

Nos. 12-1182 & 12-1183

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**In the Supreme Court of the United States**

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, ET AL., PETITIONERS  
*and*  
AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS  
*v.*

EME HOMER CITY GENERATION, L.P., ET AL.

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

**BRIEF FOR THE STATE AND LOCAL RESPONDENTS**

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GREG ABBOTT  
Attorney General of Texas

DANIEL T. HODGE  
First Assistant  
Attorney General

[additional counsel  
listed on inside cover]

JONATHAN F. MITCHELL  
Solicitor General  
*Counsel of Record*

ANDREW S. OLDHAM  
Deputy Solicitor General

BILL DAVIS  
EVAN S. GREENE  
RICHARD B. FARRER  
Assistant Solicitors General

OFFICE OF THE  
ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
jonathan.mitchell@  
texasattorneygeneral.gov  
(512) 936-1700

---

---

LUTHER J. STRANGE, III, Attorney General of Alabama  
PAMELA JO BONDI, Attorney General of Florida  
SAMUEL S. OLENS, Attorney General of Georgia  
GREGORY F. ZOELLER, Attorney General of Indiana  
DEREK SCHMIDT, Attorney General of Kansas  
JAMES D. "BUDDY" CALDWELL, Attorney General of  
Louisiana  
BILL SCHUETTE, Attorney General of Michigan  
JON BRUNING, Attorney General of Nebraska  
MIKE DEWINE, Attorney General of Ohio  
SCOTT PRUITT, Attorney General of Oklahoma  
ALAN WILSON, Attorney General of South Carolina  
KENNETH T. CUCCINELLI, II, Attorney General of Virginia  
J.B. VAN HOLLEN, Attorney General of Wisconsin

LESLIE SUE RITTS, counsel for the City of Ames, Iowa  
HERMAN ROBINSON, Executive Counsel of the  
Louisiana Department of Environmental Quality  
DAVID RICHARD TAGGART, counsel for the Louisiana  
Public Service Commission  
HAROLD EDWARD PIZZETTA, III, counsel for the  
Mississippi Public Service Commission  
HENRY V. NICKEL, counsel for the Office of Public  
Utilities, City of Springfield, Illinois

[The State of Texas, the Public Utility Commission of  
Texas, the Railroad Commission of Texas, the Texas  
Commission on Environmental Quality, and the Texas  
General Land Office are represented by the counsel listed  
on the cover.]

## QUESTIONS PRESENTED

Through its provisions governing “state implementation plans” (“SIPs”), the Clean Air Act gives States the first opportunity to satisfy, consistent with their unique regulatory agendas, the bottom-line air-quality obligations that EPA mandates. 42 U.S.C. § 7410(a). If the States fail to satisfy those obligations and certain other conditions are met, EPA may promulgate “federal implementation plans” (“FIPs”), which serve as federal backstops to satisfy EPA requirements that the States could have satisfied, but did not satisfy, in SIPs. *Id.* § 7410(c)(1). In the rule at issue here (the “Transport Rule,” 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a)), EPA defined a new region of 27 upwind States and announced new obligations for those States to mitigate interstate transport of air pollution under the Act’s “good neighbor” provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). But instead of giving the Transport Rule States a chance to satisfy those new obligations through SIPs, EPA immediately imposed FIPs on all of them.

The questions presented are:

1. Whether the court of appeals had jurisdiction to consider the challenges to the Transport Rule.
2. Whether the court of appeals correctly vacated the Transport Rule for imposing FIPs to implement obligations that EPA had not previously announced.
3. Whether the court of appeals correctly vacated the Transport Rule for exceeding the substantive limits of the good-neighbor provision.

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## STATEMENT

### I. STATUTORY AND REGULATORY BACKGROUND

#### A. The Clean Air Act And Its Good-Neighbor Provision

1. Under the Clean Air Act, the prevention of air pollution has always been “the primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3); *see id.* § 7407(a). As the Court explained in 1975, “[t]he Act gives [EPA] no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)].” *Train v. Natural Res. Defense Council, Inc.*, 421 U.S. 60, 79 (1975). The same is true today: EPA sets air-quality requirements, but the States get the first chance to implement those requirements through SIPs. *See* 42 U.S.C. §§ 7407(a), 7410(a).

The process begins with EPA announcing a national ambient air quality standard (“NAAQS”) and designating geographic areas as “nonattainment,” “attainment,” or “unclassifiable” with respect to that NAAQS. *Id.* §§ 7407(c)–(d), 7409. After EPA promulgates a NAAQS, States have up to three years to submit SIPs that “provide[] for implementation, maintenance, and enforcement” of the NAAQS on an appropriate compliance schedule. *Id.* § 7410(a)(1), (a)(2)(A); *see* NY Br. 4 (explaining that a SIP is not a single document, but rather a “collection of state laws, regulations, and other measures”).

After a SIP is submitted, EPA reviews it for compliance with the Act's requirements. 42 U.S.C. § 7410(k)(1)–(4). If a SIP meets the Act's requirements, EPA “shall approve” it. *Id.* § 7410(k)(3). If EPA later concludes that a previously approved SIP has become “substantially inadequate” to maintain the relevant NAAQS or fails to comply with any requirement of the Act, EPA “shall require the State to revise the [SIP] as necessary to correct such inadequacies.” *Id.* § 7410(k)(5) (the “SIP call” provision).

EPA cannot impose a FIP unless it either disapproves a State's SIP submission or finds that a State has failed to make a SIP submission. *Id.* § 7410(c)(1). If EPA disapproves a State's SIP submission or issues a finding of failure to submit, EPA must issue a FIP within two years of that disapproval or finding. *Id.* But EPA's FIP authority is extinguished if the State “corrects the deficiency,” and EPA approves the SIP or SIP revision, before a FIP is promulgated. *Id.*

2. The Clean Air Act requires SIPs to comply with the requirements of 42 U.S.C. § 7410(a)(2), including the requirements of the good-neighbor provision. As EPA explains, this provision evolved from a directive enacted 50 years ago to “encourage cooperative activities by the States and local governments for the prevention and control of air pollution,” 42 U.S.C. § 1857a(a) (1964), to the more detailed provision that currently appears in section 7410(a)(2)(D)(i)(I). EPA Br. 3–5.

The earlier versions of the statute focused on localized interstate impacts. In 1977, for instance, the good-neighbor provision targeted emissions from “any stationary source” in one State that “will . . . prevent” attainment of a NAAQS in another State. 42 U.S.C. § 7410(a)(2)(E) (Supp. II 1977). This 1977 provision was designed to deal with NAAQS, like the one for sulfur dioxide (“SO<sub>2</sub>”), that target pollution caused by emissions from a nearby source or a discrete group of nearby sources. *See Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1075–76 (6th Cir. 1984); EPA Br. 4–5; ALA Br. 8–9. It was not helpful in maintaining air-quality standards for ozone and fine particle matter (“PM<sub>2.5</sub>”). Addressing interstate transport of those pollutants requires a regional approach because ozone and PM<sub>2.5</sub> are formed through atmospheric migration and chemical transformation of “precursor” pollutants, such as nitrogen oxides (“NO<sub>x</sub>”) and SO<sub>2</sub>, that are emitted by numerous mobile and stationary sources scattered over a large area. *See* EPA Br. 5–6 & n.3; NY Br. 9–10; Calpine Br. 48; Atmospheric Scientists’ Amicus Br. 14.

The 1990 amendments to the Clean Air Act broadened the good-neighbor provision to better address this type of regional pollution while leaving “the division of responsibilities between EPA and the states in the section [74]10 process” unchanged. *Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997). The statute now requires SIPs to

contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source . . . within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].

42 U.S.C. § 7410(a)(2)(D)(i)(I).

The Act does not define “contribute significantly” or “interfere.” *See* EPA Br. 42; Calpine Br. 30. And because SO<sub>2</sub> and NO<sub>x</sub> emissions can be transported great distances, transforming into ozone and PM<sub>2.5</sub> concentrations hundreds of miles downwind, determining the “amounts” of those pollutants that will “contribute significantly” to a State’s nonattainment of air-quality standards for ozone and PM<sub>2.5</sub> is no simple task. *See, e.g.*, EPA Br. 6–7, 10–12, 46, 51–52; ALA Br. 15–20, 36; Calpine Br. 21–25, 48; Law Professors’ Amicus Br. 25.<sup>1</sup>

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<sup>1</sup> This brief focuses on the “contribute significantly to nonattainment” element of the good-neighbor provision. The court of appeals did not reach the state and local respondents’ challenge to the portions of the Transport Rule addressing the statute’s “interfere with maintenance” language. *See* State & Local Respondents’ Br. in Opp. 36–38 (noting this and other alternative grounds to affirm the court of appeals’ judgment even if the Court accepts all of the petitioners’ present contentions).

A separate portion of the 1990 amendments to the Act gives EPA a tool to accomplish that task with input from States. Section 7506a authorizes creation of a “transport region” and a “transport commission” comprised of state and federal officials who can work together, through use of section 7410(k)(5)’s SIP-call procedure, to “ensure that the plans for the relevant States meet the requirements of section 7410(a)(2)(D).” 42 U.S.C. § 7506a(a), (b)(1)–(2), (c).

But section 7506a is not the exclusive means of addressing interstate transport of air pollution, and it is not the statutory tool that EPA has used. Invoking its general rulemaking power, *id.* § 7601(a)(1), EPA has instead taken upon itself the complex task of assessing SO<sub>2</sub> and NO<sub>x</sub> emissions in light of their impact on PM<sub>2.5</sub> and ozone concentrations in downwind States. That endeavor has produced three distinct rules, each imposing new emissions-reduction requirements on a different subset of upwind States and allowing differing degrees of state involvement.

## **B. EPA’s Three Good-Neighbor-Provision Regional Programs<sup>2</sup>**

### **1. The NO<sub>x</sub> SIP Call**

The 1998 NO<sub>x</sub> SIP Call was EPA’s first regional rule to address the States’ good-neighbor obligations.

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<sup>2</sup> The appendix to this brief contains a fold-out timeline that illustrates EPA’s regional good-neighbor rules and the SIP opportunities provided under each.

The rule proceeded in three steps. First, EPA used air-quality data to identify States with large NO<sub>x</sub> emissions. 63 Fed. Reg. 57,356, 57,398 (Oct. 27, 1998). Second, EPA applied cost-effectiveness criteria to determine which States' emissions qualified as "significant[]" contributors to downwind nonattainment. *Id.* at 57,398. Finally, those States were given the opportunity to choose their preferred mix of emissions controls in SIPs. *Id.* at 57,368–70.

Under the regime that EPA initiated in the NO<sub>x</sub> SIP Call, EPA determines the *amount* of pollution that upwind States must eliminate, while the States determine *how* to achieve those EPA-mandated reductions. *See id.* at 57,369 ("Once EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of section [74]10(a)(2)(D)), it falls to the State to determine the appropriate mix of controls to achieve those reductions."); *id.* at 57,369–70 (noting that this approach allowed States to "choose from a broad[] menu of cost-effective, reasonable alternatives, including some . . . that may even be more advantageous in light of local concerns").

EPA insisted that it held the prerogative to quantify the States' good-neighbor obligations under 42 U.S.C. § 7410(a)(2)(D)(i)(I). *See id.* at 57,368–69 (rejecting the views of commenters who argued that "EPA's authority is limited to determining that the upwind States' SIPs are inadequate, and generally requiring the upwind States to submit SIP revisions



to correct the inadequacies”). EPA noted that section 7410(a)(2)(D) is “silent” on whether the States or EPA should determine the specific amount of emission reductions needed to avoid a “significant contribution” to interstate air pollution, and declared it “reasonable” to “include this determination among EPA’s responsibilities.” *Id.* at 57,369 (citing *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 468 U.S. 1227 (1984)).

EPA further recognized that it *needed* to quantify the States’ good-neighbor obligations because without this determination from EPA, a State would be left to guess at what it means to “contribute significantly” to interstate air pollution under section 7410(a)(2)(D). *See id.* at 57,370 (noting that an “upwind State would not have guidance as to what is an acceptable submission”). Worse, States would “submit SIPs reflecting their conflicting interests,” forcing EPA into issuing “SIP disapproval rulemakings in which EPA would need to define the requirements that each of those States would need to meet in their later, corrective SIPs.” *Id.*

For these reasons, EPA sensibly announced the States’ good-neighbor obligations up front, before the States would be required to submit their SIPs or SIP revisions for EPA approval. *See id.* at 57,362, 57,367, 57,369–70, 57,451. EPA then issued a SIP call under 42 U.S.C. § 7410(k)(5), giving the covered States 12 months to submit SIPs addressing the

1997 NAAQS for 8-hour ozone and revised SIPs to address the 1979 standard for 1-hour ozone.<sup>3</sup> *Id.*

The D.C. Circuit vacated the NO<sub>x</sub> SIP Call in part after concluding that EPA had unlawfully included some States in the rule and had failed to give adequate notice of some elements of its final regulatory approach. *Michigan v. EPA*, 213 F.3d 663, 681–85, 691–93, 695 (D.C. Cir. 2000) (per curiam), *cert. denied*, 532 U.S. 904 (2001). But in the portion of the decision relevant here, the court confirmed that the Clean Air Act gives States “the primary responsibility to attain and maintain NAAQS within their borders” through SIPs. *Id.* at 671. The court deemed the NO<sub>x</sub> SIP Call in keeping with EPA’s statutory role, as it “merely provide[d] the levels to be achieved by state-determined compliance mechanisms.” *Id.* at 687. The court explained that EPA’s approach had given States “real choice” regarding how to comply with EPA’s requirements, allowing them to “choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels.” *Id.* at 687–88.

## 2. The Clean Air Interstate Rule (“CAIR”)

CAIR was the second EPA regional rule addressing States’ good-neighbor obligations. It sought to implement two 1997 NAAQS, one for 8-

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<sup>3</sup> “8-hour” and “1-hour” refer to the time over which concentrations of the targeted pollutant are averaged. *See, e.g., Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 483 (2001).

hour ozone and the other for annual PM<sub>2.5</sub>. 70 Fed. Reg. 25,162, 25,168–69 (May 12, 2005). Like the NO<sub>x</sub> SIP Call, CAIR quantified the States’ good-neighbor obligations, and then allowed a period of time for States to revise their SIPs to comply with these newly announced requirements. *Id.* at 25,162, 25,263. CAIR ensured that “[e]ach State may independently determine which emissions sources to subject to controls, and which control measures to adopt.” *Id.* at 25,165; *see also id.* (noting that this approach ensures “compliance flexibility” for the States); *id.* at 25,167 (“States have the flexibility to choose the measures to adopt to achieve the specified emissions reductions.”).

CAIR reiterated that EPA does not expect the States to guess at the scope of their good-neighbor obligations in the absence of an EPA rule quantifying significant contributions under section 7410(a)(2)(D)(i)(I). *See id.* at 25,265 n.116 (noting that EPA “does not expect States to make SIP submissions establishing emission controls for the purpose of addressing interstate transport without having adequate information available to them”); *see also* 77 Fed. Reg. 46,361, 46,363 n.7 (Aug. 3, 2012) (confirming that “section [74]10(a)(2)(D)(i) . . . contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution”).

About one month before it issued CAIR, EPA issued a blanket finding that States had failed to submit SIPs to implement the 1997 NAAQS for

ozone and PM<sub>2.5</sub>. *See* CADC Joint Appendix (“CAJA”) 3,168–78. These findings triggered EPA’s authority to impose FIPs on the States. *See* 42 U.S.C. § 7410(c)(1)(A). But EPA did not impose FIPs to implement the States’ good-neighbor obligations at the time it promulgated CAIR. Instead, CAIR gave the States 18 months to submit SIPs to implement the good-neighbor obligations that EPA had just announced, 70 Fed. Reg. at 25,167, 25,176, explaining that the States could not be expected to have implemented the requirements of section 7410(a)(2)(D) before EPA quantified the States’ good-neighbor obligations:

In . . . today’s action, we have provided States with a great deal of data and analysis concerning air quality and control costs, as well as policy judgments from EPA concerning the appropriate criteria for determining whether upwind sources contribute significantly to downwind nonattainment under section [74]10(a)(2)(D). We recognize that States would face great difficulties in developing transport SIPs to meet the requirements of today’s action without these data and policies.

*Id.* at 25,268–69.<sup>4</sup>

The D.C. Circuit disapproved CAIR after finding its significant-contribution analysis invalid. *See North Carolina v. EPA*, 531 F.3d 896, 917–21 (D.C. Cir. 2008) (per curiam). The court also found that EPA had misconstrued section 7410(a)(2)(D)(i)(I) by failing to give independent effect to its “interfere with maintenance” language. *Id.* at 909–10, 929.

The court initially vacated CAIR and remanded it for EPA to cure “fundamental flaws” that would require re-evaluation of CAIR “from the ground up.” *Id.* at 929, 930. But on rehearing, it granted EPA’s request for remand without vacatur, explaining that this approach would “temporarily preserve” the environmental benefits of CAIR while EPA worked to promulgate a replacement rule. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam). EPA therefore left CAIR in place until it issued the Transport Rule in 2011, and the agency continued to approve CAIR-compliant SIPs even after the D.C. Circuit’s decisions in *North Carolina*. *See, e.g.*, 74 Fed. Reg. 65,446 (Dec. 10, 2009); 74 Fed. Reg. 62,496 (Nov. 30, 2009); 74 Fed. Reg. 53,167 (Oct. 16, 2009); 74 Fed. Reg. 48,857 (Sept. 25, 2009);

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<sup>4</sup> Although EPA promulgated FIPs before CAIR’s 18-month deadline for SIP submissions, it explained that those FIPs served only as a “[f]ederal backstop” and that they would not have effect until “a year after the CAIR SIP submission deadline.” 71 Fed. Reg. 25,328, 25,328, 25,330–31 (Apr. 28, 2006).

74 Fed. Reg. 38,536 (Aug. 4, 2009). All of this led to significant and widespread attainment of NAAQS.<sup>5</sup>

### 3. The Cross-State Air Pollution Rule (“Transport Rule”)

The 2011 Transport Rule was EPA’s replacement for CAIR. *See* 76 Fed. Reg. at 48,211 (Pet. App. 134a–35a). In addition to implementing the 1997 annual PM<sub>2.5</sub> and 8-hour ozone NAAQS that CAIR had addressed, the Transport Rule imposed good-neighbor obligations for the 2006 daily PM<sub>2.5</sub> NAAQS on a new subset of States. *Id.* at 48,209 (Pet. App. 128–29a).

But the Transport Rule did not give the covered States a window in which to implement these newly announced good-neighbor obligations. Instead, it immediately imposed these requirements on the States through FIPs. This represented a sharp break from the approach that EPA had used in the NO<sub>x</sub> SIP Call and CAIR. In each of those rules, EPA had quantified the States’ good-neighbor obligations, but it refrained from imposing FIPs until the States were given an opportunity to meet their new obligations in SIPs. In the Transport Rule, by contrast, EPA imposed good-neighbor FIPs *immediately* upon informing the States what it

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<sup>5</sup> *See* EPA, Progress Report 2011: Environmental and Health Results Report 12, 14 (2013), *available at* [http://www.epa.gov/airmarkets/progress/ARPCAIR11\\_downloads/ARPCAIR11\\_environmental\\_health.pdf](http://www.epa.gov/airmarkets/progress/ARPCAIR11_downloads/ARPCAIR11_environmental_health.pdf) (“2011 Progress Report”); *see also* Industry & Labor Respondents’ Br. Part I.A.3.

means to “contribute significantly” to another State’s nonattainment under section 7410(a)(2)(D)(i)(I). *Id.* at 48,209, 48,212, 48,219–20 & n.12 (Pet. App. 128a–29a, 138a–42a, 170a–72a & n.12).

Many upwind States had no idea that they needed to undertake *any* pollution-mitigation efforts under section 7410(a)(2)(D)(i)(I) until EPA finalized the Transport Rule. *Compare id.* at 48,212–14 (Pet. App. 142a–49a), *with* 75 Fed. Reg. 45,210, 45,215 (Aug. 2, 2010) (reflecting that the subset of States covered by the Transport Rule changed between the proposed and final rule), *and* 70 Fed. Reg. at 25,167 (reflecting that the subset of States covered by the final Transport Rule differed from the subset of States covered by CAIR). Yet the Transport Rule imposed 59 FIPs that specified exactly how the 27 covered States must meet the good-neighbor obligations that the Transport Rule had just quantified. *See* 76 Fed. Reg. at 48,213 (tbl. III–1), 48,219 n.12 (Pet. App. 143a–44a, 171a–72a n.12). And although the Transport Rule purported to allow States the opportunity to replace the EPA-imposed FIPs with SIPs, it did not allow a full SIP to replace a Transport Rule FIP until the 2014 control year. *See id.* at 48,326–32 (Pet. App. 669a–689a).

## **II. THE COURT OF APPEALS’ OPINION AND THE PETITIONERS’ CLAIMS**

A. The D.C. Circuit vacated the Transport Rule for several reasons. First, the court of appeals found that EPA misconstrued section 7410(a)(2)(D)(i)(I) by requiring States to reduce their emissions by more

than their significant contributions to other States' nonattainment. *See* Pet. App. 3a–4a, 21a–41a. Second, the court of appeals found that EPA exceeded its statutory authority by imposing FIPs at the same time it quantified the States' significant contributions under section 7410(a)(2)(D)(i)(I). *See id.* at 4a, 42a–61a.

The court of appeals vacated both the Transport Rule and its FIPs, remanding the rule to EPA. *Id.* at 62a–64a. But as in *North Carolina*, the court of appeals ordered EPA to “continue administering CAIR pending the promulgation of a valid replacement.” *Id.* at 63a–64a.

Judge Rogers dissented. She argued that some of the challenges to EPA's significant-contribution analysis had not been preserved before the agency and criticized some of the court of appeals' holdings on the merits. *Id.* at 65a, 67a–70a, 95a–114a. Judge Rogers also claimed that the challenge to the Transport Rule's FIPs was an impermissible collateral attack on prior EPA orders and argued, in the alternative, that the challenge should be rejected on the merits. *See id.* at 65a–67a, 70a–95a.

B. EPA (in No. 12-1182), along with ALA and four other environmental groups that intervened on EPA's behalf (in No. 12-1183), petitioned for certiorari. Briefs in support of certiorari were filed by a group of cities and States (led by New York) and two corporations (Calpine and Exelon), all of whom had supported EPA as intervenors in the court of



appeals. The Court granted the petitions but limited the questions to those presented by EPA.

In their merits-stage briefs, the petitioners and their supporters (both amici and a subset of the intervenors below) attack the court of appeals' jurisdiction as well as its analysis of the merits. The industry and labor respondents' brief addresses the issues surrounding the court of appeals' analysis of section 7410(a)(2)(D)(i)(I)'s substantive limits. This brief addresses the issues surrounding the scope of EPA's FIP authority.

#### **SUMMARY OF THE ARGUMENT**

The court of appeals had jurisdiction to decide whether EPA's Transport Rule could lawfully impose good-neighbor FIPs on the States. EPA tries to characterize this challenge to the Transport Rule as a jurisdictionally barred "collateral attack" on earlier agency actions that led EPA to issue the Transport Rule FIPs. But the state and local respondents are not challenging those earlier actions in this case, and their arguments in this case do not imply that those earlier agency decisions were unlawful. They are challenging the Transport Rule's issuance of FIPs to address obligations that did not exist at the time of those earlier actions, and for several of the state respondents, the predicate actions for the Transport Rule FIPs were made in the Transport Rule itself. Accordingly, even assuming this threshold challenge could properly be characterized as jurisdictional, it fails on multiple levels.

On the merits, the court of appeals was correct to vacate the FIPs in EPA's Transport Rule. There are two independent grounds on which this Court should affirm the court of appeals' judgment.

First, EPA's authority to impose FIPs for the 1997 NAAQS for ozone and PM<sub>2.5</sub> expired once EPA approved good-neighbor SIPs to implement those standards. See 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose a FIP "*unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan*" (emphasis added)). EPA's attempt to retroactively revoke its approvals of those SIPs is not authorized by section 7410(k)(6) or any other provision of the Clean Air Act, and EPA's claim that those previously approved SIPs failed to "correct[] the deficiency" within the meaning of section 7410(c)(1) is not a permissible construction of the statute. EPA had no authority to impose FIPs for the 1997 standards on the States that had EPA-approved good-neighbor SIPs in place, and because the Transport Rule FIPs are non-severable, the court of appeals properly vacated them across the board.

Second, EPA refused to quantify the States' good-neighbor obligations under section 7410(a)(2)(D)(i)(I) until the moment it issued the Transport Rule FIPs. This left the States to guess at how EPA might define the threshold for "significant[]" contributions during the SIP-submission process, and it left many States unaware of whether they needed to undertake

*any* pollution-abatement efforts as part of their good-neighbor obligations. EPA's actions deprived the Transport Rule States of the opportunity to stave off EPA-imposed FIPs by submitting approvable good-neighbor SIPs.

The FIP authority conferred by section 7410(c)(1) does not permit EPA to act in this manner. Rather, EPA's FIP authority is limited to implementing the SIP obligations in place at the time that EPA disapproves a State's SIP submission or issues a finding of failure to submit, and a FIP cannot be used to announce and impose new requirements that the States had no opportunity to implement during the SIP-submission process.

#### ARGUMENT

#### I. THE COURT OF APPEALS HAD JURISDICTION TO CONSIDER THE CHALLENGE TO EPA'S FIP-BEFORE-SIP APPROACH.

EPA contends that the court of appeals lacked jurisdiction to consider whether the Transport Rule could impose FIPs while simultaneously announcing the covered States' obligations under the good-neighbor provision. EPA Br. 15–16, 18–24; *see also* Pet. App. 66a–67a; 70a–82a (Rogers, J., dissenting). EPA insists that this represents a forbidden “collateral attack” on the SIP disapprovals that triggered EPA's FIP authority, rather than a challenge to the Transport Rule itself. EPA Br. 24.

In July 2011, *before* EPA issued its Transport Rule quantifying the States' good-neighbor

obligations regarding ozone and PM<sub>2.5</sub>, EPA issued final rules disapproving SIPs submitted by ten States.<sup>6</sup> In disapproving those submissions, EPA specifically found that they failed to comply with the “good neighbor” requirements of section 7410(a)(2)(D)(i)(I) with regard to the 2006 daily PM<sub>2.5</sub> standard. *E.g.*, 76 Fed. Reg. at 43,130.

Of course, at that time, EPA had yet to quantify the States’ good-neighbor obligations regarding this standard. The final Transport Rule would not be issued for another month, and although the proposed rule had already been published in the Federal Register, the rule’s requirements and the States subject to the rule were subject to change (and ultimately did change) before the final rule was adopted. *See* 76 Fed. Reg. at 48,213–14 (Pet. App. 144a–50a) (noting some of the substantial changes between the Transport Rule’s proposal and finalization). But EPA nevertheless disapproved the SIPs for non-compliance with the Act’s good-neighbor provision, explaining that the rationale for this action could be found in the *proposed* Transport Rule. *See supra* n.6.

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<sup>6</sup> 76 Fed. Reg. 43,128 (July 20, 2011) (Alabama); 76 Fed. Reg. 43,159 (July 20, 2011) (Georgia); 76 Fed. Reg. 43,175 (July 20, 2011) (Indiana); 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 43,136 (July 20, 2011) (Kentucky); 76 Fed. Reg. 43,156 (July 20, 2011) (Missouri); 76 Fed. Reg. 43,153 (July 20, 2011) (New Jersey and New York); 76 Fed. Reg. 43,167 (July 20, 2011) (North Carolina); 76 Fed. Reg. 43,175 (July 20, 2011) (Ohio).

EPA had also found in June 2010 that 29 States and territories had failed to submit SIPs for enforcing their good-neighbor obligations under the 2006 daily PM<sub>2.5</sub> standard. 75 Fed. Reg. 32,673 (June 9, 2010). And in July 2011, EPA made a similar finding of failure to submit with regard to Tennessee. 76 Fed. Reg. 43,180 (July 20, 2011).

All of these SIP disapprovals and findings of failure to submit authorized and required EPA to issue FIPs. *See* 42 U.S.C. § 7410(c)(1).<sup>7</sup> But in this case, the States are not attacking *any* of these past SIP disapprovals or findings of failure to submit; they are attacking only the Transport Rule and its imposition of FIPs on the States. EPA tries to maintain that the States' challenge to the Transport Rule FIPs is really a challenge to the earlier agency actions that triggered EPA's FIP authority, but this collateral-attack argument should be rejected for three independent reasons.

First, a ruling from this Court that disapproves the Transport Rule FIPs does not compel the conclusion that EPA's earlier SIP disapprovals and findings of failure to submit were unlawful. The States acknowledge in this case that EPA's earlier

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<sup>7</sup> In separate proceedings, Ohio, Georgia, and Kansas challenged their SIP disapprovals. *Ohio v. EPA*, No. 11-3988 (6th Cir.); *Kansas v. EPA*, No. 12-1019 (D.C. Cir.); *Georgia v. EPA*, No. 11-1427 (D.C. Cir.). If those States can show in those proceedings that EPA's disapprovals of their SIPs were invalid, then those invalid actions would no longer serve as lawful predicates for FIPs.

SIP disapprovals and findings of failure to submit triggered its FIP authority under 42 U.S.C. § 7410(c)(1). The States are contesting only the *type* of FIPs that EPA could issue before the Transport Rule was promulgated. EPA could, for example, issue a FIP that implements EPA’s previously announced good-neighbor requirements. What EPA cannot do is hide the ball by refusing to announce its interpretation of “contribute significantly,” disapprove SIP submissions from States that have no idea how EPA intends to interpret that phrase, and then hold off on defining the covered States’ obligations under section 7410(a)(2)(D)(i)(I) until it has issued FIPs imposing those obligations on the States.

The States’ attacks on the Transport Rule FIPs also do not imply that EPA is powerless to enact those FIPs. Rather, those FIPs must issue *after* EPA has quantified the States’ good-neighbor obligations and given the States a reasonable opportunity to meet those obligations in SIPs. *See* 42 U.S.C. § 7410(k)(5).

For example, EPA could have disapproved the SIP submissions (or issued findings of failure to submit) at time one, quantified the States’ “good neighbor” obligations at time two, and imposed the Transport Rule FIPs at time three on any States that had not yet amended their SIPs to implement these EPA-announced good-neighbor requirements. A ruling from this Court that disapproves EPA’s decision to issue the Transport Rule’s FIPs

*simultaneously* with its announcement of the States' good-neighbor obligations does not imply that the SIP disapprovals issued at time one are unlawful. Those SIP disapprovals would still trigger a duty under section 7410(c)(1) to issue FIPs—but the *Transport Rule's* FIPs could be issued only *after* EPA defined the States' good-neighbor obligations and allowed the States a reasonable opportunity to implement those requirements through SIPs.

Second, even if EPA were correct to assert that the States' arguments logically imply that EPA's earlier SIP disapprovals were unlawful, that still would not represent a collateral attack on those earlier agency actions. The only remedy that the States are seeking from this Court is a judgment affirming the court of appeals' vacatur of the *Transport Rule* and its FIPs. They are not asking this Court to invalidate EPA's earlier SIP disapprovals and resurrect the SIPs that EPA had disapproved.<sup>8</sup>

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<sup>8</sup> EPA is also wrong to suggest that the court of appeals "exceeded its jurisdiction" by opining that EPA's prior SIP disapprovals and findings of failure to submit were invalid. EPA Br. 20. The judgment issued by the court of appeals did not vacate those earlier agency actions; it merely vacated the *Transport Rule* and the *Transport Rule* FIPs. Pet. App. 64a. A court does not collaterally attack a previous court ruling or agency action whenever its opinion claims that an earlier judicial or agency decision was wrongly decided; if that were true, then this Court could never write an opinion abrogating a court of appeals ruling from which the losing party declined to petition for certiorari or a district court ruling from which the

Third, EPA’s collateral-attack argument cannot overcome the fact that EPA *approved* 22 States’ SIP submissions for the 1997 ozone and PM<sub>2.5</sub> standards before EPA issued the Transport Rule. *See* 76 Fed. Reg. at 48,220–21 (Pet. App. 177a–83a) (citing EPA’s approval of CAIR SIPs submitted by Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia). EPA approved these submissions after its 2005 blanket finding of failure to submit SIPs for the 1997 standards. *See* 70 Fed. Reg. 21,147 (Apr. 25, 2005). The States contend that those pre-Transport Rule SIP approvals terminated EPA’s authority to impose FIPs on those States for the 1997 standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose FIPs after issuing findings of failure to submit “unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan”); Part II.A, *infra*.

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losing party declined to appeal. *But see, e.g., Millbrook v. United States*, 133 S. Ct. 1441 (2013) (abrogating *Orsay v. U.S. DOJ*, 289 F.3d 1125 (9th Cir. 2002)). The time limits in section 7607(b)(1) are transgressed only when a court’s *judgment* purports to vacate or alter an agency action outside the scope of a timely filed petition for review.



This particular attack on EPA’s FIPs cannot be characterized as a “collateral attack” against the finding of failure to submit that EPA issued in 2005. The FIPs that EPA imposed on this subset of States are unlawful *regardless* of the legality of EPA’s 2005 finding of failure because EPA’s FIP authority with regard to those States expired when EPA approved their SIP submissions. To be sure, EPA denies that those SIP approvals terminated its FIP authority, *see* 76 Fed. Reg. at 48,219 (Pet. App. 172a–73a), but the courts surely can resolve *that* disagreement without launching a collateral attack on EPA’s finding of failure to submit.

Moreover, the Transport Rule’s FIPs are non-severable. As the petitioners themselves explain, the States’ good-neighbor obligations are intertwined with other States’ obligations under the 1997 and 2006 standards. *See* EPA Br. 45–53; ALA Br. 39–41; *see also* Calpine Br. 47–54; 76 Fed. Reg. at 48,252–53 (tbl. VI.B–3 & n.a) (Pet. App. 335a–37a) (reflecting EPA’s conclusion that Transport Rule FIPs requiring more stringent emissions reductions in some States than others will cause emissions shifting, resulting in greater emissions in States whose Transport Rule FIPs are more lenient); *cf. North Carolina*, 531 F.3d at 929 (noting that the components of CAIR “must stand or fall together”). This non-severability enables the Court to resolve the legality of the entire Transport Rule even if it concludes that some of the States’ challenges were untimely.

Finally, even if EPA were correct to characterize the States' challenge to the Transport Rule FIPs as a collateral attack on earlier agency actions, that characterization would not have jurisdictional implications. The premise of EPA's jurisdictional argument is that any collateral attack on EPA's SIP disapprovals or findings of failure to submit is jurisdictionally out of time because section 7607(b)(1) requires petitions for review of those decisions to be filed within 60 days of the decision. But section 7607(b)(1) is not phrased in jurisdictional terms. *See* 42 U.S.C. § 7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register . . ."). And the only authority EPA cites for the idea that section 7607(b)(1) establishes a jurisdictional time limit comes from the D.C. Circuit, not from this Court. *See* EPA Br. 19 (citing *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998)).

Recent decisions of this Court make clear that the filing deadlines in section 7607(b)(1) do not establish jurisdictional limits on the federal courts. *See, e.g., Henderson v. Shinseki*, 131 S. Ct. 1197, 1202–03 (2011) (holding that a 120-day deadline on filing appeals to the Veterans Court is non-jurisdictional); *id.* at 1203 ("Filing deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules."); *Kontrick v. Ryan*, 540 U.S. 443, 454–55, (2004) (holding that filing deadlines in the Bankruptcy Code are "claim-processing rules"

rather than jurisdictional time limits). The jurisprudence of the D.C. Circuit on this matter is out of step with this Court. And so is EPA's argument that the court of appeals lacked jurisdiction to consider the arguments of the state and local respondents.

## **II. THE COURT OF APPEALS CORRECTLY HELD THAT EPA LACKED AUTHORITY TO IMPOSE THE TRANSPORT RULE FIPS.**

### **A. EPA Had No Authority To Impose Transport Rule FIPs On The 22 States With EPA-Approved SIPs For The 1997 Ozone And PM<sub>2.5</sub> NAAQS.**

After EPA promulgated CAIR, States submitted SIPs to implement the good-neighbor obligations for the 1997 ozone and PM<sub>2.5</sub> standards. *See, e.g.*, 72 Fed. Reg. 55,659 (Oct. 1, 2007). By the time EPA issued the Transport Rule, EPA had approved good-neighbor SIPs submitted by 22 States. *See* 76 Fed. Reg. at 48,220–21 (Pet. App. 177a–83a). This revoked EPA's authority to impose FIPs on those States with regard to the 1997 standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose a FIP “*unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan*” (emphasis added)).

The Transport Rule, however, imposed at least one FIP with regard to the 1997 standards on all but three of those 22 States whose good-neighbor SIPs

for the 1997 standards had previously been approved. *See* 76 Fed. Reg. at 48,213 (tbl. III–1), 48,219 n.12 (Pet. App. 143a–44a, 171a–72a n.12) (reflecting EPA’s ultimate conclusion that each of these States except Connecticut, Massachusetts, and Minnesota would be covered by one or more Transport Rule FIPs as to the 1997 NAAQS). In all, 31 of the Transport Rule’s 59 FIPs implement good-neighbor obligations under the 1997 standards for States whose CAIR SIPs addressing those standards had previously been approved. *Id.* (further reflecting that 14 of those 31 FIPs were imposed on the eight state respondents whose CAIR SIPs had previously been approved, *see id.* at 48,220–21 (Pet. App. 178a–83a); EPA Br. (II)).

EPA had no authority to impose a FIP that implements the 1997 standards on any of those States because its FIP authority for the 1997 standards expired once EPA approved the good-neighbor SIP submissions from those States.<sup>9</sup> Even

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<sup>9</sup> For the reasons discussed in Parts II.B and II.C, *infra*, EPA also lacked authority to impose Transport Rule FIPs implementing the 1997 standards on Michigan, New Jersey, Tennessee, Texas, and Wisconsin, all of which were governed by CAIR FIPs when EPA issued the Transport Rule. *See CAJA* 3,172, 3,174, 3,176–78 (explaining that the abbreviated CAIR SIPs that EPA approved for these States “modified but did not replace the CAIR FIPs”). Because a FIP may not impose obligations that were not disclosed in time to be addressed in a SIP, EPA could not replace the CAIR FIPs for these States with Transport Rule FIPs without providing an opportunity to submit SIPs addressing the new obligations disclosed in the Transport Rule.

if one assumes, for the sake of argument, that EPA could impose FIPs to implement the 2006 PM<sub>2.5</sub> standard on the States subject to the Transport Rule, EPA had no authority to impose a FIP that implements the 1997 ozone or PM<sub>2.5</sub> standards on Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, or West Virginia. And because the FIPs imposed by the Transport Rule are non-severable, *see supra* p. 23, this Court should affirm the court of appeals' judgment vacating all of the Transport Rule's FIPs.

EPA was well aware that its prior approval of these good-neighbor SIPs presented a problem under the "unless" clause of 42 U.S.C. § 7410(c)(1). *See* 76 Fed. Reg. at 48,219 (Pet. App. 172a–73) (acknowledging commentators who argued that EPA lacked authority to impose FIPs on States with EPA-approved SIPs for the 1997 ozone and PM<sub>2.5</sub> standards). The Transport Rule tried to obviate the "unless" clause by deploying two dubious maneuvers. First, EPA attempted to retroactively revoke its approval of the States' SIP submissions under section 7410(k)(6). *See id.* at 48,217, 48,219 (Pet. App. 162a, 173a–74a). Second, EPA argued that the approved SIP submissions failed to "correct[] the deficiency" that had prompted EPA to issue findings of failure to submit. *See id.* at 48,219 (Pet. App.

173a). None of this can salvage the Transport Rule FIPs.

**1. EPA Had No Authority To Retroactively Disapprove The SIPs That It Had Previously Approved.**

EPA claims that section 7410(k)(6) allowed it to retroactively disapprove the good-neighbor SIPs that it had previously approved. *See* EPA Br. 33. Section 7410(k)(6), entitled “Corrections,” provides:

Whenever the Administrator determines that the Administrator’s action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification *was in error*, the Administrator may *in the same manner as the approval, disapproval, or promulgation* revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

42 U.S.C. § 7410(k)(6) (emphases added). EPA thought that it could invoke section 7410(k)(6) because its previous SIP approvals had been issued under CAIR and the D.C. Circuit later disapproved CAIR’s interpretation of the States’ good-neighbor obligations in *North Carolina*. EPA’s use of section

7410(k)(6) was unlawful for two independent reasons.

First, section 7410(k)(6) allows “corrections” only when a past EPA action “*was* in error,” meaning that the action was erroneous based on the law in existence *at that time*. Section 7410(k)(6) cannot be used to revoke a SIP approval on account of subsequent developments in judicial doctrine or agency rulemaking. That is the office of section 7410(k)(5), which requires EPA to issue a “SIP call” whenever it determines that a SIP is “substantially inadequate to attain or maintain the relevant [NAAQS] . . . or to otherwise comply with any requirement of this chapter.”

EPA now insists that section 7410(k)(6) empowers the agency to revoke an earlier SIP approval as “error” by relying on new developments that post-date the approval. EPA Br. 32–33 & n.11.<sup>10</sup> EPA appears to be saying that it could approve 50 SIP submissions at time one, change its interpretation of the good-neighbor requirements at time two, and then immediately revoke the earlier SIP approvals under section 7410(k)(6) and impose FIPs on all 50

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<sup>10</sup> It is noteworthy, however, that EPA did not stop approving CAIR SIPs when *North Carolina* was decided. Seven of the subsequently “corrected” CAIR SIP approvals post-date the D.C. Circuit’s 2008 decisions in that case. See 76 Fed. Reg. at 48,221 (Pet. App. 180a–83a) (citing post-*North Carolina* CAIR SIP approvals for Indiana, Maryland, North Carolina, Ohio, Pennsylvania, South Carolina, and West Virginia).

States. This is a manifestly implausible construction of the phrase “was in error.”

To begin, EPA’s interpretation of section 7410(k)(6) allows the Transport Rule to apply retroactively by “altering the past legal consequences of past actions.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (emphasis omitted). When EPA approved the States’ SIP submissions, it terminated its authority to issue FIPs for those States as to the 1997 ozone and PM<sub>2.5</sub> standards. See 42 U.S.C. § 7410(c)(1). The Transport Rule, however, altered the past legal consequences of those agency actions, as those “approvals” are now deemed to have prolonged, rather than terminated, EPA’s authority to impose FIPs.

This contradicts *Bowen*, which forbids agencies to engage in retroactive rulemaking absent clear and unambiguous statutory authorization. 488 U.S. at 208. It also contradicts the Administrative Procedure Act, which defines “rule” as “an agency statement of general or particular applicability *and future effect*.” 5 U.S.C. § 551(4) (emphasis added). Nothing in the Clean Air Act authorizes retroactive rulemaking in a manner sufficient to satisfy *Bowen* or the clear-statement requirement of 5 U.S.C. § 559.

EPA’s construction of the word “error” also cannot be reconciled with section 7410(k)(5)’s mandatory SIP-call provision. Section 7410(k)(5) provides that EPA “shall” issue a SIP call whenever it finds that a SIP is “substantially inadequate” to maintain a



NAAQS or comply with any requirement of the Clean Air Act. This process requires EPA to “notify the State of the inadequacies” and provide an opportunity for the State to submit a revised SIP; a FIP cannot be imposed until *after* EPA finds that the State has failed to submit the necessary SIP revisions. *See* 42 U.S.C. §§ 7410(c)(1), 7410(k)(5).

EPA’s understanding of the word “error” extends section 7410(k)(6)’s correction power to every circumstance described in section 7410(k)(5). Any time the agency discovers that an EPA-approved SIP is “inadequate” to comply with the agency’s current understandings of the Clean Air Act, EPA can simply declare its earlier approval to be “in error” and immediately impose a FIP without using any of the procedures required by section 7410(k)(5). This renders the mandatory language of section 7410(k)(5) meaningless, and makes hash of the procedural protections that section 7410(k)(5) confers on the States. There *must* be a distinction between the “inadequac[ies]” described in section 7410(k)(5) and the “error[s]” described in section 7410(k)(6), yet EPA’s construction of the statute treats these as fungible commodities.<sup>11</sup>

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<sup>11</sup> As one prominent commenter on the 1990 amendments to the Clean Air Act has explained, section 7410(k)(6) was intended merely to “enable EPA to deal promptly with clerical errors or technical errors. It [wa]s not intended to offer a route for EPA to reevaluate its policy judgements.” Henry A. Waxman, et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990*:

Finally, EPA cannot overcome the fact that its SIP approvals were not “in error” at the time that EPA approved the SIPs. Agencies are required to base their decisions on the administrative rules in existence at the time of agency action. *See Bowen*, 488 U.S. at 208 (forbidding retroactive rulemaking absent clear and unambiguous statutory authorization); *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 390 (1932) (forbidding agencies to change rules in an adjudication). It is not “error” for an agency to fail to foresee that a future decision of the D.C. Circuit will disapprove the governing agency rule. Nor is it “error” to fail to foresee that a future administration will adopt a more stringent interpretation of the good-neighbor requirement. The word “error” implies fault, and no human being can know future events. One cannot impose fault on an agency administrator—and accuse him of “error”—for failing to undertake a task that is beyond human capacity.

Even if this Court were to accept EPA’s interpretation of the word “error,” the Transport Rule’s use of section 7410(k)(6) would remain unlawful for another, independent reason. Any revisions of past agency action must be made “in the same manner as” the putative erroneous action. 42 U.S.C. § 7410(k)(6). And although EPA issued its SIP approvals through notice-and-comment

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*Bringing Blue Skies Back to America’s Cities*, 21 ENVTL. L. 1843, 1924–25 (1991).

rulemaking, its “corrections” did not go through that process. 76 Fed. Reg. at 48,221 (Pet. App. 183a–84a) (“EPA is taking this final action without prior opportunity for notice and comment . . .”).

EPA tries to excuse its failure to follow this statutory command by invoking the “good cause” exception of 5 U.S.C. § 553(b)(B). 76 Fed. Reg. at 48,221–22 (Pet. App. 184a). That is a non sequitur. EPA’s obligation to use notice and comment for its “corrections” comes from *two* independent sources: 5 U.S.C. § 553(b), which is subject to a “good cause” exception, and 42 U.S.C. § 7410(k)(6), which is not. The state and local respondents are not accusing EPA of violating the Administrative Procedure Act by failing to use notice and comment; they are accusing EPA of violating the Clean Air Act. Agencies do not have a good-cause license to violate their organic statutes.

New York suggests that this Court should overlook EPA’s unlawful use of section 7410(k)(6)’s “corrections” power because “the court of appeals did not address this issue . . . and it is not fairly raised by the questions on which this Court granted certiorari.” NY Br. 26 n.17; *see also* ALA Br. 47 n.16. But EPA makes no such claim, and for good reason. This Court may review issues “pressed *or* passed upon” in the courts below, *see Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (citation and internal quotation marks omitted), and while New York correctly observes that the section-7410(k)(6) issues were not fully “passed upon” by the court of

appeals, they were most assuredly “pressed.” See State & Local Respondents’ CADC Br. 24–29; see also *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (“As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.”).

As for whether section 7410(k)(6) falls within the scope of the questions presented, the issue need only be “fairly included,” SUP. CT. R. 14.1(a); see also *Yee v. Escondido*, 503 U.S. 519, 535 (1992), and New York does not explain how the section-7410(k)(6) issues fail to satisfy this standard. The questions presented include “[w]hether 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.” EPA Cert. Pet. (I). EPA contends that the answer is “no,” but it cannot show that the States with EPA-approved good-neighbor SIPs for the 1997 standards were required to adopt new good-neighbor SIPs unless it also shows that its invocation of section 7410(k)(6) was lawful.<sup>12</sup>

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<sup>12</sup> Even though the court of appeals declined to resolve whether EPA lawfully used section 7410(k)(6) to revoke its earlier SIP approvals, the court at least resolved whether EPA may invoke those “corrections” powers *on the same day* that it issues FIPs, depriving the States of any opportunity to adopt a SIP that

## 2. EPA's "Correct the Deficiency" Argument Is Meritless.

EPA believes that it can impose FIPs on States with EPA-approved SIPs even apart from its "corrections" power under section 7410(k)(6). EPA notes that the "unless" clause of section 7410(c)(1) kicks in only when *two* conditions are satisfied: the State must "correct[] the deficiency," *and* EPA must "approve[] the plan or plan revision," before EPA issues the FIP. EPA contends that the SIPs it approved failed to "correct[] the deficiency" within the meaning of section 7410(c)(1) and therefore did not terminate EPA's FIP authority. EPA Br. 32–33; 76 Fed. Reg. at 48,219 (Pet. App. 172a–73a).

EPA relies on the same reasons it gave for invoking its "corrections" power under section 7410(k)(6): namely, that the EPA-approved SIPs became tainted when the D.C. Circuit issued its initial ruling in *North Carolina*. In EPA's view, as soon as the D.C. Circuit disapproved CAIR's interpretation of the good-neighbor requirement, the SIPs that EPA approved in reliance on CAIR were no longer adequate to "correct[] the deficiency" within the meaning of section 7410(c)(1). EPA Br. 32–33; 76 Fed. Reg. at 48,219 (Pet. App. 173a). EPA's interpretation of "correct the deficiency" is not tenable.

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would avoid an EPA-imposed FIP. *See* Pet. App. 45a. The legality of *that* use of section 7410(k)(6) is assuredly before this Court.

The “correct the deficiency” phrase in section 7410(c)(1) uses a definite article: “*the* deficiency.” This refers to the deficiency that caused EPA to disapprove the SIP or find that a State had failed to submit a SIP. It cannot refer to a “deficiency” that arises only upon later developments in judicial doctrine or administrative rulemaking. A State “corrects *the* deficiency” by submitting a new SIP that responds to the concerns that prompted EPA to act under subsection (A) or (B) and that complies with every reasonably knowable legal obligation at the time of EPA’s disapproval or finding of failure. Every SIP that EPA approved before the ruling in *North Carolina* satisfies the “correct[] the deficiency” clause and terminates EPA’s FIP authority.

EPA’s construction of section 7410(c)(1) re-writes the “correct the deficiency” clause to require a State to “correct all deficiencies that are known at this time and that may become known in the future.” This interpretation not only departs from the natural reading of the text, but it also renders the “unless” clause useless in constraining EPA’s power. Anytime EPA approves a SIP under the “unless” clause of section 7410(c)(1), EPA can resurrect its FIP authority simply by changing its interpretation of some provision in section 7410(a)(2) and declaring the previously approved SIP “deficient.” No principle of deference to agencies can allow a statute to be interpreted in such an atextual and self-aggrandizing manner.

EPA's interpretation of "correct the deficiency" also circumvents the SIP-call process of section 7410(k)(5). Later-discovered deficiencies in a SIP are supposed to trigger a finding of "inadequa[cy]" under section 7410(k)(5), which requires EPA to notify the State of the inadequacies and provide an opportunity to submit a revised SIP within a "reasonable deadline." On EPA's view, however, any "inadequacy" in a previously approved SIP can be deemed a "deficiency" in the original submission, which allows EPA to impose a FIP immediately without using the procedural protections required by section 7410(k)(5). That is not a plausible interpretation of the statute.

### **3. EPA Has Failed To Show That The Transport Rule FIPs Are Severable.**

Because EPA's FIP authority for the 1997 standards expired when it approved the good-neighbor SIPs submitted by 22 States, the Transport Rule should be vacated to the extent it imposes FIPs on States with EPA-approved good-neighbor SIPs for the 1997 standards. The Court should go further, however, and vacate the entire rule, because the FIPs it imposes are non-severable. *See supra* p. 23.

EPA suggests in a footnote that this Court can salvage the Transport Rule even if EPA lacks authority to impose FIPs to implement the 1997 standards on the States with EPA-approved SIPs for those standards. *See* EPA Br. 33 n.11. EPA claims that "for all States except South Carolina and Texas, the EPA's authority to promulgate the federal plan

for the annual NO<sub>x</sub> and SO<sub>2</sub> requirements flows from the EPA's finding of failure to submit or disapproval of a proposed state plan for the 2006 PM<sub>2.5</sub> standard, which CAIR did not address." *Id.* This footnote seems to be saying that the Court should vacate only the FIPs that were imposed on South Carolina and Texas, leaving the remaining Transport Rule FIPs in place.

EPA is wrong to claim that it can impose the Transport Rule FIPs on any State for which it previously issued a SIP disapproval or finding of failure to submit regarding the 2006 PM<sub>2.5</sub> standard. The Transport Rule FIPs implement three different NAAQS: the 1997 standard for 8-hour ozone, the 1997 standard for annual PM<sub>2.5</sub>, and the 2006 standard for daily PM<sub>2.5</sub>. 76 Fed. Reg. at 48,219 n.12 (Pet. App. 171a–72a n.12). EPA appears to believe that if section 7410(c)(1) authorizes it to impose a FIP for a particular NAAQS on a particular State, then EPA may impose one or more additional FIPs on that State to implement any other NAAQS that EPA has ever issued. That is not a defensible construction of section 7410(c)(1), and EPA makes no effort to defend it.

In any event, even assuming EPA is correct to say that this Court need only vacate the Transport Rule FIPs imposed on South Carolina and Texas, EPA never explains how this Court can vacate the FIPs that govern those two States without causing the entire Transport Rule FIP network to come apart. EPA asserts that “the effect on the Transport Rule



would be slight,” but it never explains how the remaining Transport Rule FIPs can survive when the good-neighbor obligations imposed on other States can no longer presume compliance on the part of South Carolina and Texas.

**B. 42 U.S.C. § 7410(c)(1) Limits The Type Of FIP That EPA May Impose After Disapproving A SIP Submission Or Finding That A State Has Failed To Make A Required SIP Submission.**

There is a broader problem with the Transport Rule’s good-neighbor FIPs: EPA issued these FIPs without ever telling the States *how much* contribution to another State’s air pollution would be deemed “significant” under section 7410(a)(2)(D)(i)(I). Instead, EPA chose to leave the States in the dark about their good-neighbor obligations while demanding that the States submit SIPs to implement section 7410(a)(2)(D)(i)(I) un glossed by any agency interpretation. Not until it announced and imposed the Transport Rule FIPs did EPA deign to inform the States what it means to “contribute significantly” to another State’s air pollution. The Clean Air Act does not permit EPA to play hide-the-ball in this manner.

The good-neighbor provision states that a SIP must prohibit emissions that “contribute *significantly*” to another State’s nonattainment of any EPA-announced air-quality standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). This statute contains a significant gap: Just how much cross-

state pollution is needed to contribute *significantly* to another State's nonattainment of EPA's air-quality standards? See EPA Br. 34, 45, 55 (noting the ambiguity in the good-neighbor provision); ALA Br. 12, 25, 28, 35 (same); Calpine Br. 27–31, 33 (same).

Statutes containing gaps of this sort are presumed to delegate gap-filling authority to the agency that administers the statute. See *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984). But no State can know how to comply with section 7410(a)(2)(D)(i)(I) until EPA fills in the blanks and announces its formula for determining “significan[ce].” Otherwise, the States are left to guess how much pollution will be deemed “significant[.]” by EPA—or whether they even need to take steps to mitigate their contributions to other States' air pollution. Submitting a good-neighbor SIP under these circumstances is a fool's errand. EPA will judge the SIP submission according to a standard-to-be-announced-later and then impose FIPs on the States for “noncompliance” with this unknown (and unknowable) legal standard.

Delaware's experience illustrates the problems that arise with an undefined and unquantified good-neighbor provision. Delaware submitted a good-neighbor SIP to EPA months before EPA issued the final Transport Rule. EPA responded that Delaware's SIP submission would be approved if Delaware were ultimately excluded from the Transport Rule program, and that the exact same SIP would be disapproved (and a Transport Rule FIP

imposed) if Delaware were ultimately included in the program. 76 Fed. Reg. 2,853, 2,856–58 (Jan. 18, 2011); *see also* 76 Fed. Reg. at 48,212–14 (Pet. App. 142a–44a); 75 Fed. Reg. at 45,215 (reflecting that EPA proposed to include Connecticut, Delaware, Massachusetts, Oklahoma, and the District of Columbia in the final Transport Rule, even though none was ultimately included, and that EPA proposed to exclude Texas from the final rule’s annual PM<sub>2.5</sub> program, even though Texas was ultimately included in that program). Not even *EPA* could determine the States’ good-neighbor obligations before the Transport Rule quantified the States’ interdependent responsibilities under section 7410(a)(2)(D)(i)(I).

The petitioners say that this regime is exactly what the text of the Clean Air Act allows. *See* EPA Br. 24–33; ALA Br. 53–56, 62–65; *see also* NY Br. 24–27. Once EPA announces a NAAQS, it triggers a three-year deadline for the States to submit SIPs, 42 U.S.C. § 7410(a)(1), and those SIPs must implement all of the requirements of section 7410(a)(2)—including the requirements of the good-neighbor provision. In the petitioners’ view, EPA can announce a NAAQS, require the States to submit good-neighbor SIPs that can only guess at how EPA will determine their responsibilities under section 7410(a)(2)(D)(i)(I), and then impose FIPs to implement the agency’s never-before-announced interpretation of that statutory provision. If the States are unable to divine how EPA will quantify

their good-neighbor obligations when submitting their SIPs, that's their problem.

The petitioners' argument overstates the scope of EPA's FIP authority under section 7410(c)(1). Consider the text of that provision:

The 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 [SIP] submission . . . , or

**(B)** disapproves a [SIP] 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.

42 U.S.C. § 7410(c)(1) (emphasis added). The petitioners seem to think that section 7410(c)(1) authorizes EPA to impose *any* federal implementation plan once it issues findings of failure or disapprovals. *See* EPA Br. 25. That is not a sensible or permissible construction of the statute. When section 7410(c)(1) authorizes EPA to impose “a federal implementation plan,” EPA's FIP authority is

limited to implementing the State's SIP obligations at the time of the SIP disapproval or the finding of failure to submit.

Surely there must be *some* limitations on the FIP authority conferred by section 7410(c)(1). *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999). Suppose that EPA disapproved a State's SIP submission regarding the 2006 24-hour PM<sub>2.5</sub> standard and then decided to impose a FIP that implements not only that standard but also an entirely different NAAQS that EPA had promulgated earlier that day. Could EPA defend the legality of this FIP by simply pointing to its earlier disapproval of the State's SIP submission? Of course not. Although section 7410(c)(1) would both authorize and require EPA to impose "a federal implementation plan" in these circumstances, the statute does not open the door for EPA to impose any FIP that suits its fancy. There must be some connection between the contents of the FIP and the State's SIP obligations under 42 U.S.C. § 7410(a)(1)–(2).

Once it is acknowledged that EPA's FIP authority under section 7410(c)(1) is limited, it falls to this Court to resolve the extent of those limitations—and to decide whether EPA transgressed those boundaries by imposing FIPs to implement a never-before-announced interpretation of the States' good-neighbor obligations. The petitioners do not engage this question in their briefs, dogmatically insisting that the "plain language" of section 7410(c)(1)

authorizes the Transport Rule FIPs simply because those FIPs were preceded by a disapproval of a SIP submission or a finding of failure to submit. EPA Br. 25; ALA Br. 26; *see also* NY Br. 2, 35. But unless the petitioners want to contend that section 7410(c)(1) allows the Transport Rule to impose any FIP that EPA wants, they will need to rely on something more than incantations of “plain language” and *Chevron* deference.

**1. EPA’s FIP Authority Under 42 U.S.C. § 7410(c)(1) Is Limited.**

The petitioners never come out and say that EPA may impose any FIP that it pleases once it disapproves a State’s SIP submission or issues a finding of failure to submit. But neither do they acknowledge any judicially enforceable limits on the contents of a FIP once EPA makes disapprovals or findings under section 7410(c)(1)(A)–(B). *See* EPA Br. 16, 24–33; *see also* NY Br. 5, 16–17, 21–22. New York suggests that a FIP imposed under section 7410(c)(1) must “timely achieve the NAAQS,” but it never says whether the Clean Air Act limits the means by which EPA may achieve that goal. NY Br. 21–22. And although EPA and New York both contend that States can calculate their good-neighbor obligations on their own, they do not concede that EPA’s FIP authority is limited to enforcing legal obligations that the States can determine without exposition from EPA. *See* EPA Br. 16, 24–33; NY Br. 5, 16–17, 21–22.

If the petitioners believe that EPA's FIP authority under section 7410(c)(1) is unlimited, they should say so. Otherwise, they should explain what the limits on EPA's FIP authority are and why the Transport Rule FIPs fall on the permissible side of the line. The petitioners' reliance on deference to agencies suggests that they believe that EPA, rather than the courts, should determine the limits of the FIP authority conferred by section 7410(c)(1). *See* EPA Br. 30–32. But it is not clear from their briefs whether the petitioners intend to push the concept of deference this far, and the petitioners do not explain how far this deference (if any) to EPA's invocation of its FIP authority should extend.

In all events, it cannot be the case that an EPA-imposed FIP is *per se* legal—regardless of its contents—so long as it is preceded by a SIP disapproval or finding of failure to submit. Imagine a FIP that imposes requirements that have nothing to do with the Clean Air Act or the NAAQS that triggered the three-year SIP clock under section 7410(a)(1). That could not possibly be defended as a lawful “federal implementation plan” under section 7410(c)(1). We assume that the petitioners will concede at least this much—that there are judicially enforceable limits on the contents of a FIP, even when EPA has issued the disapproval or finding required by section 7410(c)(1)(A)–(B). The next step is to determine what those limits are, as well as the statutory sources of those limits.

**2. EPA’s FIP Authority Under 42 U.S.C. § 7410(c)(1) Cannot Exceed A State’s Known SIP Obligations.**

Consider again the hypothetical just mentioned. Suppose that the Transport Rule FIPs attempted to implement not only the 1997 and 2006 standards for ozone and PM<sub>2.5</sub>, but also an entirely new NAAQS that EPA had announced for the first time in the Transport Rule itself. One would think that this exceeds the scope of the FIP authority conferred by section 7410(c)(1). But why? What exactly in the statute prohibits EPA from doing that?

All that section 7410(c)(1) says is that EPA “shall promulgate a federal implementation plan” after it issues a disapproval or finding described in section 7410(c)(1)(A)–(B)—without purporting to define or limit the contents of the “federal implementation plan” that EPA is required to impose. And although the term “federal implementation plan” is defined elsewhere in the Clean Air Act, that definition does not establish an outer boundary on the contents of a FIP, providing only the minimum requirements for what a “federal implementation plan” must contain:

The term “Federal implementation plan” means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures,



means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

42 U.S.C. § 7602(y). But this should not lead to the conclusion that the Clean Air Act imposes no boundaries whatsoever on the contents of a FIP.

First, the text of section 7410(c)(1) indicates not only that EPA's FIP authority is limited, but also that it is limited to implementing the States' existing SIP obligations. The "unless" clause provides that EPA's FIP authority expires once the State "corrects the deficiency" that led to the disapproval or finding of failure to submit and EPA approves a SIP reflecting those corrections. If EPA's FIP authority could extend beyond "the deficiency" in the State's SIP, then it would make no sense for section 7410(c)(1) to revoke that authority once "the deficiency" has been corrected. EPA's FIP authority must therefore be limited to correcting "the deficiency" in the State's SIP.

"[T]he deficiency" addressed by an EPA-imposed FIP must also be a "deficiency" that existed—and that could have been corrected by the State—at the time EPA issued its disapproval or finding under section 7410(c)(1)(A)–(B). Otherwise, the State has no opportunity to correct the alleged deficiency, and the "unless" clause becomes a meaningless gesture.

Suppose that EPA were to promulgate a NAAQS at time one, disapprove a State's SIP submission for that NAAQS at time two, and then quantify the State's good-neighbor obligations at time three. If one tried to contend that the SIP's "deficiency" should extend to its failures to comply with EPA's later-announced good-neighbor obligations, that "deficiency" would not be one that the State was capable of correcting at the time it learned of the SIP disapproval. It is not reasonable for EPA to say that it may use its FIP authority to impose requirements that were promulgated or announced *after* it issued findings or disapprovals under section 7410(c)(1)(A)–(B).

Nothing in the petitioners' briefs contests the notion that EPA's FIP authority is limited to correcting "the deficiency" that triggered EPA's finding or disapproval, or that the FIP-corrected "deficiency" must be one that the State could have corrected as soon as it learned of the SIP disapproval or finding of failure to submit. *See* Part II.B.1, *supra*. Instead, the petitioners insist that the States *could* have corrected the deficiency in their good-neighbor SIPs—even as EPA refused to quantify "significan[ce]" in section 7410(a)(2)(D)(i)(I). It is to that issue that we now turn.

**3. EPA Cannot Use Its FIP Authority To Impose Good-Neighbor Obligations That Were Not Announced At The Time Of The SIP Disapproval Or Finding Of Failure To Submit.**

The petitioners suggest that the States can figure out their good-neighbor obligations on their own, without any need for EPA to say what counts as a significant contribution to another State's air pollution. *See* EPA Br. 29–30; *see also* NY Br. 24–27; 29–35. If this were true, then there would be no basis for the States to object to the Transport Rule FIPs because the FIPs would be addressing a deficiency that the States could have corrected.

But the petitioners actually advance a more limited claim. They contend only that the States can determine the *empirical* questions surrounding their contributions to interstate air pollution. *See, e.g.*, EPA Br. 29 (“States routinely undertake technically complex air quality determinations. . . . [T]he necessary emissions information from all States is publicly available.”); ALA Br. 53–54 (noting that the States can undertake a “technical analysis” of interstate air pollution); *see also* NY Br. 31 (“States will have the capacity to monitor and model emissions and air quality.”).

The petitioners do not and cannot possibly claim that the States can predict how EPA will interpret section 7410(a)(2)(D)(i)(I) before EPA announces its authoritative construction of that statute. Section 7410(a)(2)(D)(i)(I) delegates to EPA the prerogative

to decide *how much* pollution will be deemed to “contribute significantly” to another State’s nonattainment. Until EPA answers that question, the States are shooting at an invisible target. All the scientific knowledge in the world is useless if the States are left to guess the way in which EPA might ultimately quantify “significan[ce]” for States included in a final regional rule under section 7410(a)(2)(D)(i)(I).

States have no way to ensure that their calculations of required reductions match EPA’s because EPA’s analysis ultimately turns on subjective policy judgments regarding cost-effectiveness. *See* 76 Fed. Reg. at 48,248–49 (Pet. App. 316a–23a); Pet. App. 15a–18a. In defining the required reductions in the Transport Rule, EPA developed “cost curves,” or estimates of the amounts of reductions available at certain cost thresholds. 76 Fed. Reg. at 48,248 (Pet. App. 319a–20a). It then estimated the effect, at different cost-per-ton levels on its cost curves, that the contributing States’ “combined reductions” would have on downwind air quality and identified “significant cost thresholds,” or “point[s] along the cost curves where a noticeable change occurred in downwind air quality.” *Id.* at 48,249 (Pet. App. 322a). So to accurately determine their reduction obligations, the covered States would have had to guess not only what EPA’s cost curves would look like, but also what changes on those curves would be most “noticeable” to EPA.

The complexity of the linkages between emissions from an upwind State and nonattainment in downwind States that the petitioners mention only further decreases the likelihood of matching EPA's analysis. *See, e.g.*, EPA Br. 6. And because downwind States are also required to control their own emissions, and may voluntarily choose to impose stricter controls than EPA requires, upwind States would also have to make accurate guesses about what controls those downwind States would implement.<sup>13</sup>

New York's brief eventually gets around to acknowledging this point. NY Br. 33 ("To be sure, in reviewing a SIP submission, EPA may ultimately disagree with a State's determination of its good-neighbor obligations and issue a FIP that provides its own determination of how to address interstate air pollution."); *see also* ALA Br. 53 (recognizing that "a State's assessment of its contribution might diverge from subsequent federal findings"). But given this concession, we are at a loss to understand how New York can simultaneously insist that the States can determine their good-neighbor obligations before EPA completes that work. *See* NY Br. 29 ("States Can And Do Independently Determine Their

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<sup>13</sup> Just as some States may choose to impose emissions-reduction obligations beyond those that EPA requires, others choose to impose no greater burdens on their sources than those EPA deems necessary. States that have made the latter policy decision can control in-state sources in the first instance only after they know the overall reductions EPA will require.

Good-Neighbor Obligations.”). As New York recognizes, the formula that the Transport Rule deploys for determining significant contribution under the good-neighbor provision is quite complex. *See id.* at 13; *see also* ALA Br. 18–20. Surely New York does not believe that the States could have figured out this formula through divination. But New York never explains how else the States are supposed to know whether and to what extent they must reduce their contributions to interstate air pollution.

The petitioners also suggest that section 7410(a)(2)(D)(i)(I) delegates interpretive authority to the States—at least until EPA acts to quantify the States’ good-neighbor obligations. *See* EPA Br. 24–25; *see also* NY Br. 30 (“Section [74]10(a)(2), which includes the good-neighbor provision, charges the *States* with responsibility for implementing SIP requirements in the first instance . . . . The Act thus obligates state authorities to interpret and apply the statute’s terms in the first instance—not to helplessly await EPA’s interpretation.”) (emphasis added). This argument runs headlong into *Chevron*, which established that statutory ambiguities are presumed to delegate gap-filling authority to the federal agency that administers the statute. 467 U.S. at 843–44. The States cannot decide the legal meaning of “significant[.]” contribution unless EPA chooses to give them that authority. *See* 63 Fed. Reg. at 57,369. And EPA has given the States no such authority here.

The petitioners' argument also contradicts EPA's longstanding interpretation of section 7410(a)(2)(D)(i)(I). In the 1998 NO<sub>x</sub> SIP Call, for example, EPA asserted that it held the sole prerogative to resolve the ambiguities in that provision—and that the States had no role to play in deciding what the statute means. *See* 63 Fed. Reg. at 57,368–70.

Now EPA seems to be saying that the States are to take the first crack at quantifying significance under section 7410(a)(2)(D)(i)(I). *See* EPA Br. 24–25 (“Nothing in the statute requires the EPA to quantify upwind States’ significant contribution obligations at all . . . . To the contrary, the States’ obligation to submit timely state plans with all required elements, including good neighbor provisions, is imposed directly by [section 7410(a)(2)(D)(i)(I)] itself.”). But EPA cannot abandon its claim to exclusive interpretive authority over section 7410(a)(2)(D)(i)(I) unless it provides a reasoned explanation for the change of heart. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”). No such explanation appears in the Transport Rule.

So it is no answer for the petitioners to say that the States can determine their good-neighbor obligations on their own. The States cannot predict how EPA will quantify significance in section 7410(a)(2)(D)(i)(I), and the States lack gap-filling authority over the statute under *Chevron* as well as

under EPA’s past interpretation of the statute. The only way that the petitioners can maintain their case is to claim that section 7410 allows EPA to leave the States in the dark: Announce a NAAQS, require the States to submit SIPs that must guess at how EPA will quantify their good-neighbor obligations, and then impose FIPs after the States either guess wrong or decide that this shell game is not worth playing.

But that is not a permissible construction of section 7410. Until EPA exercises its delegated authority to determine *how much* contribution to interstate air pollution is “significant[]” within the meaning of section 7410(a)(2)(D)(i)(I), the States have no obligation to implement EPA’s standard-to-be-announced-in-the-future—just as the States have no obligation to implement a NAAQS until EPA invokes its delegated authority and announces the standard.

The petitioners note the absence of specific statutory language requiring EPA to announce a formula for determining thresholds for “significan[ce]” and “interfere[nce]” under section 7410(a)(2)(D)(i)(I). *See* EPA Br. 24–26; NY Br. 24–27. But this observation gets them nowhere. Under *Chevron*, statutes are *presumed* to delegate gap-filling authority to the agency that administers the statute—regardless of whether the statute contains explicit language conferring that responsibility on the agency. And until EPA acts to fill the gaps in section 7410(a)(2)(D)(i)(I), the unglossed statute provides no guidance to States attempting to comply



with their good-neighbor obligations. Imposing a FIP to implement a previously unannounced good-neighbor obligation is no different from imposing a FIP to implement a previously unannounced NAAQS. In both situations, the agency that holds delegated gap-filling authority concealed its plans until after it was too late for the States to submit SIPs in the hope of staving off EPA-imposed FIPs.<sup>14</sup>

**C. EPA's Understanding Of Its FIP Authority Subverts The Regime Of Cooperative Federalism Established In The Clean Air Act.**

EPA's interpretation of its FIP authority is problematic for an additional reason: it empowers

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<sup>14</sup> EPA's brief attacks the court of appeals for analogizing the issuance of a NAAQS with the quantification of the States' good-neighbor obligations. See EPA Br. 31 n.10. But the analogy is EPA's own. In the NO<sub>x</sub> SIP Call, the agency explained:

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

63 Fed. Reg. at 57,369; see also *id.* at 57,370 (finding it "necessary" for EPA "to establish the [States'] overall emissions levels" under section 7410(a)(2)(D)(i)(I)).

the agency to undermine statutory prerogatives that the Clean Air Act preserves for the States.

The Clean Air Act ensures States an opportunity to avoid an EPA-imposed FIP by submitting a SIP that complies with the requirements of section 7410(a)(2). See 42 U.S.C. § 7410(a)(1) (providing that States have three years, “or such shorter period as the Administrator may prescribe,” to submit a SIP after EPA issues a NAAQS). The Transport Rule rendered this opportunity meaningless because EPA left the States unaware of how it would interpret the phrase “contribute significantly” until the moment it promulgated the Transport Rule FIPs. If EPA wants to promulgate a good-neighbor FIP based on a novel and previously unannounced construction of section 7410(a)(2)(D)(i)(I), it must first quantify the States’ good-neighbor obligations and provide the States a reasonable time period in which to submit SIPs. Anything less would make the States’ SIP-submission opportunity a matter of EPA whim rather than statutory entitlement.

EPA nevertheless insists that the Transport Rule FIPs are lawful because they were preceded by a SIP disapproval or finding of failure to submit, and (according to EPA) section 7410(c)(1) requires nothing more. But it is not enough under *Chevron* for an agency to show that its interpretation of a statute is linguistically possible. See *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); see also *Whitman*, 531 U.S. at 468–71; *FDA v. Brown & Williamson Tobacco Corp.*, 529

U.S. 120, 132 (2000). It must also be reasonable, and it is not reasonable to interpret the Clean Air Act in a manner that leaves the States' opportunity to avoid a FIP through the SIP-submission process entirely at the mercy of EPA.

Suppose that EPA announced a NAAQS but gave the States only two hours in which to submit SIPs. Section 7410(a)(1) establishes a default rule of three years for the States to submit SIPs after EPA issues a NAAQS, but provides that EPA "may prescribe" a "shorter period." EPA might try to defend this two-hour window as consistent with the literal language of section 7410(a)(1); two hours is indeed a "shorter period" than three years. But it would not be reasonable for EPA to establish a "shorter period" that deprives the States of any meaningful opportunity to stave off FIPs with their SIP submissions.

The same problem plagues the Transport Rule. By imposing FIPs on the same day that EPA quantified the States' good-neighbor obligations, EPA left the States without any genuine opportunity to avoid the Transport Rule FIPs by submitting SIPs. Even though years had elapsed between the time that EPA announced the relevant NAAQS and the time of the Transport Rule, the States could not determine their good-neighbor obligations because no State had any idea how EPA would interpret the phrase "contribute significantly." Indeed, the States did not know whether they would need to undertake any pollution-abatement efforts under EPA's not-

then-announced construction of section 7410(a)(2)(D)(i)(I).

EPA's approach is all the more unreasonable when one considers how state authority is preserved throughout the Clean Air Act. Many more provisions of the Act confirm the States' ability to:

- provide input on the classifications and obligations that EPA defines, *e.g.*, 42 U.S.C. §§ 7407(d)(1)(B)(ii) (area designations), 7411(f)(3) (new emissions sources);
- have a fair chance to satisfy EPA's obligations without federal interference, *e.g.*, *id.* §§ 7412(l)(1), (5) (programs addressing hazardous air pollutants); 7511a(g)(2)–(3), (5) (milestones for nonattainment areas); 7545(m) (standards for oxygenated fuel); and
- play the lead role in enforcement and implementation, *e.g.*, *id.* §§ 7411(c)(1) (performance standards for new sources), 7511b(e)(7) (controls targeting volatile organic compounds); *see also id.* § 7411(j)(1)(A) (conditioning EPA's power to grant a waiver to a new emissions source on "the consent of the Governor of the State in which the source is to be located").

Again and again, the Act allows EPA to step in only if the States choose not to regulate or their initial regulatory efforts fail. *E.g.*, *id.* §§ 7589(c)(2)(F) (authorizing EPA to establish an adequate clean-fuel program only if California does

not), 7651e(b) (authorizing EPA to allocate certain emissions allowances only if States do not). And when a state plan or program fails to meet the obligations EPA defines, the Act often gives the State a chance to fix the deficiency through revisions that will obviate the need for federal involvement. *E.g.*, *id.* §§ 7412(l)(5) (programs addressing hazardous air pollutants), 7424(b) (plans for major fuel-burning sources), 7661a(d)(1) (permit programs).

Outside of this litigation, EPA has repeatedly recognized the need to give States a reasonable opportunity to implement new obligations through SIPs after a final rule establishes a regional program under the good-neighbor provision. EPA explained in CAIR, for instance, that

[w]here . . . the data and analytical tools to identify a significant contribution from upwind States to nonattainment areas in downwind States . . . . may not be available, . . . [a State's] section [74]10(a)(2)(D) SIP submission should indicate that the necessary information is not available at the time the submission is made or that, based on the information available, the State believes that no significant contribution to downwind nonattainment exists.

70 Fed. Reg. at 25,263; *accord* JA 195 (2006 EPA guidance document); 77 Fed. Reg. at 46,363 & n.7 (EPA's confirmation a year *after* the Transport Rule was promulgated that section 7410(a)(2)(D)(i)

“contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution”).

And in CAIR, after acknowledging the limited requirements of SIPs submitted before EPA quantifies good-neighbor obligations for purposes of a new regional rule, EPA identified section 7410(k)(5) as the proper mechanism to address any new obligations: “EPA can always act at a later time after the initial section [74]10(a)(2)(D) submissions to issue a SIP call under section [74]10(k)(5) to States to revise their SIPs to provide for additional emission controls to satisfy the section [74]10(a)(2)(D) obligations if such action were warranted based upon subsequently-available data and analyses.” 70 Fed. Reg. at 25,263–64. The idea that EPA could unilaterally impose a FIP without affording the States a reasonable time for SIP submissions was not even considered as an option.

Indeed, EPA recognized in both the NO<sub>x</sub> SIP Call and CAIR that States should have the first opportunity to implement EPA-announced good-neighbor obligations. *See id.* at 25,167, 25,176; 63 Fed. Reg. at 57,451. The Transport Rule departed from those precedents without acknowledging them or explaining why it was not following them. *See Fox Television Stations*, 556 U.S. at 515. EPA now tries to suggest that it switched to a FIP-first regime to secure environmental benefits, but that explanation falls flat. EPA had CAIR in place for years before it issued the Transport Rule, and EPA’s own data show

that CAIR was achieving widespread downwind attainment. *See* 2011 Progress Report at 12, 14.

**D. The Petitioners' Remaining Arguments Are Without Merit.**

The petitioners and their supporters express concern that vacating the Transport Rule FIPs will cause EPA to violate the Clean Air Act in at least two respects. First, New York suggests that a ruling to this effect will leave EPA unable to impose FIPs when section 7410(c)(1) requires them. NY Br. 22. Second, the petitioners claim that it will cause EPA to violate the Clean Air Act by tolerating nonattainment in downwind States. *See* EPA Br. 27–28; *see also* NY Br. 27–29. Each of these concerns is chimerical.

The petitioners are correct to note that section 7410(c)(1) requires EPA to issue FIPs within two years after disapproving a State's SIP submission or finding that the State has failed to make a required submission. But the state and local respondents are not disputing EPA's authority (or statutory duty) to impose FIPs; they are challenging only the *contents* of the FIPs imposed by EPA's Transport Rule. EPA could, for example, have imposed good-neighbor FIPs based on CAIR, which the D.C. Circuit allowed to remain in place until EPA issued a valid replacement. *See North Carolina*, 550 F.3d at 1178. This approach would have fulfilled the statutory mandate of section 7410(c)(1), but without using the FIP process to impose good-neighbor obligations that were unknown to the States at the time EPA issued

its predicate findings or disapprovals. Then EPA could have announced its new interpretation of the States' good-neighbor obligations and allowed the States a reasonable time to submit SIPs to implement those requirements, using the CAIR FIPs as an interim measure as the process unfolded.

The petitioners are also wrong to suggest that vacating the Transport Rule FIPs will leave EPA powerless to protect downwind States from interstate air pollution. EPA remains able to impose CAIR FIPs on States that have failed to submit good-neighbor SIPs for the 1997 standards, and the States with EPA-approved CAIR SIPs already have plans in place to mitigate interstate transport of ozone and PM<sub>2.5</sub>. Those SIPs have resulted in widespread attainment of the ozone and PM<sub>2.5</sub> standards at issue here. *See* Industry & Labor Respondents' Br. Part I.A.3. CAIR FIPs might not provide immediate attainment of every NAAQS in every region of the country, but they would go a long way toward that goal while EPA undertakes the post-*North Carolina* tasks of quantifying new good-neighbor obligations, allowing the States a reasonable window of time to submit SIPs or SIP revisions, and deciding whether to approve the SIP submissions or impose FIPs instead.

Finally, if any downwind States find themselves in noncompliance with the relevant NAAQS, that is the fault of EPA. EPA waited nearly eight years after announcing its 1997 standards for 8-hour ozone and PM<sub>2.5</sub> before issuing findings of failure to submit



for the States that had failed to implement good-neighbor SIPs with respect to those standards. Then EPA promulgated CAIR, which was rejected as unlawful by the D.C. Circuit, forcing EPA back to the drawing board. EPA's delays and mistakes should not excuse its decision to impose FIPs immediately and deprive upwind States of the opportunity to avoid those FIPs by submitting SIPs. In short, EPA cannot benefit from an exigency of its own creation.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREG ABBOTT  
Attorney General of Texas

JONATHAN F. MITCHELL  
Solicitor General  
*Counsel of Record*

DANIEL T. HODGE  
First Assistant  
Attorney General

ANDREW S. OLDHAM  
Deputy Solicitor General

[additional counsel  
listed inside cover]

BILL DAVIS  
EVAN S. GREENE  
RICHARD B. FARRER  
Assistant Solicitors General

OFFICE OF THE  
ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
jonathan.mitchell@  
texasattorneygeneral.gov  
(512) 936-1700

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## APPENDIX

# SIP Opportunities Under the NO<sub>x</sub> SIP Call, CAIR, and the Transport Rule

