiple upwind States contributing to air pollution problems in multiple downwind States. See ALA Br. 39-40; EPA Br. 45-50; Calpine/Exelon Br. 47-51; Atmospheric Scientists Amicus 26-27; C.A.App. 2311-12.

Respondents attempt to diminish the centrality of the proportionality requirement to the decision below by citing the court's statement that EPA has "some discretion about how to reasonably avoid such over-control." I/L Br. 34; quoting Pet.App. 29a. If the court's "red lines" were indeed statutory requirements, it is unclear what the basis for such flexibility would be. Regardless, the majority's proviso addressed not the proportionality requirement, but "over-control," an issue that industry respondents recognize is "independent," "distinct," and "separate[]" from proportionality. Industry Brief in Opp. 24; see also Pet.App. 25a, 27a, 29a. The court's "proportionality requirement" has no basis in the statute and departed from foundational principles of judicial review. See ALA Br. 39-40.

II. THE COURT OF APPEALS ERRED IN BARRING EPA FROM ISSUING FEDERAL IMPLEMENTATION PLANS

A. Section 7410(a) Places an Initial, Achievable Responsibility upon Each State to Develop a Good Neighbor Plan

The Act expressly requires "each state" to submit, within three years after promulgation of any new or revised NAAQS, a SIP addressing its Good Neighbor obligations, 42 U.S.C. 7410(a)(1); 7410(a)(2)(D)(i)(I). If EPA finds that a State has not submitted a plan within three years, or that a State submission is inadequate, EPA must within two years promulgate a FIP addressing the Good Neighbor obligations. *Id.* 7410(c)(1), 7602(y). As our opening brief demonstrated, respondents and the panel decision err by inserting an extra-statutory requirement that EPA quantify Good Neighbor obligations before a State's obligation to propose a transport plan is triggered. See ALA Br. 48-51, 59; Brief for New York, *et al.* 24. See also *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978) (reviewing court not empowered to impose procedures not required by statute).

Lacking a textual rejoinder, respondents condemn petitioners for "dogmatically" invoking the statute's words. Brief for the State and Local Respondents 43, 44 ("Texas Br."). But "[w]hen the words of a statute are unambiguous, then ... judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citations and internal quotation marks omitted).

Under the express terms of Section 7410(a), a State's Good Neighbor obligation is triggered when a NAAQS is promulgated under Section 7409. Each State has an obligation to secure the health benefits of NAAQS attainment for its residents, 42 U.S.C. 7410(a)(1), and to ensure its pollution sources do not prevent the residents of downwind States from realizing those same benefits, *id.* 7410(a)(2)(D)(i). In doing so, a State may propose its own mechanism for ensuring its Good Neighbor obligations are met. See *Train v. NRDC*, 421 U.S. 60, 79 (1975). States do not need EPA to define their minimum duties before they can act, and the statute does not create any such condition precedent.

Many of the respondent States have previously stated that the Good Neighbor provision is "not ambiguous as to the division of authority—EPA sets *national* air quality standards and the States have the responsibility ... to prevent significant contribution to nonattainment in other States," State Pet. Br., *Michigan v. EPA*, D.C. Cir. No. 98-1497, at 35, and that "EPA's role is to determine whether the SIP submitted is 'adequate' to reduce significant contribution to nonattainment of the NAAQS in another State, not to dictate contents of the submittal in the first instance," *id.* at 37.[4]

Respondents now complain that compliance with Good Neighbor requirements is impossible unless EPA first quantifies their obligations. Texas Br. 56. Their protestations ignore both the nature of the Good Neighbor obligation and the reality of

[4] Respondents Alabama, Indiana, Michigan, Ohio, South Carolina, Virginia and amicus West Virginia joined the brief.

independent State compliance. The statute does not require a State to determine the Good Neighbor obligations of its sister States. A State need only present a plan that addresses emissions from sources and other activities within its own borders that affect air quality in downwind States, 42 U.S.C. 7410(a)(2)(D)(i). In practice, a State requiring that in-state sources install and use commonly-available pollution control equipment is unlikely to incur further responsibilities given EPA's assessment of significant contribution in regional rulemakings. See, *e.g.*, 76 Fed. Reg. 2853, 2856 (Jan. 18, 2011) (proposing approval of Delaware transport SIP, which required power plants and industrial boilers to use best available control technology); 76 Fed. Reg. 56,368 (Aug. 29, 2011) (final approval). Nor are States incapable of conducting their own transport analyses. See, *e.g.*, 78 Fed. Reg. 45,457, 45,458 (July 29, 2013) (noting North Dakota's submittal of its own transport analysis); 78 Fed. Reg. 40,966, 40,967 (July 9, 2013) (same for New Mexico); see also ALA Br. 56 & n.24.

As amicus notes, States have the best information regarding emissions from sources within their boundaries. Amicus Brief of West Virginia, *et al.* 13-14 ("W. Va. Amicus"). They regularly undertake air quality modeling to demonstrate the effect of their emissions on ambient air quality. 42 U.S.C. 7410(a)(2)(K); see also Atmospheric Scientists Amicus 17 & n.5. Moreover, States demonstrate that upwind air pollution sources prevent them from achieving or maintaining attainment. See, *e.g.*, *North Carolina*, 531 F.3d at 909 (North Carolina noted difficulty maintaining NAAQS due to upwind sources). In reviewing timely Good Neighbor SIPs,

EPA asks only that States use available information, not that they solve the entirety of regional air quality problems. See EPA, Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) [NAAQS] (Sept. 2009) (available at http://www.epa.gov/ttn/caaa/t1/memoranda/20090925_harnett_pm25_sip_110a12.pdf).

EPA's obligation to issue a rule quantifying a State's significant contribution or interference with maintenance arises only after a State has failed to submit a transport plan, or submits an inadequate plan. 42 U.S.C. 7410(c). If EPA approves a state plan that subsequently proves inadequate based on later-arising information, EPA can *at that* time invoke its authority under a different part of Section 7410—*i.e.*, the "SIP Call" provision, *id.* 7410(k)(5)—and request that States submit revised plans to address those inadequacies. Indeed, this is what EPA did in the NO_x SIP Call, 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998), and is the approach used here to address interstate transport of ozone from Kansas when Transport Rule modeling revealed impacts that were not being addressed under Kansas's previously approved SIP, 76 Fed. Reg. 80,760, 80,766 (Dec. 27, 2011).

B. The Court of Appeals Exceeded Its Jurisdiction by Reviewing Previously Issued EPA Triggering Findings Not Properly Before It

The panel's direct attacks on EPA's triggering findings exceeded its jurisdiction in violation of Section 7607(b)(1). Respondents do not disavow the panel's rulings that SIPs "*cannot* be deemed to lack a

required submission" and "*cannot* ... be deemed deficient," Pet.App. 48a (emphasis added), if EPA has not previously quantified emissions reductions requirements. See Texas Br. 39-40, 52.

Nonetheless, respondents claim to accept EPA's prior SIP findings and to challenge not *whether* EPA may issue any FIP, but only *what kind* of FIP EPA may issue. *Id.* at 20-21; *id.* at 61 (suggesting FIP based on CAIR budgets). But if EPA must first quantify emissions reductions, no type of FIP *could* ever be lawful—let alone here, where a FIP implementing CAIR budgets already held unlawful in *North Carolina* would contravene the duty and "explicit deadline[]" established by Section 7410(c). See *Gen. Motors Corp. v. EPA*, 496 U.S. 530, 537 (1990).

Respondents suggest that EPA issue a "SIP Call" under Section 7410(k)(5), see Texas Br. 20, but that provision provides for revisions to an "applicable implementation plan." See 42 U.S.C. 7410(k)(5); *id.* 7602(q). For the 2006 NAAQS, no such plans existed. For the 1997 NAAQS, the protracted process of issuing a SIP Call, waiting for a State response, and, if needed, promulgating a second Section 7410(c) finding, would drain the current Section 7410(c) findings of effect. This approach would flout the D.C. Circuit's call for timely action to replace CAIR, *North Carolina*, 550 F.3d at 1178, and its mandate that Good Neighbor plans conform to the Act's deadlines for NAAQS compliance, 531 F.3d at 912.

Respondents insist they did not seek to *vacate* the triggering findings, Texas Br. 21; UARG Br. 20, but because any nonsubmittal or insufficiency

finding triggers an obligation to issue a FIP within two years, 42 U.S.C. 7410(c), the panel's ruling that EPA cannot (yet) issue a FIP denies those findings their legal significance—*i.e.*, as triggering a time-limited obligation to issue a FIP. See *NRDC v. Browner*, 57 F.3d 1122, 1124 (D.C. Cir. 1995) ("FIP promulgation can be avoided only if EPA has actually approved the state's SIP submission").

Respondents are left to argue that they may pursue a collateral attack because the bar on untimely petitions for review is nonjurisdictional. Texas Br. 24-25. They cite *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), but that case involved review by an *Article I* court, *id.* at 1204, and distinguished (but did not overturn) *Stone v. INS*, 514 U.S. 386 (1995), which held—as to an Article III court—that "statutory provisions specifying the timing of review" are, "as we have often stated, mandatory and jurisdictional," *id.* at 405 (citation and internal quotation marks omitted). Also inapt is *Kontrick v. Ryan*, 540 U.S. 443 (2004), which addressed requirements imposed not by statute, but by court rule, *id.* at 453-54. Here, the filing requirements are statutory, 42 U.S.C. 7607(b)(1), and under respondents' own test are jurisdictional, as they "delineate the 'classes of cases' a court may hear." I/L Br. 43 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010)). See also 42 U.S.C. 7607(e) (Act's review regime is exclusive).

C. EPA Properly Used Its FIP Authority to Implement the Good Neighbor Obligations

EPA's FIPs for the 1997 and 2006 NAAQS were properly grounded in the agency's authority under Sections 7410(a)(2)(D), 7410(c) and 7602(y). EPA's

actions, taken more than ten years after the 1997 NAAQS were established and five years after promulgation of the 2006 NAAQS, were essential protections mandated by Section 7410(c) and critical to protect human health.

Texas claims that EPA may not invoke Section 7410(k)(6) to correct its prior approvals of 22 CAIR SIPs addressing the 1997 NAAQS because any legal flaw that *North Carolina* identified did not exist at the time the SIP was approved. Texas Br. 29. EPA's action merely corrected any statement that the previously approved SIPs satisfied Good Neighbor obligations or extinguished EPA's related FIP obligations with respect to the 1997 NAAQS. EPA was bound to do so by the court's actions because "the decision of a federal court must be given retroactive effect." *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) (citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993)). EPA did not "change its interpretation" of the Good Neighbor provision, Texas Br. 29; it merely invoked Section 7410(k)(6) to give effect to the court's decision in *North Carolina*.

EPA's authority to promulgate a federal plan did not "expire," Texas Br. 29, once the agency approved the CAIR SIPs. The agency retains its statutory duty to ensure plans are in place to address Good Neighbor obligations until those obligations are satisfied. 42 U.S.C. 7410(c). Moreover, EPA properly invoked the good cause exemption from notice and comment requirements, which applies to Clean Air Act regulatory actions either under 5 U.S.C. 553(b)(3)(B) directly, or via Section

7607(d)(1)'s language expressly incorporating Section 553(b)(3)(B).

Respondents suggest that EPA's use of Transport Rule modeling in its evaluation of Kansas's and Delaware's SIPs to address the 2006 NAAQS demonstrates that EPA's assessment of SIPs was dependent on the content of its FIP actions. UARG Br. 24-26. Both reviews took place in 2011, two years after the deadline for submitting transport SIPs for the 2006 NAAQS passed. See 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 53,638 (Aug. 29, 2011) (Delaware). EPA's use of all information available to it when evaluating SIP submittals is nothing other than good administrative practice. Use of Transport Rule modeling did not indicate that the agency expected States to have predicted the analysis that EPA would later adopt, but rather that, if States disagreed with EPA's available data, they must provide technical data indicating that EPA's analysis was flawed. This is precisely what took place. Delaware provided extensive technical information regarding State emissions inventories and regulations to rebut EPA's proposed conclusion that Delaware was significantly contributing to nonattainment. 76 Fed. Reg. 2853, 2857 (Jan. 18, 2011). Based in part on that information, EPA agreed that Delaware had met its Good Neighbor obligations. 76 Fed. Reg. at 53,638. Similarly, Kansas provided additional data which was subsequently used to adjust its emissions budgets. 77 Fed. Reg. 34,830, 34,840 (June 12, 2012).

Respondents argue that States were not required to submit Good Neighbor SIPs, because Section

7410(a)(2)(D)(i)(I) contains ambiguous language (in particular, the phrase "contribute significantly"), and thus contains a "gap" that only EPA can fill. Texas Br. 39-40, 52. Statutory ambiguity does not warrant ignoring what is unambiguous, including the statute's carefully crafted sequence of implementation steps, each with a deadline to promote accountability. ALA Br. 51-52; see also *General Motors*, 496 U.S. at 533 (integrated SIP timetable in 1970 Act "reflected the urgency of establishing air-pollution controls").

Respondents' arguments contravene the Act's language—and its cooperative federalism paradigm. They deny States the statutorily prescribed opportunity to implement NAAQS by crafting Good Neighbor SIPs and deny EPA's statutorily prescribed obligation—expressly recognized by this Court's precedent—to step in with FIPs when States fail to submit state plans that conform to Section 7410(a)(2). See *Train v. NRDC*, 421 U.S. at 79.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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