Nos. 12-1182 and 12-1183

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

v.

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

AMERICAN LUNG ASSOCIATION, ET AL.,
Petitioners,

v.

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

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS UTILITY AIR REGULATORY GROUP, *ET AL.*

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QUESTIONS PRESENTED

The Clean Air Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), requires States to include in implementation plans "adequate provisions" that, "consistent with the provisions" of Title I of the Act, prohibit sources within their borders from emitting air pollutants in "amounts" that "contribute significantly" to other States' "nonattainment" of national ambient air quality standards (NAAQS). Invoking this provision, the Environmental Protection Agency (EPA) adopted the Transport Rule, requiring upwind-state emission reductions without regard to whether the required reductions went beyond those needed to eliminate a State's significant contribution and without regard to whether those reductions went beyond those needed for NAAQS attainment.

The questions presented are as follows:

1. Whether EPA's refusal to allow state implementation of the EPA-determined reduction requirements at the program's outset was unlawful.

2. Whether EPA lacks authority under the good neighbor provision to prohibit upwind-state emissions that reach a downwind State in amounts that EPA expressly found do not contribute significantly to nonattainment.

3. Whether EPA was required to assure that Transport Rule emission reductions do not exceed the amounts needed for NAAQS attainment.

4. Whether EPA was required to base good-neighbor emission reduction requirements on only the fraction of an upwind State's total emissions that reach a downwind State and contribute significantly to nonattainment in that State.

5. Whether the court of appeals had jurisdiction to consider *Chevron* step-one challenges to the rule.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding is set forth at pages II-IV of the Brief for the Federal Petitioners.

RULE 29.6 STATEMENTS

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

Southern Company Services, Inc., **Alabama Power Company**, **Georgia Power Company**, **Gulf Power Company**, **Mississippi Power Company**, and **Southern Power Company** are all wholly-owned subsidiaries of Southern Company, which is a publicly-held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of any of these respondents' stock. No publicly-held company holds 10 percent or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO." Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include four vertically integrated electric utilities—

Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company—as well as Southern Power Company, which owns generation assets and sells electricity at market-based rates in the wholesale market. These subsidiaries, each a respondent here, operate nearly 46,000 megawatts of coal, natural gas, oil, nuclear, and hydroelectric generating capacity. Southern Company Services, Inc. is the services company for Southern Company and its operating subsidiaries. Southern Company Services, Inc. provides, among other things, engineering and other technical support for the operating companies.

Pursuant to Rule 29.6 of the Supreme Court of the United States, counsel for the Environmental Committee of the Florida Electric Power Coordinating Group, Inc. certifies that the **Florida Electric Power Coordinating Group, Inc.** (FCG), is a non-profit, non-governmental corporate entity organized under the laws of Florida. The FCG does not have a parent corporation. No publicly held company owns 10 percent or more of the FCG's stock.

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

Pursuant to Supreme Court Rule 29.6, counsel for the **National Mining Association** (NMA) certifies

that the NMA is an incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent company, and NMA has not issued shares or debt securities to the public, although NMA's individual members have done so.

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

Pursuant to Supreme Court Rule 29.6, counsel for **Peabody Energy Corporation** certifies that it is a publicly-traded company on the New York Stock Exchange under the symbol "BTU." Peabody Energy Corporation does not have a parent company, and as of December 31, 2012 filings, no holding companies own 10 percent or more of Peabody Energy Corporation's outstanding shares.

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JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (Pet. App. 1459a-1462a). The petitions for writs of certiorari were filed on March 29, 2013, and granted (and consolidated) on June 24, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set out in an appendix to the Brief for the Federal Petitioners.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. The Clean Air Act (CAA or Act) employs a "cooperative federalism" approach to the development and implementation of air quality standards. As described by the State and Local Government Respondents supporting affirmance of the court of appeals' decision, EPA defines air quality "ends," and the States then choose the "means" to achieve those ends through state implementation plans (SIPs). Brief of Respondents State of Texas, *et al.* (hereinafter Brief of State and Local Government Respondents or State Br.), at 1-2; see 42 U.S.C. § 7410(a). In

this way, the CAA makes control of air pollution "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); see *id.* § 7407(a).

The CAA directs States to implement a series of programmatic requirements in their SIPs, which result in future emission reductions consistent with the terms of the specific CAA programs being implemented. See 42 U.S.C. § 7410(a)(2). Such programmatic requirements include, for example, "New Source Review" permitting programs, *id.* § 7410(a)(2)(C); visibility protection requirements, *id.* § 7410(a)(2)(J); and the "good-neighbor" program, which requires that SIPs "contain adequate provisions . . . prohibiting, consistent with the provisions of this subchapter [*i.e.*, Title I of the Act]" emissions of pollutants from sources within the State that will "contribute significantly to nonattainment" of national ambient air quality standards (NAAQS) in any other State. *Id.* § 7410(a)(2)(D).

This case involves the peculiar challenges posed by implementation of the good-neighbor program in the context of regional air pollution problems.

2. Before its amendment in 1990, the good neighbor provision focused on localized interstate impacts on nonattainment. That pre-1990 version targeted emissions from "any stationary source" in one State that "prevent[ed]" attainment of NAAQS in another State. *Air Pollution Control Dist.* v. *EPA*, 739 F.2d 1071, 1075-76 (6th Cir. 1984) (quoting pre-1990 version of good neighbor provision). The provision was structured to deal with NAAQS like the one for sulfur dioxide that involve elevated local pollution caused by emissions from a nearby source or a discrete group of nearby sources. See *id.* at 1075-77;

Connecticut v. *EPA*, 656 F.2d 902, 906 (2d Cir. 1981). The pre-1990 version was never used to address NAAQS like the ones for ozone or fine particulate matter ($PM_{2.5}$). NAAQS for those pollutants address regional pollution formed through the transport and chemical transformation of so-called "precursor" pollutants that are emitted by numerous stationary and mobile sources over a large geographic area. See generally EPA, EPA-454/B-07-002, Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze at 4-5 (Apr. 2007), available at www.epa.gov/scram001/guidance_sip.htm (describing how ozone and $PM_{2.5}$ can result from precursor emissions far upwind).

In 1990, Congress amended the good neighbor provision to better address this type of regional pollution. See 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998) ("Under the 1990 Amendments, Congress recognized the growing evidence that ozone and its precursors can be transported over long distances and that the control of transported ozone was a key to achieving attainment of the ozone standard across the nation."). As amended in 1990, the provision covered all "emissions activity within the State," not just "any stationary source" in the State. And the trigger for regulation was changed from emissions that "prevent attainment" to those that "contribute significantly to nonattainment." The good neighbor provision now provides that SIPs must:

> contain adequate provisions—
>
> (i) prohibiting, consistent with the provisions of this subchapter [*i.e.*, Title I of the Act], any source or

> other type of emissions activity within the State from emitting any air pollutant in amounts which will—
>
> (I) contribute significantly to nonattainment in . . . any other State with respect to any such national primary or secondary ambient air quality standard . . . .

42 U.S.C. § 7410(a)(2)(D).

The text of the good neighbor provision establishes two criteria that define the scope of the contemplated "prohibit[ion]" on emissions that "contribute significantly to nonattainment." First, only "significant[ ]" contributions to ambient air quality that is in "nonattainment" are properly subject to regulation by EPA. Accordingly, the provision cannot be invoked to prohibit emissions that contribute *insignificantly* to nonattainment or that contribute to air quality that is as good as, or better than, the NAAQS. Second, only that portion of the total emissions from an upwind State that both reaches a downwind State *and* contributes significantly to nonattainment in that State may be subject to the regulatory requirement. The good neighbor provision, in other words, targets only that portion of the upwind State's emissions that contributes significantly to nonattainment areas in downwind States. It cannot be used to require regulation of emissions that are not transported outside the upwind State to such a downwind area.

The good neighbor provision is but one of the emission reduction measures Congress established to address nonattainment. In establishing this measure, Congress mandated that any prohibition on

emissions that contribute "significantly" must be "*consistent with* the provisions of [Title I of the CAA]." 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Thus, EPA's "significant contribution" reduction requirements not only must observe the statutory limits discussed above but also must be "consistent with" separate but related CAA provisions.

Two elements are common to all of the statutory requirements in Subpart D of Title I of the CAA, 42 U.S.C. §§ 7501-7515, that relate to *intrastate* nonattainment SIPs. First, nonattainment emission reduction requirements must stop at the point of NAAQS attainment. Second, reduction requirements must be moderated where achieving attainment would be infeasible or otherwise entail excessive costs. See, *e.g.*, 42 U.S.C. § 7502(c)(2) ("plan provisions shall require reasonable further progress" toward attainment); *id.* § 7501(1) (defining "reasonable further progress" as "such annual incremental reductions in emissions . . . as . . . may reasonably be required . . . for the purpose of ensuring attainment"); *id.* § 7502(c)(1) ("[s]uch plan provisions shall provide for the implementation of all reasonably available control measures," including "reasonably available control technology"); 40 C.F.R. § 51.100(o) (defining "[r]easonably available control technology" as including consideration of control costs); 42 U.S.C. § 7511b(d) (providing that, in support of state plan development, EPA "shall provide guidance to the States to be used in evaluating the relative cost-effectiveness of various options for the control of emissions from existing stationary sources . . . which contribute to nonattainment"); *id.* § 7509(d) ("[c]onsequences for failure to attain" NAAQS in an area include imposition of "such additional measures

as [EPA] may reasonably prescribe, including all measures *that can be feasibly implemented in the area in light of technological achievability, costs, and any . . . health and environmental impacts*" (emphasis added)).[1]

To be "consistent with" these intrastate nonattainment provisions, EPA, in establishing good-neighbor emission reduction obligations, may use costs and feasibility to moderate the level of emission reductions that otherwise would be required where limiting contributions to nonattainment in a downwind State would otherwise be unreasonable. As the court below observed: "EPA may consider cost, but only to further lower an individual State's [emission reduction] obligations" under the good neighbor provision. Pet. App. 27a (citing *Michigan* v. *EPA*, 213 F.3d 663, 675 (D.C. Cir. 2000) (per curiam); *North Carolina* v. *EPA*, 531 F.3d 896, 918 (D.C. Cir.) (per curiam), *modified on other grounds on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam)).

[1] See also 42 U.S.C. § 7511(b)(2) (providing that, for ozone, the consequence of an area's failure to attain generally is "reclassification" of the area so as to provide more time for attainment and to require application of additional, feasible controls); *id.* § 7513(e) (providing that, for particulate matter, attainment deadlines may be extended if attainment by the otherwise-applicable statutory date "would be impracticable" and the State demonstrates it has required the most stringent measures that "can feasibly be implemented in the [nonattainment] area" in question).

II. EPA's Approach to Defining Good-Neighbor Emission Reduction Obligations for Regional Pollution Problems

A. EPA's Decision To Define States' Good-Neighbor Emission Reduction Obligations Through Separate and Distinct Comprehensive Regional Programs

EPA first invoked the amended good neighbor provision to address a regional pollution problem in the late 1990s in the rulemaking that became known as the "NOx SIP Call."[2] See 63 Fed. Reg. 57,356 (Oct. 27, 1998). In that rulemaking, EPA addressed significant contributions to nonattainment of NAAQS for the pollutant ozone and, in this context, addressed what it means to "contribute significantly to nonattainment." See *id.* at 57,369.

For other CAA SIP programs, EPA has promulgated regulations that establish generally applicable requirements for identifying emissions that might need to be reduced and criteria for developing future emission limitations under those programs. EPA uses this "how-to manual" approach, for example, in addressing SIPs required by 42 U.S.C. § 7410(a)(2)(J) to implement the CAA visibility protection program, which calls for "reasonable progress" toward a national visibility goal, 42 U.S.C. § 7491(b)(2). EPA does not itself identify specific "reasonable progress" emission reductions for each State to implement through SIP revisions. Rather, EPA's regulations provide instructions for States to follow in developing their own "reasonable progress" emission reduction

[2] "NOx" means "nitrogen oxides."

requirements for their SIPs. See 40 C.F.R. § 51.308(d), (e).

Theoretically, EPA could have developed a similar approach with respect to the good neighbor provision. If EPA had done so, then immediately after EPA promulgated any new NAAQS, each State would have had a defined process to follow that would allow it to identify—and to develop control requirements that would satisfy—any good-neighbor emission reduction obligations it might have. But, instead of establishing a process that would allow each State to determine whether emission reductions are required—and, if they are, to determine the required amounts of those reductions—EPA opted for a federal rulemaking approach on a multi-state scale, under which EPA itself (1) identifies those States that have good-neighbor emission reduction obligations, (2) defines or quantifies those obligations for each chosen State, and then (3) gives each such State the opportunity to implement those obligations through SIP revisions. See 63 Fed. Reg. at 57,369, 57,376.

In its NOx SIP Call rulemaking, EPA selected this multi-state approach because NOx and other ozone precursors emitted over a wide geographic area can contribute to ozone concentrations in the ambient air hundreds of miles away, through a variety of chemical and atmospheric processes that transform those precursors into ground-level ozone. See *id.* at 57,359, 57,360. As EPA explained:

> It is becoming increasingly apparent that some of the most highly polluted ozone nonattainment areas will not be able to demonstrate attainment simply

> through the implementation of control measures within the nonattainment area. In some cases, significant ozone concentration and precursor emission reductions within the upwind air mass being transported into the nonattainment area also appear to be necessary.

62 Fed. Reg. 1420, 1422 (Jan. 10, 1997).

EPA recognized that its decision to define by regulation the good-neighbor emission reduction obligations of upwind States must be harmonized with the CAA's cooperative federalism structure. Under this structure, EPA could not simultaneously define the reduction obligation and dictate the measures that sources in each covered State must use to meet that obligation. See *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("The Act gives the Agency 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)], and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.") (citing 42 U.S.C. § 7410(c)). Rather, the States must be given an opportunity to implement their emission reduction obligations as newly defined by EPA. Accordingly, EPA used the CAA's SIP call provision—42 U.S.C. § 7410(k)(5)—and gave each State included within the program the opportunity and time to revise its SIP to implement its EPA-defined statewide good-neighbor emission reduction obligation. EPA's approach in this respect was consonant with the Act's core structure, under which EPA promulgates NAAQS or regulations governing programmatic emission reduction requirements, and

States determine the mix of controls to implement those EPA-defined control objectives. As EPA explained in promulgating the NOx SIP Call,

> [o]nce EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of [42 U.S.C. § 7410(a)(2)(D)]), it falls to the State to determine the appropriate mix of controls . . . .

63 Fed. Reg. at 57,369.

This decision, whatever its merit, had consequences for the establishment of future good-neighbor emission reduction obligations to address regional pollution problems. In particular, EPA's decision meant that a State would not—indeed, could not—know whether it "significantly contributed" to downwind nonattainment, and, if so, what emission reductions the good neighbor provision demanded of it, until EPA had conducted and completed a comprehensive good-neighbor regional rulemaking.

As EPA explained,

> the data and analytical tools available at the time the section [7410(a)(2)(D)] SIP is developed and submitted to EPA necessarily affect the content of the [SIP] submission [required after promulgation of a new NAAQS]. Where . . . the data and analytical tools to identify a significant contribution from upwind States to nonattainment areas in downwind States are available [*i.e.*, where EPA has adopted a final rule

> identifying good-neighbor reductions for covered States], the State's SIP submission must address the existence of the contribution and the emission reductions necessary to eliminate the significant contribution.

70 Fed. Reg. 25,162, 25,263 (May 12, 2005). Because some States would be evaluated in EPA's regional rulemaking, however, EPA recognized that

> *the section [7410(a)(2)(D)] SIP submission [for such a State] should indicate that the necessary information is not available at the time the submission is made . . . . EPA [will] . . . act at a later time after the initial section [7410(a)(2)(D)] submissions to issue a SIP call under section [7410(k)(5)] to States to revise their SIPs to provide for additional emission controls to satisfy the section [7410(a)(2)(D)] obligations if such action [is] warranted based upon subsequently-available data and analyses.*

Id. at 25,263-64 (emphasis added). In other words, if a State is not in a multi-state good-neighbor program, it has no obligation to submit a SIP requiring additional emission controls. If controls are found to be needed later, EPA will identify the State's emission reduction obligation at that time through a SIP call rulemaking.

B. The NOx SIP Call and CAIR

The briefs of State and Local Government Respondents and of Industry and Labor Respondents

discuss EPA's first two regional good-neighbor programs—the NOx SIP Call, which addressed good-neighbor obligations under the 1997 "8-hour" ozone NAAQS and the 1979 "1-hour" ozone NAAQS, and the Clean Air Interstate Rule (CAIR), which addressed the 1997 NAAQS for 8-hour ozone and for annual $PM_{2.5}$. This brief will not duplicate that discussion but emphasizes three important features of these programs that bear on the questions addressed here.

First, both of these programs used the same basic two-step framework for identifying and quantifying the good-neighbor emission reduction obligations for regionally widespread pollutants like ozone and $PM_{2.5}$. That framework requires EPA: (1) to identify which States have emission reduction obligations and which do not; and (2) to define, in quantitative terms, that obligation for each covered State. See, *e.g.*, 63 Fed. Reg. at 57,365.

Second, as discussed in the Brief of State and Local Government Respondents, both the NOx SIP Call and CAIR respected the CAA's cooperative federalism structure by calling on States to submit SIPs to implement the emission reduction obligations identified in EPA's comprehensive rule. The NOx SIP Call gave States "real choice" as to how to implement the obligations defined by EPA. *Michigan,* 213 F.3d at 687-88. CAIR likewise gave the States "the flexibility to choose the measures to adopt to achieve the specified emissions reductions." 70 Fed. Reg. at 25,167.

Finally, each of EPA's multi-state programs, including the Transport Rule, was unique. It was impossible for any State to know definitively whether it

would be included in these multi-state programs at all, let alone what its precise reduction obligations would be, until EPA took final rulemaking action resolving those issues. EPA relied exclusively on its own modeling to identify the States contributing to ozone and $PM_{2.5}$ nonattainment at levels exceeding the EPA-specified "insignificance" thresholds and to unravel the linkages between upwind and downwind States. Each of EPA's good-neighbor rulemakings was infused with myriad technical assumptions and policy judgments that were subject to change between EPA's proposal and its final promulgation of each program. As a result, predicting the outcome of these determinations in advance for each of these distinct good-neighbor programs would have been impossible—a "fool's errand." State Br. at 40.

III. The Transport Rule

In August 2010, EPA proposed the Transport Rule as its response to the D.C. Circuit's remand of CAIR in *North Carolina*. 75 Fed. Reg. 45,210 (Aug. 2, 2010). EPA promulgated the final Transport Rule a year later. 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a-1417a).

In the Transport Rule, EPA created, "from the ground up," *North Carolina*, 531 F.3d at 929, a new good-neighbor emission reduction program, covering different States, addressing an additional NAAQS, and imposing different emission reductions than did CAIR or the NOx SIP Call. In developing the Transport Rule, EPA applied its two-step framework to develop programs for the 1997 NAAQS for ozone and $PM_{2.5}$ addressed in CAIR as well as the newer, 2006 "24-hour" NAAQS for $PM_{2.5}$.

At step one, EPA found that upwind-state emissions contributing less than one percent of the relevant NAAQS to any downwind area "do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." 76 Fed. Reg. at 48,236, 48,237 (Pet. App. 255a, 256a). EPA used this insignificance threshold to identify those States that were not subject to *any* good-neighbor emission reduction obligation for the ozone and $PM_{2.5}$ NAAQS. For those States contributing above the threshold, EPA in step two defined their emission reduction obligations using cost-effectiveness criteria that differed from those used in earlier programs. See 75 Fed. Reg. at 45,233 (contrasting Transport Rule cost analysis with that in the NOx SIP Call and CAIR).

The coverage of States in the proposed Transport Rule differed from that in CAIR, with some States added and others removed. *Id.* at 45,338 (explaining differences in coverage between CAIR and the proposed Transport Rule). The coverage also changed between the proposed and final rules for each of the NAAQS being addressed. Initially, a total of 31 States and the District of Columbia had emission reduction responsibilities. *Id.* at 45,212-13 (24 jurisdictions for annual $PM_{2.5}$ NAAQS; 25 for 24-hour $PM_{2.5}$ NAAQS; and 26 for ozone NAAQS). But the States covered by the program remained in flux until EPA promulgated the final Transport Rule. In the final rule, EPA imposed emission reduction obligations on Texas without prior notice, while EPA dropped other States from the program altogether. EPA included 27 States in the final rule. 76 Fed. Reg. at 48,210 (Pet. App. 130a-131a) (18 States for annual $PM_{2.5}$ NAAQS; 21 for 24-hour $PM_{2.5}$ NAAQS; and 20 for ozone NAAQS).

Two aspects of the final Transport Rule are important here. First, unlike its predecessors, the Transport Rule did not call on States to develop and submit SIPs establishing the means for accomplishing the EPA-defined ends. To the contrary, EPA immediately imposed federal implementation plans (FIPs) to implement those obligations. *Id.* at 48,208, 48,212, 48,219-20 (Pet. App. 117a, 139a-142a, 170a-176a).

Second, EPA declined to evaluate whether the emission reductions mandated by the final rule conformed to limits imposed by the text of the good neighbor provision—*i.e.*, whether the final rule's requirements assured that emissions that either make no contribution or make only an "insignificant" contribution to nonattainment would be excluded from the rule's coverage.

IV. The Decision of the Court of Appeals

When the D.C. Circuit was asked to review the Transport Rule, the court began, as every reviewing court must, by identifying the statutory limits imposed on agency authority. It then assessed EPA's action in the context of those statutory limits.

As a result of this analysis, the court found that the Transport Rule violated the language of 42 U.S.C. § 7410(a)(2)(D)(i)(I) and the D.C. Circuit's mandate in *North Carolina*. The rule crossed three clear statutory limitations on EPA's authority by: (1) requiring reductions in emissions that contribute insignificantly to downwind nonattainment; (2) requiring greater emission reductions than needed to achieve attainment; and (3) requiring reductions in emissions from an upwind State that would never

reach the downwind nonattainment areas in question. Pet. App. 31a-40a. The court also found that EPA had no authority under 42 U.S.C. § 7410(c) to promulgate FIPs implementing this new and unique multi-state program without first having defined the end required of States (*i.e.*, state emission budgets) and then having given each State an opportunity to choose the means of achieving those ends through development and submittal of a SIP.

SUMMARY OF ARGUMENT

The court of appeals correctly held that EPA acted beyond its statutory authority in promulgating the Transport Rule and that the rule was therefore unlawful. The court of appeals' decision should be affirmed.

I.A. The court of appeals had jurisdiction to address the FIP-before-SIP issue. Only the Transport Rule FIPs were before the court. No other EPA actions were affected by the court of appeals' vacatur of those FIPs. The Transport Rule FIPs and earlier SIP disapprovals (and findings of failure to submit) were separate and distinct EPA actions. As petitioners below were not collaterally attacking any earlier EPA actions, there was no jurisdictional impediment to the court's review of the merits of petitioners' FIP-before-SIP argument.

I.B. EPA chose to establish good-neighbor emission reduction requirements for ozone and $PM_{2.5}$ NAAQS through regional emission reduction programs. As a result, a State's good-neighbor ozone and $PM_{2.5}$ SIP obligations depended entirely on whether that State was included in the Transport Rule. Under any CAA program that must be imple-

mented in SIPs, States must be given the opportunity to exercise their statutory role at the implementation stage. The Transport Rule denied States that right.

The court of appeals correctly determined that the approach that EPA took in the Transport Rule was contrary to how the CAA's cooperative federalism structure works. EPA's argument here that States could have escaped EPA's imposition of a FIP by undertaking the regional analyses necessary to identify amounts of emissions that must be abated under the good neighbor provision conflicts with the system EPA chose to create to address regional interstate pollution. As EPA concluded in 1998, with respect to the ozone NAAQS, it was "EPA's responsibility" to determine the overall level of air pollutants that could be emitted in a given State without violating 42 U.S.C. § 7410(a)(2)(D)(i)(I). 63 Fed. Reg. at 57,369.

EPA reiterated this view of the good neighbor provision's applicability to regional pollution in defending the NOx SIP Call and in its CAIR rulemaking. The position EPA takes now in defense of the Transport Rule, however, flatly contradicts these long-standing pronouncements. And EPA's own actions in approving and disapproving good-neighbor SIPs establish that any SIP submittal by a potential Transport Rule State that was premised on the State's *not* contributing significantly to downwind nonattainment could not (and would not) have been approved until EPA concluded *in the final Transport Rule* that the State was outside the program.

II.A. The court of appeals correctly determined that the Transport Rule was statutorily flawed in

three distinct respects. The court's conclusion that the rule must be vacated as contrary to clear congressional intent should therefore be affirmed.

The first flaw is that the Transport Rule required upwind States to reduce amounts of pollutants that EPA itself had found to be "insignificant." Under 42 U.S.C. § 7410(a)(2)(D)(i)(I), the court of appeals held, EPA lacked statutory authority to compel such reductions. Once EPA found that amounts below one percent of the relevant NAAQS did not "contribute significantly" to nonattainment, EPA was precluded from requiring States to eliminate any portion of those "insignificant" contributions.

The second flaw is that the Transport Rule requires upwind-state reductions in emissions that never leave the State or contribute to downwind-state nonattainment. Because only part of the emissions originating in an upwind State will leave that State, and only a fraction of that part will "contribute significantly" to nonattainment in a downwind State, EPA exceeded its section 7410(a)(2)(D)(i)(I) authority.

The third flaw is that EPA failed in the Transport Rule to ensure that the collective obligations of the upwind States, when aggregated, did not produce unnecessary over-control (*i.e.*, more upwind-state emission controls than needed to achieve attainment of the NAAQS in downwind States). Under the plain terms of the good neighbor provision, the court held, EPA was required to account for such over-control. EPA does not here dispute the court of appeals' reading of the statute. The Agency can only suggest that the court's concern was theoretical in nature. But the record below contradicts EPA's attempts to dis-

miss the court's determination that the Transport Rule failed to respect this statutory limitation on EPA's authority.

II.B. The court of appeals had jurisdiction to consider the statutory objections to the lawfulness of the Transport Rule's "significant contribution" emission reduction requirements that were raised below. In addressing the statutory limits on EPA's "significant contribution" rulemaking authority, the court acted in accordance with its powers as a reviewing court.

The CAA imposes on a court reviewing EPA FIPs the obligation to "reverse any such action found to be . . . in excess of statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9). That is what the court of appeals did: it determined that the Transport Rule failed as a matter of law. In so doing, the court acted in a manner consistent with the principles that underpin the administrative exhaustion doctrine and did not contravene the provisions of 42 U.S.C. § 7607(d)(7)(B). EPA argues here for a regime under which agencies would be discharged from obeying clear statutory commands, and reviewing courts would be precluded from exercising their constitutional and statutory responsibilities, whenever EPA claims that a statute's plain meaning is not spelled out with sufficient specificity in a rulemaking comment. That is not the law.

ARGUMENT

I. The Court of Appeals' Invalidation of EPA's FIP-Before-SIP Approach Should Be Affirmed.

A. The Court of Appeals Had Jurisdiction To Address the FIP-Before-SIP Issue.

The challenge below to EPA's FIP-before-SIP approach arose in briefing timely-filed petitions to review EPA's Transport Rule FIPs. Neither in those petitions nor in the briefs below did anyone argue that the earlier EPA actions disapproving SIPs and making findings of failure to submit SIPs should be set aside. Accordingly, the court below vacated only the Transport Rule FIPs; it rendered no judgment and made no disposition with respect to any other EPA action. As a result, petitioners below did not collaterally attack earlier EPA actions. For that reason, and the reasons presented in the Brief of State and Local Government Respondents, there was no jurisdictional impediment to the court of appeals' review of the merits of the FIP-before-SIP argument.

Petitioners also largely ignore timely petitions filed by Georgia, Kansas, and Ohio for judicial review of EPA's disapproval of their respective good-neighbor SIP submissions.[3] Proceedings on those pe-

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[3] These EPA disapprovals are published at 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 43,159 (July 20, 2011) (Georgia); and 76 Fed. Reg. 43,175 (July 20, 2011) (Ohio). Petitions to review the disapproval of the Kansas and Georgia SIPs are pending in the D.C. Circuit. See *Westar Energy, Inc.* v. *EPA*, No. 11-1333 (D.C. Cir. filed Sept. 19, 2011); *Georgia* v. *EPA*, No. 11-1427 (D.C. Cir. filed Nov. 3, 2011). A petition to review the disapproval of the Ohio SIP is pending in the Sixth

titions for review have been stayed in the courts of appeals pending the outcome of this case.[4] But those SIP disapproval cases are independent of this Transport Rule FIP case. Consider what will happen to the SIP cases after the present case concludes.

Those pending SIP cases will be disposed of in one of two ways depending upon this Court's disposition of the present case. If the Court affirms the D.C. Circuit's decision and adopts its reasoning on the FIP-before-SIP issue, the issues in those SIP disapproval cases may be narrowed but not resolved. For example, EPA disapproved Kansas's SIP submission for two reasons: (1) it failed to anticipate the outcome of the Transport Rule; and (2) it was not supported by sufficient data. A Kansas challenge as to reason (1) would likely be rendered moot by a decision affirming the D.C. Circuit's reasoning, but a challenge as to reason (2) would not be moot. Kansas would need to prevail in its challenge on that latter basis to prevent EPA from including Kansas in a successor to the Transport Rule.

Circuit. See *Ohio* v. *EPA*, No. 11-3988 (6th Cir. filed Sept. 19, 2011).

[4] The Georgia and Kansas SIP disapproval cases were stayed at EPA's request. EPA, in a joint submission with the States, argued that the SIP disapproval cases should be stayed pending the outcome of the review of the Transport Rule because the decision in the Transport Rule case "could narrow or eliminate some issues that would otherwise be presented in [the SIP disapproval] litigation, or eliminate the need for litigating [the SIP disapproval] case[s] altogether." Joint Motion To Hold Case in Abeyance ¶ 6, *Georgia* v. *EPA*, No. 11-1427 (D.C. Cir. Jan. 17, 2012), Doc. No. 1353040; Joint Motion To Hold Case in Abeyance ¶ 6, *Westar Energy, Inc.* v. *EPA*, No. 11-1333 (D.C. Cir. Jan. 17, 2012), Doc. No. 1353039.

On the other hand, if this Court were to agree with EPA that the States' challenge was a collateral attack on these SIP disapprovals, and vacates that part of the decision below for lack of jurisdiction, then the issue would be back before the court of appeals almost immediately. The abeyance of the SIP disapproval cases would be lifted, and the D.C. Circuit would be asked to consider the questions that EPA says should have been considered on review of the SIP disapprovals and not in this case. If the D.C. Circuit were to adopt in those cases the same reasoning it applied in its merits decision on review here—as one must assume it would—and find the SIP disapprovals to be unlawful, then the Transport Rule FIPs for these States as they relate to the 2006 $PM_{2.5}$ NAAQS would lack a lawful predicate and therefore would be vacated. And, because the Transport Rule FIPs are not severable, all other Transport Rule FIPs would fall as well. See State Br. at 23.

B. Approval of Good-Neighbor SIP Submissions Depended Entirely on Whether the State Was Included in the Transport Rule.

There are good reasons why EPA opted to define "contribute significantly" with respect to ozone and $PM_{2.5}$ NAAQS through comprehensive rulemakings governing multiple States. Ozone and $PM_{2.5}$ are fairly described as regional pollution problems that demand regional solutions. But that approach is consistent with the CAA only if States are given an opportunity to perform their statutory role at the implementation stage. *Michigan*, 213 F.3d at 687.

EPA failed to give States that opportunity in the Transport Rule. State Br. at 12-13. EPA simultane-

ously (1) identified the States that had any good-neighbor emission reduction obligations; (2) defined what those obligations would be; and (3) imposed FIPs to implement those obligations. This, the court of appeals correctly held, is not how the CAA's cooperative federalism structure is designed to work.

EPA responds by suggesting that the States could have done their jobs without EPA's help. EPA Br. at 26 ("Nothing in the Act makes the timing of the State's submission contingent on prior action by the EPA to define what portion of its contribution to downwind nonattainment is 'significant.'"). If States simply had performed the technical analyses themselves, EPA argues, they could have identified emissions that must be abated under the good neighbor provision and thus would have escaped EPA's FIPs. *Id.* at 27.

This litigation position is fundamentally at odds with the system EPA created in 1998 and with repeated Agency pronouncements since then. From the outset, EPA rejected adoption of a regulatory system that would allow States to determine for themselves what their good-neighbor emission reduction obligations would be. Cf., *e.g.*, 40 C.F.R. § 51.308(d)(1) (regulations telling States how to derive the emission reductions necessary to make "reasonable progress" toward visibility objectives). Instead, EPA concluded in 1998 that, for NAAQS like the ozone NAAQS, "[d]etermining the overall level of air pollutants allowed to be emitted in a State [without violating section 7410(a)(2)(D)]" would be "EPA's responsibility." 63 Fed. Reg. 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

[7410(a)(2)(D)])," *id.,* States would be responsible for choosing the mix of controls to abate those emissions.

Until it developed the Transport Rule, EPA readily acknowledged that its regional rulemaking approach was the administrative path EPA chose to create good-neighbor obligations that would trigger adoption of emission reduction SIPs. In the preamble to CAIR, for example, EPA explained that States outside the regional rulemaking were not required to adopt good-neighbor SIPs reducing their emissions. Instead, EPA explained, it can "issue a SIP call . . . to States to revise their SIPs to provide for additional emission controls to satisfy . . . [good-neighbor] obligations . . . based upon subsequently-available data and analyses." 70 Fed. Reg. at 25,263-64. EPA's argument here ignores this historical understanding and contradicts the arguments it advanced to defend its regional rulemaking approach when it was challenged in the court of appeals following promulgation of the NOx SIP Call. See *Michigan*, 213 F.3d at 685-88.

EPA's argument here also is contradicted by its actions in approving and disapproving good-neighbor SIPs submitted in response to the 2006 $PM_{2.5}$ NAAQS. That record demonstrates that no State that EPA later included in the Transport Rule could have developed and submitted a SIP that EPA would have approved. The sole criterion that would allow EPA to approve a good-neighbor SIP submission under the 2006 $PM_{2.5}$ NAAQS was whether the State making the submission was excluded from the final Transport Rule's coverage.

Compare the experience of Kansas, a State that EPA included in the final Transport Rule, and that of

Delaware, a State that EPA did not include in the final Transport Rule. Kansas and Delaware each submitted a SIP attempting to demonstrate through modeling data that the State did not contribute significantly to nonattainment or interfere with maintenance. EPA disapproved Kansas's submittal based on EPA's Transport Rule modeling supporting Kansas's inclusion in the Transport Rule. 76 Fed. Reg. at 43,145. EPA approved Delaware's submittal based on Transport Rule modeling that excluded Delaware from the program. 76 Fed. Reg. 53,638 (Aug. 29, 2011). In that approval, EPA made clear that it would have disapproved Delaware's SIP if EPA had made that State subject to the final Transport Rule. See *id*. at 53,638-39.

Because—and only because—Delaware was not included in the Transport Rule, EPA could approve the SIP, even though Delaware's technical demonstration was no more robust than the CAIR-based modeling provided by Kansas. *Id.* In short, whatever EPA may say now, the truth is that any submission by any potential Transport Rule State premised on the State not contributing significantly to downwind nonattainment could not have been approved before EPA promulgated the final Transport Rule with that State being excluded from coverage.

The Kansas and Delaware examples demonstrate that coverage of the good-neighbor regional program was dependent on promulgation of the Transport Rule in final form. As a result, specific emission reduction obligations for covered States did not, as a matter of law, come into existence until EPA's rule

was final.[5] No State may be required to submit a SIP now in order to satisfy requirements that are to be defined in the future. Cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). And no State was required to guess the terms of the Transport Rule in preparing SIP submissions years before EPA promulgated that rule. As the State and Local Government Respondents argue, this is a classic case of "hide the ball." State Br. at 20, 39. It is completely inconsistent with a system of cooperative federalism.

II. The Transport Rule Impermissibly Exceeds Statutory Boundaries.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Georgetown Univ. Hosp.*, 488 U.S. at 208. EPA "is a

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[5] Similarly, the regulatory consequence of failing to submit a good-neighbor SIP following promulgation of the 2006 $PM_{2.5}$ NAAQS depended entirely on the outcome of EPA's Transport Rule rulemaking. On June 9, 2010, EPA found that 29 States and territories had failed to submit good-neighbor SIPs for the 2006 $PM_{2.5}$ NAAQS. 75 Fed. Reg. 32,673 (June 9, 2010). Seventeen of those States and territories were not identified in the Transport Rule as "significantly contributing" to nonattainment of the 2006 $PM_{2.5}$ NAAQS in downwind States within the Transport Rule region. EPA has not imposed a FIP on any of these States. Indeed, EPA announced it had determined that, in light of its Transport Rule findings, one of those States—North Dakota—need not modify its SIP at all to address the good neighbor provision with respect to the 2006 $PM_{2.5}$ NAAQS. 78 Fed. Reg. 45,457 (July 29, 2013).

creature of statute, and has only those authorities conferred upon it by Congress; if there is no statute conferring authority, a federal agency has none." *North Carolina*, 531 F.3d at 922 (internal quotation marks omitted).

When establishing States' emission reduction obligations as part of a multi-state good-neighbor program, EPA must conform to the limits in 42 U.S.C. § 7410(a)(2)(D)(i)(I). The plain language of this provision precludes EPA from (1) prohibiting emissions that do not contribute significantly to nonattainment; (2) requiring emission reductions in amounts greater than necessary to achieve attainment; and (3) basing reduction requirements on emissions that never leave the upwind State and therefore can never reach the downwind-state nonattainment area. These statutory limits mean that a State can be required to prohibit no more than the amount of its total emissions that is transported to, and that contributes significantly to NAAQS nonattainment in, a downwind State. In promulgating the Transport Rule, EPA ignored these statutory boundaries.

A. The Transport Rule Is Statutorily Flawed in Three Distinct Respects.

The Transport Rule used a two-step approach in imposing good-neighbor ozone and $PM_{2.5}$ NAAQS emission reduction requirements. EPA first identified an air quality contribution threshold below which States could not be said to "contribute significantly" to nonattainment. 76 Fed. Reg. at 48,238-46 (Pet. App. 265a-309a). For each NAAQS, EPA made a finding in the rulemaking that a contribution of less than one percent of the NAAQS to any of the downwind nonattainment areas at issue "*do[es] not*

significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." *Id.* at 48,236, 48,237 (Pet. App. 255a, 256a) (emphasis added).

After identifying the States that would be included in the multi-state program, EPA quantified the amount of emissions that each State must abate. Because good-neighbor emission reduction requirements must be "consistent with the provisions" of Title I of the CAA, the cost of emission controls may properly moderate the reduction amount needed to achieve good-neighbor air quality goals. See *supra* at 5-6 & n.1 (identifying numerous provisions of Title I that require consideration of cost and feasibility in limiting CAA nonattainment-based emission reduction obligations). Rather than using cost as a brake on required reductions in emissions contributing to air quality concentrations that exceed one percent of the NAAQS, however, EPA used cost as a license to compel reductions in emissions that contribute insignificantly to nonattainment, as well as to mandate emission reductions exceeding the amount required to achieve NAAQS attainment.[6]

The court of appeals found that, in adopting this approach, EPA exceeded its authority in "at least

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[6] The Brief of Industry and Labor Respondents (hereinafter Industry Br.) argues that EPA cannot consider costs in defining "significant contribution." This Court need not resolve whether, and, if so, how, costs may be considered under the good neighbor provision in order to affirm the court of appeals' vacatur of the Transport Rule. All respondents urging affirmance of the court of appeals' decision agree that requiring reductions in emissions that contribute insignificantly to nonattainment cannot, as a matter of law, be justified on cost or any other grounds.

three independent but intertwined" ways. Pet. App. 31a. Each of the discrete flaws that the court of appeals identified in the Transport Rule compels the conclusion that the rule must be vacated as contrary to clear congressional intent.

First, the court of appeals found that, under 42 U.S.C. § 7410(a)(2)(D)(i)(I), EPA had "no statutory authority to compel States to reduce amounts of pollution that are 'insignificant.'" *Id.* That is, the CAA "requires [an upwind] State to prohibit *at most* those 'amounts' which will 'contribute significantly'—and no more." *Id.* at 37a (emphasis added). Where "amounts below a numerical threshold do not contribute significantly to a downwind State's nonattainment, EPA may not require an upwind State to do more." *Id.*

The court of appeals properly found that EPA had exceeded its statutory authority. The good neighbor provision, the court noted, "is not a blank check for EPA to address interstate pollution on a regional basis without regard to an individual upwind State's actual contribution to downwind air quality." *Id.* at 23a. Once EPA promulgated a final rule finding that amounts below one percent of the relevant NAAQS "do not contribute significantly" to nonattainment, EPA could not require States to eliminate any emissions contributing below the one percent threshold.

The importance of administrative findings in determining the limits of an agency's statutory authority is illustrated by *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In that case, the Court began its analysis with the observation that an agency "may not exercise its authority in a manner that is inconsistent

with the administrative structure that Congress enacted into law." *Id.* at 125 (internal quotation marks and citation omitted). The Court then considered the findings that the Food and Drug Administration (FDA) made to justify the regulation, but not the prohibition, of tobacco products. *Id.* at 135. *Based on the agency findings*, the Court held that, if those products *were* within the regulatory ambit of the Food, Drug and Cosmetic Act (FDCA), the FDA would have to remove them "from the market entirely." *Id.* at 143. Thus, given the FDA's own findings, the only authority it could conceivably exercise under the FDCA would be authority to prohibit such products "entirely"—but, because Congress in subsequent legislation had rejected any such ban, "there [was] . . . no room for tobacco products within the FDCA's regulatory scheme." *Id.*

The Court's reasoning in that case applies here. Once EPA made the regulatory finding that emissions contributing to concentrations below the one percent threshold "do not significantly contribute to nonattainment," 76 Fed. Reg. at 48,236, 48,237 (Pet. App. 255a, 256a), the language of 42 U.S.C. § 7410(a)(2)(D)(i)(I) precluded EPA from regulating those emissions. Accordingly, any authority EPA has to require regulation of upwind States' emissions is necessarily constrained by EPA's own finding that amounts contributing below the one percent threshold do not significantly contribute. The Court's admonition in *Brown & Williamson* applies here: "[W]e must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." 529 U.S. at 161 (internal quotation marks and citation omitted).

EPA offers no effective rebuttal to the court of appeals' determination that, once EPA had made a finding marking "a floor below which 'amounts' of downwind pollution were not significant," the Agency "could not then ignore that mark and redefine each State's 'significant contribution' in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State." Pet. App. 36a (emphasis in original). EPA suggests that "[t]he court of appeals' analysis is misguided" and that "[t]he court did not suggest that the EPA had set out to regulate emissions that will contribute *in*significantly to downwind nonattainment, or even that the Transport Rule is likely to have that effect—only that the Rule does not eliminate that possibility." EPA Br. at 54 (emphasis in original). But regardless of whether EPA "set out to regulate" upwind emissions that do not contribute significantly to downwind nonattainment, under 42 U.S.C. § 7410(a)(2)(D)(i)(I) EPA is authorized only to require upwind-state prohibitions of emissions that create *significant* contributions.

Second, simple physics dictates—and EPA recognizes—that emissions originating in an upwind State, and the atmospheric products of those emissions, dissipate or deposit out of the atmosphere continually over time and distance. See, *e.g.*, 76 Fed. Reg. at 48,316 (Pet. App. 621a-622a). In disregard of this principle, however, the Transport Rule failed to discount the portion of the emissions that never leaves the upwind State and reaches downwind-state nonattainment areas.

The court of appeals thus held that the Transport Rule ran "afoul of the [CAA's] proportionality requirement as described in . . . *North Carolina*." Pet.

App. 38a. "Under the statute," the court explained, "each upwind State that contributes to a downwind nonattainment area is responsible for no more than its own 'amounts which will . . . contribute significantly' to the downwind State's pollution problem." *Id.* The Transport Rule, however, held each upwind State responsible for more than the emissions that traveled from the State to the downwind nonattainment areas at issue.

As the court of appeals observed, "the text of Section [7410(a)(2)(D)(i)(I)] tells us that the 'amounts which will . . . contribute' to a downwind State's nonattainment are *at most* those amounts that *travel beyond an upwind State's borders and end up in a downwind State's nonattainment area*." *Id.* at 23a (emphases added). Yet EPA acknowledged to the court of appeals that under the Agency's construction of the good neighbor provision on which the Transport Rule rested, EPA "could require a State to reduce *more than the State's total emissions that go out of State*." *Id.* at 38a n.23 (emphasis in original); see also *id.* at 23a n.12. "[S]uch a claim of authority," the court of appeals explained, "does not square with the statutory text—'amounts' of pollution obviously cannot 'contribute' to a downwind State's pollution problem if they don't even reach the downwind State." *Id.* at 38a n.23.

Here, EPA neither repudiates this claim of sweeping authority nor identifies any statutory foundation for it. Instead, EPA blandly asserts that "no basis [exists] for the court of appeals' concern that, under the EPA's approach, an upwind State could be required to 'reduce more than the State's total emissions that go out of State.'" EPA Br. at 48 n.14. "The pollution that travels beyond an upwind State's bor-

ders is not separate and distinct from the pollution with local impacts," EPA says, and "[t]he only way to reduce 100% of a State's contribution to a downwind area therefore would be to eliminate 100% of its emissions." *Id.* at 48-49 n.14.

This is a non sequitur. While the "pollution" in a downwind State that is attributable to emissions from an upwind State is thoroughly mixed with the "pollution" created from emissions originating in the downwind State, it does not follow from this that an upwind State's contribution is caused by all of the emissions originating in that upwind State. EPA's atmospheric modeling determines the "contribution" in a downwind State that is attributable to the "emissions" from an upwind State, see 76 Fed. Reg. at 48,239 (Pet. App. 265a), and those upwind-state emissions reaching the downwind State are a fraction of the upwind State's total emissions, see, *e.g.*, *id.* at 48,316 (Pet. App. 621a-622a) (reflecting the physical principle that pollutants deposit out of the atmosphere as emissions travel downwind).

Third, the court of appeals found that the Transport Rule was unlawful because EPA "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." Pet. App. 39a. Because "EPA's statutory authority . . . is limited to attaining the NAAQS in the downwind States[,] EPA [could] not require upwind States to do more than necessary for the downwind States to achieve the NAAQS." *Id.* at 39a-40a. In the Transport Rule, however, "EPA did not try to take steps to avoid such over control." *Id.* at 40a.

EPA does not dispute the court of appeals' reading of the statute. Rather, the Agency now suggests the court's "concern" was "theoretical and misplaced." EPA Br. at 50. As the Brief of Industry and Labor Respondents explains, EPA's after-the-fact explanations are unavailing; they are based on arguments that the Agency did not make below and that in any event the record contradicts. See Industry Br. at 18-20 (citing record evidence demonstrating over-control). As it is, the court of appeals recognized that, with "the end goal of the statute [being] attainment in the downwind State[,] EPA's authority to force reductions on upwind States ends at the point where the affected downwind State achieves attainment." Pet. App. 24a. Because, by its terms, the Transport Rule did not respect this statutory limitation on EPA's authority, the court properly found the rule to be unlawful.

B. The Court of Appeals Had Jurisdiction To Consider Statutory Objections to the Lawfulness of EPA's "Significant Contribution" Emission Reduction Requirements.

Petitioners argue that the court of appeals lacked jurisdiction under 42 U.S.C. § 7607(d)(7)(B) to declare EPA's Transport Rule emission reduction requirements contrary to the plain terms of the good neighbor provision because, they contend, rulemaking participants did not state with sufficient specificity what the statute means. EPA Br. at 33-42; Brief of American Lung Association, *et al.* (collectively, ALA), at 28-35. The respondents submitting this brief concur with the Brief of Industry and Labor Respondents that comments submitted in EPA's rulemaking by the Utility Air Regulatory Group (UARG),

Southern Company, and others raised statutory objections with sufficient specificity. See Industry Br. at 16, 47-48. The respondents submitting this brief further agree that the provisions of 42 U.S.C. § 7607(d)(7)(B) do not operate to limit the powers of a reviewing court.[7] See *id.* at 42-46. The respondents submitting this brief write separately to address the responsibility of the court of appeals under 42 U.S.C. § 7607(b) to determine whether the Transport Rule was consistent with clear statutory limits that Congress imposed on EPA and to explain further why 42 U.S.C. § 7607(d)(7)(B) cannot be construed to constrain the exercise of that jurisdiction.

Only by exercising its Article III power to interpret the law is a court able to review any agency decision. Because objections grounded in the Transport Rule's departure from the statute's terms were raised in the rulemaking, see Industry Br. at 16, 47-48; Comments of UARG at 64 (Oct. 1, 2010), EPA-HQ-OAR-2009-0491-2756, Deferred Joint Appendix, Vol. II at JA01060, *EME Homer City Generation, L.P.* v. *EPA*, No. 11-1302 (D.C. Cir. Mar. 14, 2012) (objecting to emission reduction requirements where EPA "fail[s] to adhere to the terms of the CAA"), the court below was obligated to decide whether the rule exceeded EPA's authority under the plain terms of the Act. To accept EPA's "waiver" arguments here

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[7] The Brief of Industry and Labor Respondents explains that although EPA and ALA assert that the court of appeals exceeded its jurisdiction in reaching the merits of the petitioners' arguments below, neither EPA nor ALA makes any effort to show that 42 U.S.C. § 7607(d)(7)(B) in fact establishes a "jurisdictional" requirement. See Industry Br. at 43. That brief demonstrates that the administrative exhaustion requirement in 42 U.S.C. § 7607(d)(7)(B) is nonjurisdictional. *Id.* at 43-46.

would require the Court to construe 42 U.S.C. § 7607(d)(7)(B) as a congressional shield that protects plainly ultra vires Agency action from judicial review in order to give repose to rules that exceed textual statutory limitations. Enshrining Executive Branch conduct that violates explicit legislative direction is hardly Congress's normal priority.

The CAA establishes for a court reviewing EPA FIPs under 42 U.S.C. § 7607(b) the obligation to "reverse any such action found to be . . . in excess of statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9);[8] cf. 5 U.S.C. § 706(2)(C) (judicial review provision of the Administrative Procedure Act (APA)).[9] This is what the court of appeals did here. It determined, under *Chevron* step one,[10] that the Transport Rule failed as a matter of law in three independent respects.

In this regard, this Court's discussion of the fundamental purpose of the "administrative exhaustion" doctrine, and of the values that the doctrine is meant to promote, provides context for determining whether, as petitioners' arguments assume, 42 U.S.C. § 7607(d)(7)(B) contemplates that rulemaking participants can themselves "waive" statutory limits on EPA's powers. In *McCarthy* v. *Madigan*, 503 U.S.

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[8] 42 U.S.C. § 7607(d)(1)(B) makes FIPs, including those promulgated by EPA in the Transport Rule, subject to the provisions of 42 U.S.C. § 7607(d).

[9] See *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983) ("The standard for substantive judicial review of EPA action under the Clean Air Act is taken directly from the APA.").

[10] *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

140, 145 (1992), the Court explained that "the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." This principle requires application of the exhaustion doctrine "when the action under review involves exercise of *the agency's discretionary power* or when the agency proceedings in question allow the agency to apply *its special expertise*." *Id.* (citing *McKart* v. *United States*, 395 U.S. 185, 194 (1969) (emphases added)). Where, however, there is "*nothing to be gained* from permitting the compilation of a detailed factual record, or from [the application of] agency expertise," *Bowen* v. *City of New York*, 476 U.S. 467, 485 (1986) (emphasis added), the rationale for requiring "exhaustion" before the agency disappears.

Consistent with the principles that underpin the exhaustion doctrine, the court of appeals properly addressed the statutory limits on EPA's "significant contribution" rulemaking authority as an element of the court's inherent powers as a reviewing court. Because, as the court of appeals found, the good neighbor provision is unambiguous regarding the three statutory limits on EPA's authority, EPA had no "discretionary power" to exercise or "special expertise" to apply in determining whether to obey those limits. The issues here were pure questions of law not requiring application of EPA's expertise. See *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) (interpreting the law is "the province and duty of the judicial department").

Indeed, given these circumstances, had the court of appeals *declined* to reach issues related to the limits on EPA's statutory authority, the court would have abdicated its responsibility under 42 U.S.C. § 7607(d)(9)(C) to "reverse any [EPA] action found to be . . . in excess of statutory jurisdiction, authority, or limitations." This past Term, the Court had occasion to note that, "for agencies charged with administering congressional statutes[,] [b]oth their power to act and how they are to act [are] authoritatively prescribed by Congress." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1869 (2013). Accordingly, when such agencies "act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." *Id.*

The implications of petitioners' assertion that 42 U.S.C. § 7607(d)(7)(B) deprived the court of appeals of jurisdiction to consider whether EPA acted within the scope of its congressionally delegated authority are breathtaking. The asserted principle that EPA advances would discharge agencies from obeying clear statutory commands and would bar reviewing courts from exercising their constitutional and statutory responsibilities whenever agencies might claim that rulemaking comments failed to recite a statute's plain meaning.

At issue here was a straightforward question of statutory interpretation, involving a provision of the CAA that the court below found *not* to be ambiguous. Objections were raised during the rulemaking to the exercise of EPA's "significant contribution" emission reduction authority; EPA was not "subjected to verbal traps" or required "to wade through reams of documents searching for "'implied" challenges.'" *Natural Res. Def. Council* v. *EPA*, 559 F.3d 561, 564

(D.C. Cir. 2009) (quoting *Mossville Envtl. Action Now* v. *EPA*, 370 F.3d 1232, 1239 (D.C. Cir. 2004)).

To the contrary, as the majority below pointed out, "one of the central questions in the long history of EPA's efforts to implement the good neighbor provision has been whether EPA has complied with the basic statutory limits on its authority." Pet. App. 32a n.18. EPA thus, for example, "knew from the beginning [of the rulemaking here] that it was required to comply with *North Carolina*, including that part of the [court of appeals'] holding on which petitioners rel[ied]" in challenging the Transport Rule. *Id.* Because the statutory provisions construed by the court below were *not* ambiguous, the *Chevron* framework removes all deference to the agency. As the court of appeals has stated, "at *Chevron* step one [the reviewing court] alone [is] tasked with determining Congress's unambiguous intent," and the court is therefore to "answer [the] inquir[y] without showing the agency any special deference." *Vill. of Barrington* v. *Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

EPA was obligated, in developing its Transport Rule emission reduction requirements, to assure that statutory limits imposed on the exercise of the Agency's good-neighbor powers would not be crossed. Because EPA ignored those limits, the court of appeals' obligation under 42 U.S.C. § 7607(d)(9)(C) was to vacate the Transport Rule.[11] Accepting petitioners'

[11] Other D.C. Circuit decisions recognize EPA's independent obligation to justify "key assumptions as part of its affirmative 'burden'" to promulgate valid rules, *Small Refiner*, 705 F.2d at 534-35, and recognize that "even the failure to object during the comment period is insufficient to bar [judicial] review" of those key assumptions. *S. Coast Air Quality Mgmt. Dist.* v. *EPA*, 472

view of the statute would enshrine outcomes that Congress explicitly precluded under statutory provisions that, on their face, give EPA notice of the limits on its authority. That is not the law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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F.3d 882, 891-92 (D.C. Cir. 2006), *clarified on other grounds on denial of reh'g*, 489 F.3d 1245 (D.C. Cir 2007); see *Small Refiner*, 705 F.2d at 535. This principle has been applied to arguments, made in challenges to EPA actions under the CAA, that EPA failed (1) to set compliance deadlines consistent with the CAA, *Appalachian Power Co.* v. *EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998) (per curiam), (2) to promulgate rules consistent with the requirements of 42 U.S.C. § 7607(d), *Ne. Md. Waste Disposal Auth.* v. *EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam), and (3) to establish the validity of important modeling assumptions, *Small Refiner*, 705 F.2d at 534-35—notwithstanding claims in each case that those arguments were not raised in comments.

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