Nos. 12-1182, 12-1183

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

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

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION OF INDUSTRY AND LABOR RESPONDENTS

F. WILLIAM BROWNELL
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

P. STEPHEN GIDIERE III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203
(205) 251-8100

PETER D. KEISLER
Counsel of Record
C. FREDERICK BECKNER III
ROGER R. MARTELLA, JR.
TIMOTHY K. WEBSTER
ERIC D. MCARTHUR
CHRISTOPHER A. BATES
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Luminant Generation Company LLC et al.

[Additional Counsel Listed on Inside Pages]

JANET J. HENRY
AMERICAN ELECTRIC POWER SERVICE CORP.
1 Riverside Plaza
Columbus, OH 43215
(614) 716-1612

Counsel for AEP Texas North Company, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma, and Southwestern Electric Power Company

STEVEN G. MCKINNEY
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4642
(205) 251-8100

Counsel for Alabama Power Co.

BART E. CASSIDY
KATHERINE L. VACCARO
DIANA A. SILVA
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue
Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

Counsel for ARIPPA

JEFFREY L. LANDSMAN
VINCENT M. MELE
WHEELER, VAN SICKLE & ANDERSON, S.C.
25 West Main Street
Suite 801
Madison, WI 53703-3398
(608) 255-7277

Counsel for Dairyland Power Cooperative

GREGORY G. GARRE
CLAUDIA M. O'BRIEN
LORI ALVINO MCGILL
JESSICA E. PHILLIPS
KATHERINE I. TWOMEY
STACEY VANBELLEGHEM
LATHAM & WATKINS LLP
555 Eleventh St., N.W.
Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200

Counsel for EME Homer City Generation, L.P.

WILLIAM M. BUMPERS
JOSHUA B. FRANK
MEGAN H. BERGE
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7700

Counsel for Entergy Corporation, Northern States Power Company – Minnesota, Southwestern Public Service Company, and Western Farmers Electric Cooperative

KELLY M. MCQUEEN
ASSOCIATE GENERAL COUNSEL
ENTERGY SERVICES, INC.
425 W. Capitol Avenue
27th Floor
Little Rock, AR 72201
(501) 377-5760

Counsel for Entergy Corporation

ROBERT A. MANNING
JOSEPH A. BROWN
MOHAMMAD O. JAZIL
HOPPING GREEN &
SAMS, PA
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
(850) 222-7500

Counsel for the Environmental Committee of the Florida Electric Power Coordinating Group

ROBERT J. ALESSI
DLA PIPER LLP (US)
677 Broadway
Suite 1205
Albany, NY 12207
(518) 788-9710

Counsel for Environmental Energy Alliance of New York, LLC

MARGARET CLAIBORNE
CAMPBELL
BYRON W. KIRKPATRICK
HAHNAH WILLIAMS GAINES
TROUTMAN SANDERS LLP
600 Peachtree St., N.E.
5200 Bank of America
Plaza
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Georgia Power Co., Southern Co. Services, Inc., and Southern Power Co.

ROBERT A. MANNING,
HOPPING GREEN &
SAMS, P.A.
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
(850) 222-7500

Counsel for Gulf Power Co.

TERRY RUSSELL YELLIG
SHERMAN, DUNN, COHEN, LEIFER & YELLIG, PC
900 7th Street, N.W.
Suite 1000
Washington, D.C. 20001
(202) 785-9300

Counsel for International Brotherhood of Electrical Workers, AFL-CIO

DENNIS LANE
STINSON MORRISON HECKER LLP
1150 18th Street, N.W.
Suite 800
Washington, D.C. 20036-3816
(202) 785-9100

DAVID R. TRIPP
PARTHENIA B. EVANS
STINSON MORRISON HECKER LLP
1201 Walnut Street
Suite 2900
Kansas City, MO 64106
(816) 842-8600

Counsel for Kansas City Board of Public Utilities – Unified Government Wyandotte County/Kansas City, Kansas, Kansas Gas and Electric Co., Sunflower Electric Power Corp., and Westar Energy, Inc.

MAUREEN N. HARBOURT
TOKESHA M. COLLINS
KEAN MILLER LLP
P.O. Box 3513
Baton Rouge, LA 70821-3513
(225) 387-0999

Counsel for the Lafayette Utilities System and Louisiana Chemical Association

DAVID M. FLANNERY
GALE LEA RUBRECHT
JACKSON KELLY PLLC
500 Lee Street East
Suite 1600
P.O. Box 553
Charleston, WV 25322-553
(304) 340-1000

Counsel for the Midwest Ozone Group

TERESE T. WYLY
BALCH & BINGHAM LLP
1310 Twenty Fifth Ave.
Gulfport, MS 39501-1931
(228) 864-9900

Counsel for Mississippi Power Co.

PETER S. GLASER
TROUTMAN SANDERS LLP
401 Ninth Street N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for National Mining Association and Peabody Energy Corp.

WILLIAM L. WEHRUM, JR.
HUNTON & WILLIAMS LLP
2200 Pennsylvania
Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

Counsel for National Rural Electric Cooperative Association

ANN M. SEHA
ASSISTANT GENERAL
COUNSEL
XCEL ENERGY INC.
414 Nicollet Mall
5th Floor
Minneapolis, MN 55401
(612) 215-4619

Counsel for Northern States Power Company – Minnesota and Southwestern Public Service Company

MICHAEL J. NASI
JACOB ARECHIGA
JACKSON WALKER L.L.P.
100 Congress Avenue
Suite 1100
Austin, Texas 78701
(512) 236-2000

Counsel for San Miguel Electric Cooperative, Inc.

KARL R. MOOR
JULIA A. BAILEY DULAN
SOUTHERN COMPANY
SERVICES, INC.
600 North 18th Street
Bin 15N-8190
Birmingham, AL 35203
(205) 251-6227

Counsel for Southern Co. Services, Inc.

GRANT CRANDALL
ARTHUR TRAYNOR, III
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Suite 200
Triangle, VA 22172
(703) 291-2457

EUGENE M. TRISKO
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 47
Glenwood, MD 21738
(301) 639-5238

Counsel for United Mine Workers of America

ANDREA BEAR FIELD
NORMAN W. FICHTHORN
E. CARTER CHANDLER CLEMENTS
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

Counsel for the Utility Air Regulatory Group

RICHARD G. STOLL
FOLEY & LARDNER LLP
3000 K Street, N.W.
Suite 600
Washington, D.C. 20007
(202) 295-4021

BRIAN H. POTTS
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
(608) 258-4772

Counsel for Wisconsin Public Service Corporation

QUESTIONS PRESENTED

The Clean Air Act's "good-neighbor" provision requires upwind States to prohibit sources within their borders from "emitting any air pollutant in amounts" that "contribute significantly" to downwind States' "nonattainment" of national ambient air quality standards ("NAAQS"). 42 U.S.C. §7410(a)(2)(D)(i)(I). Pursuant to this provision, the Environmental Protection Agency ("EPA") issued a regulation, known as the Transport Rule, requiring upwind States to make emissions reductions without regard to whether the reductions mandated in a particular State were greater than necessary to eliminate that State's significant contribution to downwind States' nonattainment of the NAAQS, and without regard to whether the overall reductions mandated in the upwind States were greater than necessary for the downwind States to achieve attainment.

The questions presented are:

1. Whether the court of appeals correctly held that the challenges to the Transport Rule on which the court granted relief were adequately presented to EPA and preserved for judicial review.

2. Whether the court of appeals correctly held that the States must be given the initial opportunity to implement the reductions required by EPA under the good-neighbor provision.

3. Whether the court of appeals correctly held that the Transport Rule exceeded EPA's statutory authority to prohibit only those "amounts" of emissions that "contribute significantly" to downwind States' "nonattainment" of the NAAQS.

RULE 29.6 STATEMENT

AEP Texas North Company is a wholly owned subsidiary of AEP Utilities, Inc. AEP Utilities, Inc., Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma, and Southwestern Electric Power Company are wholly owned subsidiaries of American Electric Power Company, Inc. American Electric Power Company, Inc. has no parent, and no publicly held corporation owns ten percent or more of its stock.

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally friendly circulating fluidized bed ("CFB") boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988 for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Big Brown Lignite Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Big Brown Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Dairyland Power Cooperative is a non-stock, not-for-profit cooperative association organized under the laws of the State of Wisconsin, with its principal office located in La Crosse, Wisconsin. Dairyland is engaged, among other things, in the business of generating and transmitting electric power to its 25 member distribution cooperatives and to other wholesale customers. Dairyland has no corporate parent. No publicly held corporation owns a 10% or greater ownership interest in Dairyland.

EME Homer City Generation, L.P. ("EME Homer City") is a limited partnership composed of Mission Energy Westside, Inc., a California corporation, as the general partner and Chestnut Ridge Energy Company, a California corporation, as the limited partner. Mission Energy Westside, Inc. and Chestnut Ridge Energy Company are wholly owned subsidiaries of Edison Mission Holdings Company, which, in turn, is a wholly owned subsidiary of Edison Mission Energy. Edison Mission Energy is a Delaware Corporation, which is a wholly owned subsidiary of Mission Energy Holdings Company, a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison Mission Group, Inc., a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison International, a California corporation.

On May 2, 2013, EME Homer City filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Illinois. EME Homer City has requested that the bankruptcy court jointly administer its case (13-18703) with the lead case, *In re Edison Mission Energy*, Case No. 12-49219 (JPC).

When EME Homer City filed its petition in the Court of Appeals, EME Homer City was the lessee

and operator of the Homer City generating station, a coal-burning electric power facility that is affected by the Transport Rule. Edison Mission Energy is an independent power producer that generates electricity to sell wholesale in the open market. The ultimate parent company, Edison International, is engaged in the business of holding for investment the common stock of its subsidiaries which also include Southern California Edison, a California public utility corporation, and Edison Capital, which has investments in energy and infrastructure projects worldwide. In addition, the following parent companies, or affiliates of EME Homer City have outstanding shares that are in the hands of the public: Edison International and Southern California Edison.

Entergy Corporation is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in Entergy Corporation.

Environmental Energy Alliance of New York, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

The Florida Electric Power Coordinating Group, Inc., ("FCG") is a non-profit, non-governmental corporate entity organized under the laws of Florida. The FCG does not have a parent corporation. No publicly held corporation owns ten percent or more of the FCG's stock.

International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") is an unincorporated international labor organization with headquarters in Washington, D.C. The IBEW provides collective bargaining representation and other services to its members, and collective bargaining representation to all members of collective bargaining units it exclusively represents. The IBEW represents electrical workers in the Unit-

ed States, Canada, and the Republic of Panama, engaged in the manufacture, assembling, construction, installation, and erection, repair or maintenance of all materials, equipment, apparatus and appliances required in the production, generation, utilization and control of electricity and its effects, and transmission of data, voice, sound, video and other emerging technologies (including fiber optics, high speed data cable, etc.). The IBEW has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The Kansas City Board Of Public Utilities-Unified Government Wyandotte County/Kansas City, Kansas is not required to provide a Corporate Disclosure Statement because it is a governmental entity organized under the laws of the state of Kansas. Accordingly, no Corporate Disclosure Statement is being provided.

The Lafayette Utilities System, a department within the Lafayette City-Parish Consolidated Government, is a local government utility primarily servicing the citizens of the City of Lafayette, Louisiana. As a customer-owned municipal utility, the Lafayette Utilities System's mission is to provide its customers with quality and affordable electric, water, wastewater and fiber optic services. The Lafayette Utilities System does not issue stock; it does not have a parent corporation, and no publicly held corporation holds any Lafayette Utilities System stock.

The Louisiana Chemical Association has no parent companies, and no publicly held company has a 10% or greater ownership interest. The Louisiana Chemical Association is a non-profit Louisiana corporation formed in 1959. Its mission is to promote a positive climate for chemical manufacturing that ensures

long-term economic growth for its members. It is a "trade association."

Luminant Big Brown Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Energy Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Generation Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Holding Company LLC is the parent company that wholly owns Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, Oak Grove Management Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company LLC, and Luminant Energy Company LLC (collectively, the "Luminant Entities"). Luminant Holding Company LLC is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"). EFCH is a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."), formerly TXU Corp. Substantially all of the common stock of EFH Corp is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater ownership interest in EFH Corp.

Luminant Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

The Midwest Ozone Group is an unincorporated association of businesses and organizations formed to assist in the development of scientifically sound and effective air quality strategies. The Midwest Ozone Group has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in the Midwest Ozone Group.

National Mining Association ("NMA") is an incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

The National Rural Electric Cooperative Association ("NRECA") is the national association of rural electric cooperatives. NRECA does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Northern States Power Company – Minnesota is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Northern States Power Company – Minnesota.

Oak Grove Management Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

Peabody Energy Corporation is a publicly traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU." As of March 31, 2013 filings, no holding companies own more than 10% of Peabody Energy Corporation's outstanding shares.

San Miguel Electric Cooperative, Inc. is a 400 MW, mine-mouth, lignite-fired electric generating unit located in Atascosa County, Texas roughly 45 miles south of San Antonio. San Miguel was created on February 17, 1977, under the Rural Electric Cooperative Act of the State of Texas, for the purpose of owning and operating the generating plant and associated mining facilities that furnish power and energy to Brazos Electric Power Cooperative, Inc. and South Texas Electric Cooperative, Inc. San Miguel is a not-for-profit electric cooperative incorporated in the State of Texas under the Electric Cooperative Corporation Act, Tex. Util. Code, Chapter 161. San Miguel does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public and no publicly owned company has an ownership interest in San Miguel.

Sandow Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company are all wholly owned subsidiaries of

Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly held company owns 10% or more of any of these Respondents' stock. No publicly held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO." Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include four vertically integrated electric utilities—Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company—as well as Southern Power Company, which owns generation assets and sells electricity at market-based rates in the wholesale market. These subsidiaries, each a Respondent here, operate more than 42,000 megawatts of coal, natural gas, oil, nuclear, and hydroelectric generating capacity. Southern Company Services, Inc. is the services company for Southern Company and its operating subsidiaries. Southern Company Services, Inc. provides, among other things, engineering and other technical support for the operating companies.

Southwestern Public Service Company is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Southwestern Public Service Company.

Sunflower Electric Power Corporation is a Kansas non-profit corporation doing business as a cooperative with its principal place of business in Hays, Kansas. It is not a publicly held corporation; no publicly held

corporation holds any ownership interest in it and it has no "parent" corporation. It is owned solely by its seven member distribution cooperatives, all of which are located in western Kansas. Sunflower Electric Power Corporation is engaged in the generation, transmission and sale of electric power and energy at wholesale to its member distribution cooperatives and municipalities in the state of Kansas.

United Mine Workers of American ("UMWA") is a non-profit national labor organization with headquarters in Triangle, Virginia. UMWA's members are active and retired miners engaged in the extraction of coal and other minerals in the United States and Canada, and workers in other industries in the United States organized by the UMWA. UMWA is affiliated with the American Federation of Labor-Congress of Industrial Organizations. UMWA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric utilities and electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Westar Energy, Inc., a publicly traded Kansas corporation with its principal place of business in Topeka, Kansas, is the parent corporation of Kansas Gas and Electric Company ("KGE"), a Kansas corporation with its principal place of business in Topeka, Kansas. Westar and its wholly owned subsidiary, KGE,

are electric utilities engaged in the generation, transmission, distribution and sale of electric power and energy at wholesale and retail to approximately 687,000 customers in the state of Kansas. Westar owns all of the stock of KGE. In addition to Westar's publicly traded stock, both Westar and KGE have issued debt and bonds to the public. There is no corporation that owns 10% or more of the stock of Westar Energy, Inc.

Western Farmers Electric Cooperative ("WFEC") hereby certifies that no publicly held company has a 10 percent or greater ownership interest in WFEC. WFEC is a non-profit generation and transmission rural electric cooperative that supplies wholesale electricity to its member owners, which include 19 rural electric distribution cooperatives located in Oklahoma and 4 distribution cooperatives located in New Mexico.

Wisconsin Public Service Corporation ("WPSC") is a wholly owned subsidiary of the publicly owned corporation Integrys Energy Group, Inc (NYSE: TEG). WPSC is a regulated electric and natural gas utility operating in northeast and central Wisconsin and an adjacent portion of Upper Michigan.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES AND REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Industry and Labor Respondents respectfully submit this brief in opposition to the petitions for certiorari filed by the Environmental Protection Agency, *et al.* ("EPA") and the American Lung Association, *et al.* ("ALA").

STATEMENT OF THE CASE

1. The Clean Air Act ("CAA") requires EPA to establish national ambient air quality standards ("NAAQS") for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7408(a)(1)(A); *see also id.* §7409. It also requires EPA to designate areas of the country as "attainment," "nonattainment," or "unclassifiable" for each such air pollutant, depending on whether the area meets the NAAQS. *Id.* §7407(c), (d). Although EPA sets the NAAQS, each State has "the primary responsibility for assuring air quality" within its borders, *id.* §7407(a), and must develop a state implementation plan ("SIP") to meet the NAAQS and submit its SIP to EPA for approval, *id.* §7410.

The CAA also contains a "good-neighbor" provision. Section 110(a)(2)(D)(i)(I) requires that SIPs "contain adequate provisions" prohibiting "any source … within the State from emitting any air pollutant in amounts which will … contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." *Id.* §7410(a)(2)(D)(i)(I). As pertinent here, various sources, including power plants, emit sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x"), which can contribute to a downwind State's nonattainment of the particulate matter ("$PM_{2.5}$") and ozone NAAQS. 76 FR 48208, 48209-10 (Aug. 8, 2011).

In 1998, EPA issued the "NO_x SIP Call," which instructed upwind States to revise their SIPs to mitigate downwind ozone formation by imposing NO_x emissions limits. 63 FR 57356 (Oct. 27, 1998). The D.C. Circuit largely upheld the NO_x SIP Call in *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (per curiam).

In 2005, EPA promulgated the Clean Air Interstate Rule ("CAIR"), which addressed interstate transport of NO_x and SO_2. 70 FR 25162 (May 12, 2005). CAIR required upwind States to achieve EPA-specified "emissions budgets" reflecting emissions reductions for each State that EPA determined were cost-effective.

In *North Carolina* v. *EPA*, the D.C. Circuit invalidated CAIR because EPA had not tailored its budgets to individual upwind States' emissions that actually "contribute significantly" to downwind nonattainment. 531 F.3d 896, 907-08 (D.C. Cir.) (per curiam), *on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam). *North Carolina* rejected EPA's effort to reallocate emissions-reduction burdens among the States in a way the agency considered "fai[r]." *Id.* 918-19. It held that §110(a)(2)(D)(i)(I) "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions"; rather, "[e]ach state must eliminate its own significant contribution to downwind pollution," and EPA "may not require some states to exceed the mark." *Id.* 921. The D.C. Circuit remanded, but allowed CAIR to remain in place while EPA developed a new rule. 550 F.3d at 1178.

In response, EPA issued the Transport Rule. EPA initially determined which downwind States would have problems "attaining" or "maintaining" NAAQS in 2012 assuming CAIR would not be in effect. 76 FR

at 48211. EPA relied on computer modeling to make this hypothetical future air-quality projection using 2005 base-year data rather than "the most recent ambient data" that showed improvements in actual air quality in the covered States. *Id.* 48229-30.

After identifying projected downwind "nonattainment" and "maintenance" locations, EPA employed a two-stage approach to determine (1) whether to regulate an upwind State's emissions and (2) the emissions budget for that State. At the first stage, EPA used its air-quality models to predict the amount each upwind State would "contribute" to the "nonattainment" and "maintenance" locations it had identified (again, assuming, counterfactually, that CAIR was not in effect). *Id.* 48233-36. To determine which upwind States to regulate, EPA set air-quality contribution thresholds at 1% of each NAAQS. *Id.* 48236. States whose contributions to a nonattainment or maintenance location were predicted to exceed this threshold were deemed "linked" to that location and subjected to emissions budgets. *Id.* Conversely, EPA determined that "states whose contributions are below these thresholds do *not significantly contribute* to nonattainment," *id.* (emphasis added), and thus were not subject to any emissions budgets, *see also id.* 48237 (the 1% threshold "identif[ies] states whose contributions *do not significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS") (emphasis added).

For upwind States with predicted contributions exceeding these "insignificance" thresholds, EPA's second stage imposed emissions limits based on the cost of reducing emissions. EPA identified the emissions reductions available at various "cost thresholds" and then set emissions budgets reflecting the "amounts" of emissions EPA projected would remain if emissions

were eliminated at a dollar-per-ton cost equal to those cost thresholds. *Id.* 48248-52, 48258. For 2012 budgets, EPA used a $500/ton threshold for both SO_2 and NO_x—*i.e.*, EPA calculated the amount of SO_2 and NO_x emissions each State could reduce for $500 per ton of emissions. *Id.* 48252, 48257–59.[1]

Notwithstanding objections raised by commenters, CAJA556, 1293, 1756, EPA did not attempt to determine an individual State's downwind "contribution" after imposition of emissions controls, let alone determine whether the emissions controls would drive a State's "contribution" below the insignificance threshold it had determined in stage-one "d[id] not significantly contribute to nonattainment or interfere with maintenance," 76 FR at 48236. Instead, EPA set emissions limits based on its view of "reasonable" and "cost-effective" emissions reductions that could be undertaken by upwind States collectively.[2]

Moreover, although §110(a)(2)(D)(i)(I) authorizes reductions only of emissions that contribute significantly "to nonattainment" or "interfere with maintenance" of NAAQS, EPA never considered whether the emissions reductions it directed were greater than necessary to achieve or maintain the relevant NAAQS, 76 FR at 48256-57, even though EPA's own data showed that the agency was imposing emissions

---

[1] For 2014 budgets, EPA split the States into two groups for SO_2, using $2,300/ton for Group 1 and $500/ton for Group 2. 76 FR at 48252, 48257. The 2014 NO_x budgets used the $500/ton threshold. *Id.* 48257.

[2] *See, e.g.*, 76 FR at 48249 (setting controls at the "point where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective"); *id.* 48257 (EPA's controls achieved "significant air quality improvements" with "cost impacts [that] remained reasonable").

reductions far greater than necessary for downwind States to achieve attainment, CAJA2546-637, and despite data demonstrating that less stringent emissions limits would still result in downwind attainment, CAJA1066-68, 1374. Nor did EPA consider the extent to which projected nonattainment resulted from the downwind States' own in-state pollution. *See, e.g.*, 75 FR 45210, 45226, 45241 (Aug. 2, 2010); 76 FR at 48248, 48259.

2. The D.C. Circuit vacated the Transport Rule, finding that it exceeded EPA's authority under §110(a)(2)(D)(i)(I) in "at least three independent" respects relevant here. EPA.Pet.App. 31a.

First, the court found EPA's approach for setting emissions budgets unlawful because those limits were not based on "'amounts' from upwind States that 'contribute significantly to nonattainment' in downwind States." *Id.* EPA first defined "amounts" of air-quality contribution that were "insignificant," but then "ignore[d]" that threshold and defined emissions budgets "in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State." *Id.* 36a.[3]

Second, the court found that the Transport Rule unlawfully imposed reductions greater than necessary for downwind States to attain NAAQS. Under §110(a)(2)(D)(i)(I), EPA may only "targe[t] those

---

[3] The court also found EPA's approach "illogical" and that EPA's justification "rings hollow." *Id.* 36a, 37a n.22. As the court noted, "EPA itself said in the final rule that 'states whose contributions are below these thresholds do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS,'" yet EPA simultaneously adopted an approach that could arbitrarily require a State to reduce emissions below those thresholds. *Id.* 36a.

emissions from upwind States that 'contribute significantly *to nonattainment*.'" *Id.* 28a. Thus, "EPA may not require upwind States to do more than necessary for the downwind States to achieve the NAAQS." *Id.* 39a-40a. The court found, however, that "EPA did not try to take steps to avoid such over control." *Id.* 40a.

Third, the court found the Transport Rule violated *North Carolina*'s holding that EPA may not force a State to "'share the burden'" of reducing another State's emissions. *Id.* 38a. Here, the court rendered two related, yet distinct, holdings. It first held that EPA violated the good-neighbor provision because it "made no attempt to calculate … on a proportional basis … contributions of other upwind States to the downwind States' nonattainment problems." *Id.* 39a. The court also held that EPA "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." *Id.* In other words, EPA could not require upwind States to reduce emissions to compensate for downwind State emissions that caused NAAQS to be exceeded. *Id.* 26a & n.15, 39a.

The court recognized, however, that "multiple upwind States may affect a single downwind State" and "a single upwind State may affect multiple downwind States." *Id.* 29a. The court held that EPA had "discretion" to account for these complexities and was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not … possible" to do so. *Id.* The court required EPA to eliminate "over-control" only where technically feasible and not where it is "unavoidable." *Id.* 28a-29a.

3. The court vacated the Transport Rule but directed EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* 64a.

Under CAIR, virtually all downwind locations in the eastern United States (the area of concern in the Transport Rule proceedings) have attained the relevant NAAQS. EPA, *Progress Report 2011: Environmental and Health Results* 12, 14 (2013) ("*2011 Progress Report*"), *available at* http://www.epa.gov/airmarkets/progress/ARPCAIR11_downloads/ARPCAIR11_environmental_health.pdf.

REASONS FOR DENYING THE PETITIONS[4]

Petitioners do not claim the decision below conflicts with any other decision or presents any broadly recurring legal issue. Instead, petitioners argue that the court of appeals erred and that there will be adverse health consequences unless the Transport Rule is reinstated.

Petitioners fail to demonstrate any error in the decision below, let alone error warranting review. In the Transport Rule, EPA mandated that upwind States make whatever emissions reductions the agency deemed "reasonable" and "cost-effective" without regard to whether those "amounts" "contribut[ed] significantly to nonattainment." The court of appeals correctly held that this approach had no basis in the statute. While other provisions of the CAA authorize EPA to require further emissions reductions, §110(a)(2)(D)(i)(I) permits EPA only to require an upwind State's SIP to "prohibi[t] [emissions] within the State [of] any air pollutant in amounts which will … contribute significantly to nonattainment" of NAAQS in any downwind State. The good-

[4] This brief addresses the court of appeals' holding that the Transport Rule violated the good-neighbor provision's substantive limits. The court also held that the Transport Rule violated the CAA's "cooperative federalism" structure; that issue is addressed in the State and local governments' brief in opposition.

neighbor provision thus has both a State-specific focus—EPA must consider "amounts" from "within" each upwind State that "contribute"—and a focus on air quality—EPA may prohibit only those "amounts" that "contribute significantly to nonattainment" in a downwind State. EPA's assertion of broader authority to order whatever collective upwind reductions it deemed "reasonable" ignored those statutory limits.

Moreover, EPA challenges only a *subset* of the holdings below, leaving unchallenged key holdings that led to the Transport Rule's vacatur. For example, while EPA acknowledges that the court of appeals independently vacated the Transport Rule because EPA imposed emissions reductions greater than necessary for downwind States to attain NAAQS, EPA.Pet. 10, that issue is nowhere addressed in EPA's petition. Likewise, EPA does not mention, let alone dispute, the court's holding that EPA failed to account for downwind States' own contributions to nonattainment. Thus, even if EPA's petition were granted and this Court ruled in EPA's favor, the Transport Rule would remain vacated and would still need to be fundamentally revised.

EPA's own air-quality findings both confirm the flaws identified by the court of appeals and refute the notion that the Transport Rule is essential to public health. The Transport Rule mandated more stringent emissions controls than its predecessor, CAIR. But EPA's most recent actual air-quality data demonstrate that virtually all downwind areas in the eastern United States have attained the NAAQS under CAIR. Significant emissions reductions beyond CAIR are thus unnecessary to eliminate "significant contribution" to "nonattainment."

Indeed, the Transport Rule itself found that because of other independent factors (such as other fed-

eral requirements, industry efforts and State-mandated emissions reductions), many downwind areas addressed in the Transport Rule would attain NAAQS in 2014 *even in the absence* of *any* good-neighbor emissions controls. Thus, even if this Court upheld EPA's approach to defining upwind States' obligations without regard to each State's actual contribution to downwind nonattainment, the Transport Rule would still need to be substantially redone to account for EPA's own findings that the upwind emissions controls it adopted in 2011 will, in many instances, be unnecessary in 2014.

EPA's air-quality data also provide the complete answer to petitioners' unfounded suggestion that thousands of deaths and other massive public health consequences will occur unless the Transport Rule is reinstated. Petitioners rely on analyses comparing the Transport Rule's benefits to a hypothetical world with *no* good-neighbor emissions controls. *See* 76 FR at 48308-19. Those analyses are irrelevant to whether the decision below will adversely affect public health because the court of appeals directed EPA to continue administering CAIR until a replacement rule is adopted. And, as noted, there has been widespread attainment of NAAQS under CAIR—a level of ambient air quality that is by definition sufficient "to protect the public health." 42 U.S.C. §7409(b)(1).

I. EPA DOES NOT DISPUTE AN INDEPENDENT BASIS UPON WHICH THE COURT OF APPEALS VACATED THE TRANSPORT RULE.

1. EPA does not challenge an independent ground upon which the court of appeals vacated the Transport Rule. Rather, EPA challenges only a *subset* of the holdings below. *See* EPA.Pet. 10, 21-28; EPA.Pet.App. 31a-41a. The court correctly held that

the Transport Rule was flawed because EPA failed to "targe[t] those emissions from upwind States that 'contribute significantly *to nonattainment*.'" *Id.* 28a. EPA does not challenge that holding and it is not included in EPA's Questions Presented. Even apart from the merits of the legal issues, therefore, this case is a particularly inappropriate candidate for certiorari.

This holding was an "independent" basis for vacating the Transport Rule, *id.* 31a, and it is distinct from the court of appeals' additional holding that the Transport Rule unlawfully used cost to "redefine each State's 'significant contribution,'" *id.* 35a-36a. Section 110(a)(2)(D)(i)(I) authorizes EPA to require States to prohibit only those "amounts" of emissions that "contribute significantly *to nonattainment*" (emphasis added). EPA was thus separately obligated to ensure that its emissions controls did not "require upwind States to do more than necessary for the downwind States to achieve the NAAQS." EPA.Pet.App. 39a-40a. Where less costly emissions controls would have achieved downwind attainment—which was the case here, *see infra* pp. 11-12—EPA was required to "ratchet back the upwind States' obligations to the levels of reductions necessary and sufficient to produce attainment in the downwind States." EPA.Pet.App. 28a. This independent statutory limitation applies even if EPA were otherwise permitted to use its two-stage approach to define "cost-effective" "significant contribution."

2. EPA's decision not to challenge the court of appeals' "nonattainment" holding is understandable because that holding is correct. "The good neighbor provision is not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS." *Id.* Under

§110(a)(2)(D)(i)(I), EPA may require a State to prohibit only "amounts" of emissions that "contribute significantly *to nonattainment*" (emphasis added). Once a downwind location achieves attainment, EPA's authority to regulate upwind emissions ceases.

Indeed, EPA has previously recognized this independent limitation. In the NO_x SIP Call, EPA stressed it had ensured that its "cost-effective" emissions controls had not produced any "instance of 'overkill,' so that none of the upwind reductions required under [the NO_x SIP Call] is more than necessary to ameliorate downwind nonattainment." 63 FR at 57403; *see also id.* 57379, 57446-47. And in opposing certiorari in *Michigan*, EPA again stressed that it had not imposed emissions controls greater than necessary to eliminate downwind nonattainment. EPA *Michigan* Cert. Opp. 11.

As the NO_x SIP Call demonstrates, EPA can prevent this type of overcontrol even when it determines "significant contribution" based on "cost-effectiveness." But EPA in the Transport Rule refused even to consider its statutory obligation to do so.

As noted, EPA used uniform "cost per ton thresholds"—*i.e.*, emissions reductions that could be achieved at a certain cost per ton—to determine emissions reductions requirements. *See supra* pp. 3-4. EPA, however, refused to consider whether downwind States could attain NAAQS even if less stringent emissions limits were imposed on upwind States. For example, EPA conceded that it selected the uniform $500/ton threshold for NO_x without modeling whether downwind attainment could be achieved at lower costs. 76 FR at 48256. EPA also refused to consider the impact of SO_2 controls costing less than $500/ton, despite having gathered data on

such controls, *see* CAJA2192-93. Had EPA considered these data, it would have found, as commenters showed, that less costly controls would still have allowed downwind States to attain NAAQS—and thus EPA had *no statutory basis* for imposing more stringent emissions controls. *See* CAJA1066-68; CAJA1374.

3. Although ALA, unlike EPA, does challenge this aspect of the court of appeals' decision, it does not dispute the substance of the court's holding that EPA cannot mandate emissions reductions beyond those necessary to achieve downwind attainment, and it does not dispute the court's holding that EPA failed to consider whether less costly emissions controls would have allowed downwind States to attain NAAQS. Instead, ALA asserts that "challengers [did not] identif[y] any instance in which the Rule required greater reductions than necessary to achieve attainment." ALA.Pet. 23-24.

That is simply false. As shown above, commenters specifically demonstrated that less costly controls would still have enabled downwind States to attain the NAAQS, and EPA has never disputed that showing. Moreover, EPA's own findings further demonstrate that EPA significantly overcontrolled. For example, for the locations EPA projected to have problems attaining or maintaining the annual $PM_{2.5}$ NAAQS, the emissions controls imposed by the Transport Rule were projected to achieve air quality at each of those locations *superior to* the relevant NAAQS, in many instances by a substantial margin.[5]

---

[5] *See* CAJA2964. The difference between the NAAQS and the average air-quality levels EPA imposed in the Transport Rule for these locations was more than *15 times* the level of "signifi-

EPA likewise imposed reductions far greater than necessary for downwind States to attain NAAQS for 24-hour $PM_{2.5}$ and ozone for the substantial *majority* of the relevant locations.[6] Any doubt on this score is further dispelled by the fact that widespread attainment of NAAQS by the downwind States has been achieved under CAIR even though CAIR allows for higher levels of emissions than the Transport Rule. *See infra* pp. 30-31.

Indeed, ALA appears to concede that in numerous instances the Transport Rule mandated emissions reductions that will produce downwind air quality substantially superior to NAAQS, but speculates that such overcontrol is necessary to ensure that all other downwind locations achieve NAAQS. ALA.Pet. 24.

---

cant contribution" that triggered imposition of emissions controls. Industry/Labor DC Cir. Merits Br. 28 n.11.

[6] Industry/Labor Merits DC Cir. Br. 28-29 & nn.12-13 (citing EPA data). To the extent ALA suggests the record is unclear as to whether any specific State was overcontrolled, EPA's own data confirm that such overcontrol would occur under the Transport Rule. For example, Texas was "linked" solely to Madison, Illinois with respect to $PM_{2.5}$, *see* 76 FR at 48241 (tbl.V.D-2), 48243 (tbl.V.D-5), but Madison was projected to achieve air quality significantly superior to the relevant NAAQS, *see* CAJA2964-65. So too for South Carolina. *Compare* 76 FR at 48241 (tbl.V.D-2) (linking South Carolina to Fulton, Georgia for annual $PM_{2.5}$), *with* CAJA2964 (projecting post-Rule air quality for Fulton superior to NAAQS). Examples of overcontrol with respect to ozone-related emissions abound as well. *Compare, e.g.*, 76 FR at 48246 (tbl.V.D-9) (linking Iowa, Kansas, Oklahoma and Wisconsin to Allegan, Michigan), *with* CAJA2561 (projecting post-Rule air quality for Allegan superior to NAAQS). More broadly, the record demonstrated that downwind attainment could have been achieved with much less strict emissions controls, CAJA1066-68; CAJA1374, and, indeed, that *current* emissions levels have produced widespread attainment of NAAQS by downwind States, *see infra* pp. 31-32.

But EPA never made such a finding and, in fact, determined in the NO_x SIP Call that it could adjust upwind emissions obligations to avoid imposing obligations "more than necessary to ameliorate downwind nonattainment." 63 FR at 57403. Here, as explained, EPA simply refused even to examine the relevant data, *see supra* pp. 11-12, which directly contradict ALA's claim. In any event, that one upwind State may need to be "overcontrolled" in the sense posited by ALA to ensure that a downwind State achieves attainment is not grounds for overcontrolling other States.[7]

II. THE COURT OF APPEALS' CORRECT AND FACTBOUND DETERMINATION THAT THE "SIGNIFICANT CONTRIBUTION" ARGUMENT WAS RAISED BEFORE EPA DOES NOT WARRANT REVIEW, AND ITS HOLDING ON THE UNDERLYING MERITS OF THE ARGUMENT WAS CORRECT.

Petitioners' lead argument for certiorari is that the court of appeals "should not even have decided" what they call the "significant contribution" issue because, petitioners claim, it was not first presented to EPA. *See* EPA.Pet. 18-21; *see also* ALA.Pet. 16-20. This

---

[7] Likewise, that some locations may not achieve attainment even after imposition of the Transport Rule's emissions budgets provides no justification for overcontrolling other upwind States that are not "significantly contributing" to those locations. *Cf.* ALA.Pet. 23. In any event, EPA found that the Transport Rule would "resolve all projected downwind nonattainment of the annual and 24-hour $PM_{2.5}$ NAAQS," except for a single area that "is significantly affected by local emissions from a sizable coke production facility and other nearby sources," 76 FR at 48259, and this single, unique instance of nonattainment says nothing about whether upwind States linked to other areas were overcontrolled.

"waiver" issue does not remotely warrant review. It presents only the context-specific application of settled precedent to a single issue that, given the multiple statutory violations found by the court of appeals, was not even dispositive. Moreover, petitioners' focus on waiver only underscore that certiorari is improper because, if petitioners were correct about waiver, the Court would not even reach the merits argument that petitioners contend justifies certiorari. *See* EPA.Pet. (I), 21-28; ALA.Pet. i, 28-30.

In all events, the court of appeals correctly held that the "significant contribution" argument was raised with sufficient "specificity" before EPA. EPA.Pet.App. 34a n.18. And neither EPA nor the dissent below has seriously disputed the *merits* of the court of appeals' holding that the Transport Rule was "flawed" because it imposed emissions reductions that were "not based on the 'amounts' from upwind States that 'contribute significantly to nonattainment.'" *Id.* 31a.

1. Petitioners make no serious effort to claim that the court of appeals' "waiver" holding itself presents an issue of exceptional importance justifying certiorari. Nor could they, as this holding does not even raise a legal issue.

Indeed, there was common ground below on the applicable legal principles. Both the majority and dissent agreed that §307(d)(7)(B) of the CAA, 42 U.S.C. §7607(d)(7)(B), supplied the standard for exhaustion. *Compare* EPA.Pet.App. 32a n.18, *with id.* 65a, 96a. Both the majority and dissent therefore considered whether "objections" were raised with "reasonable specificity" in the Transport Rule proceeding. *Compare id.* 34a n.18, *with id.* 96a. They likewise both recognized that §307(d)(7)(B) does not limit parties to the precise formulations made before the agency, but

rather permits "leeway" to expand and elaborate on review. *Compare id.* 34a n.18, *with id.* 109a-10a.

Thus, the only issue is the court of appeals' application of these agreed-upon principles to the specific record in this case. Certiorari to review such a factbound question is clearly unwarranted. *See, e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

That is particularly so here given EPA's and ALA's treatment of the waiver issue below. EPA's brief below did not even *mention* "waiver" in its jurisdictional statement, statement of issues, or summary of argument. *See* EPA DC Cir. Merits Br. 1-3, 12-17. And in the body of its brief, EPA only suggested in the most glancing and tentative fashion (amid sections addressed to the merits) that the claim *may* have been waived. *See id.* 30 (merely complaining that commenters did not articulate their views "'forcefully'" and stating that "[w]hether their failure to do so formally rises to the level of waiver, it at the very least bolsters the reasonableness of EPA's adoption of its proposed approach"). Elsewhere, EPA tersely asserted—in a single sentence—that petitioners' "significant contribution" argument "likely has been waived." *Id.* 32. Nowhere did EPA contend that this argument was actually waived, let alone provide the argument and case citations it now advances. For its part, ALA did not mention waiver of the issue below at all.

2. Nor do petitioners identify any error in the court of appeals' application of settled law to the facts of this case. EPA wrongly suggests that the court held §307(d)(7) was satisfied solely by comments made in the predecessor CAIR rulemaking. EPA.Pet. 20. As EPA conceded below, and ALA concedes now, *commenters in the Transport Rule proceeding did raise objections to EPA's "significant contribution" ap-*

proach. EPA DC Cir. Merits Br. 30 & n.16, 32 & n.18; ALA.Pet. 18 n.2. The court of appeals considered comments made in the prior CAIR proceeding—along with *North Carolina*'s reasons for invalidating CAIR—as relevant *context* for assessing whether the arguments made in the Transport Rule proceeding were "reasonabl[y] specifi[c]." *See* 42 U.S.C. §7607(d)(7)(B); EPA.Pet.App. 34a n.18 ("In light of the indications that EPA was aware of their objection but had no intention to revisit its approach … the specificity of the commenters such as Wisconsin and Tennessee was 'reasonable' under the circumstances."). The court's conclusion that the Transport Rule comments were sufficiently specific was correct and in any event does not warrant further review.

In particular, the court of appeals evaluated the Transport Rule comments objecting to EPA's "significant contribution" approach in light of the fact that EPA "considered—and rejected—precisely this same argument in CAIR." EPA.Pet.App. 32a n.18. CAIR commenters argued "that the threshold contribution level selected by EPA should be considered a floor, so that upwind States should be obliged to reduce their emissions only to the level at which their contribution to downwind nonattainment does not exceed that threshold level." 70 FR at 25176-77. In issuing CAIR, EPA acknowledged this argument but rejected it. *Id.* 25177; *see also* EPA Reh'g Pet. 11 (acknowledging CAIR rejected commenters' objection to EPA's "significant contribution" methodology "for legal and policy reasons").

EPA had another opportunity—and, indeed, an obligation—to revisit this issue after *North Carolina*. As noted, *North Carolina* held that once EPA defines each State's "significant contribution," it may not "require some states to exceed the mark." 531 F.3d at

921; *see also id.* 918 ("EPA can't just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply."). *North Carolina* found that CAIR was "fundamentally flawed" because it failed to make "state-specific quantitative contribution determinations or emissions requirements," and instructed "EPA [to] redo its analysis *from the ground up*." *Id.* 929 (emphasis added).[8]

In the remand proceeding that led to adoption of the Transport Rule, commenters urged EPA to adopt regulatory approaches consistent with *North Carolina*. 75 FR at 45299; CAJA2308-12. Among the alternatives put before EPA was one that reflected the "essential principles" of the statutory construction ultimately adopted by the court of appeals. EPA.Pet.App. 40a n.24. But EPA refused to reconsider its fundamental position on significant contribution and rejected these alternative approaches. 75 FR at 45299; CAJA2308-12. And notwithstanding EPA's statements that it would not revisit this issue,

---

[8] EPA's suggestion that *North Carolina* did not "disturb the agency's basic two-step analytical approach" is incorrect. EPA Pet. 10; *see also id.* 21. The portion of *North Carolina* EPA cites observed merely that petitioners in that case had not challenged EPA's "two-step analytical approach" and that the court was thus not directly addressing it. *See* 531 F.3d at 916-17. But, as the court of appeals correctly concluded below, *North Carolina*'s findings that CAIR's distribution of NO_x reduction obligations was unlawful because it could "force an upwind State to 'exceed the mark,'" EPA.Pet.App. 35a (quoting *North Carolina*, 531 F.3d at 921), clearly called into question EPA's use of the second stage here to require States to reduce emissions to levels below the "insignificance" threshold or beyond those necessary for the downwind State to achieve NAAQS. The same "statutory authority" applied in both instances. *Id.* 35a n.19. In *North Carolina,* as here, EPA could require States only to "prohibit those 'amounts which will … contribute significantly to nonattainment." *Id.*

several parties still filed additional comments in the Transport Rule proceeding urging EPA to abandon its approach of setting emissions budgets solely based on cost and without considering the impact on downwind "contribution." CAJA556, 1293, 1756.

ALA acknowledges that commenters did, in fact, raise the "significant contribution" issue in the Transport Rule proceeding, but ALA tries to minimize the importance of these comments by mischaracterizing them. Wisconsin did not advocate "more stringent regulation." ALA.Pet. 18 n.2 (emphasis omitted). Wisconsin's proposed approach would have produced *less* stringent budgets in situations where the agency had required a State to eliminate more than its significant contribution. CAJA1293. And Tennessee contended that EPA should *not* apply its uniform cost controls when doing so would "reduce [a State's] contribution below [the] 1% significance [threshold]." CAJA556.

ALA also acknowledges that, at the outset of the Transport Rule proceeding, parties argued against the approach ultimately adopted by EPA and in favor of alternative approaches more consistent with *North Carolina*. ALA, however, says these objections are irrelevant because they merely challenged the agency's policy as arbitrary. ALA.Pet. 18. But the court of appeals found EPA's approach was arbitrary too. EPA.Pet.App. 36a, 37a n.22; *see infra* p. 21. More fundamentally, as shown above, the agency in fact received, considered, and rejected statutory as well as policy arguments and the issue was clearly raised and not waived.

3. Finally, EPA does not seriously dispute the merits of the court of appeals' holding that under the good-neighbor provision the agency cannot require an upwind State to make reductions greater than its

own "significant contribution." EPA also acknowledges, EPA.Pet. 28, that it will ultimately need to confront this statutory requirement as it continues to regulate upwind emissions—including in the remand that will be necessary for EPA to ensure it is not imposing emissions reductions beyond those necessary for downwind locations to attain NAAQS and to account for EPA's own projections of substantially improved air quality in 2014 even absent good-neighbor emissions controls. Certiorari in such circumstances is clearly unwarranted.

As noted, EPA used a two-stage approach to define significant contributions. In the first stage, EPA defined "amounts" of downwind pollution that were deemed to be, by definition, insignificant. 76 FR at 48236 ("states whose contributions are below these thresholds do *not significantly contribute* to nonattainment") (emphasis added); *see also id.* 48237. But in the second stage, EPA ignored those "insignificance" thresholds and instead set emissions budgets based on "cost-effectiveness," with the result that a State "may be required to reduce its emissions by an amount greater than the 'significant contribution' that brought it into the program in the first place." EPA.Pet.App. 34a-35a.

The court of appeals found this aspect of EPA's approach unlawful for two reasons. First, the court found that EPA's approach violated the plain language of §110(a)(2)(D)(i)(I) because the reductions EPA imposed were not based on "the 'amounts' from upwind States that 'contribute significantly to nonattainment' in downwind States." *Id.* 31a. EPA cannot "redefine each State's 'significant contribution' in such a way that an upwind State's required reductions could be more than its own significant contribution to a downwind State." *Id.* 36a (emphasis omit-

ted). The "statute requires a State to prohibit at *most* those 'amounts' which will 'contribute significantly'—and no more." *Id.* 37a (emphasis added).

Second, the D.C. Circuit found EPA's approach arbitrary because it was internally inconsistent. *Id.* 36a, 37a n.22. EPA found at stage one that "'states whose contributions are below th[e] thresholds do not significantly contribute to nonattainment,'" *id.* 36a (quoting 76 FR at 48236), but then adopted a definition of "significant contribution" that disregarded that finding and that could arbitrarily require a State to reduce emissions below those "insignificance" thresholds, *id.*

Neither EPA nor ALA presents this issue fairly, because each studiously avoids quoting the operative language from EPA's rule on which the court of appeals relied. One would never know by reading the petitions that EPA found that States whose emissions fall below the stage-one threshold "*do not significantly contribute to nonattainment.*" Instead, petitioners invent a new nomenclature that never appeared in the Transport Rule, calling stage one "the Screening Analysis" and stage two "the Control Analysis." EPA.Pet. 6-7. But whatever their terminology, petitioners do not and cannot dispute that EPA expressly found that certain amounts were insignificant and then ignored that statutory boundary in determining the amount of reductions to order.

Petitioners offer no objection to the court of appeals' actual reasoning. Nor did the dissent below dispute the majority's analysis on the merits. EPA.Pet.App. 111a-14a. That is because there is no possible justification for a methodology that defines an "insignificant contribution" threshold as a basis for determining whether to regulate, but then ignores the very

same definition when imposing specific regulatory requirements.

To the limited extent that EPA now defends the Transport Rule as actually written, EPA's arguments highlight that the Transport Rule's approach is untethered from statutory text. EPA asserts it is "reasonable" to "determine the 'significan[ce]' of particular state contributions by reference to [cost-effectiveness] and without regard to the amount of each State's downwind contribution." EPA.Pet. 21 (first alteration in original).[9] As the court of appeals correctly held, however, the "statute requires a State to prohibit at most those 'amounts' which will 'contribute significantly'—and no more." EPA.Pet.App. 37a. By contrast, as EPA conceded below, the Transport Rule's approach would permit EPA to "require a State to reduce *more than the State's total emissions that go out of State*." *Id.* 38a n.23 (emphasis added).

Finally, EPA suggests that the concern that it required States to reduce emissions beyond the "significance" threshold is "hypothetical." EPA.Pet. 28. Notably, EPA does not and cannot claim that it did not mandate such overcontrol, because EPA never determined the "amounts" upwind States were "contributing" after it imposed emissions budgets. EPA.Pet.App. 15a-17a; *see also* EPA DC Cir. Merits Br. 33 n.20 ("this was not an issue EPA analyzed in a direct fashion for the Rule"). As the D.C. Circuit observed in *North Carolina*, "[w]hen a petitioner com-

---

[9] EPA incorrectly suggests that *Michigan* approved the Transport Rule's approach to "significant contribution." *See* EPA.Pet. 24-25. This issue "was not presented in *Michigan*," EPA.Pet.App. 36a n.20, and, as explained *infra*, the Transport Rule's use of "cost" differed from that approved in *Michigan*.

plains EPA is requiring a state to eliminate more than its significant contribution, it is inadequate for EPA to respond that it never measured individual states' significant contributions." 531 F.3d at 920.[10] EPA seeks to excuse this failure by asserting that no party raised any concern about whether its regulatory approach could force a State to eliminate "insignificant" contributions. EPA.Pet. 28. But as explained above, commenters not only objected to EPAs approach, but also—specifically referencing the 1% insignificance threshold—asked EPA to provide State-specific contribution data showing what levels of emissions reductions were necessary to eliminate "significant contribution" "without considering costs." Comments of West Virginia Department of Environmental Protection 3 (Sept. 30, 2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-2981. EPA's response was to completely ignore the issue.

---

[10] Although EPA asserts "[t]he court cited no basis in the record for believing" there was a "realistic possibility" States could be forced to reduce emissions below the "insignificance" threshold, EPA.Pet. 28, the record indicates the opposite. In several instances, the Transport Rule required States that were contributing only slightly above the "insignificance" threshold to make substantial emissions reductions. *See, e.g.*, 76 FR at 48240 (tbl.V.D-1) (regulating Texas notwithstanding a "contribution" of only 0.03 $\mu g/m^3$ to nonattainment above the "insignificance" threshold); *id.* 48245 (tbl.V.D-7) (regulating South Carolina notwithstanding a "contribution" of only 0.1 ppb above the "insignificance" threshold); *id.* 48261-63 (imposing emissions budgets).

III. PETITIONERS ALSO FAIL TO DEMONSTRATE ANY ERROR WITH REGARD TO THE COURT OF APPEALS' INDEPENDENT "PROPORTIONALITY" HOLDING.

1. The only aspect of the court of appeals' decision seriously disputed by EPA on the merits is what EPA calls the "proportionality" holding. EPA.Pet. 22-28. But even here, EPA's challenge is incomplete. As noted, the court of appeals rendered two related, yet distinct, holdings on this point. It held that EPA violated the good-neighbor provision because EPA "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." EPA.Pet.App. 39a. It also separately held that EPA "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." *Id.* EPA does not even mention the latter holding.

2. Even as to the aspect of the "proportionality" holding EPA does challenge, it fails to demonstrate any error.[11] That holding corrected EPA's attempts to "'force an upwind state to share the burden of reducing other upwind states' emissions.'" EPA.Pet.App. 38a (quoting *North Carolina*, 531 F.3d at 921).

As noted, in determining the amount of reductions to require, EPA defined these "amounts" based on the collective "cost-effectiveness" of pollution controls on all emissions in the upwind State. 76 FR at 48248-

---

[11] EPA is wrong in suggesting (EPA.Pet. 19-20) this issue was not raised in the court of appeals. *See* Industry/Labor DC Cir. Merits Br. 22, 33. ALA is wrong in claiming (ALA.Pet. 20, 25) it was not raised to EPA. *See* 75 FR at 45299; CAJA2311-12.

52, 48255, 48258-59. Under EPA's interpretation, the cost of emissions reductions determined what portion of an upwind State's emissions would be prohibited. *Id.*

This is inconsistent with—indeed, completely disconnected from—the text of §110(a)(2)(D)(i)(I), which requires EPA to consider each "individual upwind State's actual contribution to downwind air quality." EPA.Pet.App. 23a. Under EPA's "cost-effectiveness" approach, however, emissions-reduction obligations were "not tied to how much the upwind State contributed to downwind States' air pollution problems." *Id.* 16a.

As a result, under EPA's approach, a State could be subjected to a *heightened* emissions-reduction obligation simply because it can reduce emissions more cheaply than another State contributing equal amounts to the same location. *See* EPA.Pet. 27-28. A "definition" of "significant contribution" that has that consequence cannot be squared with the plain text of §110(a)(2)(D)(i)(I). There is no statutory basis for setting States' emissions budgets at levels more stringent than justified by the "amounts" that States are individually "contributing."

EPA's approach also impermissibly ignores the statute's focus on each State's *individual* contribution to nonattainment. As noted, EPA determined upwind States' emissions-reductions obligations based on whether those reductions are *collectively* cost-effective. *See also* EPA DC Cir. Merits Br. 29 (noting EPA determined emissions reductions on upwind States "collectively"). But nothing in the CAA permits EPA to increase emissions-reduction obligations on one upwind State merely because that State can reduce more cheaply than another upwind State. To the contrary, the good-neighbor provision directs EPA

to consider the "amounts" from "*within*" each upwind State that "contribute significantly" to downwind nonattainment.

In contrast to EPA's approach, the court of appeals' "proportionality" reading faithfully applies the statute's text and purpose. That interpretation is the only one that ensures consistency in determining the "air pollutant … amounts" that "contribute significantly to nonattainment" and prevents a State from being required to eliminate "more than its own 'amounts which will … contribute significantly'" to downwind nonattainment. EPA.Pet.App. 38a; *see id.* (EPA has "'no authority to force an upwind state to share the burden of reducing other upwind states' emissions'"). It ensures that when States "contribute" equal "air pollutant … amounts" to a downwind location, they are treated equally. *Cf.* EPA.Pet. 27. And it ensures that EPA cannot find an "air pollutant … amount" in one State to constitute a "significant contribution" to nonattainment simply because EPA deems the costs of eliminating it in that State to be minor, while it simultaneously finds a much greater "amount" in another State to be insignificant.

In this regard, and contrary to EPA's claims, EPA.Pet. 21, 24, the Transport Rule did not use cost considerations in the way previously approved by the D.C. Circuit in *Michigan*. There, EPA had relied on cost considerations to "reduce" the emissions reductions required by regulated upwind States. 213 F.3d at 675. The *Michigan* court recognized that EPA had "first determined that 23 jurisdictions [were] 'significant' contributors" based on each State's contribution, but held EPA could thereafter consider costs to "terminat[e]" only a "subset of each state's contribution." *Id.* It based that holding on the interpretive principle that Congress intends for agencies "to con-

sider the costs of demanding *higher* levels of environmental benefit" and to reduce the level of control required when costs are disproportionate to benefits. *Id.* 679 (emphasis added).

By contrast, as the court of appeals found, the Transport Rule used cost in a different manner. EPA.Pet.App. 38a. Rather than seeking "to prevent exorbitant costs from being imposed on certain upwind States" and *reducing* the amount of contribution above the insignificance threshold that a State must eliminate, as *Michigan* approved, *id.* 27a, the Transport Rule misused cost to define and increase States' emissions-reduction obligations. EPA used "cost-effectiveness" without regard to its own insignificance threshold and without regard to whether the emissions reductions it imposed were needed to address nonattainment. Indeed, EPA's misuse of costs would allow it to "require a State to reduce *more than the State's total emissions that go out of State*." *Id.* 38a n.23. The court correctly concluded that neither §110(a)(2)(D)(i)(I) nor *Michigan* countenanced that entirely different use of costs. *Id.* 25a.

3. EPA offers no statutory argument to the contrary, but instead tries to justify its approach on two policy grounds. *First*, EPA says its "cost effectiveness approach provides a rough but objective means of equitably distributing pollution-control burdens among" upwind States. EPA.Pet. 28. In particular, EPA poses a hypothetical in which three upwind States contribute equal amounts to a downwind State's nonattainment but have made differing levels of investment in pollution controls. *Id.* 27-28. EPA says that under the court of appeals' approach, all three would be required to make equivalent emissions reductions. *Id.* 27. EPA contends that the Transport Rule's reliance on "cost-thresholds" properly reduces the obliga-

tion of States that have already mandated substantial emissions controls by imposing greater reductions on States that have not made such investments on the ground that they can reduce emissions more cheaply. *Id.* 27-28; *see also* ALA.Pet. 27.

Again, EPA's arguments only highlight the Transport Rule's failure to "adhere to th[e] basic requirement of the statutory text." EPA.Pet.App. 37a-38a. As noted, §110(a)(2)(D)(i)(I) permits EPA to require an upwind State to "prohibit" only the "amount" of "air pollutants" emitted by sources "within the State" that travel to downwind locations and "contribute significantly to nonattainment." From the perspective of the good-neighbor provision, not to mention the downwind State, the three upwind States in EPA's hypothetical all "contribute equal amounts to downwind nonattainment." EPA.Pet. 27. The court of appeals' decision thus furthers the congressional purpose embodied in the statutory text.

In contrast, EPA never explains why it would be "inequitable" to treat the same amount of "contribution" by two States equally merely because one State had previously mandated investments to reduce its amount to the *same* level as a neighboring State. For example, the neighboring State may have achieved lower "amounts" of emissions by mandating greater use of clean energy or undertaking policies that minimized energy consumption, or its economy may simply have a different industrial base—none of which makes it necessarily more equitable, much less lawful, for it to be required to bear a portion of the first State's statutory burden.

Second, EPA says that the court of appeals' textual reading of §110(a)(2)(D)(i)(I) is "unrealisti[c]" and suggests this standard would be difficult for the agency to implement. EPA.Pet. 22; *see also* ALA.Pet.

26. But EPA stops short of saying it would be impossible for the agency to comply and ultimately acknowledges that the decision below leaves it "enough latitude" to "craft a new regulatory approach that meets the court's requirements." EPA.Pet. 30.

Nor could it maintain otherwise. The "difficulty" identified by EPA is that it may not be possible to undertake precisely "proportional" reductions when multiple upwind States contribute to multiple downwind locations. In those instances, EPA asserts that it is "likely" there would be "some degree of incidental 'overcontrol' as well as a lack of 'proportionality.'" *Id.* 23. But as EPA admits, the court of appeals fully understood that there are "multiple, overlapping linkages involved in the interstate pollution problem," *id.* 30 and the court's ruling accounted for this fact, EPA.Pet.App. 29a. The court held that EPA had "discretion" to account for these complexities and that the agency was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not … possible" to do so. *Id.* The court thus required EPA to eliminate "over-control" only where technically feasible and not where it is "unavoidable." *Id.* 28a-29a. The flaw in the Transport Rule is that EPA did not even attempt to limit its overcontrol to those circumstances.

Thus, EPA's argument ultimately devolves to *ipse dixit* assertions that it will "likely be more costly and burdensome" to comply with the court of appeals' "proportionality" holding. EPA.Pet. 30. Given the complex nature of the analysis already undertaken in the Transport Rule, any incremental "burden" that adhering to the statute's text might impose neither calls into question the correctness of the court of appeals' holding nor provides a compelling justification for certiorari. This is particularly true in light of the

separate errors in the Transport Rule that EPA does not contest here and that will require extensive revisions of the Rule.

IV. EPA'S OWN FINDINGS PRECLUDE READOPTION OF THE TRANSPORT RULE.

As noted, EPA justified its emissions controls based on future air-quality predictions made in 2011 in the Transport Rule using 2005 base-year data. EPA now seeks to have the Transport Rule become effective for the first time. The resulting air-quality improvements that have, in fact, occurred since 2005 under CAIR provide vivid confirmation of the Transport Rule's fundamental errors. Further, imposing the Transport Rule's emissions controls now would be inconsistent with the Rule's own air-quality predictions and EPA's justifications for emissions controls in the first instance.

1. In the Transport Rule, EPA relied on modeling to predict future air quality under two scenarios: (i) without any good-neighbor emissions controls (*i.e.*, no CAIR) and (ii) with the controls mandated under the Transport Rule. 76 FR at 48228-36, 48253-59; CAJA2546-637. Notwithstanding generally improving air quality under CAIR, EPA determined that steeper emissions reductions beyond CAIR were needed to achieve the air-quality levels desired by EPA. 76 FR 70091, 70099 (Nov. 10, 2011) (the Transport Rule "mandates even greater reductions than have already occurred under CAIR"); *see also* 75 FR at 45217; 76 FR at 48214.

Yet EPA's own recent air-quality data demonstrate that this fundamental predicate for the Transport Rule was incorrect. First, EPA has recently reported that virtually all "downwind" locations in the eastern United States attained the NAAQS for ozone and

$PM_{2.5}$ by 2011. *E.g., 2011 Progress Report* 12 ("Improvements in these 90 areas means that over 98 percent of the original nonattainment areas in the East now have ozone air quality that is better than the [NAAQS]."); *id.* 14 ("Improvements in these 35 areas mean that 97 percent of the areas originally designated nonattainment in the East now have $PM_{2.5}$ air quality that is better than the standard under which they were originally designated nonattainment."). EPA found that CAIR-related reductions were a "significant contributor to these improvements." *Id.* 12, 14.

Second, EPA's recent "design value" data also show that air quality continues to improve under CAIR at the locations specifically at issue in the Transport Rule.[12] With regard to the "nonattainment" and "maintenance" locations that were the focus of the Transport Rule, over 92% of the 65 locations with current data values meet the NAAQS under CAIR without the Transport Rule emissions controls. *Id.*[13]

2. In light of EPA's future air-quality predictions in the Transport Rule itself, the Rule cannot be readopted now even if EPA's approach to establishing emissions reductions were affirmed by this Court. As noted, the Transport Rule made projections of 2012 air quality on the counterfactual assumption that

---

[12] *Compare* EPA's 2009-2011 Design Values for $PM_{2.5}$ ("PM2.5 Detailed Information" at tbl.6) and Ozone ("Ozone Detailed Information" at tbl.6), *available at* http://www.epa.gov/airtrends/values.html (access bottom table tab), *with* 76 FR at 48240-46 (tbls.V.D-2, V.D-3, V.D-5, V.D-8, and V.D-9) (listing downwind location "linkages" used for the Transport Rule).

[13] On remand, EPA will also presumably have to consider subsequent changes to the NAAQS since the Transport Rule was promulgated. *See, e.g.,* 78 FR 3086 (Jan. 15, 2013) (revising annual $PM_{2.5}$ NAAQS).

CAIR was not in place. EPA used those projections to identify the "nonattainment" and "maintenance" locations that needed to be protected with upwind emissions controls. *See supra* pp. 2-3. No upwind emissions regulation was imposed for 2012 with respect to locations that were projected to attain NAAQS without good-neighbor emissions controls. 76 FR at 48233-36, 48239-46.

But EPA also made projections of future air quality for 2014. *Id.* 48211; CAJA2546-637. And those projections showed that many of the locations EPA believed would have air-quality problems in 2012 would attain NAAQS in 2014 *even absent* any good-neighbor emissions reductions (typically because of other federal requirements, independent State regulation, and other undertakings by industry sources to improve air quality).[14] Thus, under the Transport Rule's own analysis and findings, there is no justification for upwind emissions controls for the many downwind locations now expected to attain NAAQS without such controls.

V. THE TRANSPORT RULE IS NOT NECESSARY TO ENSURE THAT DOWNWIND STATES ATTAIN AND MAINTAIN NAAQS.

Finally, EPA contends that certiorari is necessary because "[t]he court of appeals' decision will substantially delay emissions reductions by upwind States that are necessary for downwind States to attain and maintain NAAQS." EPA.Pet. 29. Every aspect of this argument is incorrect.

---

[14] Industry/Labor DC Cir. Merits Br. 45 & n.28 (citing EPA data). This is true with regard to each of the three NAAQS considered by EPA (annual and 24-hour $PM_{2.5}$ and ozone). *Id.*

First, as explained above, in striking down the Transport Rule, the court of appeals ordered EPA to continue administering CAIR. CAIR, of course, is the transport rule that EPA initially wanted to adopt, and it imposes significant emissions limitations on upwind States. *See generally* 70 FR at 25162-405. Consistent with EPA's predictions, downwind air quality has substantially improved under CAIR. *See supra* pp. 30-31. Indeed, EPA has recently found that there has been widespread attainment of NAAQS by downwind States in the eastern United States. *2011 Progress Report* 12-14.

In that regard, petitioners' claims that the Transport Rule would save thousands of lives and produce billions of dollars of social benefits, EPA.Pet. 31; ALA.Pet. 11-12, 34, is based on a misleading and irrelevant comparison. When EPA calculated the projected health benefits of the Transport Rule, it compared emissions under the Transport Rule with projected emissions if *no* good-neighbor restrictions (including CAIR) were in place. *See* 76 FR at 48308-19; *see also id.* 48229 (EPA did not "consider reductions associated with CAIR in the analytical baseline emissions scenario"). EPA has provided no analysis comparing the health benefits expected from the Transport Rule to those expected from CAIR, which has been in effect and will remain so until a valid replacement rule is adopted. And because there has been widespread attainment of NAAQS under CAIR, the rule has achieved ambient air quality that is sufficient "to protect the public health" with "an adequate margin of safety." 42 U.S.C. §7409(b)(1).

Second, even if this Court granted certiorari and ruled in EPA's favor on the issues raised in EPA's petition, EPA would still need to undertake a substantial rulemaking to revise the Transport Rule. *Cf.*

EPA.Pet. 29. As explained above, EPA has not challenged two of the fundamental errors with the Transport Rule identified by the court of appeals. *See supra* pp. 9-10, 24. These undisputed errors must be corrected before a lawful cross-state air pollution rule can be imposed. The Transport Rule must also be revised to reflect the predictions in the Rule itself of air-quality improvements that would be achieved independent of the Rule. *See supra* pp. 31-32. The "delay" about which EPA expresses concern will thus occur in any event, and will likely be longer if these issues must be reviewed by the Court before the new rulemaking can even commence.

Finally, the court of appeals did not rule on several legal arguments raised below that would independently require vacatur of the Transport Rule. *See, e.g.*, Industry/Labor DC Cir. Merits Br. 37-47; States DC Cir. Merits Br. 42-55. Because the court stayed the Transport Rule, these objections would need to be resolved before the Rule could be reinstated, and EPA offers no basis for assuming the court would rule in the agency's favor on these issues.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted,

F. WILLIAM BROWNELL
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

P. STEPHEN GIDIERE III
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203
(205) 251-8100

PETER D. KEISLER
Counsel of Record
C. FREDERICK BECKNER III
ROGER R. MARTELLA, JR.
TIMOTHY K. WEBSTER
ERIC D. MCARTHUR
CHRISTOPHER A. BATES
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Luminant Generation Company LLC et al.

JANET J. HENRY
AMERICAN ELECTRIC POWER SERVICE CORP.
1 Riverside Plaza
Columbus, OH 43215
(614) 716-1612

Counsel for AEP Texas North Company, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma, and Southwestern Electric Power Company

STEVEN G. MCKINNEY
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4642
(205) 251-8100

Counsel for Alabama Power Co.

BART E. CASSIDY
KATHERINE L. VACCARO
DIANA A. SILVA
MANKO, GOLD, KATCHER & FOX, LLP
401 City Avenue
Suite 500
Bala Cynwyd, PA 19004
(484) 430-5700

Counsel for ARIPPA

JEFFREY L. LANDSMAN
VINCENT M. MELE
WHEELER, VAN SICKLE & ANDERSON, S.C.
25 West Main Street
Suite 801
Madison, WI 53703-3398
(608) 255-7277

Counsel for Dairyland Power Cooperative

GREGORY G. GARRE
CLAUDIA M. O'BRIEN
LORI ALVINO MCGILL
JESSICA E. PHILLIPS
KATHERINE I. TWOMEY
STACEY VANBELLEGHEM
LATHAM & WATKINS LLP
555 Eleventh St., N.W.
Suite 1000
Washington, D.C. 20004-1304
(202) 637-2200

Counsel for EME Homer City Generation, L.P.

WILLIAM M. BUMPERS
JOSHUA B. FRANK
MEGAN H. BERGE
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7700

Counsel for Entergy Corporation, Northern States Power Company – Minnesota, Southwestern Public Service Company, and Western Farmers Electric Cooperative

KELLY M. MCQUEEN
ASSOCIATE GENERAL COUNSEL
ENTERGY SERVICES, INC.
425 W. Capitol Avenue
27th Floor
Little Rock, AR 72201
(501) 377-5760

Counsel for Entergy Corporation

ROBERT A. MANNING
JOSEPH A. BROWN
MOHAMMAD O. JAZIL
HOPPING GREEN & SAMS, PA
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
(850) 222-7500

Counsel for the Environmental Committee of the Florida Electric Power Coordinating Group

ROBERT J. ALESSI
DLA PIPER LLP (US)
677 Broadway
Suite 1205
Albany, NY 12207
(518) 788-9710

Counsel for Environmental Energy Alliance of New York, LLC

MARGARET CLAIBORNE CAMPBELL
BYRON W. KIRKPATRICK
HAHNAH WILLIAMS GAINES
TROUTMAN SANDERS LLP
600 Peachtree St., N.E.
5200 Bank of America Plaza
Atlanta, GA 30308-2216
(404) 885-3000

Counsel for Georgia Power Co., Southern Co. Services, Inc., and Southern Power Co.

ROBERT A. MANNING,
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street
Suite 300
Tallahassee, FL 32301
(850) 222-7500

Counsel for Gulf Power Co.

TERRY RUSSELL YELLIG
SHERMAN, DUNN, COHEN, LEIFER & YELLIG, PC
900 7th Street, N.W.
Suite 1000
Washington, D.C. 20001
(202) 785-9300

Counsel for International Brotherhood of Electrical Workers, AFL-CIO

DENNIS LANE
STINSON MORRISON HECKER LLP
1150 18th Street, N.W.
Suite 800
Washington, D.C. 20036-3816
(202) 785-9100

DAVID R. TRIPP
PARTHENIA B. EVANS
STINSON MORRISON HECKER LLP
1201 Walnut Street
Suite 2900
Kansas City, MO 64106
(816) 842-8600

Counsel for Kansas City Board of Public Utilities – Unified Government Wyandotte County/Kansas City, Kansas, Kansas Gas and Electric Co., Sunflower Electric Power Corp., and Westar Energy, Inc.

MAUREEN N. HARBOURT
TOKESHA M. COLLINS
KEAN MILLER LLP
P.O. Box 3513
Baton Rouge, LA 70821-3513
(225) 387-0999

Counsel for the Lafayette Utilities System and Louisiana Chemical Association

DAVID M. FLANNERY
GALE LEA RUBRECHT
JACKSON KELLY PLLC
500 Lee Street East
Suite 1600
P.O. Box 553
Charleston, WV 25322-553
(304) 340-1000

Counsel for the Midwest Ozone Group

TERESE T. WYLY
BALCH & BINGHAM LLP
1310 Twenty Fifth Ave.
Gulfport, MS 39501-1931
(228) 864-9900

Counsel for Mississippi Power Co.

PETER S. GLASER
TROUTMAN SANDERS LLP
401 Ninth Street N.W.
Suite 1000
Washington, D.C. 20004
(202) 274-2998

Counsel for National Mining Association and Peabody Energy Corp.

WILLIAM L. WEHRUM, JR.
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

Counsel for National Rural Electric Cooperative Association

ANN M. SEHA
ASSISTANT GENERAL COUNSEL
XCEL ENERGY INC.
414 Nicollet Mall
5th Floor
Minneapolis, MN 55401
(612) 215-4619

Counsel for Northern States Power Company – Minnesota and Southwestern Public Service Company

MICHAEL J. NASI
JACOB ARECHIGA
JACKSON WALKER L.L.P.
100 Congress Avenue
Suite 1100
Austin, Texas 78701
(512) 236-2000

Counsel for San Miguel Electric Cooperative, Inc.

KARL R. MOOR
JULIA A. BAILEY DULAN
SOUTHERN COMPANY SERVICES, INC.
600 North 18th Street
Bin 15N-8190
Birmingham, AL 35203
(205) 251-6227

Counsel for Southern Co. Services, Inc.

GRANT CRANDALL
ARTHUR TRAYNOR, III
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Drive
Suite 200
Triangle, VA 22172
(703) 291-2457

EUGENE M. TRISKO
LAW OFFICES OF EUGENE M. TRISKO
P.O. Box 47
Glenwood, MD 21738
(301) 639-5238

Counsel for United Mine Workers of America

ANDREA BEAR FIELD
NORMAN W. FICHTHORN
E. CARTER CHANDLER CLEMENTS
HUNTON & WILLIAMS LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

Counsel for the Utility Air Regulatory Group

RICHARD G. STOLL
FOLEY & LARDNER LLP
3000 K Street, N.W.
Suite 600
Washington, D.C. 20007
(202) 295-4021

BRIAN H. POTTS
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
(608) 258-4772

Counsel for Wisconsin Public Service Corporation

May 29, 2013