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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

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

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

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

3. Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate

air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

PARTIES TO THE PROCEEDING

The following were parties in the proceedings in the United States Court of Appeals for the District of Columbia Circuit:

American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club, petitioners in this Court, were intervenors in support of the United States Environmental Protection Agency.

The United States Environmental Protection Agency ("EPA"), respondent in the D.C. Circuit, has filed a separate petition in this Court, which was also granted (No. 12-1182). The other named respondent in the court of appeals was EPA Administrator Lisa Perez Jackson. As of February 15, 2013, Ms. Jackson no longer holds that office. Regina McCarthy is the current Administrator.

Additional respondent-intervenors below in support of the United States Environmental Protection Agency, who are nominal respondents on review, are Calpine Corporation; City of Bridgeport, Connecticut; City of Chicago; City of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395); City of Philadelphia; Commonwealth of Massachusetts;

District of Columbia; Exelon Corporation; Mayor and City Council of Baltimore; Public Service Enterprise Group, Inc.; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395); State of North Carolina; State of Rhode Island; and State of Vermont.

Petitioners below, who are respondents in this Court, were AEP Texas North Company; Alabama Power Company; American Coal Company; American Energy Corporation; Appalachian Power Company; ARRIPA; Big Brown Lignite Company LLC; Big Brown Power Company LLC; City of Ames, Iowa; City of Springfield, Illinois, Office of Public Utilities, d/b/a City Water, Light & Power; Columbus Southern Power Company; Consolidated Edison Company of New York, Inc.; CPI USA North Carolina LLC; Dairyland Power Cooperative; DTE Stoneman, LLC; East Kentucky Power Cooperative, Inc.; EME Homer City Generation, LP; Entergy Corporation; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Environmental Energy Alliance of New York, LLC; GenOn Energy, Inc.; Georgia Power Company; Gulf Power Company; Indiana Michigan Power Company; International Brotherhood of Electrical Workers, AFL-CIO; Kansas City Board of Public Utilities, Unified Government of Wyandotte County, Kansas City, Kansas; Kansas Gas and Electric Company; Kenamerican Resources, Inc.; Kentucky Power Company; Lafayette Utilities System; Louisiana Chemical Association; Louisiana Department of Environmental Quality; Louisiana Public Service

Commission; Luminant Big Brown Mining Company LLC; Luminant Energy Company LLC; Luminant Generation Company LLC; Luminant Holding Company LLC; Luminant Mining Company LLC; Midwest Food Processors; Mississippi Power Company; Mississippi Public Service Commission; Municipal Electric Authority of Georgia; Murray Energy Corporation; National Rural Electric Cooperative Association; Northern States Power Company (a Minnesota Corporation); Oak Grove Management Company LLC; Ohio Power Company; Ohio Valley Coal Company; Ohio American Energy Inc.; Peabody Energy Inc.; Public Service Commission of Oklahoma; Public Utility Commission of Texas; Railroad Commission of Texas; Sandow Power Company; South Mississippi Electric Power Association; Southern Company Service, Inc.; Southern Power Company; Southwestern Electric Power Company; Southwestern Public Service Company; State of Alabama; State of Florida; State of Georgia; State of Indiana; State of Kansas; State of Louisiana; State of Michigan; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; State of Virginia; State of Wisconsin; Sunbury Generation LP; Sunflower Electric Power Corp.; Texas Commission on Environmental Quality; Texas General Land Office; Utility Air Regulatory Group; United Mine Workers of America; Utah America Energy, Inc.; Westar Energy, Inc.; Western Farmers Electric Cooperative; Wisconsin Case Metals Association; Wisconsin Electric Power Company; Wisconsin Paper Council,

Inc.; Wisconsin Manufacturers and Commerce; and Wisconsin Public Service Corp.

Intervenors in support of petitioners below, who are respondents or nominal respondents on review, were City of New York (D.C. Cir. Nos. 11-1388 & 11-1395 only); San Miguel Electric Cooperative, and State of New York (D.C. Cir. Nos. 11-1388 & 11-1395 only).

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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JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. That court denied petitions for rehearing en banc on January 24, 2013. Pet.App. 1459a-1462a. The petition for certiorari was filed on March 29, 2013. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

Section 110(a)(2) of the Clean Air Act, 42 U.S.C. 7410(a)(2), provides:

> Each implementation plan submitted by a State under this chapter … shall …
>
> (D) contain adequate provisions—
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
> >
> > > (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with

> respect to any such national primary or secondary ambient air quality standard. …

Section 110(c), *id*. 7410(c)(1), provides:

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

The Act's judicial review provisions state:

> Any petition for review … shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day. *Id*. 7607(b)(1);
>
> Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment … may be raised during judicial review. *Id*. 7607(d)(7)(B).

Other relevant provisions of the Clean Air Act may be found at Pet.App. 1463a-1498a. EPA's Cross State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) ("Transport Rule"), is reprinted at Pet.App. 117a-785a.

INTRODUCTION

Interstate pollution poses a distinct challenge for our federal system. Upwind States may lack incentives to control pollution insofar as it affects their neighbors, and downwind States lack the authority to regulate "persons beyond [their] control," *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907). Indeed, for many areas with difficulties attaining or maintaining the Act's health-based air quality standards, pollution from upwind States accounts for more than three-quarters of local air pollution concentrations.[1] Such pollution creates both public health and economic harms for downwind States, which may be forced to impose far more stringent, and expensive, controls than upwind neighbors.

Remedying interstate air pollution has therefore long been understood to be a special federal responsibility. Decades before Congress enacted the Clean Air Act, this Court explained that "[w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done," and then granted Georgia's "fair and reasonable

[1] See, *e.g.*, C.A.App. 2457 (Air Quality Modeling TSD), JA 175-85 (Air Quality Modeling TSD, App. F).

demand" that its air "should not be polluted on a great scale" by States whose geographic position and climatological conditions permitted them to export air pollution. *Tennessee Copper*, 206 U.S. at 236; see also *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Missouri v. Illinois*, 200 U.S. 496, 519 (1906).

Consistent with the national government's responsibility for preventing and resolving interstate conflicts, *cf.*, *e.g.*, U.S. Const., Art. I, Sec. 8, Cl. 3 (regulation of interstate commerce); Art. I, Sec. 10, Cl. 3 (Compact Clause); Art. III, Sec. 2 (jurisdiction over suits between States); Art. IV, Sec. 1 (Full Faith and Credit Clause), Congress repeatedly has enacted, and strengthened, interstate air pollution protections in clean air legislation adopted in 1963, 1967, 1970, 1977, and 1990. See *infra*, 8-10. The current version of the Clean Air Act contains a "Good Neighbor" provision prohibiting air pollution that "contributes significantly" to nonattainment or "interferes with maintenance" of air quality standards in downwind States. 42 U.S.C. 7410(a)(2)(D)(i)(I); see also *id.* 7426(b).

EPA adopted the Transport Rule pursuant to the Good Neighbor provision in order to address interstate pollution that is a major cause of failures to attain and maintain health-based air quality standards. The agency crafted the Rule specifically to respond to shortcomings the D.C. Circuit had identified in a predecessor rule adopted in 2005. The Rule is projected to have very extensive public health benefits and to help resolve air quality

problems for many downwind areas, in accord with statutory attainment deadlines and prior D.C. Circuit instructions specifically directing that EPA act expeditiously to provide downwind States timely relief. In the decision below, a divided panel of the D.C. Circuit vacated this major rule.

In so ruling, the court below abandoned its proper review task. Inverting the proper role of a court under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-45 (1984), the majority imposed its own detailed judicial requirements for Good Neighbor rules, ones not compelled by anything in the ambiguous statutory text and unsuited to the realities of the air pollution problem the provision addresses. In doing so, the court entertained (and raised *sua sponte*) objections to EPA's rule that had not been raised in the administrative proceedings.

The majority below also defied plain statutory text in invalidating EPA's federal implementation plans for the Transport Rule. The court's decision, effectively invalidating prior administrative actions, was beyond its jurisdiction. Moreover, its novel and highly consequential ruling that States lack any duty to submit plans until EPA issues a quantifying rule contravenes plain statutory language and diminishes the proper role of States under the Act.

The court of appeals majority's revisions of the statute would force EPA to follow unworkable judicial algorithms that Congress never enacted, make interstate transport regulation an endless cycle of delay and failure, and thwart timely

attainment of the nation's health-based air quality standards.

STATEMENT OF THE CASE

A. Statutory Background

In the Clean Air Act, Congress adopted a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Act aims "to guarantee the prompt attainment and maintenance" of health-based air quality standards. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976). EPA is required to list air pollutants that "may reasonably be anticipated to endanger public health or welfare" and to promulgate national ambient air quality standards (NAAQS) for such pollutants. 42 U.S.C. 7408(a), 7409(a); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 462-63 (2001). States then have a responsibility to submit to EPA state implementation plans (SIPs) adequate to maintain air quality in areas that are meeting standards and to bring "nonattainment" areas into attainment status by specified dates (and in all cases as "expeditiously as practicable"). See, *e.g.*, 42 U.S.C. 7502(a)(2)(A), 7511(a)(1), 7513(c); *Train v. NRDC, Inc.*, 421 U.S. 60, 66 (1975) (characterizing this timely attainment obligation as the "heart" of the Act).

"[W]ithin 3 years (or such shorter period as the Administrator may prescribe)" after the promulgation or revision of a NAAQS, States are

obligated to submit to the Administrator a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS and satisfies other, specified statutory conditions. 42 U.S.C. 7410(a)(1), 7410(a)(2)(A). Among these conditions is the requirement that SIPs contain provisions adequate to ensure that sources within the State will not emit pollutants in amounts that "contribute significantly" to other States' nonattainment or that "interfere with" their maintenance of NAAQS. *Id.* 7410(a)(2)(D)(i)(I).

If a State fails to submit a SIP, or submits an inadequate one, EPA must make a finding of failure to submit or disapprove the submission. 42 U.S.C. 7410(k)(1), (3). The "Administrator shall promulgate a Federal implementation plan at any time within 2 years" of making such a finding or disapproval unless the State has addressed the problem and the EPA has approved the SIP. See *id.* 7410(c)(1).

Challenges to EPA's rulemakings must be filed within 60 days, *id.* 7607(b)(1), and "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment … may be raised during judicial review," *id.* 7607(d)(7)(B). See also *id.* 7607(e) ("Nothing in this chapter shall be construed to authorize judicial review … except as provided in this section.").

B. Interstate Air Pollution and the Act's "Good Neighbor" Provision

Over the last half-century, Congress has repeatedly enacted, revisited, and strengthened provisions intended to provide relief from interstate air pollution. See Pub. L. No. 88-206, §5, 77 Stat. 392, 396-99 (1963); Pub. L. No. 90-148, §2, 81 Stat. 485, 490, 494-96 (1967). See H.R. Rep. No. 90-728, at 12 (1967). Although the landmark 1970 amendments added a provision requiring SIPs to include "measures necessary" to "insure" against interference with attainment in downwind areas, Pub. L. No. 91-604, §4(a), 84 Stat. 1676, 1680-81 (1970), EPA, with court approval, interpreted the provision narrowly as requiring only "information exchange," among States. *E.g.*, *NRDC, Inc. v. EPA*, 483 F.2d 690, 692-93 (8th Cir. 1973).

Concluding that "[t]he problem of interstate air pollution remains a serious one that requires a better solution," H.R. Rep. No. 95-294, at 329-330 (1977), Congress in 1977 amended the Act to require that each SIP contain adequate provisions prohibiting emissions from "any stationary source within the State … which will … prevent attainment or maintenance by any other State of any [NAAQS]," Pub. L. No. 95-95, §108(a)(4), 91 Stat. 685, 693 (1977), and to authorize EPA to impose emissions limitations directly upon stationary sources emitting pollutants across State boundaries, *id.* §123, 91 Stat. at 724. The 1977 Amendments reflected Congress's recognition that weak regulation had "result[ed] in serious inequities

among several States"—*i.e.,* that "[i]n the absence of interstate abatement procedures," plants in downwind States were "at a distinct economic and competitive disadvantage"—and were "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." S. Rep. No. 95-127, at 41-42 (1977).

Even after these amendments, however, federal statutory remedies for interstate pollution continued to be inadequate. Due in part to the absence of remedies for "states affected by numerous sources," Kay M. Crider, *Interstate Air Pollution: Over A Decade of Ineffective Regulation*, 64 Chi.-Kent L. Rev. 619, 637-38 (1988), and the restrictive "prevent attainment" language, States' efforts to obtain Good Neighbor relief proved uniformly unsuccessful. See, *e.g.*, *Connecticut v. EPA*, 696 F.2d 147, 152 (2d Cir. 1982); *Air Pollution Control Dist. of Jefferson County v. EPA*, 739 F.2d 1071, 1094-95 (6th Cir. 1984); *New York v. EPA*, 852 F.2d 574, 581 (D.C. Cir. 1988) (R.B. Ginsburg, J., concurring) ("As counsel for the EPA acknowledged at oral argument, the EPA has taken *no* action against sources of interstate air pollution under either § 126(b) or § 110(a)(2)(E) in the decade-plus since those provisions were enacted.") (emphasis in original).

Determining that "additional efforts" were needed to address the "transport problem," see S. Rep. No. 101-228, at 48 (1989), Congress amended

the Good Neighbor provision into its current form in 1990, requiring that each state implementation plan:

> (D) contain adequate provisions—
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source *or other type of emissions activity* within the State from emitting any air pollutant in amounts which will—
> >
> > > (I) *contribute significantly* to nonattainment in, or *interfere with maintenance* by, any other State with respect to any such national primary or secondary ambient air quality standard. …

42 U.S.C. 7410(a)(2)(D) (emphasis added).

As with other SIP requirements, States' Good Neighbor plans must be submitted to EPA within three years of the promulgation of a new or revised NAAQS. 42 U.S.C. 7410(a)(1), 7410(a)(2)(D).

Under the Act, each State remains responsible for complying with air quality standards by the statutory deadlines even if much of its local air pollution originates out of State. See *Sierra Club v. E.P.A.* 294 F.3d 155, 160-62 (D.C. Cir. 2002) (holding that EPA was without authority to grant extension from nonattainment deadline in 42 U.S.C. 7511(a)(1) on basis of "setbacks owing to [interstate] ozone transport"); *Sierra Club v. EPA*, 311 F.3d 853, 860 (7th Cir. 2002); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002). See also *Southwestern*

Pennsylvania Growth Alliance v. Browner, 121 F.3d 106, 115-17 (3d Cir. 1997) (Alito, J.) (upholding EPA's refusal to redesignate nonattainment area in Western Pennsylvania despite argument that much of area's ozone pollution was attributable to pollution transported from other States, including agency's conclusion that origin of pollution was "legally irrelevant" to attainment status); *id*. at 124 (Becker, J., concurring) (lamenting circumstances of locality "whose herculean and largely successful efforts to combat air pollution may be derailed due to circumstances (upwind ozone) beyond its control").

C. Prior Transport Rules and Judicial Decisions

In response to upwind States' failure to address substantial interstate contributions to persistent downwind non-attainment and the development of better modeling techniques, EPA promulgated a series of regulations addressing interstate transport and quantifying minimum obligations of States under the Good Neighbor provision.

The NO_x SIP Call and *Michigan*. The first of these rulemakings was the 1998 NO_x SIP Call, which required 22 upwind States to revise their SIPs under 42 U.S.C. 7410(k)(5) to address their interstate contributions to downwind States' ozone pollution by reducing emissions of nitrogen oxides ("NO_x," an ozone precursor), and established an emissions trading program. 63 Fed. Reg. 57,356, 57,358-59 (Oct. 27, 1998). EPA relied upon recommendations and air quality modeling from the

Ozone Transport Assessment Group, a collaboration of 37 States, EPA, and industry and environmental groups. *Id.* at 57,361. The agency found that interstate pollution was the "major reason" some States failed to timely attain the ozone NAAQS. *Id.* EPA identified upwind States' "significant contributions" to downwind nonattainment based on upwind emissions' "ambient impact downwind," as well as on "the costs of the upwind emissions reductions," *id.* at 57,376. Upwind States were required to achieve emissions reductions that could be obtained through adoption of "highly cost-effective" controls, set at $2000/ton of NO_x reduced (in 1990 dollars). *Id.* at 57,377-78, 57,399-403. EPA explained: "When upwind emitters exacerbate their downwind neighbors' ozone nonattainment problems, and thereby visit upon their downwind neighbors additional health risks and potential clean-up costs, EPA considers it fair to require the upwind neighbors to reduce at least the portion of their emissions for which highly cost-effective controls are available." *Id.* at 57,379.

In *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), the D.C. Circuit upheld the NO_x SIP Call in relevant part. The court concluded that EPA's reliance upon control costs rested upon a permissible construction of the statute's "ambiguous" language, explaining that "[t]he term 'significant' does not in itself convey a thought that significance should be measured in only one dimension." *Id.* at 679.

CAIR and *North Carolina*. States were obligated to submit plans to meet their good neighbor obligations for the 1997 ozone and 1997 fine $PM_{2.5}$ NAAQS by 2000, but none did. In 2005, EPA issued a nonsubmittal notice that "start[ed] a 2-year clock for promulgation by EPA of a FIP, in accordance with section 110(c)(1)." 70 Fed. Reg. 21,147, 21,151 (Apr. 25, 2005). A few weeks later, EPA promulgated the Clean Air Interstate Rule (CAIR), requiring 28 States to reduce their emissions of NO_x (a precursor of particulate pollution, as well as ozone) and sulfur dioxide (SO_2, a particulate precursor), 70 Fed. Reg. 25,162 (May 12, 2005), and establishing a regional emissions trading program, *id.* at 25,274.[2]

The D.C. Circuit set aside CAIR in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam), on reh'g, 550 F.3d 1176 (D.C. Cir. 2008), holding that, in multiple respects, the rule gave downwind States insufficient protection. The court ruled that CAIR's emissions trading rules failed to assure that each upwind State would, in fact, eliminate its significant contributions. *Id.* at 907-08. The court also held that EPA had "ignored its

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[2] A number of States submitted SIPs based on CAIR, which EPA subsequently approved, while States that chose not to submit SIPs remained under EPA's CAIR FIP. C.A.App. 3167-78. See also EPA, Transport Rule Primary Response to Comments at 71 (June 2011), Docket No. EPA-HQ-OAR-2009-0491-4513 (hereinafter "Primary RTC") (available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4513); Pet.App. 177a.

statutory mandate" to harmonize CAIR with downwind States' statutory NAAQS-compliance deadlines, *id*. at 908-12, and that the rule failed to give independent effect to the statute's prohibition of emissions that "interfere with maintenance" in downwind areas, *id*. at 908-11. *North Carolina* did not disturb *Michigan's* acceptance of EPA's consideration of control costs in determining each State's "significant contribution" responsibilities. See *id*. at 917.

Having initially vacated CAIR, the *North Carolina* panel upon rehearing decided, in light of the rule's health benefits, to leave it in place on remand, while ordering EPA expeditiously to remedy its "fundamental flaws." 550 F.3d at 1178. The court "remind[ed]" EPA that it did not intend to "grant an indefinite stay of the effectiveness of this court's decision," and noted petitioners' right to "bring a mandamus petition to this court in the event that EPA fails to modify CAIR in a manner consistent with our July 11, 2008 opinion." *Id.* [3]

D. The Transport Rule

After *North Carolina*, EPA faced both a time-limited statutory duty under Section 110(c) and a court-issued directive to ensure prompt compliance with Good Neighbor provisions in time to meet

[3] In accord with the D.C. Circuit's order leaving CAIR in effect on an interim basis, after the *North Carolina* decision, EPA "approv[ed] State SIP revisions that [were] consistent with CAIR" for 6 states. 74 Fed Reg. 27,731, 27,734 (June 11, 2009); C.A.App. 3167-78.

downwind attainment deadlines for the *1997* NAAQS, some of which had already passed.[4] And in June 2010, EPA had found that 23 States had failed to submit interstate transport plans satisfying the *2006* "24-hour" $PM_{2.5}$ NAAQS, 75 Fed. Reg. 32,673, 32,674 (June 9, 2010), triggering federal obligations for that air quality standard as well.[5] In response to these obligations and the D.C. Circuit's orders in *North Carolina*, EPA undertook the extensive technical analysis and administrative process that resulted in the Transport Rule.

In developing the Rule, EPA used air quality models to identify downwind air quality problems affected by interstate pollution transport and to quantify upwind States' obligations to reduce emissions of SO_2 and NO_x contributing to exceedances of the 1997 ozone and annual $PM_{2.5}$ standards and 2006 daily $PM_{2.5}$ NAAQS. Relying on emissions data from the National Emissions Inventory, EPA used the Comprehensive Air

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[4] The attainment deadline for the 1997 $PM_{2.5}$ NAAQS was 2010 with a possible extension to 2015; for the 1997 ozone NAAQS deadlines were 2007, 2010, or 2013, depending on nonattainment status. In all cases States have a statutory obligation to meet deadlines as "expeditiously as practicable." See *North Carolina*, 531 F.3d at 911; Pet.App. 449a-453a.

[5] By August 2011, EPA had disapproved SIPs from 11 additional States whose SIPs did not satisfy the Good Neighbor requirement. Pet.App. 177a-183a (summarizing these actions).

Quality Model with Extension (CAMx)[6] to simulate $PM_{2.5}$ and ozone concentrations in the eastern U.S. in the 2005 base year, 2012, and 2014, and identify locations expected to be in nonattainment or have maintenance problems for $PM_{2.5}$ and ozone in those years absent any further transport regulation. C.A.App. 2409-13 (Air Quality Modeling Technical Support Document[7]). CAMx also provided EPA with estimated contributions of individual upwind States at each downwind location projected to have nonattainment or maintenance problems. *Id.* 2435. EPA then used the Integrated Planning Model (IPM)[8], to analyze the SO_2 and NO_x emissions reductions available from power plants (also known as electric generating units, or EGUs) in each affected upwind State, using various control cost thresholds. C.A.App. 2933 (Significant Contribution TSD). Taking projected emissions data from the IPM modeling, EPA then used CAMx modeling and another model, the Air Quality Assessment Tool, to estimate downwind air quality

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[6] CAMx simulates the formation, transport, and deposition of $PM_{2.5}$, ozone, and their precursor pollutants (SO_2 and NO_x) on national, regional, and local scales. C.A.App. 2413.

[7] Throughout, "TSD" abbreviates "Technical Support Document."

[8] IPM is a model of the U.S. electric power sector that EPA, States, and industry use to analyze cost and emissions impacts of environmental policies and market decisions. See C.A.App. 2933. Taking into account operating and regulatory constraints such as emission limits, transmission capabilities, and fuel market conditions, IPM predicts how power plants will be utilized over a specified period of time. See *id.* 2339.

impacts under different regulatory scenarios. *Id.*, C.A.App. 2945-46 (Significant Contribution TSD).

EPA found that "that the total 'collective contribution' from upwind sources represents a large portion of $PM_{2.5}$ and ozone" measured by receptors in downwind nonattainment areas and that this transported pollution came from "numerous upwind States." Pet.App. 257a. Referring to its modeled results for 2012, EPA reported that:

> [T]he amount of transport from upwind States comprises a very large portion of the concentration at the 8-hour ozone, annual $PM_{2.5}$ and 24-hour $PM_{2.5}$ nonattainment and maintenance sites. For ozone, more than 90 percent of the concentration at the Allegan, MI, Fairfield County, CT and New Haven County, CT receptors is due to transport from upwind States. … For annual $PM_{2.5}$, 60 to 70 percent of the concentration is due to upwind transport at all receptors, except for Jefferson County, AL where transport is somewhat less, but still substantial at 45 to 50 percent. The amount of $PM_{2.5}$ due to transport is 60 to 80 percent of the concentration at a majority of the 24-hour $PM_{2.5}$ receptors.

C.A.App. 2457 (Air Quality Modeling TSD).

EPA identified emission reductions required from 27 upwind States to eliminate significant contribution to nonattainment and interference with maintenance with respect to the 1997 ozone, 1997 annual $PM_{2.5}$, and 2006 daily $PM_{2.5}$ NAAQS.

See Pet.App. 117a. EPA adopted "a two-step approach to measuring each State's significant contribution," which was "based on the approach used in CAIR and the NO_x SIP Call but modified to address the concerns raised by" the D.C. Circuit in *North Carolina*. C.A.App. 24 (proposed rule); see Pet.App. 135a (final rule). First, based on transport modeling and monitoring data, the agency conducted a screening analysis that excluded many States from regulation: If a State's contributions to air quality monitors in downwind nonattainment and maintenance areas did not exceed one percent of the relevant NAAQS at any monitor, it was not subject to the Rule. Pet.App. 136a-183a, 255a-259a. Upwind States whose emissions exceeded that threshold amount would be "considered 'linked' to those [downwind] sites for the purpose of the second step in the analysis." C.A.App. 24.

In the second step, EPA identified "the portion of each State's contribution that constitutes its 'significant contribution' and 'interference with maintenance" based upon a consideration of air quality and control costs:

> Air quality considerations in the assessment include, for example, how much air quality improvement in downwind States results from upwind State emission reductions at different levels; whether, considering upwind emission reductions and assumed local (in-State) reductions, the downwind air quality problems would be resolved; and the components of the remaining downwind air

> quality problem (*e.g.*, whether it is a predominantly local or in-State problem, or whether it still contains a large upwind component). Cost considerations include, for example, how the cost per ton of emission reduction compares with the cost per ton of existing federal and State rules for the same pollutant; whether the cost per ton is consistent with the cost per ton of technologies already widely deployed (similar to the highly-cost-effective criteria used in both the NO_x SIP Call and CAIR); and what cost increase is required to achieve additional meaningful air quality improvement.

Pet.App. 350a-351a.

In contrast to the two prior regional transport rules, in which EPA had applied "a uniform remedy to all States found to have a significant contribution," in the Transport Rule EPA divided the significantly contributing States into "[t]hose whose significant contribution can be eliminated at a lower cost threshold; and those whose significant contribution is not eliminated … until they reach the higher cost threshold." C.A.App. 24. For all covered NO_x States, and for one set of SO_2 contributors, EPA adopted a cost threshold of $500/ton; for another set of SO_2 States that were upwind contributors to more severe problems, EPA adopted a cost threshold of $500 for 2012 increasing to $2300/ton in 2014. Pet.App. 355a-358a. EPA found that the $500/ton level would largely reflect operation of existing pollution controls (which EPA

projected would be turned off absent CAIR or a substitute rule). *Id.* 463a-464a.

EPA provided for limited emissions trading in a program designed to conform to *North Carolina*'s requirement that such flexibility does not come at the expense of "all necessary reductions within [a] State." See *id.* 140a, 576a-580a.

During the rulemaking, EPA examined a number of possible approaches to defining upwind States' Good Neighbor responsibilities. See C.A.App. 90, 2307-20. For example, EPA considered approaches that would involve prohibiting all contributions above a fixed threshold, but concluded that, even at a much higher initial threshold, such approaches could mandate very large emissions reductions by some upwind States, *id.* 2309-10, and could lead to substantial "over-control"—*i.e.*, reductions "well beyond what would be needed for all of the downwind areas to attain [NAAQS]." *Id.* 2309. See also *id.* 2311-20 (discussing other possible methodologies).

Noting that it lacked authority to extend the deadlines set out in 42 U.S.C. 7410(c), Pet.App. 174a-175a, EPA implemented the Rule via federal implementation plans allocating emission allowances to power plants in the covered States, while providing that, beginning in 2014, States could submit SIPs that would modify or replace the federal plans. See *id.* 677a-680a.[9] EPA emphasized

[9] Invoking its authority under section 110(k)(6), 42 U.S.C. 7410(k)(6), EPA also corrected its CAIR SIP approvals "to

that "[t]he [*North Carolina*] decision remanding CAIR without vacatur stressed the court's conclusion that CAIR was deeply flawed and emphasized EPA's obligation to remedy those flaws expeditiously." *Id.* 175a. See also *id.* 163a.

EPA projected that the Transport Rule would enable all downwind States to meet their 1997 $PM_{2.5}$ NAAQS attainment and maintenance obligations and almost all to meet their obligations for the 2006 $PM_{2.5}$ and 1997 ozone NAAQS. *Id.* 130a-131a. The agency also estimated that the reductions in $PM_{2.5}$ pollution under the Transport Rule would, starting in 2014:

> [A]nnually reduce between 13,000 and 34,000 $PM_{2.5}$-related premature deaths, 15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma while also reducing 10 million days of restricted activity due to respiratory illness and approximately 1.7 million work-loss days.

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rescind any statements" that such SIPs satisfied the statutory Good Neighbor requirements. Pet.App. 177a-178a. EPA explained that it had approved these SIPs pursuant to the *North Carolina* remand and that the SIPs had "remained in place for the limited purpose [of] achiev[ing] interim reductions until EPA promulgated a rule to replace CAIR," and, per *North Carolina*, that these plans did not satisfy States' *statutory* obligations. See *id.* 173a-174a. The court below did not reach challenges to EPA's section 110(k)(6) actions. See *id.* 49a n.29.

Id. 602a. EPA determined that "the annual net benefit (social benefits minus social costs)" of the Transport Rule in 2014 would be $110 to $280 billion, with compliance costs totaling $1.85 billion in 2012 and decreasing to less than $1 billion in 2014. *Id.* 610a-611a.[10]

E. Proceedings on Judicial Review

A divided D.C. Circuit panel granted petitions for review from upwind States and industry and vacated the Transport Rule. The court interpreted the Act and *North Carolina* as creating a set of "red lines," Pet.App. 22a, limiting EPA's authority and held that the Rule transgressed each of these. The "most fundamental[]" problem, according to the majority, was the possibility the restrictions imposed by the Rule in the second step of EPA's methodology "could require upwind States to reduce emissions by more than the amount" EPA had used in the first step to exclude States from program coverage, *id.* 31a, 35a, *i.e.*, to require abatement of contributions that were less than one percent of the NAAQS in the relevant downwind State. *Id.* 31a-36a. In a lengthy footnote, *id.* 32a-34a n.18, the majority rejected EPA's submission that this statutory argument was barred by 42 U.S.C.

[10] This calculation of benefits and costs was based upon conditions expected to prevail in the absence of CAIR. EPA explained that "because the Transport Rule will replace CAIR, EPA cannot consider reductions associated with CAIR in the 'base case' (*i.e.*, analytical baseline emissions scenario)." Pet.App. 191a.

7607(d)(7)(B) because no one raised it in the administrative proceedings.

The majority next concluded that the Rule violated "the statute's proportionality requirement," because, in the court's view, EPA had "made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems." Pet.App. 38a-39a. In addition, the majority concluded that the Rule "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." *Id.* 39a.

The majority held that the Rule was also invalid because EPA had implemented it by means of federal implementation plans. In the panel's view, EPA's prior administrative actions determining that States had not submitted valid transport plans did not provide authority for federal action because, "a SIP cannot be … deemed deficient for failing to implement the good neighbor obligation until after EPA has defined the State's good neighbor obligation." *Id.* 31a.

Judge Rogers (who had joined and co-authored both the *Michigan* and *North Carolina* opinions) filed a comprehensive dissent faulting the majority for "disregard[ing] limits placed on its jurisdiction, the plain text of the Clean Air Act, and the [D.C. Circuit's] settled precedent interpreting the same statutory provisions at issue." *Id.* 65a.

SUMMARY OF ARGUMENT

EPA promulgated the Transport Rule years after States had failed to meet their obligations to limit emissions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. 7410(a)(2)(D)(i)(I). The Rule reflects EPA's extensive experience, over the last three Administrations, in crafting remedies for regional air pollution problems. Its objective—eliminating pollution that impedes attainment and maintenance of health-based air quality standards—is the core goal of the Clean Air Act, and the massive health benefits this Rule is projected to provide, see Pet.App. 601a-609a, testify to its vital importance.

In striking down the Rule, the court of appeals exceeded clear limits on its review authority. First, its main bases for condemning EPA's methodology consisted of statutory objections that had not been "raised with reasonable specificity during the period for public comment," and therefore could not be "raised during judicial review." 42 U.S.C. 7607(d)(7)(B). That limit is central to the Act's carefully wrought regime of judicial review and reflects the need for reviewing courts to have the benefit of the agency's judgments on technical and complex matters of pollution control law and policy.

The hazards of disregarding exhaustion requirements are illustrated pointedly here: The court's "most fundamental[]" statutory concern—the possibility that the second step of EPA's methodology could require upwind States to reduce

emissions below the one percent screening threshold—was neither raised by any commenter nor demonstrated in the record. Likewise, it was for good reason the court's "proportionality" requirement was not advocated by any commenter in the administrative proceedings; it has no textual basis and fails abjectly under real-world conditions.

The court of appeals' merits ruling disapproving the Rule's measure of "significant contribution" abandoned basic principles governing judicial review of administrative action. EPA's interpretation of the Good Neighbor provision's ambiguous language and its carefully considered approach to this complex problem merited deference from the court. The agency's designation as "significant" those "amounts" of air pollution emitted from an upwind State that contribute to downwind nonattainment problems and can be eliminated via widely available, low-cost emissions controls, is consistent with the statutory text. Moreover, it was carefully designed to work in real-world conditions marked by complex multistate transport linkages and an interconnected and interdependent power sector. Contrary to the majority's statements, EPA plainly did recognize the limits of its authority under the Good Neighbor provision and fully recognized that the provision does not excuse downwind States from their own obligations to meet air quality standards.

The court's "over-control" discussion simply disregarded EPA's diligent efforts to calibrate the Rule's requirements to the demonstrated scope of

projected downwind nonattainment and maintenance problems. The opinion's invalidation of the Rule in favor of an impromptu judicially crafted rulebook was the clearest possible violation of *Chevron* and its progeny.

In overturning EPA's federal implementation plans and denying States' independent obligations under the Good Neighbor provisions, the court of appeals ignored plain statutory meaning, transgressed limits on its own jurisdiction, and subverted federalism principles. Under the plain terms of the Act, each State has an obligation, within three years of issuance of a new NAAQS, to submit a plan demonstrating that it will not contribute significantly to nonattainment or interfere with maintenance of air quality standards in downwind States. None did so for any of the three NAAQS at issue here. EPA formally noted that failure to submit, triggering an obligation under 42 U.S.C. 7410(c)(1), to issue, within a specified time, federal plans fulfilling the Good Neighbor obligations.

The court of appeals' ruling that the agency was *precluded* from issuing federal plans until the agency had first quantified upwind States' obligations and allowed yet another opportunity for submission of SIPs violates the plain language of the statute. EPA may escape its FIP duty only if "the State corrects the deficiency," and EPA approves the State plan, see 42 U.S.C. 7410(c)(1), an exception inapplicable here. The court lacked authority to rewrite the statute and create an

exemption from EPA's duty that Congress chose not to adopt.

The majority below also transgressed explicit statutory limits on its jurisdiction by declaring invalid EPA's prior administrative actions finding State submissions inadequate or absent. Under the Act, those separate actions could only be challenged by petition for review filed within 60 days of publication.

The basis on which the court declared those prior actions invalid contravened the plain statutory text and longstanding practice. Each State's obligation to submit adequate Good Neighbor plans is explicit and unambiguous: Congress used the word "shall" to describe the States' obligation to submit SIPs. 42 U.S.C. 7410(a)(1). And section 7410(a) is unambiguous about what triggers the States' obligation to submit Good Neighbor SIPs: "the promulgation of a national primary ambient air quality standard (or any revision thereof)."

The court's insertion of an extra-statutory step into the Good Neighbor SIP process seriously disrupts a carefully wrought allocation of responsibilities in which the federal and State roles are triggered by and subject to a series of explicit duties and deadlines. In this and other respects, the decision grievously impedes achievement of the Act's overriding purpose—timely attainment of health-based air quality standards.

I. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY AND ERRED IN SETTING ASIDE EPA'S METHODOLOGY FOR DEFINING STATES' SIGNIFICANT CONTRIBUTIONS TO DOWNWIND NONATTAINMENT

A court of appeals' role in reviewing a rulemaking is limited. First, a court is authorized to consider only those objections that were "raised with reasonable specificity during the period for public comment." 42 U.S.C. 7607(d)(7)(B). Second, an agency's interpretation of an ambiguous provision "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217-18 (2009) (emphasis in original) (citing *Chevron*, 467 U.S. at 843-44).

By invalidating EPA's methodology for determining States' "significant contributions" to downwind nonattainment, the court of appeals transgressed these limits, entertaining objections that were never raised during the administrative process and imposing its own interstate pollution control regime in place of the agency's reasonable and carefully considered implementation of ambiguous statutory language.

A. The Court of Appeals Exceeded Statutory Limits on Its Review Authority

The exhaustion requirement in 42 U.S.C. 7607(d)(7)(B) is central to the Act's detailed judicial review regime. As this case demonstrates, Clean Air Act rulemakings often involve multi-dimensional policy questions, complex scientific and technical analyses, and thousands of public comments. "Exhaustion concerns apply with particular force … when the agency proceedings in question allow the agency to apply its special expertise." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). *Cf. Am. Elec. Power Co. v. Connecticut,* 131 S. Ct. 2527, 2539 (2011) ("the first decider under the Act is the expert administrative agency, the second, federal judges"). The need to adhere to statutory exhaustion rules is vital to the integrity and fairness of the administrative process—and to informed judicial review. See *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764-765 (2004); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998). The special force of these concerns in Clean Air Act rulemakings is highlighted by Congress's provision that, even when a party can show it was "impracticable" to raise an objection during the comment period, the party still may not go directly to court, but must first seek administrative reconsideration. 42 U.S.C. 7607(d)(7)(B); see also H.R. Rep. No. 95-294, at 323 (1977) ("Even in such cases, … the Agency must

first be given an opportunity to pass on the significance of the materials.").

The methodology for defining significant contribution was a central issue before the agency, and EPA described its proposed approach in great detail in the proposed rule, C.A.App. 20-90. Furthermore, although EPA set out numerous alternative approaches, *id*. 90; *id*. 2306-20, none of the myriad participants in the Transport Rule rulemaking argued that the Act required EPA to adopt one of these alternatives (including the "air quality only" and "proportional" approaches the panel majority apparently favored, Pet.App. 33a n.18, 40a n.24). No participant challenged the reasons EPA had offered for rejecting these and other alternative methodologies. See Primary RTC 733-34. Nor did anyone object that the statute mandated some other methodology that EPA had not considered in its canvass of alternatives.[11]

[11] Many features of the rulemaking were intensely contested, but the quiescence of regulated entities and upwind States regarding EPA's "significant contribution" approach likely reflects the fact that the Rule's architecture—including its focus on cost-effectiveness and provisions for emissions trading—serves to reduce compliance burdens for upwind States and sources located there, relative to alternative approaches. *Cf*. *Michigan*, 213 F.3d at 675-77 (noting limited nature of challenges to features of program that generally mitigated burdens on upwind States). Furthermore, parties opposing EPA's approach would have had some obligation to suggest reasonable, workable alternatives. See *id*. at 679 (challengers failed to offer any "material critique" of EPA's reasons for rejecting alternative methodologies).

The "One Percent Threshold" Objection. No participant in the rulemaking raised what the majority opinion would later assert was the Transport Rule's "most fundamental[]" statutory flaw, see Pet.App. 31a—namely, that the emission reduction obligations defined pursuant to the second step of EPA's methodology could, in theory, "require upwind States to reduce emissions by more than the amount" (one percent of the NAAQS) EPA had used to exclude States from program coverage in the first step. *Id*. 35a. Accordingly, under the plain terms of 42 U.S.C. 7607(d)(7)(B), this objection could not "be raised during judicial review."

None of the grounds offered in the panel's lengthy footnote on exhaustion, see *id*. 32a-34a n.18, withstands scrutiny. Indeed, treated as precedent, the footnote would nullify the statutory exhaustion requirement. For example, neither the fact that the prior interstate transport proceedings had involved the question "whether EPA has complied with the basic statutory limits on its authority," *id*., nor the presence in *North Carolina* of standard "consistent with this opinion" remand language remotely satisfied the statutory requirement that objections be raised with "reasonable specificity" during the comment period. Comments made years earlier in the CAIR rulemaking were likewise insufficient. See 42 U.S.C. 7607(d)(3), 7607(d)(4)(B). "[O]bjections raised at the wrong time or in the wrong docket will not do." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001).

That EPA, in its discussion of policy alternatives, *supra*, 19-20, had addressed "two air quality only approaches" (Pet.App. 33a n.18; see C.A.App. 2308-12) by no means authorized the panel to overlook the challengers' failure to raise their distinct, *statutory* theories "during the period for public comment." 42 U.S.C. 7607(d)(7)(B). *See also Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 7-8 (D.C. Cir. 2011) (citing voluminous D.C. Circuit precedent confirming that failure to raise particular textual objection constitutes forfeiture). No commenter supported any of these alternatives, let alone argued that they were mandated by statute. To the extent the panel majority meant to suggest that objections would have been *futile*, the absence of such an exception in this statute is dispositive. See *Booth v. Churner,* 532 U.S. 731, 741 n.6 (2001). In any event, the suggestion is unsupported by any evidence, let alone "most exceptional circumstances" demonstrating "certain" administrative rejection, *Tesoro Refining & Marketing Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009).[12]

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[12] The only two actual rulemaking comments cited in the majority's footnote were also patently insufficient. See Pet.App. 98a-101a (dissent). Wisconsin's comment nowhere mentioned the threshold-exceedance concept, instead advocating more stringent and expeditious controls on upwind States and maintaining that EPA needed "to primarily depend on air quality results instead of control costs." See C.A.App. 1293. Tennessee's comment merely stated that a "lower cost threshold *should be considered* for any State that can reduce their contribution below 1% significance using cost thresholds below the maximum values," C.A.App. 556 (emphasis added),

The circumstances here vividly illustrate the hazards of bypassing exhaustion requirements. The panel overturned EPA's rule not because it found that the agency's methodology *actually* required even a single upwind State to reduce emissions below the one percent threshold the majority deemed a "red line," Pet.App. 22a; rather, for the majority, it was fatal that the Rule "*could* require upwind States to reduce emissions by more than the [initial threshold] amount." See, *e.g.*, *id.* 35a. (emphasis added). But precisely because no participant in the rulemaking raised the objection, EPA had no reason to address whether, in fact, the panel majority's "red line" would be crossed, or to address the legal or policy implications of the objection. See 42 U.S.C. 7607(d)(7)(B) (explicitly requiring petition for administrative reconsideration even when litigant had no opportunity to raise the objection during rulemaking). After the industry challengers presented the issue in their D.C. Circuit brief, EPA analyzed the record evidence and reported its conclusion that "such a scenario is extremely *unlikely* to occur," explaining that "even with all required reductions, all covered States except Maryland will remain at or above the one percent threshold for at least one of their annual $PM_{2.5}$ linkages," and that "Maryland's contribution to Lancaster, Pennsylvania with respect to daily $PM_{2.5}$ is so far above the threshold … that there is no

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with no mention of any statutory basis for this policy suggestion, let alone any claim of statutory obligation.

reason to believe it would fall below that threshold after implementation of the Rule." Resp't Br., D.C. Cir. No. 11-1302 at 33-34 & n.20 (filed Mar. 1, 2012) (citing Annual $PM_{2.5}$ Air Quality Assessment Tool, C.A.App. 2986-92; Air Quality TSD, App. D, C.A.App. 2706-09).

The "Proportionality" Objection. Again exceeding its review authority, the D.C. Circuit ruled that the Good Neighbor provision includes a particular "fair share" requirement, under which abatement obligations "must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment." Pet.App. 25a; see also *id.* 26a-27a & n.15 (giving example involving three upwind States contributing varying numbers of "units" of pollution to nonattainment in one downwind State).

This objection too was not raised in the administrative process, or even in the D.C. Circuit briefs, see *id.* 69a (dissent). The court of appeals majority said that EPA had considered "a proportional approach that reflected many of the essential principles described" in its opinion, but "ultimately chose not to adopt that approach." Pet.App. 40a n.24 (citing Alternative Approaches TSD, C.A.App. 2311-12). Unmentioned by the majority, however, were the facts that (1) no commenter in the rulemaking advocated that approach, let alone claimed it was required by statute, see *id.* 107a-108a (dissent); C.A.App. 1912-54; Primary RTC 733-34; and (2) EPA rejected this approach, prior to the comment period, for a variety

of reasons that were not challenged by any commenter, pointing out, *inter alia*, that the proportionality concept breaks down whenever more than one downwind State is involved. C.A.App. 90 (proposed rule's discussion of alternative approaches and reference to docketed technical support document concerning them, see *id*. 2306-2320).

B. The Court of Appeals' Requirements Lack Support in the Statutory Good Neighbor Provision

On their merits, the court of appeals' rulings are equally deficient. The Transport Rule presents a quintessential case for judicial deference. The statute does not prescribe a methodology for deciding whether interstate transport controls are "adequate" or for identifying the "significant" contributions to nonattainment that must be prohibited. As the D.C. Circuit observed in *Michigan*, the term "contribute significantly" is ambiguous and does not "convey a thought that significance should be measured in only one dimension." 213 F.3d at 677. "Significant" is not defined in the Act, and the "ordinary meaning," see *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012), is broad and synonymous with "notable" and "meaningful."[13] See *City of Arlington*

[13] See *Webster's Dictionary* (2d International Unabridged Ed. 1948) (defining "significant" as "having a meaning" and "deserving to be considered"); *Webster's Third New International Dictionary* 2116 (2002) ("having meaning," "having or likely to have influence or effect"); *Oxford*

v. FCC, 133 S. Ct. 1863, 1868 (2013). ("Congress knows to speak … in capacious terms when it wishes to enlarge[] agency discretion.").

The Good Neighbor provision calls for projections of whether emissions "will" contribute significantly to downwind nonattainment, and EPA's Rule used sophisticated modeling to project future emissions levels, pollution transport, and attainment status. C.A.App. 2406-77; *supra*, 15-16. This sort of "predictive judgment," see *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009), and "technical expertise," see *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989), warrants deference from reviewing courts, which "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Am. Elec. Power Co.*, 131 S. Ct. at 2539-40.

In striking down the Transport Rule and proposing its own rules for regulating interstate air pollution, the majority did "precisely what *Chevron* prevents," "'substituting [its] own interstitial lawmaking' for that of [the] agency," *City of Arlington*, 133 S. Ct. at 1873 (citation omitted). As the agency explained, implementation of the Good Neighbor provision "inherently involves a decision on how much emissions control responsibility

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English Dictionary (2d ed.1989) ("important," "notable"). *Cf. Na'l Railroad Passenger Corp. v. Boston & Main Corp*, 503 U.S. 407, 423-24 (1992) (rejecting, as unduly "restrictive" and inconsistent with *Chevron*, D.C. Circuit's construction of phrase "significantly impair" in statute addressing conveyances of railroad property).

should be assigned to upwind States, and how much responsibility should be left to downwind States," and its methodology was intended to "assign a substantial but reasonable amount of responsibility to upwind States … to control their emissions." C.A.App. 63.

EPA's designation as "significant" those "amounts" of air pollution emitted from an upwind State that contribute to downwind nonattainment problems and can be eliminated via widely available, low-cost emissions controls, is reasonable, fair, and easily consistent with the statute. As in the two prior regional transport rules, and after considering alternatives (none seriously advocated by any party here), EPA settled on an approach that employed control cost thresholds as tools to assess the consequences of different levels of control effort, and then, in light of the projected relationship between upwind controls and downwind air quality, as a basis for establishing upwind States' abatement obligations. Under EPA's approach, examination of control costs functioned, not as a counterweight to the statute's explicit and paramount health goals, but as a workable, sensible means to apportion and define contributing upwind States' Good Neighbor obligations and thereby facilitate NAAQS attainment. The Rule's use of cost is a fair, effective, and administrable means to allocate clean-up responsibilities among jointly responsible States.[14]

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[14] The panel majority mischaracterized *Michigan* as holding that, under the Good Neighbor provision, cost may be

One Percent Threshold. As demonstrated, the majority's principal concern—the possibility that EPA's approach could force upwind States' emissions below the one percent threshold used to identify program coverage—(1) was not raised in the rulemaking, and (2) was counterfactual, see *supra*, 30-33.

In any event, this objection lacks support in the statute. The statutory text does not address the methodology for identifying significant contributions to nonattainment and does not forbid separate tests for coverage and control obligations, even if States over the coverage threshold would thereby be required to reduce emissions to a level lower than the threshold (and if States just below the threshold would thereby be entirely exempted). It is hardly uncommon for a statute or regulation, for administrative efficiency or other reasons, to set a coverage threshold that excludes some actors or activities, but then to subject those above the

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considered only "to further lower an individual State's obligations," or "allow some upwind States to do *less* than their full fair share," Pet.App. 38a, by avoiding "exorbitant costs," *id*. 27a. That is not an accurate account of *Michigan*, see 213 F.3d at 679; Pet.App. 112a (Rogers, J.), or of the NO_x SIP Call's use of "highly cost-effective controls," see 63 Fed. Reg. at 57,378. Furthermore, a rule permitting consideration of costs to *weaken* Good Neighbor obligations would be questionable under *American Trucking Ass'ns,* 531 U.S. at 468-71, which confirmed that EPA may not consider cost in setting the health-based NAAQS under 42 U.S.C. 7409(b)(1); see also *id*. at 469 n.1 (citing *Michigan*). In contrast, the Transport Rule does not use cost as a basis to diminish or postpone the overriding statutory health objective, NAAQS attainment.

threshold to the plenary regulation without granting a pro tanto "credit." Any "line-drawing process" often involves "difficult choices," *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 288 (1976), and is normally a matter of agency discretion unless the lines drawn are "irrational" or the consequences "dire." *Leather Indus. of Am., Inc. v. EPA*, 40 F.3d 392, 409 (D.C. Cir. 1994). No such showing was made here.

Proportionality. The statute cannot reasonably be read to command that EPA adopt the court of appeals' "proportionality" or "statutory fair share," Pet.App. 39a, requirement. Nothing in the text requires EPA to treat physical quantities of emissions attributed to different upwind States as the only relevant consideration in defining their Good Neighbor responsibilities. Neither the statutory phrase "amounts which will … contribute significantly," nor the judge-made concept of a "fair share," obligates EPA to treat relative physical contributions as the only factor relevant to States' Good Neighbor obligations. See, *e.g.*, C.A.App. 2312 (Alternative Approaches TSD) (approach requiring "the same percent reduction of existing emissions," would burden upwind States "that had previously implemented stringent control programs," relative to others that "had previously done little").

Unlike in the court's simple hypothetical, upwind States frequently contribute to nonattainment in multiple downwind States. *E.g.*, Pet.App. 286a-299a Tables V.D-5, V.D-6. In those circumstances, as a matter of sheer arithmetic,

there exists no unique "proportional" abatement solution. As EPA explained in discussing proportional approaches it had considered (but that no rulemaking commenter advocated): "most upwind States contribute to multiple downwind monitors (in multiple States) and would have a different reduction percentage for each one." C.A.App. 2311-12. Here, as elsewhere, the court set forth its own approach without engaging at all with EPA's explanation in the rulemaking the court ostensibly was "reviewing."

To be sure, a claim of unfair or unreasonable disparities among contributing States' obligations (if timely raised in comments), would demand a reasoned agency response. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). But judicial review of such a claim under the "arbitrary and capricious" standard, 42 U.S.C. 7607(d)(9)(A), would require examining the legal and policy reasons given by the agency for its choices, its responses to objections properly raised in comments, and the feasibility and probable consequences of alternatives. The court below, in contrast, looked at none of this and failed to point to any concrete example of allegedly impermissible disparities in the Rule's treatment of the respective upwind States.

In its "proportionality" discussion, the court below also cursorily stated that EPA had "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." Pet.App. 39a. But EPA *repeatedly*

recognized downwind States' own obligations, and its methodology was specifically designed to balance fairly the obligations of upwind and downwind States. See, *e.g.*, *id.* 129a-120a ("Section 110(a)(2)(D)(i)(I) only requires the elimination of emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in other States; it does not shift to upwind States the responsibility for ensuring that all areas in other States attain the NAAQS."); *id.* 350a [48,256] (rejecting calls for tighter ozone-season NO_x restrictions in part because "the mandate of section 110(a)(2)(D)(i)(I) is not to ensure that reductions in upwind States are sufficient to bring all downwind areas in to attainment, it is simply to ensure that all significant contribution to nonattainment and interference with maintenance is eliminated"); C.A.App. 17 ("EPA continues to conclude … it would be difficult if not impossible for many nonattainment areas to reach attainment through local measures alone"); *id.* 2457 (Air Quality Modeling TSD) (showing in-State contribution to pollution concentrations in nonattainment areas is between 10-50% of total for ozone, 30-40% for 1997 annual $PM_{2.5}$ NAAQS, and 20-40% for 2006 daily $PM_{2.5}$ NAAQS). See also Primary RTC 380, 444, (C.A.App. 1689, 1753).

"Collective Over-Control." The panel majority's assertion that EPA "did not try to take steps to avoid … over-control," Pet.App. 40a, is also simply wrong. In multiple ways, EPA crafted the Rule's requirements to secure needed reductions in interstate pollution transport while avoiding

excessive or unreasonable burdens on upwind States. For example, EPA projected current and future emissions levels and regulatory requirements, "analyz[ing] whether additional reductions are necessary beyond those already mandated by existing emission limitation requirements." *Id*. 190a. EPA rejected "significant contribution" metrics that it believed could result in "substantial over-control." C.A.App. 2311. The agency rejected suggestions that it use initial coverage thresholds lower than one percent of the NAAQS, concluding that the agency was "not convinced" lower thresholds were "necessary or desirable," in part because "the controls required under this rule are projected to eliminate nonattainment and maintenance problems with air quality standards at most downwind State receptors." Pet.App. 258a.

EPA projected that, even when the Transport Rule is fully implemented, some of the nonattainment areas the Rule is intended to benefit would remain in nonattainment. Pet.App. 131a, 232a, 313a; C.A.App. 2466, 2470 (Air Quality TSD) (five sites are projected to have 24-hour $PM_{2.5}$ issues post-implementation, while ten sites in two areas (Houston and Baton Rouge) will have ozone problems). See also *supra*, 33-34 (noting EPA's calculation that all covered States' contributions would, after implementation of Transport Rule controls, remain above the one percent applicability threshold).

Further undermining claims of unlawful stringency, the emissions reductions required of upwind States under the Rule are modest. EPA explained that cost thresholds *lower* than the $500/ton it settled on would provide an economic incentive to cease operating *existing* pollution controls and would—given that CAIR would cease to operate when the new rule went into effect—*increase* emissions and associated contributions to downwind nonattainment problems. See Pet.App. 354a. EPA determined that the $500/ton threshold for SO_2 "Group 2" States reflects "the cost at which EGUs operate all installed controls, continue to burn coals with sulfur contents consistent with what they were burning in 2009, and operate any additional controls they are currently planning to install by 2014." C.A.App. 2167. See *id.* (similar analysis for annual NO_x reductions). Once CAIR ceased to be in effect, "sources would have an economic incentive to discontinue operating installed controls, or to operate those controls less effectively," so EPA's analysis "treats the costs of operating controls installed to meet CAIR requirements as costs of meeting Transport Rule requirements." Pet.App. 197a.

The cost thresholds, moreover, are considerably lower than those employed in the NO_x SIP Call sustained in *Michigan*. The Transport Rule $500 thresholds (in 2007 dollars) are about one-sixth the NOx SIP Call threshold of $2000/ton (1990 dollars). Even the $2300/ton threshold for the "Group 1" States is about 28 percent lower in real terms than

the $2000 (1990 dollars) threshold in the NOx SIP Call.[15]

The Rule's modest requirements stand in marked contrast to far more demanding regulations in place in many downwind States, which have mandated controls on their own sources that are many times more stringent. See Primary RTC 278 (C.A.App. 1587) (comment of organization of Northeast States' air quality agencies, noting that downwind States "have already implemented successful programs at much greater per ton costs (some are even greater than $40,000/ton)"); *id.* 586 (comments of Maryland Department of the Environment criticizing $500/ton threshold and stating that "our own State is already enacting NO_x control measures at significantly higher costs"); *id.* 928 (New York agency's comment that "[i]t is certainly reasonable to require more effort from upwind States than the current $500/ton threshold requires, particularly when downwind States such as New York have required NO_x emissions reductions at values up to ten times of this amount and more for purposes of attaining the NAAQS"); *id.* 1230 (comments of the Connecticut Department of Environmental Protection, listing widely varying average NO_x emission rates for various States). Downwind states should not have

[15] The Transport Rule's costs are also dwarfed by its benefits: Dividing the Rule's projected annual health and welfare benefits in 2014 ($110-$280 billion), Pet.App. 156a, Table III-4, by the Rule's projected SO_2 and NO_x reductions that year (4.2 million tons combined), Pet.App. 151a, Table III-2, yields a range of between $26,190 and $66,667 in benefits per ton.

to incur costs to clean up pollution from upwind states whose geographic position and climatological conditions permit them to export air pollution.

The majority's premise that the statute tolerates *under*-control of interstate pollution, Pet.App. 27a, 38a, but requires that the agency stop on a dime to avoid even the possibility of over-control, turns the Clean Air Act upside-down. Timely achievement of the health-based NAAQS is the very core of the Act. *Union Electric,* 427 U.S. at 249; *Train*, 421 U.S. at 79; see 42 U.S.C. 7410, 7502, 7511a. Evaluating the risk that regulatory limits will do more than necessary to control interstate pollution against the risk they will not do enough requires a "complex balancing," see *Am. Elec. Power Co.*, 131 S. Ct. at 2539, a job Congress assigned to agency policymakers. See *City of Arlington*, 133 S. Ct. at 1868.

Especially given courts' own "anything but smooth" efforts to develop workable rules for interstate pollution controversies, *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 501 (1971); see also *Missouri*, 200 U.S. at 519-20, and the "difficult technical problems" presented, see *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981), EPA's carefully considered implementation of the Good Neighbor provision deserved at least the measure of judicial deference regularly due on matters less clearly requiring agency judgment and expertise.

II. THE COURT ERRED IN OVERTURNING FEDERAL IMPLEMENTATION PLANS AND REPEALING STATES' STATUTORY RESPONSIBILITY TO SUBMIT GOOD NEIGHBOR PLANS

Acting on issues not before it, the court of appeals abrogated the States' obligation to submit Good Neighbor SIPs under 42 U.S.C. 7410(a), ignoring the plain meaning of the statute and subverting federalism principles. On this flawed basis, the court overturned EPA's federal implementation plans issued under section 7410(c).

A. In Abrogating the States' Statutory Good Neighbor Obligations, the Panel Transgressed Its Own Jurisdiction and the Plain Meaning of Section 7410(a)

1. Having Been Triggered by Separate EPA Actions, the States' Clear Obligation to Submit Good Neighbor SIPs Was Not Before the Panel

In striking down EPA's federal implementation plans, the panel reached beyond the substance of the rule before it to overturn administrative actions made, in many cases, years before, the majority of which were unchallenged, and for which no petition for review was before the panel.

The Act sets a 60-day deadline for challenging "any" final action by the Administrator. 42 U.S.C. 7607(b)(1); *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980). In each of the triggering findings at issue here, EPA expressly reminded the public of

this sixty-day deadline. See, *e.g.*, 76 Fed. Reg. 43,128, 43,136 (July 20, 2011). No petition for review of any of the various triggering findings was before the panel below.[16]

The panel insisted it was not invalidating these threshold findings, but its opinion shows that it in fact did so. EPA's findings and disapprovals rested on the premise that States were obligated to submit SIPs satisfying Section 7410(a), including the Good Neighbor provisions, within three years of the promulgation of new or revised NAAQS. See, *e.g.*, 76 Fed. Reg. at 43,132. The panel held that the States' SIPs "*cannot* be deemed to lack a required submission" because EPA has not previously quantified or defined each State's Good Neighbor obligations. Pet.App. 8a-9a, 47a-48a (emphasis added).

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[16] See 70 Fed. Reg. 21,147 (nonsubmittal finding for 1997 ozone and $PM_{2.5}$ NAAQS covering all 50 States) (no petition for review filed); 75 Fed. Reg. 32,673 (nonsubmittal finding for 2006 $PM_{2.5}$ NAAQS covering 23 States, including 11 Transport Rule States) (no petition for review filed). Three States filed petitions for review of EPA's disapproval of their 2006 $PM_{2.5}$ Good Neighbor SIPs; none was consolidated with the proceedings below. See Pet.App. 74a n.5 (dissent). EPA did, in the Transport Rule, issue corrections to certain 1997 ozone and $PM_{2.5}$ Good Neighbor SIPs that had relied on CAIR. See *supra*, 12-14. Because the panel did not address challenges to those actions, they are not before this Court. See Pet.App. 48a-49a n.29. Even if they were, neither EPA nor a State could properly claim that a SIP resting on CAIR, held unlawful in *North Carolina*, satisfied the requirements of the Act.

The panel's rulings directly address—and undo—the core elements of EPA's triggering actions. Because those actions were not before the panel, it lacked authority to rule on them,[17] and this ground alone requires reversal of its decision.

2. On the Merits, the Panel Erred by Creating an Extra-Statutory Federal Predicate to States' Good Neighbor Obligations

Even if the Court were to reach the merits of EPA's triggering findings, the panel's ruling must be rejected. The panel claimed that a State need not submit a SIP satisfying 42 U.S.C. 7410(a)(2)(D)(i)(I) until EPA issues a rule quantifying or defining the State's Good Neighbor obligations. Pet.App. 8a-9a, 47a-48a. "[C]ourts must presume that a legislature says in a statute what it means," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see also *Chevron*, 467 U.S. at 842-43. The statute's plain terms place on States the obligation to submit SIPs including Good Neighbor provisions within three years of establishment or revision of a NAAQS and direct EPA to promulgate a FIP within two years of finding a SIP is inadequate or not submitted. 42 U.S.C. 7410(a); *id*. 7410(c)(1). At a minimum, EPA's interpretation of these statutory requirements, one informed by the impending statutory deadlines and

[17] See*, e.g.*, *Med. Waste Inst. v. EPA,* 645 F.3d 420, 427 (D.C. Cir. 2011) (Section 307(b)(1) filing period is "jurisdictional").

the mandate in *North Carolina*, was a "reasonable" one entitled to judicial deference. *Chevron*, 467 U.S. at 845.

(a) Section 7410(a) Expressly Identifies States' Obligation to Submit Good Neighbor SIPs as Part of a Carefully Crafted Sequence of NAAQS Implementation Steps

The statute's wording confirms States' obligations to develop and submit Good Neighbor SIPs. First, Congress provided that States "shall" submit SIPs, 42 U.S.C. 7410(a)(1), and that those SIPs "shall" include Good Neighbor provisions. *Id.* 7410(a)(2). Congress knew how to provide that a State "may" take specified actions. *Id.* 7410(a)(5)(A)(i) ("Any State *may* include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program.") (emphasis added). See *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (contrasting "permissive 'may'" with "mandatory 'shall'"); see also *City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 338 (1994).

Second, Congress emphasized the broad applicability of the SIP obligations by repeatedly using "any" and "each." 42 U.S.C. 7410(a)(1) (SIPs must be submitted for a NAAQS or "any" revision thereof); *id.* 7410(a)(2)(D)(i)(I) (Good Neighbor obligation applies to "any" such NAAQS); *id.* 7410(a)(1) (SIP submission obligations applies to "[e]ach" State); *id.* 7410(a)(2) ("Each" State plan

shall contain specified elements, including Good Neighbor provisions). See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning") (citation and some internal quotation marks omitted); *Sierra Club v. EPA*, 536 F.3d 673, 678 (D.C. Cir. 2008) ("'Each' means '[e]very one of a group considered individually.'") (citation omitted).

Third, in enacting thirteen paragraphs specifying what "[e]ach" SIP "shall" include, 42 U.S.C. 7410(a)(2)(A) through (M), Congress connected them with the conjunctive "and," meaning that all thirteen items—including the Good Neighbor provision—must be included in a State's SIP. *Cf. Reynolds v. United States*, 132 S. Ct. 975, 984 (2012). When Congress intended States to condition their submittal on further EPA action beyond establishment or revision of a NAAQS, it stated so explicitly. See *id.* 7410(a)(2)(F) (SIP shall "require, as may be prescribed by the Administrator," that sources monitor and report emissions); *id.* 7410(a)(2)(K) (SIP shall "provide for … the performance of such air quality modeling as the Administrator may prescribe"). Because Section 7410(a)(2)(D)(i)(I) contains no such condition, the court of appeals lacked authority to create one. See *Chicago v. Environmental Def. Fund*, 511 U.S. at 338.

Finally, Section 7410(a) expressly provides that it is "the promulgation of a national primary ambient air quality standard (or any revision thereof)"—and not, as the panel erroneously

concluded, some other action—that triggers the States' duty to submit SIPs containing Good Neighbor provisions satisfying Section 7410(a)(2)(D)(i)(I).

The court of appeals' insertion of a requirement that EPA issue a quantification or definition rule also subverts 42 U.S.C. 7410(a)'s tightly-drawn sequence of requirements, each accompanied by a deadline to ensure timely action. The Act was passed as "a drastic remedy to what [Congress] perceived as a serious and otherwise uncheckable problem of air pollution." *Union Electric*, 427 U.S. at 256. It "place[s] the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject[s] the States to strict minimum compliance requirements." *Id.* at 256-57. Most crucially, States are to "attain air quality of specified standards, and to do so *within a specified period of time*." *Train*, 421 U.S. at 65 (emphasis added).

Congress established deadlines not just for attaining the NAAQS, but for the steps *leading up to* attainment—including the submission of State plans, 42 U.S.C. 7410(a)(1); EPA action on such plans, *id.* 7410(k)(1) through (3); and (if EPA disapproved or found a State had failed to submit a plan) promulgation of federal plans, *id.* 7410(c)(1). Because these deadlines are express statutory requirements, see *Union Electric*, 427 U.S. at 258-60; *North Carolina*, 531 F.3d at 912, the panel erred by adopting an interpretation conflicting with them. See*, e.g., Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct.

1350, 1356 (2012) ("our task is to fit, if possible, all parts into an harmonious whole") (citation and internal quotation marks omitted).

The panel's ruling upends this crucial statutory architecture by inserting a non-statutory step, one that does not interrelate with those which *are* statutorily specified, and removes accountability that Congress carefully designed. Under the panel's holding, the agency and future courts are left without guidance to critical questions: By what date must EPA promulgate a quantification rule? What happens if the agency fails to do so? Would such failure excuse States' missing deadlines for plan submission and NAAQS attainment? Does the precondition requirement apply in situations of simple interstate transport or pollutants transported only over short distances? By severing Congress's carefully crafted linkage between each statutory implementation step, the panel's judicial improvisation invites delays in timely attaining the health-based air quality standards and securing attendant public health protections, complicates efforts of downwind States to craft timely SIPs, and places States not able to meet air quality standards by controlling in-state sources at risk of nonattainment sanctions.

This Court has described "the requirement that each State formulate … an implementation plan designed to achieve [the NAAQS]" as the "heart" of the Act, *Union Electric*, 427 U.S. at 249, and found that "strict minimum compliance requirements" are "apparent on the face of Section 7410(a)," *id.* at 256-

57. The panel erred by undertaking a judicial rewrite.

(b) States Are Capable of Preparing Good Neighbor SIPs

The panel's ruling—that State Good Neighbor plans, or the failure to submit such plans, cannot be deficient until EPA quantifies or defines State obligations—presupposes that such an approach is necessary to avoid an "impossibility." Here too the panel erred.

A State need not solve the entirety of a regional air quality problem to comply with the Good Neighbor requirement; it must merely demonstrate it has taken action to prevent sources within its boundaries from contributing to such problems. See 42 U.S.C. 7410(a)(2)(D)(i)(I). The possibility that a State's assessment of its contribution might diverge from subsequent federal findings does not excuse a State from making an effort on its own. If a State has done something, but not enough, it will at least have partly addressed the statutory requirement to address interstate air pollution. See 42 U.S.C. 7410(k)(3) (EPA's authority to approve a SIP submission in part).[18]

States have ample information and means, even absent an EPA rule, to (1) determine the emissions

[18] Where an already approved SIP is found not to fully comply with the Act, EPA can call for plan revisions under 42 U.S.C. 7410(k)(5), providing States with guidance and time for proposing alternatives, as it did in the NO_x SIP Call, see *supra*, 11-12, and in this rule for Kansas, see *infra*, 58 n.25.

from their own sources, (2) to assess the downwind impacts of those emissions; (3) identify neighbors with nonattainment problems, and (4) to reduce emissions that significantly contribute to their neighbors' nonattainment problems, or interfere with their ability to maintain attainment. Congress has repeatedly required similar technical analysis of States. See*, e.g.*, 42 U.S.C.7410(a)(1)(K); *id.* 7511a(c)(2)(A); *id.* 7511a(j) (specifically requiring States in multi-State ozone nonattainment areas to use air quality modeling); *id.* 7513a(a)(1); *id.* 7513a(b)(1). Indeed, in prior litigation, many petitioning States argued vigorously for their *right* to prepare Good Neighbor SIPs prior to EPA's quantification of interstate obligations. See State Pet. Br., *Michigan v. EPA*, D.C. Cir. 98-1497, at 37 ("EPA's role is to determine whether the SIP submitted is 'adequate' … not to dictate contents of the submittal in the first instance. Under *Virginia* and *Train*, each State has the right and the obligation to write a SIP that complies with §[74]10(a)(2), including the 'good neighbor' provision in §[74]10(a)(2)(D).").[19]

States, including petitioners here, regularly conduct analyses using the same technology EPA used to develop the Transport Rule,[20] and such

[19] EPA's *discretion* to issue a quantification rule, as it did in the NO_x SIP Call, does not authorize a court to *require* the agency to do so—and certainly not when such a requirement would conflict with statutory text.

[20] See*, e.g.*, Texas Commission on Environmental Quality, San Antonio Early Action Compact Ozone State Implementation Plan Revision at 3.1-3.2 (Nov. 17, 2004),

analyses incorporate assessment of interstate air pollution.[21] Two decades worth of regional air quality modeling developed for the purpose of meeting past interstate transport, regional haze, and prevention of significant deterioration requirements are available to the States.[22] And air quality data for each NAAQS pollutant are freely and publicly available on a monitor-by-monitor basis for each county in the country.[23]

Docket No. EPA-R06-OAR-2005-TX-0010-0020 (describing use of CAMx model to demonstrate ozone attainment expected by 2007) (hereinafter "San Antonio SIP") (SIP approved by EPA, 70 Fed. Reg. 48,877 (Aug. 22, 2005)).

[21] San Antonio SIP at 3.1-3.2 (noting modeling extends "throughout much of the South and Central U.S. including the Ohio River Valley to the north and Atlanta to the east" and that "[t]his regional scale grid matches the TCEQ standard modeling domain.").

[22] See, *e.g.*, EPA, Technical Support Document for the Final Clean Air Interstate Rule, Air Quality Modeling (March 2005), Docket No. EPA-HQ-OAR-2003-0053-2123, available at http://www.epa.gov/cair/technical.html; Lake Michigan Air Directors Consortium, Regional Air Quality Analyses for Ozone, $PM_{2.5}$, and Regional Haze: Final Technical Support Document, States of Illinois, Indiana, Michigan, Ohio, and Wisconsin (April 25, 2008), available at http://www.ladco.org/reports/technical_support_document/tsd/tsd_version_iv_april_25_2008_final.pdf. Regional air quality modeling information is available for all 48 continental States. See EPA, *Technology Transfer Network Support Center for Regulatory Atmospheric Modeling* (2013), http://www.epa.gov/ttn/scram/relatedindex.htm.

[23] See EPA, *Technology Transfer Network (TTN) Air Quality System (AQS)* (2013), http://www.epa.gov/ttn/airs/airsaqs/.

State capacity to meet Good Neighbor obligations is demonstrated by the experience of multiple States. For instance, Delaware, initially identified as a contributor to nonattainment in the proposed Transport Rule, demonstrated its compliance with Good Neighbor requirements by providing technical evidence demonstrating benefits of its own state regulations. 76 Fed. Reg. 53,638. 53,638-39 (Aug. 29, 2011) (approving Delaware SIP); 76 Fed. Reg. 2853, 2856 (Jan. 18 2011) (describing state efforts). EPA also approved Wyoming's Good Neighbor SIP, which used CAIR modeling, geographic and climatological data, and its own analysis to demonstrate that it did not contribute significantly to nonattainment in any other State. 73 Fed. Reg. 26,019, 26,022-23 (May 8, 2008).[24]

States need not hit "impossible-to-know target[s]," Pet.App. at 51a., in order to comply with the Good Neighbor provisions. They must, however, take action to prevent emissions sources within their boundaries from causing nonattainment and maintenance problems in downwind states. States' own experience demonstrates this is possible.

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[24] See also 77 Fed. Reg. 1027 (Jan. 9, 2012) (Colorado); 76 Fed. Reg. 48,002 (Aug. 8, 2011) (California). States' actual compliance with Good Neighbor obligations also rebuts any notion that the Act's plain meaning is "absurd." See Pet.App. 55a n.32. There is nothing absurd about the Act's assignment to States of initial responsibility for preparing plans to attain NAAQS. See also *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002) (noting "the Court rarely invokes [absurd results] to override unambiguous legislation").

B. Having Issued Disapprovals and Nonsubmittal Findings Addressing Each State's Good Neighbor Implementation, EPA Had a Duty Under Section 7410(c)(1) to Promulgate Federal Implementation Plans Within Two Years

Notwithstanding the availability of information, technical capacity, and opportunity, States have failed to meet their Good Neighbor obligations. State responsibility with respect to two of the NAAQS at issue was first triggered over a decade ago, and nearly eight years have passed since EPA first formally declared the States' failure to comply with those requirements. After the D.C. Circuit held unlawful both CAIR and its related FIPs, and after EPA promulgated nonsubmittal findings and disapproved submitted plans that failed to satisfy statutory provisions, EPA faced a statutory and a judicial mandate to ensure that upwind States had in place plans to meet their Good Neighbor obligations.

1. No State Had Complied with the Act's Good Neighbor Requirement

As described above, *supra*, 12-14 & n.5, EPA issued disapprovals and nonsubmittal findings concluding that no Transport Rule State had submitted a State implementation plan satisfying the Good Neighbor requirements for either the 1997 $PM_{2.5}$ or ozone NAAQS. Under *North Carolina*, neither the CAIR FIP, nor CAIR-based SIPs, not at issue here, satisfied the statutory requirements to ensure no significant contribution to nonattainment

or interference with maintenance of downwind air quality standards. See *North Carolina*, 531 F.3d at 930; Pet.App. 172a-173a. As a result, EPA's Section 7410(c) obligation to ensure compliance with Section 7410(a)(2)(D)(i) requirements for 1997 ozone and $PM_{2.5}$ NAAQS remained in effect.[25] For the 2006 $PM_{2.5}$ NAAQS, many States had failed entirely to submit Good Neighbor SIPs, as EPA found formally, 75 Fed. Reg. at 32,673, while EPA disapproved other SIPs reliant on CAIR and thus not compliant with state obligations.[26]

Section 7410(c)(1) prescribes a two-year deadline for EPA promulgation of a FIP. Moreover, EPA recognized that *North Carolina* had left it with "an obligation to align the compliance dates with the

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[25] In 2007, EPA did approve a Good Neighbor SIP from Kansas based on a demonstration that the State did not significantly contribute to or interfere with maintenance of the 1997 ozone or $PM_{2.5}$ NAAQS in any other State. 72 Fed. Reg. 10,608, 10,609 (Mar. 9, 2007). Subsequent modeling indicated that Kansas has significant impacts on downwind State air quality for ozone. Because the agency had approved a SIP that remained lawful, but inadequate in light of post-approval developments, it concluded it did not have authority for action under Section 7410(c) and instead proposed to issue a SIP call under Section 7410(k)(5). 76 Fed. Reg. 80,760, 80,766 (Dec. 27, 2011).

[26] Pet.App. 173a. EPA also disapproved 2006 $PM_{2.5}$ Good Neighbor SIPs from New Jersey, New York, and Kansas because their submissions failed to provide adequate technical demonstration that their proposed emissions controls would address the downwind impacts of their emissions. 76 Fed. Reg. 43,153, 43,154 (July 20, 2011) (New Jersey, New York); 76 Fed. Reg. 43,143, 43,147-48 (July 20, 2011) (Kansas).

attainment deadlines for the relevant NAAQS." Primary RTC 73. EPA could not "leave CAIR in effect indefinitely. It has an obligation pursuant to the D.C. Circuit opinions in the *North Carolina* case, to issue a rule to replace the CAIR." *Id.* at 124.

2. The Majority's Conclusion that EPA Was Prohibited from Promulgating Federal Implementation Plans Contravenes the Plain Statutory Text

The panel concluded EPA erred by promulgating a FIP under Section 7410(c) containing control measures without having first issued a separate rule quantifying or defining States' Good Neighbor obligations. The statute's plain meaning either precludes the court's reading, *Chevron*, 467 U.S. at 842-43, or EPA's reading is a "reasonable" interpretation that warranted the panel's deference, *id.* at 845.

"The Administrator *shall* promulgate a Federal implementation plan at any time within 2 years after the Administrator" makes any of three specified triggering findings. 42 U.S.C. 7410(c)(1) (emphasis added). By statutory definition, a FIP "includes enforceable emission limitations or other control measures, means or techniques." 42 U.S.C. 7602(y). An "emission limitation," in turn, means, *inter alia*, "a requirement established by the State *or the Administrator* which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." *Id.* 7602(k) (emphasis added).

As to each of the FIPs at issue here, EPA made a Section 7410(c)(1) triggering finding: the agency in each instance either "disapprove[d] a State implementation plan submission in whole or in part," *id.* 7410(c)(1)(B), or found that the State "ha[d] failed to make a required submission," *id.* 7410(c)(1)(A). Accordingly, Section 7410(c)(1)'s requirement that EPA "shall" promulgate a federal implementation plan was triggered. See, *e.g.*, *Lopez*, 531 U.S. at 241. Moreover, the lone statutory off-ramp from EPA's FIP duty—agency approval of a submitted SIP that "corrects the deficiency," 42 U.S.C. 7410(c)(1)(B)—was inapplicable. There is no statutory exemption from EPA's FIP duty authorizing the approach posited by the panel—*i.e.*, delay of a FIP while EPA issues a rule quantifying or defining States' emissions obligations and allowing States additional time to submit SIPs. The court of appeals lacked authority to rewrite the statute by creating an exemption from EPA's FIP duty that Congress chose not to include. See *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (statutory language was "categorical," and it was "impossible to find in it an exception" of the kind urged); *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 344 (2005) (rejecting the notion "that courts may simply create exceptions" to statute "wherever courts deem them appropriate").

The panel repeatedly suggested (Pet.App. 8a, 19a, 56a) that EPA should have proceeded under Section 7410(k)(5), which applies when EPA finds that "the applicable implementation plan for any

area" is substantially inadequate to comply with CAA requirements. As a threshold matter, for the NAAQS at issue here, EPA's authority is grounded in Section 7410(k)(1) through Section 7410(k)(3), which grant authority to disapprove State plans or make findings of non-submittal, and not in Section 7410(k)(5), which provides authority only to call for revisions of plans that have already been approved. See, *e.g.*, 70 Fed. Reg. at 21,148; 75 Fed. Reg. at 32,673.[27] Because section 7410(k)(5) addresses inadequacies in "the applicable implementation plan," it is inapplicable where there is no such plan because EPA has disapproved the State's submission or because the State did not make such a submission. See 42 U.S.C. 7602(q) (defining "applicable implementation plan" to include *inter alia* the portion of the implementation plan which "has been approved under section 7410 of this title"). No State subject to a FIP under the Transport Rule had an "applicable implementation plan" meeting its Good Neighbor obligations.[28]

Finally, the panel pointed to a separate CAA provision authorizing EPA to set "emission

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[27] The only instance where EPA had authority to invoke Section 7410(k)(5) in the Transport Rule is as to Kansas. See *supra*, 58 n.25. The panel mistakenly characterized EPA's action as to Kansas, suggesting that EPA had invoked FIP authority. Pet.App. 14a-15a (describing supplemental transport rule as adding 6, not 5, States to Transport Rule's ozone program).

[28] See *supra*, 57-58. This contrasts with the NO_x SIP Call. See *infra*, 66-67.

limitations and compliance schedules" for sources emitting interstate pollution, 42 U.S.C. 7426(c), reasoning by negative implication that EPA lacked such authority here. Pet.App. 55a. But Section 7410(c)(1) expressly authorizes a "federal implementation plan," which in turn includes "emission limitations." 42 U.S.C. 7602(y). Moreover, the provisions in Section 7426 relate to interstate pollution caused by a specific "major source" or "group of stationary sources," 42 U.S.C. 7426(b), whereas Section 7410(a)(2)(D)(i) refers to "any source or other type of emissions activity." To the degree these sections overlap, this is nothing exceptional, see *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995). Section 7426 (added in 1977) does not expressly override Section 7410(c) (added in 1970), and basic statutory interpretation principles preclude inferring such an override. See, *e.g.*, *J.E.M. Ag. Supply v. Pioneer Hi-Bred Int'l*, 534 U.S. 124, 137, 141-42 (2001) (repeal by implication requires "overwhelming evidence" and will be found only "when the earlier and later statutes are irreconcilable").

3. The Rule's Federal Implementation Plans Fit Squarely Within the Act's Cooperative Federalism Approach

The panel invoked federalism principles in an attempt to justify its insertion of a judge-made additional step into the statutory FIP process. But, because Congress unquestionably has power to

regulate interstate air pollution,[29] the question before the panel was simply one of statutory interpretation. *Cf. Egelhoff v. Egelhoff*, 532 U.S. 141, 151 n.4 (2001) ("Contrary to the dissent's suggestion that the resolution of this case depends on one's view of federalism, we are called upon merely to interpret ERISA") (citation omitted). As shown above, the statute precludes the panel's approach.

The panel relied on a "federalism bar" that it drew from *Train*, 421 U.S. at 60, and *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), *modified*, 116 F.3d 499 (D.C. Cir. 1997). While both decisions reflect a State's primary role in determining controls within a state implementation plan, neither involved *federal* implementation plans under 42 U.S.C. 7410(c). Both expressly recognized EPA's authority to promulgate FIPs. *Train*, 421 U.S. at 79 (citing Section 7410(c), recognizing that EPA could "devise and promulgate a specific plan of its own" if "a State fails to submit an implementation plan which satisfies th[e] standards" of Section 7410(a)(2)); *Virginia*, 108 F.3d at 1408 ("if EPA rejected a State Plan because it would not achieve or maintain ambient air quality standards, EPA could promulgate a federal implementation plan").

Far from raising a federalism problem, the Act's implementation plan provisions foster the

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[29] See*, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 282 (1981).

federalism interests reflected in *Train*. The statute provides States the opportunity to first submit State plans sufficient to attain NAAQS within their borders and downwind. 42 U.S.C. 7410(a)(1), 7410(a)(2). Only when—as here—EPA has found States have failed to submit a plan that satisfies those requirements is the agency's FIP duty triggered. *Id*. 7410(c)(1). States can supplant a FIP by submitting a compliant Good Neighbor SIP. *Id*; *id*. 7410(k)(1),(3); *id*. 7410(l).[30] These provisions embody the "cooperative federalism" paradigm approved by this Court, which has recognized Congress' power to "offer States the choice of regulating … activity according to federal standards or having State law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992) (internal quotations and citation omitted).

It is the panel's approach, not EPA's, that disserves cooperative federalism. The decision below would actually *reduce* the State authority it purports to foster—as is confirmed by contrasting the panel's ruling with the positions taken by a number of the petitioning States noted in *Michigan*. See *supra*, 54. While the statute's plain meaning

[30] These multiple opportunities for State regulation of both intrastate and interstate emissions implement the Act's purpose clause recognizing States' role in air pollution abatement. 42 U.S.C. 7410(a)(3) (cited by court of appeals majority at Pet.App. 33a). In any event, Section 7410(a)(3)'s statement of purpose cannot override the unambiguous text of substantive statutory provisions such as 42 U.S.C. 7410(c)(1). *Cf. New York v. FERC*, 535 U.S. 1, 22 (2002) .

gives States the initial opportunity to implement the Act's Good Neighbor obligation, the panel's interpretation would transfer that prerogative to EPA. See*, e.g.*, Pet.App. 8a ("*EPA* plays the critical role in gathering information about air quality in the downwind States, calculating each upwind State's Good Neighbor obligation, and transmitting that information to the upwind State.") (emphasis added). Neither the statute nor the two precedents cited by the panel (*Train* and *Virginia*) authorize a court to abrogate explicit state responsibilities under section 7410(a), nor to establish judicially-created EPA obligations as prerequisites to state duties. See *Train*, 421 U.S. at 79 (recognizing States' responsibility to submit SIPs complying with section 7410(a)(2)). Accord *Union Electric*, 427 U.S. at 256-57.

The panel's shift of authority away from States to EPA thus contravenes the panel's own recognition that "Congress intended *States* to implement the obligations set forth in Section 110(a)(2)(D)(i)(I)." Pet.App. 54a (emphasis in original).

4. Prior EPA Interstate Transport Decisions Do Not Support the Panel Majority's Reading

The panel sought support for its approach in two prior EPA interstate air pollution rules. Pet.App. 55a-57a. Because the Act's plain meaning must be implemented by both courts and agencies, see *Chevron*, 467 U.S. at 842-43, prior agency practice cannot justify the panel's exercise in judicial

rewriting. And even if there were some ambiguity in the statute, an agency's decision to calibrate its approach is permissible, where (as here) the adjusted approach reasonably implements the statute. See *id*. at 863-64.

Neither the NO_x SIP Call nor CAIR supports the panel's position that States are not obligated to submit Good Neighbor plans until EPA has promulgated a rule quantifying or defining each State's Good Neighbor obligation. Pet.App. 8a-9a, 47a-48a. In CAIR, EPA issued its nonsubmittal findings for the 1997 NAAQS on April 25, 2005, 70 Fed. Reg. at 21,147, *prior* to finalizing its quantification of interstate obligations on May 12, 2005, 70 Fed. Reg. at 25,162. The panel opinion focused on the fact that EPA did not issue a FIP until a year after finalizing significant contribution amounts in CAIR, 71 Fed. Reg. 25,304 (Apr. 28 2006). But under the panel's theory, the States' obligation to submit a Good Neighbor SIP did not even arise until quantified in CAIR, three weeks *after* EPA had determined the States had failed to meet these obligations.

The NO_x SIP Call involved a distinct factual situation, where EPA requested revision to *previously approved* Good Neighbor SIPs based on information developed in the Ozone Transport Assessment Group process and related analysis. 62 Fed. Reg. 60,318, 60,320 (Nov. 7, 1997). EPA's prior approval of Good Neighbor SIPs laid a predicate for the agency to invoke Section 7410(k)(5), 63 Fed. Reg. at 57,367, and the availability of newfound

information generated as a result of efforts to address ozone challenges in the northeast created a duty to do so. 62 Fed. Reg. at 60,369.[31] In the NO_x SIP Call, EPA recognized, and used, *authority* under section 7601(a) to issue a rule prospectively quantifying States' Good Neighbor obligations, see 42 U.S.C. 7601(a)(1) (the Administrator is "authorized" to prescribe regulations), and the D.C. Circuit upheld that authority. *Michigan*, 213 F.3d at 687. But EPA's *discretion* to issue a quantification rule does not authorize a court to *require* the agency to do so—and certainly not when such a requirement conflicts with statutory text.

The circumstances of the Transport Rule's adoption differ markedly from both prior rulemakings. EPA's time-limited FIP duty had been triggered for a host of eastern States. The D.C. Circuit had invalidated EPA's prior rule—CAIR—and commanded the agency to replace CAIR expeditiously in order to ensure that emissions reductions would occur soon enough to allow downwind States to meet their statutory NAAQS attainment deadlines. *North Carolina*, 531 F.3d at 908-12; 550 F.3d at 1178. Thus, not only did EPA

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[31] EPA explained this distinct situation in the preamble to CAIR: "at the time of the NO_x SIP Call in 1998 … EPA issued a section 110(k)(5) SIP call to States regarding their section 110(a)(2)(D) obligations on the basis of new information that was developed years after the States' SIPs had been previously approved as satisfying section 110(a)(2)(D) without providing for additional controls." 70 Fed. Reg. at 25,264.

confront long-expired statutory deadlines for Good Neighbor SIPs, but it was also under pointedly worded judicial instructions. The notion that EPA was *obligated* to defer action in these circumstances is untenable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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