**Nos. 12-1182 and 12-1183**

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# In the Supreme Court of the United States

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS
v.

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

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AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS
v.

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

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**On Writs of Certiorari to the U.S. Court of Appeals for the D.C. Circuit**

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**BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONERS**

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## INTEREST OF *AMICUS CURIAE*

*Amicus* Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case. *Amicus* submits this brief to demonstrate that the text, history, and structure of the Constitution all strongly support Congress's power to enact laws that address genuinely national problems like interstate air pollution and, in turn, bolster the Environmental Protection Agency's authority to deal with this complex problem, including through its recently enacted Transport Rule.[1]

## INTRODUCTION AND SUMMARY OF ARGUMENT

In the early days of the American Republic, the young nation faced a multitude of difficulties—a woefully underfunded army and navy, uncertain day-to-day funding of the federal government, and disa-

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief; letters of consent have been filed with the Clerk of the Court.

greements among the States on everything from debt to commerce to meeting treaty obligations. Unfortunately, the nation, then bound by the Articles of Confederation and its ineffectual model of central government, also lacked a national government with sufficient power to address these challenges, which transcended State lines and implicated a national interest the federal government was not yet empowered to protect.

Today, our nation faces new problems that spill across State lines and affect the public interest of the country as a whole, including the scourge of air pollution at the heart of this case. Fortunately, our enduring Constitution conveys ample federal power to address these problems.

When the Framers came to Philadelphia, the failures of the Articles were fresh in their minds. In considering the scope of power necessary to establish a national government capable of meeting the task of governing the United States, the Constitutional Convention delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). The principle of Resolution VI was translated into constitutional provisions—specifically, the powers granted to Congress in Article I—affording the federal government the ability to provide national solutions to national problems.

Interstate air pollution is a quintessential example of the sort of problem that implicates "the general Interests of the Union," in which "the States are separately incompetent," and as to which "the Harmony of the United States may be interrupted by the Exercise of individual legislation." Air pollution does not respect State lines, and emissions from one State may cause harm in another (with little cost to the emitting State). For more than 50 years, the federal government has sought to mitigate interstate air pollution and promote healthy air quality through the Clean Air Act ("CAA"), 42 U.S.C. 7401 *et seq*., and implementing regulations from the Environmental Protection Agency ("EPA").

The Cross-State Air Pollution Rule at issue here—commonly referred to as the Transport Rule—is the government's most recent attempt to mitigate the spillover effects of air pollution. The EPA promulgated the Transport Rule to address the emission of pollutants in 27 upwind States that significantly contribute to the problem that downwind States have attaining certain air quality standards. As argued persuasively by the Petitioners, the Transport Rule is a reasonable interpretation and application of the CAA.

Nonetheless, the court of appeals threw out the Transport Rule, blatantly interfering with the federal government's attempt to solve the complex interstate problem of air pollution—a challenge that is precisely the sort of national issue the architects of our constitutional system of government intended Congress to solve. Particularly remarkable is the lower court's willingness to, as Judge Rogers explained in her dissent, engage in "a redesign of Congress's vision of

cooperative federalism between the States and the federal government in implementing the CAA," Pet. App. at 65a, based on the panel's own policy preferences and without any basis in the factual record, the controlling statute, or relevant precedent.

Quite contrary to the court of appeals' suggestion that the Transport Rule transgresses the "federalism bar," Pet. App. at 56a, the CAA and the Transport Rule are perfect examples of how the federal government can use its constitutionally granted authority to solve complex interstate problems while respecting the role of the States in our federalist system. Under the CAA, the EPA establishes national air quality standards, including requirements aimed at the spillover effects of air pollution, while leaving the States flexibility to implement their own clean air policies that meet these federal standards. It is only *after* individual States fail to satisfy these requirements—as was the case here—that the CAA imposes a duty on the federal government to intervene and design implementation plans of its own, which is exactly what the EPA did when it created the Transport Rule.

Our Constitution establishes a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative policy solutions reflecting the diversity of America's people, places, and ideas. The CAA and the Transport Rule respect the balance of power the Constitution strikes between the federal government and the States. Unfortunately, the court of appeals failed to respect the limits placed on its role in this

process, overstepping jurisdictional limitations and reworking Congress' statutory scheme and vision of cooperative federalism in the CAA. *Amicus* urges this Court to reverse the decision below and uphold the EPA's Transport Rule as a reasonable effort to carry out its duties under the CAA.

## ARGUMENT

### I. The Federal Government Has Ample Authority To Regulate Problems That Implicate The National Interest And Cross State Lines, Such As Air Pollution.

The desire to ensure that the United States' national government was furnished with constitutional authority to address truly national problems was perhaps the most important motivation for our Framers to return to the drawing board in the summer of 1787 and craft our enduring Constitution.

Our Constitution was drafted "in Order to form a more perfect Union"—both more perfect than the British tyranny against which the founding generation had revolted and more perfect than the flawed Articles of Confederation under which Americans had lived for a decade since declaring independence. The result was a vibrant federalist system that empowers the federal government to provide national solutions to national problems—including complicated interstate problems such as air pollution—while preserving a significant role for State and local governments to exercise general police power and craft policies "adapted to local conditions and local tastes." Michael W. McConnell, *Federalism: Evaluating the*

*Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

While some have portrayed the Constitution as a document that is primarily about limiting government, the historical context shows that the Founders were just as, if not more, concerned with creating an empowered, effective national government than with setting stark limits on federal power. *E.g.*, THE FEDERALIST NO. 3, at 36 (John Jay) (Clinton Rossiter, ed. 1999) (noting Americans' agreement on "the importance of their continuing firmly united under one federal government, vested with sufficient powers for all general and national purposes").

By the time our Founders took up the task of drafting the Constitution in 1787, they had lived for nearly a decade under the dysfunctional Articles of Confederation. The Articles, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built merely on a "firm league of friendship" among thirteen independent states. ARTICLES OF CONFEDERATION (1781), art. III. Without any serious federal oversight, States often "acted individually when they needed to act collectively." Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010). There was only a single branch of the national government, the Congress, which was made up of State delegations. ARTICLES OF CONFEDERATION, art. V. Under the Articles, Congress had some powers, but was given no means to execute those powers.

This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War. *See*

18 THE WRITINGS OF GEORGE WASHINGTON 453 (John C. Fitzpatrick, ed. 1931) (Letter to Joseph Jones, May 31, 1780). *See also* WASHINGTON: WRITINGS 393 (John Rhodehamel, ed. 1997) (Circular to State Governments, Oct. 18, 1780). Congress was only able to ask the States to send troops and money to the war cause, but the States were often loathe and late to send such support. *See id.* at 488 (Letter to Alexander Hamilton, March 4, 1783); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 45-46 (2005) (noting that, in the United States as it existed under the Articles, "the individual states could not be trusted to provide their fair share of American soldiers and the money to pay them").

The inadequacy of the central government of the Articles was not merely a military problem. The government could not ensure compliance with international treaties; after America's 1783 peace treaty with Britain, individual States failed to honor parts of the treaty. *Id.* at 47. Without the power to impose taxes, Congress could not regulate the currency or control inflation effectively, nor could it secure the country's long-term credit. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 619 (1999). The nation could not adequately address civil unrest; indeed, the difficulty Massachusetts had in quelling Shay's Rebellion in 1786 further convinced Washington of the great need for improving upon the Articles of Confederation: "What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man of life, liberty, or property?" 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 332 (W.W. Ab-

bot et al., eds. 1992) (Letter to James Madison, Nov. 5, 1786).

As Washington explained to Alexander Hamilton, "unless Congress have powers competent to all *general* purposes, that the distresses we have encountered, the expences we have incurred, and the blood we have spilt in the course of an Eight years war, will avail us nothing." *Id.* at 490 (Letter to Alexander Hamilton, March 4, 1783) (emphasis in original). *See also id.* at 519 (Circular to State Governments, June 8, 1783) ("[I]t is indispensible to the happiness of the individual States, that there should be lodged somewhere, a Supreme Power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of long duration.").

Fortunately, when the Framers assembled in Philadelphia for the Constitutional Convention in 1787, they sought to remedy the failures of the Articles and establish a government with sufficient power to govern the United States. In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2615 (2012) (Ginsburg, J., concurring in part and dissenting in part); AMAR, AMERICA'S CONSTITUTION, at 108; Jack M. Balkin,

*Commerce*, 109 MICH. L. REV. 1, 8-12 (2010). The delegates then passed Resolution VI on to the Committee of Detail, which was responsible for drafting the enumerated powers of Congress in Article I, to transform this general principle into a list of powers enumerated in the Constitution. Balkin, *Commerce*, at 10.

Resolution VI established a structural constitutional principle with "its focus on state competencies and the general interests of the Union." *Id*. Translating this general principle into specific provisions, the Committee of Detail drafted Article I to grant Congress the broad power to, among other things, "regulate Commerce . . . among the several States," U.S. CONST. art I, § 8, cl. 3. These enumerated powers were intended to capture the idea that "whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (Jonathan Elliot ed., 2d ed. 1836) (Statement of James Wilson). *See also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996) (explaining that Article I was "an effort to identify particular areas of governance where there were 'general interests of the Union,' where the states were 'separately incompetent,' or where state legislation could disrupt the national 'Harmony'"); THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) ("Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.").

This list of enumerated powers was not an attempt to limit the federal government for its own sake, but rather "was designed so that the new federal government would have power to pass laws on subjects and concerning problems that are federal by nature"—those that individual states could not "unilaterally solve by themselves" and that might, in turn, "hamper economic union in the short run and threaten political and social union in the long run." Balkin, *Commerce*, at 12, 13. This included problems where "activity in one state ha[d] spillover effects in other states." *Id.* at 13. *See also* Cooter & Siegel, *Collective Action Federalism*, at 117.

As Chief Justice John Marshall explained:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). Today, the problem of air pollution and unhealthy air quality fits within this paradigm. Phrased in the language of Resolution VI, air pollution that crosses State lines is precisely the sort of problem that implicates "the general Interests of the Union," in which "the States are separately incompetent," and as to which "the Harmony of the United States may be in-

terrupted by the Exercise of individual legislation." 2 FARRAND'S RECORDS at 131-32.

## II. Congress Has Used Its Constitutionally Granted Authority, Aided By The EPA's Implementing Regulations, To Address The Genuinely National Problem of Interstate Air Pollution.

Air pollution that crosses State lines has long been of concern in the United States. As Justice Oliver Wendell Holmes wrote in 1907, "[i]t is a fair and reasonable demand on the part of a sovereign" in our federal system "that the air over its territory should not be polluted on a great scale . . . by the act of persons beyond its control" in a neighboring State. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907). Then, as now, as the Federal Petitioners explain, "[t]he fundamental problem is that the emitting, or upwind, State secures all the benefits of the economic activity causing the pollution without having to absorb all the costs." Br. of Fed. Ptrs. at 2.

Air pollution is a truly national problem. To begin with, it inevitably crosses State borders, with decisions made in one State often affecting the air quality in others. For instance, consider a State's policy to cluster its power plants near its border. Such a policy may protect the welfare of that State's own citizens, but it may also result in the State's export of air pollution from its power plants to its downwind neighbors. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2350 (1996). Or, consider a State law requiring taller smoke stacks. Again, this policy may protect nearby citizens by sending polluted air

higher into the atmosphere, but it may also increase that pollution's impact further downwind. *Id.* In each case, these policy choices are completely rational. They protect a State's own citizens and send its air pollution elsewhere. At the same time, these decisions also seriously damage the environment in downwind States and, in turn, the health of their citizens. This is federalism run amok, and it demands a national solution.

Without federal intervention, upwind States certainly have an incentive to reduce pollution within their own jurisdiction. At the same time, they have little incentive to protect their downwind neighbors. Even worse, they may actually have an incentive to pollute them, thereby "obtain[ing] the labor and fiscal benefits of the economic activity that generates the pollution" without "suffer[ing] the full costs of the activity." Revesz, *Interstate*, at 2343. Either way, downwind States are helpless before the policy decisions of their upwind neighbors, and often saddled with a degraded environment and less healthy citizens—all through no fault of their own. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 3389 (1989) ("Aggressive controls in downwind areas will do little to improve air quality if the quality of air entering the region is poor.").

This is precisely the sort of problem that the delegates to the Constitutional Convention had in mind when approving Resolution VI, that the Committee of Detail had in mind when translating that general principle into Article I's enumerated powers, and that Chief Justice Marshall had in mind when outlining the reach of federal power in *Gibbons*—a problem that "involve[s] activity in one state that has spillo-

ver effects in other states." Balkin, *Commerce*, at 23. *See also* Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1958 (2013) (using interstate pollution as an example of the type of spillover effect that our federal government was designed to address).

Beginning in 1970 with major amendments to the Clean Air Act, Congress set the reasonable goal of ensuring that upwind states were held accountable for the pollution that they exported to their downwind neighbors. Since then, Congress has amended the CAA multiple times to both strengthen these interstate responsibilities and increase the federal government's role in policing interstate disputes.

Congress first pursued a national interstate air pollution policy with the 1970 amendments to the CAA. This initial policy gave States great latitude to coordinate with one another to reduce the spillover effects of air pollution—in turn, carving out a very limited role for the federal government. The original provision required the States to address interstate air pollution through "intergovernmental cooperation," 42 U.S.C. § 1857c-5(a)(2)(E) (1970), with the EPA issuing a regulation simply calling for "an exchange of information among States on factors which may significantly affect air quality in any State," 40 C.F.R. § 51.21(c). Neither the statute itself nor the EPA's implementing regulations included any concrete enforcement measures that might hold upwind States accountable for any harm done to their downwind neighbors.

Before long, Congress concluded that stronger medicine was needed. Prior to enacting major revisions to the CAA in 1977, a House Report

acknowledged that interstate air pollution had "long been a source of concern." H.R. Rep. No. 294, 95th Cong., 1st Sess. 330 (1977). Nevertheless, it conceded that the 1970 amendments were "an inadequate answer to the problem," adding that a mere "information exchange" was "simply insufficient" and that "a *Federal* mechanism for resolving disputes" was required. *Id.* (emphasis added). Similarly, a Senate Report expressed concern that, without "interstate abatement procedures" or "interstate enforcement actions," the 1970 law "result[ed] in serious inequities among the several States" and put some States "at a distinct economic and competitive disadvantage." S. Rep. No. 127, 95th Cong., 1st Sess. 41-42 (1977).

Tracking these concerns, Congress increased federal oversight of interstate air pollution in its 1977 amendments to the CAA. Rather than relying on mere "cooperation" between the States, Congress amended the Act to require upwind States to curb emissions from "any stationary source" that would "*prevent* attainment or maintenance" of federal air pollution standards in downwind States. 42 U.S.C. § 7410(a)(2)(E) (1980) (emphasis added). In amending the CAA in this manner, Congress acknowledged that the previous law had failed because it depended too much on voluntary actions by upwind States that really had no "incentive and need to act." H.R. Rep. No. 294, 95th Cong., 1st Sess. 330 (1977). The new provisions were "intended to establish an effective mechanism for prevention, control, and abatement of interstate air pollution," *id.*—one that would "equalize the positions of the States with respect to interstate air pollution by making a source at least as responsible for polluting another State as it would be

for polluting its own State," S. Rep. No. 127, 95th Cong., 1st Sess. 16 (1977).

By the late 1980s, Congress once again concluded that the current law was too weak,[2] and, in 1990, Congress once again strengthened the federal government's hand. After struggling for years to prove that upwind States had "*prevent[ed]*" them from meeting federal air pollution standards[3]—as required by the 1977 amendments—downwind States finally received even stronger protection in the 1990 amendments. The result was the "good neighbor" provision at issue in this case, a provision that was designed to be more flexible than its predecessor and, in turn, more helpful to downwind States. In relevant part, Congress changed the 1977 law's "prevent attainment or maintenance" prong to a new provision requiring upwind States to "prohibit[] any source or other type of emissions activity . . . from emitting any air pollutant in amounts that will . . . contribute significantly" to nonattainment or maintenance in downwind States—whether or not those emissions could be shown, on their own, to "*prevent*" attainment or maintenance of federal air pollution standards. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

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[2] S. Rep. No. 228, 101st. Cong. 1st Sess. 48-49 (1989) (explaining that "additional efforts must be made" to address the "transport problem").

[3] *See, e.g.*, *State of New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *Air Pollution Control Dist. of Jefferson County v. EPA*, 739 F.2d 1071 (6th Cir. 1984); *State of New York v. EPA*, 716 F.2d 440 (7th Cir. 1983); *State of Connecticut v. EPA*, 696 F.2d 147 (2d Cir. 1982).

From there, the EPA went to work developing regulations to implement this new "good neighbor" provision. In 1998, it established a cap-and-trade program for nitrogen oxide emissions, which, in turn, was largely upheld by the D.C. Circuit in *Michigan v. EPA*, 213 F.3d 663 (2000).

In 2005, the EPA then issued its Clean Air Interstate Rule (CAIR), which attempted to apply its approach to nitrogen oxide to regulations covering fine particulate matter and ozone. 70 Fed. Reg. 25,162 (May 12, 2005). The D.C. Circuit struck down this rule, concluding that it did not go far enough to protect the interests of downwind States like North Carolina. *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008) ("*North Carolina I*"). While the court first vacated the rule in its entirety, it later modified its ruling to allow for the EPA to continue to administer CAIR until it could replace it with other (stronger) regulations, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) ("*North Carolina II*"). However, the EPA would first have to "redo its analysis from the ground up" as "expeditious[ly] as practicable," *North Carolina I*, 896 F.3d at 929, 930. *See also North Carolina II*, 550 F.3d at 1178 ("[W]e remind the Petitioners that they may bring a mandamus petition to this court in the event that EPA fails to modify CAIR in a manner consistent with [*North Carolina I*].").

Finally, in response to the *North Carolina* decisions, the EPA issued its Transport Rule, which is at issue in this case. This Rule addresses the emissions of 27 upwind States that significantly contribute to the problems downwind States have attaining or maintaining governing air quality standards. None

of these upwind States satisfied their "good neighbor" obligations prior to the EPA's challenged actions. For each State subject to the Transport Rule, the agency had previously conducted an administrative proceeding in which it either (1) made a finding that the State failed to submit a plan addressing the good neighbor requirement or (2) disapproved the State's plan as inadequate. Br. of Fed. Ptrs. at 9. In the Transport Rule, the EPA promulgated federal plans for those states, as required under the CAA. *See generally* Br. of Fed. Ptrs. at 10-13 (describing the EPA's analysis in detail).

The CAA and the EPA's implementing Transport Rule are excellent examples of the type of cooperative federalism envisioned by our Founders. While the EPA establishes national air pollution standards in the first instance, the statutory scheme provides States with flexibility to implement their own clean air policies to meet these federal standards. 42 U.S.C. §§ 7408, 7409. It is only *after* individual States fail to establish adequate air policy programs—as was the case here—that the CAA requires the federal government to step in with implementation plans of its own. 42 U.S.C. § 7410(c)(1).

As discussed above, the CAA, through its "good neighbor" provision, requires each State to craft an implementation plan that addresses the spillover effects of air pollution. Indeed, each upwind State must submit a plan that regulates pollutants that "contribute significantly" to its downwind neighbors' difficulties in complying with federal air pollution standards. 42 U.S.C. § 7410(a)(2)(D)(i)(I). In turn, the CAA provides the EPA with great discretion to define the related policy details through regulations

like the Transport Rule. And when States fail to fulfill their "good neighbor" responsibilities, the EPA has the power to hold them accountable—as it did in this case.

## III. In Rejecting The Transport Rule, The Court Of Appeals Undermined The Federal Government's Ability To Address Interstate Air Pollution, And Engaged In An Unauthorized Redesign Of The Clean Air Act's Vision Of Cooperative Federalism.

As Judge Rogers explained in her dissent, the majority in the court of appeals did "several remarkable things" when it vacated the Transport Rule. Pet. App. at 115a. It ignored congressional limitations on the courts' jurisdiction. It ignored precedent enforcing those jurisdictional limitations. It ignored requirements of administrative exhaustion. It deemed the EPA's clearly reasonable interpretation of the Clean Air Act—an "interpretation" Judge Rogers characterizes as "*reading the actual text of the statute*," Pet. App. at 85a (emphasis in original)—absurd. And, in the process, the majority below rewrote the plain text of a federal statute and "recalibrate[d] Congress's statutory scheme and vision of cooperative federalism in the CAA." Pet. App. at 115a.

Just last Term, this Court reaffirmed its commitment to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). As the Court explained then, "*Chevron* is rooted in a background presumption of congressional intent": "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge agency discretion." *City of Arlington v. FEC*,

133 S. Ct. 1863, 1868 (2013). The court below deviated from this clearly established principle, "transferring any number of interpretative decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from [an] agenc[y] that administer[s] the statute[] to [a] federal court[]" and, in turn, "'substituting [the lower court's] own interstitial lawmaking' for that of an agency." *Id.* at 1873. (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). While the Federal Petitioners' brief fully addresses the lower court's substantive and procedural errors, we offer one illustrative example below.

In invalidating the Transport Rule, the lower court concluded, in part, that the EPA erred in issuing a federal implementation plan for noncomplying States, relying on "contextual and structural factors" to support its conclusion, Pet. App. at 54a—over and above the plain text of the CAA. As per the CAA itself, within three years of the EPA issuing new federal air pollution standards, each State "shall" submit a new implementation plan—one that satisfies its "good neighbor" obligations, among other requirements. 42 U.S.C. § 7410(a)(2). The EPA "shall" then "promulgate [a federal plan] at any time within 2 years" after it either "finds that a State has failed to make a required submission" or it "disapproves" of a given State's plan. 42 U.S.C. § 7410(c)(1)(A) & (B).

The Transport Rule covered federal standards first put in place in 1997 (for ozone) and 2006 (for fine particulate matter). 76 Fed. Reg. 48219 (Aug. 8, 2011). Therefore, under the plain text of the CAA, State plans were due three years later—in 2000 and 2009, respectively. In turn, those plans were required

to include provisions satisfying each State's good neighbor obligations. In 2010 and 2011, the EPA concluded that many States had failed to satisfy these requirements. 75 Fed. Reg. 32673 (June 9, 2010). Furthermore, the EPA explained that this "create[d] a 2-year deadline" for each noncomplying State to implement a valid plan. 75 Fed. Reg. 32674. Only after these States failed to comply with this deadline did the EPA issue its own plan, as required by the plain text of the CAA—the lower court's "structural and contextual" factors notwithstanding.

The lower court's failure to recognize that the EPA did, in fact, give the States the opportunity to meet their obligations under the CAA before the agency promulgated federal implementation plans for those States, may account for its conclusion that the Transport Rule transgresses the "federalism bar," Pet. App. at 56a. But it certainly should not be accepted by this Court, when it is clear as day that the EPA's implementation of the CAA's system of cooperative federalism was in line with the statute. In reality, the CAA and the Transport Rule are perfect examples of how the federal government can use its constitutionally granted authority to solve complex interstate problems while respecting the role of the States in our federalist system.

* * *

Our Constitution establishes a federal government that is strong enough to act when the national interest requires a national solution, while reserving a crucial role for the States as our "laboratories of democracy." Congress has the power to address the spillover effects of interstate air pollution, and the EPA has the clear authority under the CAA

to implement a regulation like the Transport Rule to carry out its statutory duty. Far from offending our Constitution's careful balance of federal-state power, the CAA—and the EPA's attempt to implement it through the Transport Rule—reflect our system of vibrant federalism and allow the federal and State governments to better protect their citizens and resources.

## CONCLUSION

*Amicus* supports the steps toward regulating interstate air pollution undertaken in the CAA and believes that the EPA's Transport Rule is valid. *Amicus* respectfully urges this Court to uphold the EPA's Transport Rule and reverse the lower court's contrary holding.

Respectfully submitted,

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