ORAL ARGUMENT SCHEDULED FOR FEBRUARY 25, 2015

No. 11-1302 and consolidated cases (COMPLEX)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EME Homer City Generation, L.P., *et al.*,
Petitioners,
v.
Environmental Protection Agency, *et al.*,
Respondents.

On Petitions for Review of a Final Order of the
United States Environmental Protection Agency

STATE AND LOCAL PETITIONERS' REPLY BRIEF ON REMAND

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GLOSSARY

APA	Administrative Procedure Act
EPA	United States Environmental Protection Agency
CAA	Clean Air Act
CAIR	Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 FR 25,162 (May 12, 2005)
FIP	Federal Implementation Plan
JA	Joint Appendix
NO_x SIP Call	Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 FR 57,356 (Oct. 27, 1998)
NAAQS	National Ambient Air Quality Standard(s)
SIP	State Implementation Plan
Transport Rule	Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 FR 48,208 (Aug. 8, 2011)

SUMMARY

1. The petitioning States' primary assertion on remand, that EPA unlawfully imposed Transport Rule FIPs for the 1997 NAAQS on the States whose CAIR SIPs were previously approved in full, is based on the text of 42 U.S.C. 7410(c)(1) and 7410(k)(6). EPA's and the respondent-intervenors' responses misread the statutory text and rely on an inaccurate understanding of *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam), *modified on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam). The Court should hold that EPA had no authority under section 7410(c)(1) to impose FIPs on the relevant States, that its attempt to invoke section 7410(k)(6) to avoid that problem was invalid, and that the Transport Rule must therefore be vacated.

2. EPA also cannot show that it complied with the mandate in *North Carolina* to give the good-neighbor provision's "interfere with maintenance" prong independent effect in a manner that comports with the statutory text and governing precedent. The Transport Rule's implementation of that prong applies the same methodology used to prohibit emissions that "contribute significantly to nonattainment." 42 U.S.C. 7410(a)(2)(D)(i)(I). EPA's "maintenance" methodology thus fails to relate an upwind State's emissions to "interfere[nce]

with maintenance by … [a downwind] State," *id.*, and exceeds the limits of what EPA may demand of upwind States under this portion of the statute.

3. As explained in detail in the Industry and Labor Petitioners' reply brief, all of EPA's arguments in response to the petitioners' over-control assertions fail. EPA also cannot show that the petitioning States' arguments regarding downwind areas that are not or were never designated "nonattainment" are improperly raised or lack merit. EPA's responses to the States' notice argument fail to show that the final Transport Rule was a logical outgrowth of the proposed rule. Finally, Kansas and Indiana assert that EPA lacked authority to propose and promulgate Transport Rule FIPs for States with good-neighbor SIP submittals implementing the 2006 fine-particulate NAAQS that were pending when the Transport Rule was proposed.

ARGUMENT

I. EPA LACKED STATUTORY AUTHORITY TO IMPOSE FIPS FOR THE 1997 NAAQS ON A MAJORITY OF THE TRANSPORT RULE STATES.

In their opening brief on remand, the petitioning States first explained that under the plain language of 42 U.S.C. 7410(c)(1), EPA had no authority to impose Transport Rule FIPs for the 1997 NAAQS on the 22 States whose CAIR SIPs EPA had previously approved. State Br. 5–8. That assertion was based not only on the text of section 7410(c)(1) and the Supreme Court's opinion in this case, but also on

EPA's own explanation of the limits of its statutory authority. *Id.* at 5–7. The States next explained why EPA could not use section 7410(k)(6) to revive its FIP authority as to these States. *Id.* at 8–15. Finally, the States noted that, because this problem affects 31 of the Transport Rule's 59 FIPs, the rule cannot operate as intended and should be vacated in full. *Id.* at 15–16.

A. In response to these points, EPA first asserts that its purportedly erroneous approval of 22 States' CAIR SIPs did not eliminate its obligation to issue Transport Rule FIPs under 42 U.S.C. 7410(c)(1). EPA Br. 11. That provision reads, in full:

> The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or
>
> (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

As the States previously explained, "the deficiency" in section 7410(c)(1)'s final, "unless" clause cannot reasonably be read to mean *any* deficiency that may later become known, but rather only the deficiency that led EPA to (A) find that a State failed to submit a SIP or (B) disapprove a SIP that was submitted. State Br.

14–15; *see* 42 U.S.C. 7410(c)(1)(A), (B). Because the 22 States at issue "correct[ed] the deficiency" that EPA identified (the failure to submit SIPs to satisfy the requirements of the good-neighbor provision, 70 FR 21,147, 21,148 (Apr. 25, 2005); *see* JA3167–78), and EPA "approve[d]" the States' CAIR "plan[s] or plan revision[s]" satisfying those requirements "before [EPA] promulgate[d]" Transport Rule "Federal implementation plan[s]," section 7410(c)(1)'s "unless" clause deprived EPA of authority to promulgate FIPs addressing good-neighbor requirements as to these States.

EPA's lead response is that, as a judicial decision, *North Carolina* "determined that CAIR was invalid *ab initio*"—and, for that reason, the "CAIR SIP approvals were erroneous when issued," allowing EPA to claim that the "unless" clause's "corrects the deficiency" condition, 42 U.S.C. 7410(c)(1), was never satisfied. EPA Br. 12 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994)). That response fails on two levels.

First, *North Carolina* did not invalidate CAIR *ab initio*. Although the Court initially opined that CAIR and its associated FIPs should be vacated, 531 F.3d at 930, it withheld the mandate that would have implemented that relief. Order, *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. July 11, 2008) (No. 05-1244). It then granted EPA's request, on rehearing, for remand *without* vacatur, modifying its

initial opinion and issuing a mandate that kept CAIR and the CAIR FIPs in effect while the agency developed a replacement rule. 550 F.3d at 1177–78; Corrected Mandate, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. Jan. 16, 2009) (No. 05-1244) (ordering that "the case be remanded without vacatur for [EPA] to conduct further proceedings"); NY Br. 7 n.9. The *North Carolina* mandate thus ensured that CAIR would *not* be vacated but would rather continue in full force and effect. *See* 74 FR 65,446, 65,446 (Dec. 10, 2009) (post-*North Carolina* CAIR SIP approval explaining that, "[a]lthough the D.C. Circuit found CAIR to be flawed, the rule was remanded without vacatur and thus remains in place"); *cf.* NY Br. 8 (erroneously focusing on the Court's initial opinion, rather than its mandate). EPA was ordered to fix the problem on its own by developing a new legislative rule that, on the day of its promulgation, would prospectively replace the old one.

Both before and after *North Carolina*, CAIR was thus a binding legislative rule defining the applicable good-neighbor SIP requirements for the covered States and requiring EPA to approve those States' CAIR-compliant SIPs. *See* State Br. 6, 7, 13 (citing 42 U.S.C. 7410(k)(3), which provides that EPA "shall approve [a SIP] as a whole if it meets all of the applicable requirements of [the CAA]"); *accord, e.g.*, 75 FR 72,956, 72,962 (Nov. 29, 2010) (post-*North Carolina* CAIR SIP approval (citing 42 U.S.C. 7410(k))); *see also Nat'l Family Planning & Reprod. Health Ass'n,*

Inc. v. Sullivan, 979 F.2d 227, 234 (D.C. Cir. 1992) (explaining that "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked"). The CAIR SIPs therefore did "correct the deficiency" that EPA had identified, 42 U.S.C. 7410(c)(1), and EPA's approvals were not "in error," 42 U.S.C. 7410(k)(6)—but were instead required under section 7410(k)(3) and the Court's final opinion and mandate in *North Carolina*.

Second, even assuming *North Carolina* rendered CAIR void *ab initio*, that decision would have invalidated only the CAIR FIPs. *See* 531 F.3d at 930. Approved CAIR *SIPs* were not before the Court in *North Carolina*, so they remained binding legislative rules. That observation does not mean that States were "immunize[d]" from "the consequences of [*North Carolina*.]" EPA Br. 13. Section 7410(k)(5) provides that "[w]henever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant [NAAQS], … the Administrator shall require the State to revise the plan as necessary to correct such inadequacies." EPA should have determined, under this provision, whether the emissions reductions mandated by approved CAIR SIPs remained adequate to satisfy good-neighbor obligations. If they did not, EPA should have established "reasonable deadlines," 42 U.S.C. 7410(k)(5), for the States to make the necessary revisions. *See* State Br. 11–13.

In short, although an approved SIP that is inconsistent with a statutory requirement must be revised, *see* EPA Br. 13, EPA's approval of a SIP that corrects the deficiency that EPA identified extinguishes the agency's FIP authority. 42 U.S.C. 7410(c)(1). If later developments demonstrate that a SIP is inadequate to satisfy a State's good-neighbor obligations, a section-7410(k)(5) SIP call is not just one available option. *See* EPA Br. 14. It is the only option that comports with section 7410(c)(1) and (k)(3) in particular and section 7410 as a whole. And while EPA sometimes correctly describes the "different roles" that sections 7410(k)(5) and 7410(k)(6) play, NY Br. 9, it does not do so here. Accepting EPA's position in this litigation—that it was free to choose between the two provisions, EPA Br. 14—would allow EPA to bypass the procedural protections of section 7410(k)(5) whenever it finds it expedient to do so, whether because of factual developments, legal developments, or the policy views of a new administration. *See* State Br. 13.

B. EPA's invocation of 42 U.S.C. 7410(k)(6) was invalid not only for the reasons just explained, but also because EPA violated the provision's "in the same manner" requirement by failing to "correct" its CAIR SIP approvals through notice-and-comment rulemaking. *Id.* at 13–14. The Court's analysis of this point should focus on two questions: (1) whether "in the same manner" in section 7410(k)(6) refers to notice-and-comment rulemaking, at least in the scenario

presented here; and (2) if so, whether that language prevented EPA from invoking the APA's "good cause" exception, 5 U.S.C. 553(b)(B). The answer to both questions is "yes."

Section 7410(k)(6) is not the only CAA provision to use the phrase "in the same manner" to refer to notice-and-comment procedures. *See* 42 U.S.C. 7407(d)(3)(C) and (d)(4)(A)(ii), 7409(b)(1) and (b)(2) (using the same phrase to ensure the notice and opportunity for comment guaranteed by sections 7407(d)(1)(B)(ii) and 7409(a)(1)). Courts likewise use this phrase to refer to notice-and-comment procedures. *See First Nat'l Bank of Chi. v. Standard Bank & Trust*, 172 F.3d 472, 479 (7th Cir. 1999) ("[O]nce a regulation is adopted by notice-and-comment rulemaking …, its text may only be changed in the same manner."); *cf. Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 n.12 (9th Cir. 1987) (noting a party's contention that a rule "promulgated without notice-and-comment proceedings" could "be repealed in the same manner it was promulgated").

Section 7410(k)(6)'s "in the same manner" requirement means that EPA had no choice but to follow the same notice-and-comment procedures it observed in approving the CAIR SIPs. *See* 5 U.S.C. 553(b)(B) (providing that the good-cause exception cannot be invoked "when notice or hearing is required by statute").

EPA's argument amounts to a request to read "in the same manner" out of the statute.

That requirement, however, is there for good reason. To prevent additional error, "in the same manner" forbids an agency to relax procedures under which an initial error arose. It should be no surprise that, in an area as complex and important to interested parties as this one, Congress ensured through the text of section 7410(k)(6) itself that EPA would observe notice-and-comment requirements in correcting actions taken through notice-and-comment rulemaking.

Failing to offer an explanation of what "in the same manner" means, the governmental respondent-intervenors submit that EPA's erroneous invocation of section 7410(k)(6) was insignificant under 42 U.S.C. 7607(d)(8) and (d)(9)(D). NY Br. 10. But because SIP approvals are not listed in 42 U.S.C. 7607(d)(1), and are thus not governed by section 7607(d), those provisions are inapplicable.

In any event, if EPA had honored section 7410(k)(6)'s "in the same manner" requirement, interested parties would have submitted comments explaining why the CAIR SIP approvals were not "in error," 42 U.S.C. 7410(k)(6), leaving nothing for EPA to correct and requiring EPA to issue a SIP call, rather than 31 Transport Rule FIPs. *See supra* Part I.A; *see also Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 447 n.79 (D.C. Cir. 1982) (explaining that an agency

cannot avoid the APA's notice-and-comment requirements by declaring its previous regulations "'defectively promulgated,'" noting that "the question whether the regulations are indeed defective is one worthy of notice and an opportunity to comment"). Those comments would thus have been substantially likely to have significantly changed the rule.

Finally, even assuming section 7410(k)(6) allows for invocation of the good-cause exception in some circumstances, EPA failed to meet its heavy burden to show that the exception could be properly invoked here. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981). The "unnecessary" prong of the exception, 5 U.S.C. 553(b)(B) (the only prong on which EPA relied, 76 FR 48,208, 48,221–22 (Aug. 8, 2011)), is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (internal quotation marks omitted). The situation here is anything but that.

C. EPA claims that its violation of sections 7410(c)(1) and 7410(k)(6) in imposing FIPs for the 1997 NAAQS on the States whose CAIR SIPs had previously been approved affects only "a small portion of the Transport Rule." EPA Br. 15. The Transport Rule, however, was the vehicle for issuance of 59 FIPs, 76 FR at

48,219 n.12, and as already noted, the error at issue infected 31 of them. *Id.* at 48,213 (Table III–1), 48,219 n.12, 48,220–21. That is far from a "small portion" of the rule. *Cf.* EPA Br. 16 n.2 (citing *Michigan v. EPA*, 213 F.3d 663, 681–85 (D.C. Cir. 2000) (per curiam), which vacated an earlier rule as to only three of the 22 covered States).

As for EPA's state-specific contentions, the CAIR SIP approvals were not erroneous either before or after *North Carolina*, *see supra* Part I.A, so the distinction EPA attempts to draw with respect to South Carolina, *id.* at 15–16, fails. That Texas was not subjected to EPA's section-7410(k)(6) treatment likewise does not help EPA because Texas should have been excluded from the rule for other reasons. *See* State Br. 24–25, 29–30.

Finally, with respect to the Transport Rule's ozone-season nitrogen-oxides program, EPA counts only eight States by relying once again on its flawed distinction between pre- and post-*North Carolina* CAIR SIP approvals. *See* EPA Br. 16. Correcting that error brings the total from eight States to fifteen, *see* 76 FR at 48,220–21; JA3168-03178, and not even EPA asserts that allowance trading for the Transport Rule's ozone-season nitrogen-oxides program could function as intended, and ensure the availability of allowances sufficient for States to meet their compliance obligations, if three quarters of the relevant States were pulled out

of the rule and asked to revise their SIPs. *See id.* at 48,270 (Table VI.F–3) (listing the 20 States in this program); EPA Br. 16 & n.2.

II. EPA'S IMPLEMENTATION OF THE GOOD-NEIGHBOR PROVISION'S "INTERFERE WITH MAINTENANCE" PRONG IS UNLAWFUL.

As already explained, any rule implementing the good-neighbor provision's "interfere with maintenance" prong must relate upwind-state emissions to an imminent threat to efforts "by … [a downwind] State" to assure continued NAAQS attainment. 42 U.S.C. 7410(a)(2)(D)(i)(I); *see EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 27 n.25 (D.C. Cir. 2012). In the case of attainment areas with approved SIPs, this requires a methodology focused only on emissions above those already accounted for in a SIP's attainment/maintenance demonstration. *See* State Br. 16–19; *see also id.* at 20–23 (explaining how EPA's failure to give the "maintenance" prong independent effect violated the text of the statute and this Court's decision in *North Carolina*, and illustrating EPA's error through the example of Allegan County).

The responses of EPA and the governmental respondent-intervenors, EPA Br. 18–22; NY Br. 11–16, are insufficient to save the rule.

A. Contrary to EPA's assertion, EPA Br. 20, this issue is properly before the Court. It was litigated in *North Carolina* and resulted in this Court's mandate that, on remand, EPA develop a new rule that gives the "maintenance" prong

independent significance. 531 F.3d at 908–11, 929–930 (rejecting, at *Chevron* step one, EPA's conclusion in CAIR that the prohibition of emissions that "contribute significantly to nonattainment in … any other state" would address any obligation a State might have to abate emissions that "interfere with maintenance by … any other state," 42 U.S.C. 7410(a)(2)(D)(i)(I)).

The question here is whether EPA satisfied that mandate, *see EME Homer*, 696 F.3d at 24 n.18 (noting that "EPA knew from the beginning that it was required to comply with *North Carolina*"), and "the court retains a residual jurisdiction to enforce its mandate." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. OSHA*, 976 F.2d 749, 750 (D.C. Cir. 1992) (per curiam). In any event, EPA's assertion of waiver has itself been waived. *See EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602–03 (2014); Brief for Respondents at 54, *EME Homer*, 696 F.3d 7 (D.C. Cir. Mar. 16, 2012) (No. 11-1302) (reflecting that this is one of the challenges that EPA claimed "*likely* has been waived" (emphasis added)); *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 n.6 (D.C. Cir. 2013).

B. As the Court previously explained, the "maintenance" prong addresses emissions that "will reach a specific maintenance area in a downwind State and push that maintenance area back over the NAAQS in the near future." *EME*

Homer, 696 F.3d at 27 n.25. Accordingly, for the prong to have independent significance, EPA's methodology implementing it must first link emissions from upwind States to NAAQS-pollutant concentrations in downwind attainment areas of potential concern.

According to EPA, it narrowed the universe of downwind "maintenance" areas for evaluation to those with some residual "risk of violating the NAAQS due to variability in emissions and meteorological conditions." EPA Br. 19. But EPA then failed to evaluate whether upwind emissions pose an imminent threat to continued NAAQS attainment in those areas and, if so, what amount of emissions must be prohibited to remove the threat. EPA instead simply applied the "one percent of the applicable NAAQS" threshold it had used to define significant contributions to nonattainment to "determine[] which States were linked to that [maintenance] receptor," then required the resulting upwind States to make all emissions reductions it deemed cost-effective, irrespective of any air-quality objective. *Id.*

In failing to delineate between upwind-state emissions that pose an imminent threat to NAAQS maintenance and those that do not, *see* 76 FR at 48,227–29, EPA's "maintenance" methodology neglected to limit emissions only as necessary to abate an identified "interfere[nce] with maintenance by … any other state." 42

U.S.C. 7410(a)(2)(D)(i)(I). EPA instead imposed "maintenance"-prong reductions without regard to whether all, some, or any of the reductions achieved by cost-effective controls would actually be needed to prevent such "interfere[nce]." *Id.*

That feature of EPA's methodology enables the agency to use the "maintenance" prong to drive upwind States' emissions budgets down unchecked by anything other than EPA's view of cost effectiveness and, in the process, to impose (contrary to every other CAA provision addressing attainment and nonattainment SIP requirements) more stringent obligations with respect to attainment-area air quality than to nonattainment-area air quality. *See* State Br. 16–17. In addition, it violates the limits that both the Supreme Court and this Court agreed were applicable under the "nonattainment" prong: Only reductions required to achieve the air-quality objectives of the good-neighbor provision (in this case, emissions that "interfere with maintenance") may be prohibited. *See EME Homer*, 134 S. Ct. at 1608.

To give the "maintenance" prong independent effect, and to comply with the statutory text and governing precedent, EPA would at a minimum need to resolve three questions: First, are there any upwind-state emissions that contribute to downwind "attainment" air quality that are expected to increase? Second, do

those upwind-state emissions that are unaccounted for in any downwind State's attainment or maintenance plan threaten to push emissions levels "over the NAAQS in the near future"? *EME Homer*, 696 F.3d at 27 n.25. And third, if reductions are required, where must they stop in order to avoid reductions in upwind emissions that pose no threat to continued NAAQS maintenance? By not engaging those questions, and instead mandating cost-effective reductions without regard to any air-quality objective, EPA failed to give independent significance to the "maintenance" prong.

C. The remaining assertions of EPA and the governmental respondent-intervenors likewise fail. Some of those assertions attack arguments that the petitioning States did not make. *E.g.*, EPA Br. 21 (labeling "absurd" the purported argument that "controls on upwind States must be included in an area's maintenance plan as a contingency measure"); *see* NY Br. 15 (similarly mischaracterizing the States' position); States' Br. 22 (citing the proposed approval of the Allegan County maintenance plan, in which EPA noted that Michigan appropriately accounted for emissions reductions "in upwind areas" and "nationwide," 75 FR 42,018, 42,025 (July 20, 2010)). The petitioning States are challenging EPA's failure to identify the amounts of upwind-state emissions that may reasonably be said to interfere with maintenance, a necessary step that requires

EPA to draw a line separating emissions that actually threaten nonattainment from those that do not.

Footnote 18 of the Supreme Court's opinion does not help EPA because it recognizes the agency's latitude merely to "apportion responsibility" among upwind States under the "maintenance" prong. *EME Homer*, 134 S. Ct. at 1604 n.18; *see* NY Br. 13. It does not suggest that EPA could "reasonabl[y]" use the Transport Rule to identify "maintenance" areas that are not, in fact, at "high risk for nonattainment," EPA Br. 19, 20; *see* NY Br. 13–14, or impose cost-effective controls untethered to any air-quality objective. And it does not even address, and certainly did not "reverse[]," this Court's decision with respect to the "maintenance" prong—which, as already explained, is indeed "inconsistent with EPA's approach." EPA Br. 20 n.4. In holding that EPA cannot exceed the textual limits of the good-neighbor provision, the Supreme Court's decision supports this Court's statements regarding the limits of that provision's second prong. *See* 134 S. Ct. at 1604 n.18 (explaining that "EPA is limited, by the ['maintenance' prong], to reduce only by 'amounts' that 'interfere with *maintenance*,' *i.e.*, by just enough to permit an already-attaining State to maintain satisfactory air quality").

Referencing the CAA's deadlines for area designations, SIP submissions, and satisfaction of additional requirements for certain nonattainment areas, EPA

asserts that the petitioning States' argument "upends the statutory process for SIP development." EPA Br. 20–21. But the States' argument has nothing to do with the timing of area designations or SIP submissions. The fact that an attainment or maintenance plan has not yet been adopted for a downwind attainment area would merely require an independent evaluation of whether upwind emissions interfere with maintenance. The absence of such a plan could not justify a "maintenance"-prong methodology that targets upwind emissions without regard to whether they pose an imminent threat to continued maintenance. The Allegan County maintenance plan, which EPA approved before promulgating the Transport Rule, illustrates the disconnect between EPA's "maintenance"-prong methodology and any evaluation of an actual upwind threat to downwind maintenance. *See* State Br. 22–23. That disconnect exists whether or not there is a downwind maintenance plan in place because EPA's "maintenance" methodology ignores the issue across the board.

Finally, EPA attempts to justify its failure to analyze whether upwind-state emissions actually interfere with maintenance (and, if so, what is required to eliminate that interference) by asserting, without citation, that "existing attainment and maintenance plans rely on CAIR, which must be replaced." EPA Br. 20. That assertion is false. For example, the Allegan County maintenance plan does not

depend at all on emissions reductions achieved through CAIR. 75 FR at 42,028. The upwind-state contributions to ozone in Allegan County are limited by "permanent and enforceable" controls imposed by the NO_x SIP Call and other *non-CAIR* measures. *Id*. at 42,025; *see id.* at 42,028 (confirming that "Michigan has demonstrated maintenance without any additional CAIR requirements (beyond those required by the NO_x SIP Call)").

III. AT THE VERY LEAST, THE TRANSPORT RULE IS INVALID AS APPLIED TO SEVERAL PETITIONERS.

A. EPA Violated The Supreme Court's Express Prohibitions With Respect To Several States.

1. The rule impermissibly over-controls Texas.

As previously explained, the Transport Rule over-controls Texas for both fine particulate matter and ozone. State Br. 24–25. The Industry and Labor Petitioners' reply brief refutes EPA's arguments on this point. *See* Industry/Labor Reply Br. Part I.A.

The result should be vacatur of the Transport Rule FIPs for Texas because the linkages on which those FIPs depend are invalid. *See* 76 FR at 48,241 (Table V.D–2), 48,246 (Tables V.D–8, V.D–9) (linking Texas, for purposes of its two 1997-NAAQS FIPs, *see id.* at 48,213 (Table III–1), 48,214, to only Madison, Illinois for fine-particulate matter and East Baton Rouge, Louisiana and Allegan, Michigan

for ozone); 76 FR 29,652, 29,652 (May 23, 2011) (EPA determination that Madison was attaining the fine-particulate NAAQS under less-stringent requirements); 75 FR 54,778, 54,778 (Sept. 9, 2010) (same, for East Baton Rouge with respect to the ozone NAAQS); *see also* State Br. 22–23 (explaining why Allegan County, to which the Transport Rule linked Texas for ozone maintenance only, 76 FR at 48,246 (Table V.D–9), was not a valid maintenance site).

EPA argues against granting that relief only indirectly, suggesting that excluding Texas from the Transport Rule would have left the agency without a mechanism for stemming Texas emissions. EPA Br. 58. But the good-neighbor provision is not the only tool in EPA's toolbox, and in any event, the Court should reject any suggestion that CAIR-mandated reductions, which operating permits for individual sources may still require after CAIR and that sources often have economic incentives to maintain, would necessarily be lost.

2. The rule is invalid with respect to States linked to areas not designated "nonattainment."

As a matter of law, not to mention language and logic, a contribution to a downwind area designated "attainment" cannot constitute a significant contribution to "nonattainment," and areas designated "attainment" or "unclassifiable" are not subject to the stringent SIP requirements that govern areas designated "nonattainment." State Br. 26–28. Nevertheless, EPA asks the Court

to disregard the Transport Rule's imposition on upwind States of significant-contribution reduction obligations for the 2006 fine-particulate NAAQS based on linkages to downwind areas that have never been designated "nonattainment" for that NAAQS. *See* 42 U.S.C. 7407(d); EPA Br. 22–25 (leaving undisputed the States' observation that the areas identified in their opening brief have all been designated either "attainment" or "unclassifiable" since August 2011, State Br. 26).

Specifically, EPA asserts that this objection was "not raised in comments or in Petitioners' earlier briefs," and thus is "not properly before the Court." EPA Br. 22, 23. According to EPA, the claim is in any event "without merit." *Id.* at 23. Each of those assertions fails.

a. In this case, the Supreme Court stated that "[i]f any upwind State concludes it has been forced to regulate emissions" in violation of the good-neighbor provision's limits, it could "bring a particularized, as-applied challenge to the Transport Rule" based on violation of those limits, "*along with any other as-applied challenges it may have*." *EME Homer*, 134 S. Ct. at 1609 (emphasis added). The Court recognized "[t]he possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority." *Id.* Such is the case here. If EPA lacks statutory authority to impose "nonattainment"-prong requirements on

areas designated "attainment" or "unclassifiable," and EPA has in fact imposed such requirements, EPA has over-controlled as a matter of law.

The issue is thus among those remanded to this Court, and it has not been waived. The rulemaking record contains comments objecting to linkages on the ground that air quality was better than the NAAQS. *See, e.g.*, JA1288 (noting that "over 80% of the sites predicted by EPA to be in nonattainment … are already in attainment"). The States' argument presents a straightforward *Chevron* step-one question that falls within these objections.

Moreover, even if EPA were correct that it needed more specificity to become aware of the limits that Congress imposed on its authority, nothing prohibits this Court from considering the claim. Section 7607(d)(7)(B) is not a shield that protects plainly *ultra vires* agency action from judicial review and gives repose to rules that exceed clear statutory limitations. In holding that section 7607(d)(7)(B) "does not speak to a court's authority, but only to a party's procedural obligations," the Supreme Court refused to view the "'reasonable specificity'" prescription as "count[ing as] an impassable hindrance to [its] adjudication of the [Supreme Court] respondents' attack on EPA's interpretation of the Transport Rule." *EME Homer*, 134 S. Ct. at 1602–03. The petitioning States are asking this Court to resolve only a straightforward question of statutory

authority that the Supreme Court identified for this remand proceeding: Did EPA, in imposing Transport Rule emissions-reduction requirements for contributions to areas never designated nonattainment under section 7407(d), impose greater reductions than necessary to achieve attainment in those downwind areas? *See id.* at 1608–09.

Because "EPA retains a duty to examine key assumptions as part of its affirmative burden of promulgating" a valid rule, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534 (D.C. Cir. 1983) (internal quotation mark omitted), "the failure to object during the comment period is insufficient to bar [judicial] review" of such assumptions. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891–92 (D.C. Cir. 2006). The Court has applied this principle to arguments made in several other CAA cases. *See, e.g.*, *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam) (failure to promulgate rules consistent with 42 U.S.C. 7607(d)); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817–18 (D.C. Cir. 1998) (per curiam) (failure to set a compliance date); *Small Refiner*, 705 F.2d at 534–45 (failure to establish the validity of modeling assumptions).

b. On the merits, EPA asserts that "nothing in the Act limits States' obligations under section 7410(a)(2)(D)(i)(I) to downwind areas that have been

formally designated nonattainment." EPA Br. 23. Focusing on the phrase "*will* … contribute significantly to nonattainment," 42 U.S.C. 7410(a)(2)(D)(i)(I), EPA asserts that "Congress intended this requirement to be forward-looking and apply to areas that will be in nonattainment regardless of formal designation." EPA Br. 23–24.

EPA misreads the statute. The word "will" in section 7410(a)(2)(D)(i)(I) refers to current or projected upwind "amounts" of emissions, not to some downwind area's possible future (but not yet designated) nonattainment status. By definition, "[t]he term 'nonattainment area' means, for any air pollutant, an area which is *designated* 'nonattainment' with respect to that pollutant within the meaning of section 7407(d)." 42 U.S.C. 7501(2) (emphasis added). In light of this statutory definition, a downwind area cannot be considered in "nonattainment" for purposes of the good-neighbor provision when the agency has formally found that the area may not be designated "nonattainment."

As already noted, the designation of areas as "nonattainment," "attainment," and "unclassifiable" are based on EPA findings that determine the nature of the CAA requirements applicable to those areas. State Br. 26; *see* 42 U.S.C. 7407(d)(1)(A)(i) (reflecting that a "nonattainment" area is one that does not meet the NAAQS for a given pollutant). EPA's contention that an "upwind

State cannot be relieved of its obligation to address transport merely because of a lack of formal designation," EPA Br. 24, is insupportable. The "formal designation" of a downwind area is what identifies for an upwind State *how* that upwind State is to "address transport," *id.*, under the good-neighbor provision—that is, whether under the "nonattainment" prong or under the "maintenance" prong.

c. EPA next asserts that the States' "argument concerning redesignations that occurred after the Rule's promulgation" is "not properly before the Court because judicial review is limited to the record before EPA at the time the action was taken." *Id.* at 24 (submitting that the States' remedy is to petition EPA for further rulemaking under section 7607(d)(7)(B) or relief under *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975)). EPA is mistaken.

EPA does not dispute that, in several instances, areas that were designated "nonattainment" when EPA promulgated the Transport Rule have since been designated "attainment" following rigorous air-quality demonstrations. *See* State Br. 27. The Court can take judicial notice of this fact. *See*, *e.g.*, *Nebraska v. EPA*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003). Accordingly, no further "record" need be developed for this Court to consider the States' argument that, as a matter of law, the Transport Rule is flawed to the extent it mandates future reductions to

eliminate significant contributions to NAAQS nonattainment in downwind areas that are no longer designated "nonattainment." In any event, as one commenter noted, EPA improperly proposed to link (and ultimately did link) an upwind State to a downwind area that was, at the time, in the process of being redesignated "attainment." Comment submitted by Mark R. Vickery, Executive Director, Tex. Comm'n on Envtl. Quality, Document No. EPA-HQ-OAR-2009-0491-2857, at 8 (posted Oct. 7, 2010), *available at* www.regulations.gov (search for "EPA-HQ-OAR-2009-0491-2857" and view third PDF attachment).

d. Finally, EPA's response to footnote two of the States' opening brief, EPA Br. 25, ignores the Supreme Court's holding that the good-neighbor provision does not allow a State to be controlled beyond the point necessary to achieve attainment. *EME Homer*, 134 S. Ct. at 1608. EPA could thus not reasonably ignore its own approvals of redesignation requests, the emissions inventories on which those requests relied, or any other information showing emissions levels resulting in attainment. This point is not "extra-record," EPA Br. 25, as EPA received comments regarding the need to account for actual air quality. *E.g.*, JA1293.

B. EPA Violated Notice-And-Comment Requirements.

As the petitioning States explained in their opening brief, significant changes to the Transport Rule's substance and methodology between the rule's proposal

and finalization violated the "logical outgrowth" test. State Br. 28–31. These notice challenges are not "statutorily barred," EPA Br. 25, for the reasons noted by the petitioner-intervenor. *See* San Miguel Br. 27–28.

EPA's substantive contentions likewise fail. The claim that EPA's "methodology did not change" between proposal and finalization, EPA Br. 27, is belied by its admissions in the final rule. 76 FR at 48,213 (quoted in State Br. 28). The final rule's drastically lower emissions budgets arose from unexplained updates in inputs and assumptions in analysis, modeling platforms, and modeling inputs, as well as piecemeal information disseminated in three notices of data availability issued after publication of the proposed rule. *See* EPA Br. 28.

EPA's attempted justification for including several States based on the final rule's "emissions leakage" theory is also deficient. EPA concedes that it "did not use this specific terminology in the proposal" and references a single paragraph about shifting generation amid a larger discussion of coal prices. *Id.* at 27 (citing 75 FR 45,210, 45,284 (Aug. 2, 2010)). This paragraph neither mentions Indiana, Louisiana, or Maryland nor meaningfully discusses the methodology EPA ultimately used. *See* State Br. 30.

EPA next relies on cases addressing the APA's notice requirements, *see* EPA Br. 28, which are less exacting than the CAA's. *Union Oil Co. v. EPA*, 821 F.2d

678, 681–82 (D.C. Cir. 1987). In any event, *American Coke & Coal Chemicals Institute v. EPA* involved a proposed rule that clearly explained both the ultimate methodology and the potential data EPA would use in formulating the final rule, where EPA provided an opportunity to comment on the methodology, data, and potential outcomes. 452 F.3d 930, 939–40 (D.C. Cir. 2006). And *Northeast Maryland Waste Disposal Authority* approved EPA's unremarkable act of collapsing three proposed classifications into two. 358 F.3d at 951–52. Those cases do not describe what happened here.

EPA's arguments with respect to Texas, EPA Br. 29–30, fail for the reasons noted by the petitioner-intervenor. *See* San Miguel Br. 23–27. Additionally, accepting EPA's suggestion that Texas's contributions to Madison County were close enough to the *de minimis* line to warrant comment, EPA Br. 29, would counsel paranoia; under that view, every linkage in the upper end of the *de minimis* range would warrant prophylactic treatment by every State potentially covered by the rule, resulting in a flood of distracting and unnecessary comments. *See* JA2145 (excerpt from a 331-page technical support document in which the 0.13 figure that EPA cites, EPA Br. 29, is one of 287 other figures in one of several tables). Finally, EPA's mootness assertion regarding the size of Texas's emissions budgets, *id.* at 30, does not diminish the point that, had it been given proper notice, Texas would

not have been included in the Transport Rule's sulfur-dioxide and annual nitrogen-oxides programs at all. *See* State Br. 29–30.

C. EPA Lacked Authority To Propose and Promulgate FIPs For States With Pending SIP Submittals Addressing The 2006 NAAQS.*

EPA disapproved ten good-neighbor SIP submittals for the 2006 fine-particulate NAAQS more than eleven months after proposing, and less than one month before promulgating, FIPs for those States. EPA lacked authority under section 7410(c) to initiate a FIP rulemaking before disapproval of a submitted SIP. *See* State Br. 31–33; San Miguel Br. 5–14. EPA says that the Supreme Court resolved this issue against Petitioners. EPA Br. 17–18. It did not.

EPA cannot promulgate a FIP for a State unless EPA either "finds that [the] State has failed to make a required submission" or "disapproves a [SIP] submission in whole or in part." 42 U.S.C. 7410(c)(1)(A), (B). The issue before the Supreme Court was whether, after EPA takes one of those actions, it must allow the State a "second opportunity" to submit a SIP before it may promulgate a FIP. 134 S. Ct. at 1599. The issue presented here is whether EPA's finding of failure or disapproval is a "trigger" required for EPA to initiate a FIP rulemaking, or only a condition precedent to promulgating a final rule imposing a FIP. That issue was not before

* This argument is presented on behalf of Kansas and Indiana only.

the Supreme Court. Throughout its opinion, the Court recognized that failure to submit an approvable SIP must occur in order "to trigger the Agency's statutory authority to issue a FIP." *Id.*; *see id.* at 1601 ("a SIP's failure to satisfy … triggers EPA's obligation to issue a [FIP] within two years."). The question presented here, which was not resolved by the Supreme Court, is: What is the nature of the FIP "authority" that is "triggered" by a SIP disapproval?

Under the plain language of the 1970 CAA, SIP disapproval triggered EPA's obligation to "promptly prepare and publish proposed regulations" establishing a FIP, and then to promulgate that FIP within 180 days. *See* 42 U.S.C. 1857c–5(c)(1), (2) (1970) (EPA "shall … promptly prepare and publish proposed regulations setting forth an implementation plan … for a State if … the State fails to submit an implementation plan … [or] the plan … submitted [by] such State is determined by [EPA] not to be in accordance with the requirements of this section"); *see also Train v. NRDC*, 421 U.S. 60, 79 (1975) (EPA SIP disapproval triggers EPA authority to "devise and promulgate" a FIP). Similar to section 7410(c), other CAA provisions establish stringent deadlines for EPA to initiate and complete rulemaking following a triggering event. *See, e.g.*, 42 U.S.C. 7409(a), 7411(b), 7412(a). In amending the Act in 1977, Congress left in place this general approach to CAA regulation, in which a triggering event leads to initiation of EPA

rulemaking, but made section 7410(c) and other rulemaking provisions subject to more rigorous rulemaking requirements. 42 U.S.C. 7607(d)(1)(B).

In 1990, Congress reorganized section 7410 but, as this Court held, did not modify the "division of responsibilities" between EPA and the States. *Virginia v. EPA*, 108 F.3d 1397, 1409, 1410 (D.C. Cir. 1997). Although in 1990 Congress amended section 7410(c), section 7412, and other CAA provisions to establish deadlines for "promulgation" of rules, this did not signal an authorization to propose rules before EPA takes the action that triggers regulation. In these amendments, Congress merely extended rulemaking schedules and eliminated proposal deadlines. *Compare* 42 U.S.C. 1857c–5(c) (1970) (EPA "shall … promptly" propose a FIP following disapproval and "shall, within six months … promulgate [a FIP] unless, prior to such promulgation, [the] State has … submitted a plan"), *with* 42 U.S.C. 7410(c)(1) (EPA "shall promulgate a [FIP] at any time within two years after" EPA "disapproves a [SIP] … unless the States corrects the deficiency, and [EPA] approves the plan").

EPA's FIP authority is limited. For a State submitting a SIP, EPA must, following notice-and-comment rulemaking, either approve the submittal or identify specific deficiencies that require SIP disapproval. Only then is EPA authorized, and obligated, to proceed to propose and promulgate a FIP that cures the deficiencies

identified in the SIP disapproval. The Transport Rule FIPs at issue were proposed long before EPA had even reviewed the earlier-submitted SIPs. EPA simply assumed deficiencies in each SIP, making the subsequent SIP-submittal review process and Transport Rule FIP promulgations a *fait accompli*. This is not the "cooperative federalism" that has been the cornerstone of the CAA since 1970 and was unchanged by the 1990 amendments. *Virginia*, 108 F.3d at 1409, 1410.

CONCLUSION

The Court should vacate the Transport Rule in whole or part.

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I certify that this brief has been prepared in Microsoft Word using 14-point Equity typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 6,958 words, excluding the parts of the brief exempted by D.C. Circuit Rule 32(a)(1). The combined word count of the Industry and Labor Petitioners' reply brief on remand and this brief does not exceed 14,000, as mandated by this Court's October 23, 2014 order (Doc. No. 1518738). Microsoft Word was used to compute the word count.

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On February 6, 2015, this brief was served via CM/ECF on all registered counsel.

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