

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.

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

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

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

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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**A. The State Respondents' Challenges To The Relevant
Federal Implementation Plans Lack Merit**

1. The court of appeals concluded that the Environmental Protection Agency (EPA) lacked authority under the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, to issue federal implementation plans (FIPs) within the Transport Rule because “a State cannot be ‘required’ to implement its good neighbor obligation in a [state implementation plan (SIP)] ‘submission’—nor be deemed to have submitted a deficient SIP for failure to implement the good neighbor obligation—until

it knows the target set by EPA.” Pet. App. 62a n.34. The court found that the “EPA’s many SIP disapprovals and findings of failure to submit” were defective, and therefore could not serve as valid predicates for federal plans, because the agency had “made all of those findings *before* it told the States what emissions reductions their SIPs were supposed to achieve under the good neighbor provision.” *Id.* at 49a.

As our opening brief explains (at 20-24), the court of appeals lacked jurisdiction to invalidate the Transport Rule on that ground because the court did not have before it any timely challenge to the EPA’s prior state-plan disapprovals and findings of failure to submit.¹ The court therefore was required to accept the state-plan determinations as valid when considering the EPA’s authority to issue federal implementation plans. *Cf. Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398-399 (1981) (discussing “res judicata consequences of a final, unappealed judgment”).

¹ The Act authorizes the D.C. Circuit to conduct “judicial review” of EPA action when a petition for review meeting specified requirements is filed. 42 U.S.C. 7607(b)(1). The Act states that none of its provisions “shall be construed to authorize judicial review of regulations or orders of the Administrator * * * *except as provided in [Section 7607].*” 42 U.S.C. 7607(e) (emphasis added). Accordingly, the statutory conditions on the court’s exercise of jurisdiction are themselves jurisdictional. H.R. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977) (House Report) (describing Section 7607(b)(1) as limiting the “jurisdiction” of the court of appeals). But even if the statutory prerequisites to judicial review were non-jurisdictional, the court below could not appropriately have declined to enforce them. Non-jurisdictional “claim-processing rules” rules are binding if timely invoked, *e.g., Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam), and the government preserved its current argument below, Gov’t C.A. Br. 46-47.

2. The Upwind States² make no effort to defend the court of appeals' reasoning. Instead, they now assert that they "are not attacking *any* of [the EPA's] past SIP disapprovals or findings of failure to submit," Upwind States Br. 19, but rather "are contesting only the *type* of FIPs that EPA could issue" in the Transport Rule, *id.* at 20; see *id.* at 61. They argue in particular that the EPA was required to inform each covered State of its emissions budget, and then give that State a reasonable time to act, before announcing a federal implementation plan that allocates the State's emissions budget among individual sources within the State. *Id.* at 20, 39. That argument is flawed in multiple respects.

a. i. The Upwind States' challenge to the content of the federal implementation plans cannot be reconciled with their (correct) concession that the legality of the EPA's prior findings and disapprovals must be taken as given. Those findings and disapprovals depended upon the premise that the States had *already* breached existing legal obligations to submit state implementation plans with adequate good-neighbor provisions. That premise depended in turn on the EPA's view that its promulgation of National Ambient Air Quality Standards (NAAQS) for ozone and PM_{2.5} had triggered the States' good-neighbor obligations, even though the EPA had not yet announced specific emissions budgets for individual States.

² Many States are both downwind and upwind. To avoid confusion, this brief will refer to the States that are respondents seeking affirmance of the court of appeals' decision as the Upwind States and those that are respondents seeking reversal as the Downwind States.

The Upwind States contend (Br. 39) that the federal implementation plans were legally defective because the EPA issued them “without ever telling the States *how much* contribution to another State’s air pollution would be deemed ‘significant.’” But if the States’ good-neighbor obligations did not arise until the EPA had quantified their required emissions reductions in that manner, there would have been no legal justification for the agency’s prior findings and disapprovals. The Upwind States do not explain how their challenge to the substance of the federal implementation plans can be reconciled with their acceptance of the predicate findings and disapprovals.

ii. The CAA includes a series of deadlines to ensure achievement of air-quality goals “as expeditiously as practicable,” 42 U.S.C. 7502(a)(2)(A). See Gov’t Br. 18-19. It likewise imposes many regulatory obligations on the EPA. *Id.* at 27; see Downwind States Br. 26. No CAA provision, however, directs the EPA to quantify States’ levels of significant contribution or makes the States’ own obligations contingent upon the EPA’s taking that step.

The Upwind States suggest that, because the EPA’s interpretations of “contribute significantly” (42 U.S.C. 7410(a)(2)(d)(i)(II)) and other ambiguous CAA terms are entitled to judicial deference, the States are foreclosed from implementing provisions that contain those terms until the EPA has acted. Br. 40, 53-55 (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-844 (1984)). Such a prohibition would disrupt the balance that Congress struck in 42 U.S.C. 7410, under which the States have initial responsibility to adopt implementation plans that satisfy the statutory criteria, including the good-neighbor requirements con-

tained in Section 7410(a)(2)(D). In the absence of an authoritative EPA interpretation, “the States’ first-implementer role under Section [7410]” (Pet. App. 55a) necessarily entails the duty to construe ambiguous terms within that provision.³

iii. The Upwind States correctly observe (Br. 43) that “there must be *some* limitations on the FIP authority conferred by [S]ection 7410(c)(1).” See Br. 43-48. The CAA authorizes the EPA to promulgate a federal plan to correct an identified “deficiency” in a state plan with respect to a particular NAAQS. 42 U.S.C. 7410(c)(1). In this case, the Act unambiguously required States to adopt plans to eliminate emissions that significantly contribute to NAAQS nonattainment or maintenance problems in other States. 42 U.S.C. 7410(a)(2)(D)(i)(I). When the EPA determined that particular States had failed to meet that requirement, it promulgated federal plans to fill that gap.

As the Upwind States emphasize (Br. 49-50), the state emissions budgets announced in the Transport Rule reflect a complex mix of factual and policy assessments. Thus, even a State that rigorously analyzed its own good-neighbor obligations would have been unlikely to calculate an emissions budget that

³ Indeed, many of the Upwind States previously argued that the EPA lacks authority to interpret the good-neighbor provision because that provision imposes obligations on the States rather than on the EPA. Petitioning States Br. at 34-40, *Michigan v. EPA*, 213 F.3d 663 (2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001). The D.C. Circuit rejected that argument, concluding that the agency had “reasonably” determined that it had general rulemaking authority to construe the provision. 213 F.3d at 687. The court in *Michigan* did not suggest, however, that States are precluded from construing ambiguous CAA terms in the course of performing their statutory responsibilities.

precisely matched the figure the EPA ultimately chose. For each of the Upwind States, however, the “deficiency” that prompted the EPA to issue its disapproval or finding of failure to submit, and subsequently to announce a federal implementation plan, was not the State’s failure to satisfy the precise contours of a not-yet-announced EPA rule. Rather, it was the State’s failure to adopt a state plan provision that would “prohibit[]” the emission of “pollutant[s] in amounts which will * * * contribute significantly” to nonattainment in downwind States. 42 U.S.C. 7410(a)(2)(D)(i)(I). Any Upwind State that believed its own good-neighbor provision satisfied that requirement could have sought judicial review of the EPA’s disapproval or finding of failure to submit.

The Upwind States also observe (Br. 51 n.13) that, if a particular State wishes to avoid imposing emissions limits more stringent “than those EPA deems necessary,” it can reliably achieve that objective only by waiting to see what “overall reductions EPA will require.” See Pet. App. 91a (Rogers, J., dissenting). Congress placed the initial responsibility for implementing the NAAQS upon the States, however, and that choice necessarily entails the possibility that a conscientious State may adopt measures more protective than those the EPA would have imposed. In any event, by simply declining to adopt adequate good-neighbor provisions, the Upwind States effectively (though unlawfully) eliminated the risk that they might inadvertently self-impose restrictions more stringent than those the Transport Rule ultimately contained. Those States cannot now avoid the relatively minor incursion on their autonomy (the EPA’s adoption of federal implementation plans, subject to

possible replacement by compliant state plans, pp. 7-8, *infra*) that the CAA specifies as the consequence of that choice.

iv. There is likewise no merit to the Upwind States' contentions (*e.g.*, Br. 53) that the EPA departed without justification from the approach it had taken in prior rulemakings. In the NO_x SIP Call, the EPA required States to revise their state plans under 42 U.S.C. 7410(k)(5), which permits such a "SIP Call" when state plans that had previously been approved and that met statutory requirements have become inadequate. *Michigan v. EPA*, 213 F.3d 663, 669, 685 (D.C. Cir. 2000) (*per curiam*), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001); 76 Fed. Reg. 43,133 (July 20, 2011). In the Clean Air Interstate Rule (CAIR), by contrast, the EPA issued federal implementation plans, 71 Fed. Reg. 25,338-25,340 (Apr. 28, 2006), just as it did here. It is true that in CAIR, the lengthy compliance times made it possible for States to submit state plans to replace their federal plans before the new requirements took effect. *Ibid.* But the D.C. Circuit subsequently held that the EPA's CAIR deadlines were too lax, *i.e.*, they did not ensure sufficiently prompt action by Upwind States to reduce their significant contribution to downwind nonattainment of air quality standards. *North Carolina v. EPA*, 531 F.3d 896, 911-912 (2008) (*per curiam*), modified on reh'g, 550 F.3d 1176.

The deadlines in the Transport Rule were a direct response to that holding. Pet. App. 175a-176a, 449a-456a; see *id.* at 93a (Rogers, J., dissenting). And while the Transport Rule adopted federal plans for the Upwind States, it authorized those States to replace the federal plans with their own state plans as early as

2014 (and to allocate allowances as they saw fit as early as 2013). *Id.* at 669a-689a. Notwithstanding *North Carolina*, the Upwind States now contend that the EPA was required to delay its action in order to give them more time to submit state plans, even though they had already failed to meet statutory deadlines for doing so (or had submitted inadequate plans). The Act cannot sensibly be read to whipsaw the agency in this way.

In any event, the question here is not whether the EPA *could have* pursued an alternative approach, but whether the Act unambiguously *prohibited* the agency from pursuing the course it chose. *Chevron*, 467 U.S. at 842-845. The CAA directs the EPA to “promulgate a Federal implementation plan at any time within 2 years after” it disapproves a proposed state plan or makes a finding of failure to submit. 42 U.S.C. 7410(c)(1). The statute thus imposes an outer limit of two years from the date of the finding or disapproval, while giving the EPA broad discretion to choose an appropriate date within that interval. Although the EPA may sometimes deem it appropriate to wait the full two years in order to give States every opportunity to devise their own compliant plans, the agency reasonably determined that time was of the essence here.

v. As explained above, the Upwind States (Br. 20) disavow any contention that the EPA lacked authority to issue federal implementation plans at all; they “contest[] only the *type* of FIPs that EPA could issue” before individual States’ good-neighbor obligations had been quantified. The only concrete alternative they suggest, however, is that the EPA should have issued federal implementation plans based on CAIR

while giving the Upwind States yet another opportunity to submit legally adequate state plans. *Id.* at 61-62. Such an approach would have violated the mandate in *North Carolina*, which found CAIR to be legally defective and insufficiently protective of Downwind States. Although the D.C. Circuit ultimately decided not to vacate CAIR, despite its “fundamental flaws,” the court made clear that the EPA was required to replace it quickly. *North Carolina*, 550 F.3d at 1178.⁴

b. The Upwind States contend (Br. 25-39) that the EPA lacked authority to issue federal plans for States whose plans under CAIR had previously been approved. The court of appeals did not address that argument, Pet. App. 48a n.29, and this Court need not decide the question in the first instance, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012). In any event, the argument lacks merit.

i. The EPA had authority to issue federal plans for the relevant States based on pre-CAIR findings of failure to submit state plans. Gov’t Br. 32-33. The EPA did not “retroactively revoke” its subsequent, post-CAIR approvals of those States’ plan submissions. Upwind States Br. 27; see *id.* at 28-34. Those submissions remained in place for the purpose

⁴ The EPA could not have satisfied its obligation to issue federal implementation plans within two years after the various findings and disapprovals simply by advising the Upwind States of their respective emission budgets. The CAA defines the term “Federal implementation plan” to mean a plan that “includes enforceable emission limitations or other control measures, means or techniques.” 42 U.S.C. 7602(y). An EPA advisory document that simply quantified a State’s emission budget, without imposing enforceable limits on particular emission sources within the State, would not be a “Federal implementation plan” under that provision.

of implementing CAIR. Instead, recognizing the binding force of the D.C. Circuit’s adverse decision in *North Carolina*, the EPA merely corrected statements in the prior approval decisions that the plans satisfied those States’ good-neighbor obligations. 42 U.S.C. 7410(k)(6) (authorizing the EPA to “revise” a previous state-plan determination “as appropriate” when the agency concludes it “was in error”); 42 U.S.C. 7410(c)(1) (the EPA’s federal-plan authority ends if the agency approves a state plan *and* “the State corrects the deficiency”).

The Upwind States contend (Br. 29) that the EPA’s Section 7410(k)(6) correction authority may be used only when the prior action “was erroneous based on the law in existence *at that time*.” But “[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). Accordingly, the D.C. Circuit’s decision in *North Carolina* meant that the CAIR state-plan approvals were erroneous when issued, and that the state plans were likewise deficient when submitted. The EPA’s recognition of those facts was not an exercise of retroactive lawmaking. *Id.* at 311-313; cf. Upwind States Br. 30, 32.⁵

⁵ The Upwind States contend (Br. 32-33) that the EPA was required to use notice-and-comment rulemaking when issuing corrections under 42 U.S.C. 7410(k)(6). That is incorrect. The EPA invoked the good-cause exception of the Administrative Procedure Act (APA) to the notice-and-comment requirement. Pet. App. 183a-184a (citing 5 U.S.C. 553(b)(B)). The CAA’s separate rulemaking requirements do not cover EPA actions on SIP submissions, and, in any event, do not apply when the APA’s good-cause standard is satisfied. 42 U.S.C. 7607(d)(1); Pet. App. 184a.

ii. Even if the EPA lacked authority to issue federal plans regarding the 1997 air quality standards for those States with previously approved CAIR state plans, the agency's authority to issue the Transport Rule would have been largely unchanged. Gov't Br. 33 n.11. That is so because, except for Texas and South Carolina, the rule's state-by-state emission budgets for annual NO_x and SO₂, Pet. App. 958a-962a, 1211a-1214a, 1335a-1338a, independently implement the Upwind States' good-neighbor obligations with respect to the 2006 PM_{2.5} air-quality standard, which CAIR did not address, and because there is substantial overlap between the sets of States subject to the rule's annual NO_x and ozone-season NO_x emission budgets, *id.* at 143a-144a.

Contrary to the Upwind States' contention (Br. 37-39), a finding that the EPA lacked authority to issue federal plans with respect to a subset of States, such as South Carolina and Texas, would provide no basis for invalidating the entire Transport Rule. The federal plan for each State is separate, *e.g.*, Pet. App. 886a-889a (South Carolina), 894a-899a (Texas); the EPA's regulations include a severability provision, 40 C.F.R. 52.17; and the D.C. Circuit has previously held that particular States were erroneously included in regional transport rules without suggesting that its decision would invalidate the rules in toto, *e.g.*, *Michigan*, 213 F.3d at 681 (excising Wisconsin from the NO_x SIP Call).

B. In Rejecting The EPA’s Significant-Contribution Analysis, The Court Of Appeals Improperly Entertained Objections Not Presented To The Agency And Misconstrued The Relevant Statutory Language

1. The court of appeals should not have vacated the Transport Rule based on statutory objections to the EPA’s significant-contribution analysis that were not “raised with reasonable specificity” before the agency. 42 U.S.C. 7607(d)(7)(B); see Gov’t Br. 34-42.

a. Industry-Labor respondents recognize (Br. 46-47) that the regulatory history is relevant to the exhaustion analysis, but they draw the wrong lesson from it. In its 2000 decision reviewing the NO_x SIP Call, the D.C. Circuit upheld the EPA’s decision to define significant contribution by reference to the amount of emission reductions achievable through “highly cost-effective controls.” *Michigan*, 213 F.3d at 677-680. Industry parties sought review of that decision in this Court, arguing that the EPA may not consider costs when calculating an Upwind State’s degree of significant contribution. Pet. at 14-19, *Appalachian Power Co. v. EPA*, 532 U.S. 903 (No. 00-445). This Court denied the petition. 532 U.S. 903 (2001). In 2005, the EPA used the same approach in CAIR, and the D.C. Circuit declined to disturb it. *North Carolina*, 531 F.3d at 916-917.

In the Transport Rule proceeding, the EPA’s notice of proposed rulemaking (NPRM) recounted that history and stated that the agency intended “to consider the cost of controls to determine what portion of a state’s contribution is its ‘significant contribution.’” 75 Fed. Reg. 45,298 (Aug. 2, 2010) (citing *Michigan* and *North Carolina*). The agency explained that it had examined alternatives, including air-quality-only

approaches excluding cost considerations, but was not inclined to adopt them. *Id.* at 45,299; C.A. App. 2308-2312 (noting that one such approach would require draconian emission reductions in some States, *e.g.*, 93% in Indiana, and that another would be mathematically impossible to apply where, as is typical, an Upwind State contributes to nonattainment in more than one downwind area).

Against this backdrop, a party wishing to advance the objections respondents now assert had an obvious course to pursue. It was required to file comments in response to the NPRM stating that (1) the CAA prohibited the EPA's cost-based approach, and (2) the EPA was therefore legally compelled to adopt an air-quality-only approach. Respondents did not do so. Industry-Labor respondents discuss (Br. 47-51) several comments that they claim adequately preserved their statutory objections. But none of those comments argued with "reasonable specificity" (42 U.S.C. 7607(d)(7)(B)), or even reasonable generality, that the EPA's approach was invalid on its face because it reflected a legally impermissible interpretation of the statutory term "contribute significantly." Gov't Br. 38-42; American Lung Ass'n Br. 31-35.

Industry-Labor respondents' failure in this regard is starkly illuminated by their repeated invocation of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), in an attempt to bar consideration of many of the EPA's statutory counter-arguments on the ground that the EPA did not state them in the administrative proceedings. Industry-Labor Br. 16, 17, 18, 20, 21, 40. The absence of administrative response to those arguments is explained entirely by the fact that no one made the arguments during the rulemaking.

b. Industry-Labor respondents contend (Br. 42-45) that Section 7607(d)(7)(B) is not jurisdictional. Every court that has considered the question has correctly reached the contrary conclusion. *E.g.*, *North Dakota v. EPA*, 730 F.3d 750, 770 (8th Cir. 2013); *National Ass'n of Clean Water Agencies v. EPA*, No. 11-1131, 2013 WL 4417438, at *41 (D.C. Cir. Aug. 20, 2013); *Oklahoma v. EPA*, 723 F.3d 1201, 1222 (10th Cir. 2013). By its terms, the provision is a limitation on the category of objections that “may be raised during judicial review.” 42 U.S.C. 7607(d)(7)(B); see House Report 323 (provision limits authority of a “reviewing court” to consider unpreserved objections).

In any event, even non-jurisdictional claim-processing rules are binding if timely invoked, note 1, *supra*, and the government argued below that respondents’ statutory arguments had not been adequately preserved, Gov’t C.A. Br. 26, 30, 32 & n.18.⁶ And while the government’s petition for a writ of certiorari characterized the preservation issue as jurisdictional (consistent with the uniform understanding of the lower courts), the question whether Section 7607(d)(7)(B) imposes a non-jurisdictional barrier to review is fairly included in the question presented. Sup. Ct. Rule 14.1(a).

⁶ To the extent the EPA did not phrase its waiver claims more categorically in its court of appeals brief, Industry-Labor Br. 46, that is because agency counsel (operating on a highly expedited briefing schedule) were appropriately cautious in allowing for the possibility that they might have overlooked a particular comment among the tens of thousands filed in the proceeding. Industry-Labor respondents were in the best position to identify comments through which their claims on appeal had been preserved. They failed to do so.

c. Industry-Labor respondents contend (Br. 52-55) that this Court should affirm the judgment below even if their arguments were not properly preserved. Such a course is inconsistent with the text of Section 7607(d)(7)(B). Indeed, even when a particular objection could not feasibly have been raised during the period for public comment, Section 7607(d)(7)(B) does not authorize the objecting party to raise it during judicial review of the pertinent rule itself, but instead establishes a mechanism for EPA reconsideration in light of the new objection. That aspect of the CAA’s judicial-review regime highlights Congress’s commitment to the principle that “the first decider under the [Clean Air] Act is the expert administrative agency, the second federal judges.” *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) (*AEP*). That principle is especially critical in an area of extraordinary scientific, technical, and economic complexity, Gov’t Br. 18-19, and particularly where (as here) a litigant’s legal objections are closely linked to predictions about the likely practical consequences of the challenged EPA action.

2. The EPA’s approach to the good-neighbor provision reflects a reasonable interpretation of the term “contribute significantly.” Gov’t Br. 42-55.

a. Industry-Labor respondents contend (Br. 22-36) that the EPA is statutorily prohibited from considering costs *at all* when calculating the level of a State’s significant contribution to downwind nonattainment. Instead, they contend that the agency must use a strictly proportional approach based only on air-

quality factors. Those respondents are mistaken. Gov't Br. 42-50.⁷

i. As noted above (p. 12, *supra*), the D.C. Circuit in *Michigan* correctly rejected this argument, explaining that the term “significantly” (as used in the good-neighbor provision) is ambiguous, and that the EPA may permissibly determine the amount of a State’s “significant” contribution by reference to the amount of emissions reductions achievable through application of “highly cost-effective controls.” 213 F.3d at 677-680; see Gov't Br. 42-45. The fact that the EPA first adopted its interpretation in 1998 and has applied it multiple times makes it particularly worthy of deference. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009); *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 487 (2004).⁸

ii. If a particular State did not contribute more than one percent of a NAAQS to *any* downwind receptor in an area with nonattainment or maintenance problems, that State was not included in the Trans-

⁷ Another group of industry respondents contends that the EPA may use cost considerations, but only to *lessen* Upwind States' good-neighbor obligations. Util. Air Regulatory Grp. Br. 28 & n.6.

⁸ Even before the term “contribute significantly” was added to the CAA in 1990 (Gov't Br. 5), the EPA had construed the prior version of the statute to require a downwind State “to show a significant contribution by an out-of-State source to [the Downwind State's] violation” of a NAAQS in order to obtain redress under the good-neighbor provision. 49 Fed. Reg. 34,859 (Sept. 4, 1984). The EPA explained that, in determining whether a particular contribution was “significant,” the agency would consider, *inter alia*, “the relative stringencies of the pollution controls placed on in-State sources compared to those placed upon out-of-State sources” and “the relative costs of pollution abatement between sources that contribute to a violation.” *Ibid.*

port Rule for that NAAQS. Pet. App. 137a-138a, 255a. The EPA explained that “[S]tates whose contributions are below these thresholds do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS.” *Id.* at 255a. Industry-Labor respondents argue that, by then considering costs in quantifying the significant contributions of the States that *were* included in the Transport Rule, the EPA “adopted inconsistent definitions of *the very same statutory language.*” Br. 38; see *id.* at 36-40. That argument reflects a misunderstanding of the EPA’s two-step approach.

In quantifying the various Upwind States’ significant contributions to downwind nonattainment or maintenance problems, the EPA was determining the extent to which particular Upwind States should be held *legally responsible* for other States’ (actual or potential) violations of the NAAQS. Pet. App. 317a-318a (“[I]nterpreting significant contribution to nonattainment and interference with maintenance inherently involves a decision on how much emissions control responsibility should be assigned to upwind states, and how much responsibility should be left to downwind states.”). At least in theory, “there may be cases when upwind states contributing to a specific downwind nonattainment area have already done a great deal to reduce emissions while the downwind state in which the nonattainment area is located has done very little.” 75 Fed. Reg. at 45,271 (NPRM). The EPA could appropriately consider the relative prior emission-control efforts of Upwind and Downwind States in determining whether, and to what extent, an Upwind State should be treated as the legal cause of a downwind violation.

Nuisance law confirms the propriety of that approach. See *AEP*, 131 S. Ct. at 2537-2538 (CAA displaced analogous nuisance actions for pollution abatement). Nuisance law permits consideration of costs when weighing the gravity of harm against the utility of the conduct causing it. The Restatement of Torts illustrates this principle with a hypothetical involving reduction of air pollution: a factory that can reduce harmful emissions “[b]y installing certain available devices * * * at a cost of \$10,000” must do so or be subject to nuisance liability, while a factory that produces the same level of emissions but can control them only through devices costing \$150,000 may not have to install the devices. Restatement (Second) of Torts § 830 cmt. c, illus. 1 & 2, at 137-138 (1979); see *id.* § 828 cmt. h, at 133.

“Under EPA’s two-step approach, only a state that (1) contributes a threshold amount or more to a particular downwind state receptor’s air quality problem, and (2) has emission reductions available at the selected cost threshold can be deemed to have responsibility to reduce its emissions to improve air quality at that downwind receptor.” Pet. App. 344a. Those two steps do not reflect inconsistent understandings of the statutory term “contribute significantly.” Rather, they reflect the expert agency’s judgment that an Upwind State should be legally responsible for a downwind CAA violation only if the Upwind State *both* has a specified factual connection to the relevant downwind receptor *and* has available to it reasonably cost-effective means of alleviating the problem. Neither the text of the good-neighbor provision nor the background nuisance principles on which it is based foreclosed the EPA from adopting that approach.

Industry-Labor respondents' reliance (*e.g.*, Br. 24-25) on *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), is misplaced. The Court in *American Trucking* held that the language of 42 U.S.C. 7409(b)(1), which directs the EPA to establish NAAQS in accordance with public-health criteria, unambiguously precluded consideration of costs. 531 U.S. at 465. The Court did not suggest, however, that this barrier to consideration of costs extended to the whole of the CAA. To the contrary, the Court contrasted the process of *establishing* NAAQS with other CAA provisions, including Section 7410 (which describes state implementation plans, including the good-neighbor provision), that guide "*implementers* of the NAAQS." *Id.* at 470; see *id.* at 469 n.1 (citing *Michigan*). The Court explained that "[i]t would be impossible to perform [the] task" of implementation "intelligently without considering which abatement technologies are most efficient, and most economically feasible." *Id.* at 470.

iii. A strict proportionality approach that excluded consideration of cost-effectiveness would have serious adverse practical consequences. First, it would mean that "if faced with two [S]tates, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost less than \$5000 a ton, EPA must mandate the same cutback for each." *Michigan*, 213 F.3d at 676. Thus, "any aggregate cutback [in interstate air pollution] would be achieved at considerably higher cost * * * with absolutely no offsetting environmental benefit to the public." *Ibid.*; see Inst. for Policy Integrity Amicus Br. 16-33.

Second, a strict proportionality approach would create barriers to interstate trading of emission allowances. Gov't Br. 12 (discussing allowance trading under cap-and-trade system); see generally Calpine Corp. Resp. Br. 16-20, 38-42, 55-57; Hobbs Amicus Br. 21-31. That would be incompatible with Congress's intent as demonstrated by its amendment of the Act in 1990 to promote market-based approaches. Clean Air Act Amendments of 1990, Pub. L. No. 101-549 §§ 101(b), 108(j), 104 Stat. 2404, 2468 (adding "economic incentives such as fees, marketable permits, and auctions of emissions rights" to state and federal implementation plan provisions); 42 U.S.C. 7410(a)(2)(A), 7602(y).

Finally, the court of appeals built its proportionality requirement on a grossly over-simplified hypothetical involving three Upwind States and one downwind receptor. In the real world of myriad upwind-downwind linkages, however, a proportionality requirement would be mathematically impossible to apply. C.A. App. 2312; Gov't Br. 47-48; Atmospheric Scientists Amicus Br. 26-27. In response, Industry-Labor respondents point (Br. 34) to the court of appeals' acknowledgement that "it may not be possible to accomplish the ratcheting back in an entirely proportional manner among the upwind States." Pet. App. 29a. Rather than recognizing that this concession rendered its proportionality red line unworkable, the court said the EPA should have an undefined category of "discretion" to deviate from proportionality. *Id.* at 28a-29a. Neither the court of appeals nor the Industry-Labor respondents explain how the agency could have "discretion" to depart from what they contend is an inexorable statutory command.

Industry-Labor respondents also invoke (Br. 32) the court of appeals' conclusion that the EPA's methodology did not account for downwind States' own contributions to air-quality problems. That objection is baseless. In assessing the relative cost-effectiveness of various potential cost thresholds, the EPA estimated the impact on air quality that would occur if *both* Upwind *and* Downwind States achieved the emission reductions available at those thresholds. *E.g.*, Pet. App. 343a ("EPA assumes reductions at each cost threshold from the linked upwind states as well as the downwind receptor state to assess the shared responsibility of these upwind states to address air quality at the identified receptors."); 75 Fed. Reg. at 45,272 ("[O]ur methodology implicitly assumes controls at the same cost per ton level in the downwind state as in the upwind contributing states."). And in reality, downwind States have already adopted (or are considering adopting) much more expensive controls. C.A. App. 1587 (\$40,000/ton of NO_x), 1788 (\$10,000/ton of NO_x), 1882 (\$2000-\$80,000/ton of NO_x). Respondents observe that a summary document cited by the government excludes certain in-state emissions, Industry-Labor Br. 33 (citing Gov't Br. 48), but they do not dispute that the substantial majority of pollution affecting downwind areas originates in Upwind States.

b. Industry-Labor respondents contend that the EPA's methodology violates the CAA because it fails to prevent "over-control in the downwind States." Br. 15 (citation omitted); see *id.* at 15-22. That argument elides the fact that the Act separately requires NAAQS attainment at *all* individual downwind locations, not a regional average. 42 U.S.C. 7410(a)(2)(D)(i)(I). It also elides the fact that a given

power plant does not emit discrete, separately-controllable NO_x and SO₂ streams, each of which affects a distinct downwind location. Rather, the only way to reduce an upwind facility's adverse impact on a particular downwind area is to reduce the facility's overall NO_x and SO₂ emissions.

For those reasons, the emission reductions needed to bring the most polluted downwind areas into attainment may have the practical effect of bringing less polluted downwind areas well below the NAAQS. That does not mean that the upwind emissions are over-controlled; it means that lesser reductions would result in *under*-control with respect to the most polluted areas. The likelihood that other downwind areas will have better air quality than the law requires is an unavoidable collateral benefit of the Transport Rule, not a sign of EPA overreaching.

Industry-Labor respondents make the same error when they contend that "less costly emission controls would have enabled downwind States to achieve attainment at *almost all* the same locations as the more costly controls EPA chose." Br. 16 (emphasis added). As an initial matter, this argument relates only to the EPA's selection of a \$500/ton SO₂ threshold for a group of seven States. Gov't Br. 11; Pet. App. 356a-357a. It ignores completely the higher \$2300 SO₂ threshold that applies to 16 States. *Ibid.* The EPA explained in detail why it chose that \$2300/ton threshold, as opposed to some lower figure. Pet. App. 362a-365a.

Even with respect to the \$500/ton SO₂ threshold, Industry-Labor respondents' own description of their proffered alternatives shows that adoption of those alternatives would have resulted in under-control.

For example, Industry-Labor respondents cite (Br. 16) a chart showing the number of downwind monitors that would have attainment or maintenance problems at cost controls decreasing in \$100 increments from \$500 to \$100. C.A. App. 1374. The chart shows steady increases in the number of monitors with such problems at every \$100 step-down from \$500. *Ibid.*⁹ The EPA explained that it based its choice of the \$500/ton SO₂ threshold on “more detailed analysis using smaller increments” in the NPRM, Pet. App. 330a, and that analysis showed inferior results at cost thresholds below \$500, 75 Fed. Reg. at 45,275-45,282.

Finally, to the extent a challenger could demonstrate that the EPA did not adequately explain its choice of cost thresholds, that showing would at most have supported a limited remand to the agency for further explanation. It would not support facial invalidation of the rule on statutory grounds. And the argument that lower cost thresholds should have been considered is unrelated to Industry-Labor respondents’ overarching contention that, in defining each covered State’s significant contribution to downwind pollution, the EPA should not have considered costs at all.

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⁹ Industry-Labor respondents’ contention (Br. 18) that the Transport Rule would result in substantial over-control with respect to the annual PM_{2.5} NAAQS ignores the fact that substantially the same emission reductions were necessary to address the 24-hour PM_{2.5} NAAQS, which is harder to achieve. The comparable data for that NAAQS do not demonstrate over-control. C.A. App. 2963, 2965.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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