

Nos. 12-1182 and 12-1183

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

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

**BRIEF OF THE INSTITUTE FOR POLICY
INTEGRITY AT NEW YORK UNIVERSITY
SCHOOL OF LAW AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

This amicus brief considers the third of the Questions Presented:

Whether the EPA permissibly interpreted the statutory term “contribute significantly” so as to define each upwind State’s “significant” interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State’s physically proportionate responsibility for each downwind air quality problem.

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INTEREST OF THE AMICUS CURIAE¹

The Institute for Policy Integrity at New York University School of Law ² (Policy Integrity) is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity is a collaborative effort of faculty at New York University School of Law; a full-time staff of attorneys, economists, and policy experts; law students; and a Board of Advisors composed of leaders in public policy, law, and government.

Policy Integrity and its directors have produced extensive scholarship on the economics and regulation of interstate pollution under the Clean Air Act. An area of special concern for Policy Integrity is the promulgation of federal environmental regulations justified by cost-benefit analysis. The question presented, above, directly bears on the use of cost-effectiveness criteria in interpreting and implementing environmental statutes. Policy Integrity has a significant interest in the outcome of the legal issues at stake—particularly in ensuring that federal agencies have the authority and flexibility to promulgate rational and economically efficient regulations.

¹ The parties have submitted letters to the Clerk granting blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

² No part of this brief purports to present New York University School of Law's views, if any.

SUMMARY OF THE ARGUMENT

A central and original justification for the Clean Air Act has been to more effectively address the serious and complex spillover effects that result from interstate air pollution. Congress confronted the difficult problem of interstate air pollution through a series of revisions to the Clean Air Act over several decades, ultimately producing the current version of the so-called Good Neighbor Provision,³ which defines the obligations upwind states owe to their downwind neighbors. *See* Clean Air Act § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D). Crucially, the Good Neighbor Provision defines the allocation of responsibility between states for implementing air quality standards; it does not alter the level of health and welfare protection required by the statute. At no point has Congress ever prohibited the Environmental Protection Agency (EPA) or states from considering costs when they implement the Good Neighbor Provision. Indeed, the legislative history of this provision and related sections of the Act support the use of cost-minimizing market mechanisms to address interstate air pollution.

For decades, since its earliest interpretations of the Good Neighbor Provision, EPA has consistently determined—during both Republican and Democratic administrations—that the provision

³ As explained further below, Congress has revised the Good Neighbor Provision several times over the past few decades, and it has been renumbered as well as reworded. This brief uses the phrase “Good Neighbor Provision” to refer to all of the versions of the statutory provision. The brief will specify when it is referring to a particular version of the provision.

authorizes the consideration of costs in crafting a program that effectively mitigates interstate air pollution while minimizing the unnecessary use of resources to achieve that goal. Similarly, for decades and through administrations of both parties, EPA has employed interstate emissions trading systems as a tool to cost-effectively achieve ambient air quality goals.

In accordance with EPA's longstanding interpretation of the Good Neighbor Provision, the Transport Rule at issue in this case considers costs in combination with other factors to determine when upwind states have violated their statutory obligations to downwind states. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,248 (Aug. 8, 2011) [hereinafter Transport Rule]. Congress did not prohibit the agency from considering costs under this section through either the text or the statutory structure. Moreover, the text of the statute and policy considerations support the agency's interpretation of the provision. Instead of substituting its own policy judgment for how best to address the complex problem of interstate air pollution—as the D.C. Circuit did—this Court should defer to the agency's reasonable interpretation of the Good Neighbor Provision, allowing the agency to utilize its expertise to cost-effectively mitigate interstate air pollution.

ARGUMENT

I. CONGRESS DESIGNED THE GOOD NEIGHBOR PROVISION AS PART OF A COMPREHENSIVE, FLEXIBLE SOLUTION TO THE ECONOMICALLY AND SCIENTIFICALLY COMPLEX PROBLEM OF INTERSTATE AIR POLLUTION

In the D.C. Circuit’s majority opinion below, Judge Kavanaugh belittles the Good Neighbor Provision, calling it a “mousehole”—an “ancillary provision” that contains just one minor obligation among the many requirements for implementing air quality standards, and maintaining that the provision is too “narrow” to possibly authorize EPA to design a comprehensive, cost-effective response to interstate air pollution. *EME Homer City Generation v. EPA*, 696 F.3d 7, 28 (D.C. Circuit 2012) (citing *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)). Far from being a “mousehole,” the Good Neighbor Provision directly serves one of the most central and original rationales for the Clean Air Act: efficiently tackling the challenges of interstate air pollution. The plain language, statutory context, and legislative history of the Good Neighbor Provision all confirm that Congress never prohibited EPA and the states from considering or minimizing costs as they work together to achieve air quality goals.

A. Interstate Externalities Provide a Central Justification for Federal Environmental Protections

Air pollution is a classic negative economic externality: polluting activities impose uncompensated health and welfare costs on third

parties. When those third parties cannot efficiently bargain with the polluters to mitigate those negative external costs, the resulting market failure justifies government regulation. See U.S. Office of Mgmt. & Budget, *Circular A-4: Regulatory Analysis* 4 (2003).

Additionally, air pollution famously “does not know” or respect state lines. S. Rep. No. 88-638, at 3 (1963). Subject to weather patterns, air pollution emitted from inside an upwind state can drift into and harm third parties in a downwind state. Even assuming that states adequately respond to all intrastate environmental problems, any individual state has little incentive to control the interstate air pollution externalities it generates. After all, the upwind state receives the productive benefits of the polluting activity without having to bear the full costs, which have been opportunistically externalized to a downwind state. Consequently, the upwind state has a powerful motive to allow its industries to exceed the socially optimal level of emissions. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996). The potential for externalization of air pollution costs to other states means that state-level regulation may not sufficiently address air pollution. Indeed, “[t]he presence of interstate externalities is a powerful reason for intervention at the federal level.” Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210, 1222 (1992); see also Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 555, 557 n.3 (2001).

The particular case of interstate air pollution presents an important wrinkle on the classic story of externalities. The Clean Air Act separately obligates every state to comply with standards specifying the maximum permissible concentrations of certain “criteria” pollutants, *see* 42 U.S.C. §§ 7409-10, a category that includes some of the pollutants likely to cross borders and cause interstate harms, such as sulfur dioxide, *see, e.g.*, Primary National Ambient Air Quality Standard for Sulfur Dioxide; Final Rule, 75 Fed. Reg. 35,519, 35,522 (June 22, 2010). The fact that an upwind state contributes to a downwind state’s ambient concentrations does not relieve the downwind state of any part of its obligation to comply with the federal ambient standards. Therefore, the externality imposed by upwind pollution often is not health and welfare costs, since the downwind state is still charged with achieving the overall target level of health and welfare. Instead, the negative externality is often the additional pollution abatement costs that the downwind state must now impose on itself to offset the upwind pollution. *See* Revesz, 144 U. Pa. L. Rev. at 2352.

Indeed, those very ambient air quality standards create an additional incentive for upwind states to externalize pollution. Not only does the upwind state want to enjoy the productive benefits of the polluting activity without facing the full health and welfare costs, but also it is motivated to try to avoid the regulatory costs by shifting the burden onto downwind states. In the 1970s and 1980s, following the enactment of the Clean Air Act, upwind states began having taller emissions stacks, sending their emissions into downwind states rather than

curtailing the polluting activity: in 1970, only two stacks in the United States were higher than 500 feet; by 1985, more than 180 stacks were higher than 500 feet, and twenty-three were higher than 1000 feet. *Id.* at 2352-53. Statutory provisions and EPA regulations have since addressed some, but not all, of the concerns associated with tall stacks. *Id.* at 2354. Moreover, upwind states may be inclined to encourage their polluting sources to locate near their downwind borders to effectively export their uncontrolled pollution out of state. *Id.* at 2350-54.

Theoretically, states or private parties could address these externalities on their own, by negotiating with the polluting state and offering payments in exchange for pollution abatement. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 15 (1960) (explaining that, in the absence of transaction costs, parties would bargain to pay polluters in exchange for reducing pollution). History, however, strongly suggests that this approach is not realistic. This Court's 1907 ruling in *Georgia v. Tenn. Copper Co.* offers a good example of the limitations of voluntary interstate bargaining: Georgia went to court only after "a vain application to the State of Tennessee for relief." 206 U.S. 230, 236. In addition to the shortcomings of bargaining, the same case further shows that the common law is similarly unlikely to produce a timely, efficient remedy to interstate air pollution problems. See *id.*, enforced by 237 U.S. 474 (1915) (ending nine years of litigation with modest emissions reductions requirements).

The need for federal action on interstate air pollution motivated the original Clean Air Act. In

1963, Congress highlighted the air pollution problems created when growing urban areas and their impacts “cross the boundary lines” between states. Pub. L. No. 88-206, § 1(a), 77 Stat. 392, 392; *see also* Hon. Edmund S. Muskie, *Role of the Federal Government in Air Pollution Control*, 10 Ariz. L. Rev. 17, 18 (1968) (“The philosophy of the Clean Air Act of 1963 was to encourage state, regional, and local programs to control and abate pollution, while spelling out the authority of the national government to step into interstate situations with effective enforcement authority.”). In fact, encouraging regional control efforts was listed as an original legislative purpose. Pub. L. No. 88-206, § 1(b)(4), 77 Stat. 392, 393.

Initially, Congress attempted to address interstate air pollution largely by promoting bargaining among the states. To that end, Congress empowered the federal government to convene interstate conferences, *id.* § 5(c), 77 Stat. at 396-97, and to set up interstate planning commissions, Air Quality Act of 1967, Pub. L. No. 90-148, § 106, 81 Stat. 485, 490.

But by 1970, no interstate planning commission had ever been empaneled, S. Rep. No. 91-1196, at 6 (1970), and only eight, largely ineffective conferences had ever been convened on interstate pollution, Bruce M. Kramer, *Transboundary Air Pollution and the Clean Air Act*, 32 U. Kan. L. Rev. 181, 189 (1983). “Disappointed” in these results, S. Rep. No. 91-1196, at 6, in 1970 Congress abandoned its exclusive reliance on the conference procedure and imposed a more regulatory solution by moving interstate air pollution issues under the rubric of section 110’s

State Implementation Plans (SIPs). Specifically, this first version of the Good Neighbor Provision required SIPs to provide for “intergovernmental cooperation,” including measures to ensure upwind pollution would not “interfere with” downwind air quality standards. *See* Clean Air Amendments of 1970 § 110(a)(2)(E), Pub. L. No. 91-604, 84 Stat. 1676, 1681. In short, the barriers to effective interstate negotiations were simply too intractable, and the market failures created by the interstate air pollution externalities required a more comprehensive federal response. *See* U.S. Office of Mgmt. & Budget, *Circular A-4*, at 5 (explaining that “problems that spill across State lines . . . are probably best addressed by Federal regulation”).

Though the initial version of the Good Neighbor Provision created by the 1970 Amendments was later deemed “inadequate,” H.R. Rep. No. 95-294, at 330 (1977), Congress remained committed to designing a “better solution” to the “serious” problem of interstate air pollution. *Id.* The 1977 Amendments began to establish the Clean Air Act’s modern approach to interstate air pollution. Central to this structure was a stronger Good Neighbor Provision, which replaced the vague call for “intergovernmental cooperation” with a specific mandate for “adequate provisions . . . prohibiting any stationary source within the State from emitting any air pollutant in amounts which will . . . prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard.” Clean Air Act Amendments of 1977 § 110(a)(2)(E), Pub. L. No. 95-95, 91 Stat. 685, 693; *see also id.*, 91 Stat. at 721-22, 724-25 (creating section 123 constraining tall stacks and section 126 allowing

states to petition EPA to declare violations of the Good Neighbor Provision).

The final elements of the modern approach took shape in 1990, when Congress made two important changes to the language of the Good Neighbor Provision. First, it expanded the scope from individual stationary sources to “any . . . emissions activity”; second, it changed the standard from “prevent attainment or maintenance” to “contribute significantly to nonattainment in, or interfere with maintenance by.”⁴ Clean Air Act Amendments of 1990 § 110(a)(2)(D), Pub. L. No. 101-549, 104 Stat. 2399, 2404. These modifications gave EPA and the states more flexibility to address cumulative emissions from multiple sources and activities, instead of just regulating individual, stationary sources.

B. The Good Neighbor Provision Is a Key Element of the Clean Air Act’s Overall Response to Interstate Externalities

The Good Neighbor Provision, housed within the requirements for State Implementation Plans (SIPs), requires:

adequate provisions (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the

⁴ The statute thus provides two distinct avenues for finding a violation of the Good Neighbor Provision: (1) an upwind state “contribute[s] significantly to nonattainment” of ambient air quality standards in a downwind state, or (2) an upwind state “interfere[s] with” a downwind state’s “maintenance” of the ambient air quality standards. This brief will use “contribute significantly” as a shorthand to refer to both provisions.

State from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standards, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility.

Clean Air Act § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D). The Act provides multiple mechanisms to ensure the obligation is satisfied. After EPA issues or revises national ambient air quality standards, each state must submit a SIP for EPA's approval that adequately addresses the Good Neighbor Provision. Clean Air Act § 110(a), 42 U.S.C. § 7410(a). If a state fails to submit an adequate SIP, EPA "shall" develop a Federal Implementation Plan to enforce the Good Neighbor Provision. Clean Air Act § 110(c), 42 U.S.C. § 7410(c). If EPA finds an approved SIP is "substantially inadequate" with respect to the Good Neighbor Provision, the agency must call for revisions. Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5). Finally, a downwind state or local government may petition EPA for a finding that a source in an upwind state is violating the Good Neighbor Provision. Clean Air Act § 126, 42 U.S.C. § 7426. The subject of this case, the Transport Rule, concerns a Federal Implementation Plan under section 110(c), but the content of the substantive standard contained in the Good Neighbor Provision remains the same regardless of how it is enforced.

The Good Neighbor Provision works together with and alongside several other provisions in the Clean Air Act to address interstate pollution. Some of these other provisions, like sections 106 and 176A on interstate commissions, 42 U.S.C. §§ 7406, 7506a, harken back to Congress's first efforts to address the problem. Some, like section 123 on stack heights, 42 U.S.C. § 7423, attempt to mitigate particular perverse incentives that may result in socially inefficient levels of interstate pollution, *see* Revesz, 144 U. Pa. L. Rev. at 2349, 2354-58. Some, like section 184 on interstate ozone pollution, 42 U.S.C. § 7511c, and Title IV on acid rain pollution, 42 U.S.C. §§ 7651-7651o, target specific pollutants and sources. But only the Good Neighbor provision applies more broadly to "any pollutant" emitted by "any source or . . . activity" that interferes with air quality and visibility standards in other states, and creates binding obligations on states while still giving them flexibility in designing a response.

C. From the Clean Air Act's Earliest Approaches to Interstate Pollution, Congress Has Never Prohibited the Consideration of Costs or the Pursuit of Cost-Effective Strategies

Since 1963, the Clean Air Act has listed four fundamental statutory purposes: one is to "protect the Nation's air resources so as to promote the public health and welfare *and the productive capacity*" of the country; another is to assist the development of regional air pollution control programs. Pub. L. No. 88-206, § 1(b), 77 Stat. at 393 (emphasis added). These goals remain key statutory purposes today. 42 U.S.C. § 7401(b) (note that the phrase "and enhance

the quality” has been added to the first goal of protecting air resources). As recently as the 1990 Amendments, Congress expressed its intent for EPA to continue to balance these underlying objectives, by “exercis[ing] equally” “both the regulatory tools to accomplish cleaner air and the flexibility to protect our industrial and productive capacity.” H.R. Rep. No. 101-490, at 163 (1990).

For example, the now obsolete interstate conference process from 1963 authorized the federal government to recommend “reasonably calculated” abatement strategies, and the Attorney General to initiate litigation in which the court was instructed to weigh “the physical and economic feasibility . . . , [against] public interest and the equities.” Pub. L. No. 88-206, § 5(d)-(g), 77 Stat. at 397-98; *see also* Pub. L. No. 90-148, §§ 108(c)-(h), 81 Stat. at 493-96; S. Rep. No. 90-403, at 3 (1967) (noting that the Clean Air Act’s success would depend in part on “the development of plans for air regions, to implement the established ambient air standards giving due consideration of factors of technical and economic feasibility”). Though, as discussed above, the conference process ultimately proved too cumbersome and weak and was replaced, it shows the start of a historical trend of Congress not foreclosing cost considerations from interstate air pollution remedies.

Similarly, when strengthening the Good Neighbor Provision in 1977, Congress noted that the “economic and competitive . . . positions” of emissions sources in different states were one important factor in designing an effective interstate air pollution program. S. Rep. No. 95-127, 41-42 (1977). Even

more telling than such occasional references to economic considerations, though, is the complete absence from the legislative histories in 1963, 1967, 1970, 1977, and 1990 of any mention of a congressional intent to prohibit the consideration of costs or the pursuit of cost-effective strategies.

D. Congress Explicitly Authorized EPA and the States to Use Market Mechanisms to Address Interstate Air Pollution in Order to Achieve Environmental Goals Cost-Effectively

In 1990, as part of a broad initiative to harness economic theory to design more efficient air quality regulations, Congress added several provisions to the Clean Air Act authorizing the use of market-based incentives to control emissions.⁵ Notably, Congress inserted language explicitly allowing State Implementation Plans to use:

enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter.

⁵ Perhaps the best known is the highly successful program to control interstate acid rain pollution under Title IV of the Clean Air Act. 42 U.S.C. §§ 7651-7651o; see Gabriel Chan, Robert Stavins et al., *The SO₂ Allowance Trading System and the Clean Air Act Amendments of 1990* at 31 (Nat'l Bureau of Econ. Research, Working Paper No. 17,845, 2012) (noting the program is “viewed as a success by almost all measures”).

42 U.S.C. § 7410(a)(2)(A). Similarly, Federal Implementation Plans—like the one proposed by the Transport Rule—are authorized to use these same market-based tools (except for fees). 42 U.S.C. § 7602(y). Because the Good Neighbor Provision is one of the “applicable requirements” of implementation plans, the plain language of section 110 makes clear that market mechanisms like trading are available to satisfy the requirements of the Good Neighbor Provision. The 1990 Amendments arguably further facilitated trading under the Good Neighbor Provision by giving EPA and the states more flexibility to address cumulative emissions from multiple sources and activities, instead of just regulating individual, stationary sources. *See* Pub. L. No. 101-549, 104 Stat. at 2404.

The purpose of using market mechanisms like trading is to achieve the same environmental goal at a lower cost (or a better environmental outcome at the same cost) by concentrating pollution control efforts on the least-cost abatement opportunities. *See* U.S. Office of Mgmt. & Budget, *Regulatory Impact Analysis: A Primer* 6 (2011) (recommending “trading . . . as an approach that might achieve the same [environmental] gain at a significantly lower cost”). As many of the drafters of the Clean Air Act Amendments of 1990 stated, “the overall goal” of the various trading programs added in 1990 was “to permit an aggregate least-cost solution.” *See* 136 Cong. Rec. 35,000, 35,044, 35,759 (Oct. 26, 1990) (identical phrases appearing in statements of Rep. Sharp, Rep. Hall, and Sen. Simpson); *accord* 133 Cong. Rec. 1382 (Jan. 16, 1987) (statement of Sen. Proxmire). In short, Congress explicitly authorized the use of trading to achieve interstate goals like the

Good Neighbor Provision, as a way for EPA and the states to minimize the aggregate costs of achieving these pollution reductions. Therefore, EPA and the states must not be prohibited from considering and minimizing costs under the Good Neighbor Provision, since that is the whole point of authorizing trading.

II. MULTIPLE PRESIDENTIAL ADMINISTRATIONS OVER SEVERAL DECADES HAVE CONSISTENTLY INTERPRETED THE GOOD NEIGHBOR PROVISION TO PERMIT FLEXIBLE INTERSTATE POLLUTION-CONTROL MECHANISMS THAT CONSIDER AND MINIMIZE COSTS

For over three decades, under both Republican and Democratic presidential administrations, EPA has interpreted the Good Neighbor Provision to authorize pursuit of cost-effective, regional strategies to mitigate interstate air pollution externalities. For more than two decades, presidents and their EPA administrators—again from both parties—have similarly interpreted the Clean Air Act to authorize the use of market mechanisms to minimize the costs of achieving goals like those under the interstate air pollution programs. As explained in more detail below, a consistent interpretation by an agency is entitled to additional deference. On this point, EPA’s remarkably consistent interpretation of the statutory language in the Good Neighbor Provision is highly relevant.

A. EPA Has Consistently Interpreted the Good Neighbor Provision to Allow for Consideration of Costs When Addressing Interstate Air Pollution

For decades, EPA has interpreted the relevant Clean Air Act provisions to permit it to consider costs when regulating interstate air pollution. For example, under the Carter Administration, EPA believed the Good Neighbor Provision gave it authority to require “generally comparable emission limits for comparable sources” in different states. Interstate Pollution Abatement; Notice of Proceedings under Section 126 of the Clean Air Act and Hearing, 45 Fed. Reg. 17,048, 17,049 (1980). Moreover, in the same notice, EPA asked for comments on whether it should “consider the application of reasonably available control technology (RACT) by the contested sources to be sufficient in and of itself to avoid a finding of impermissible interstate pollution.” *Id.* at 17,049. EPA had previously defined RACT to include a consideration of cost factors. State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas—Supplement (on Control Technique Guidelines), 44 Fed. Reg. 53,761, 53,762 (Sept. 17, 1979) (defining RACT as “[t]he lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility”). Though the proceeding on interstate violations was not completed during the Carter Administration, it shows that from EPA’s earliest statutory interpretations of the Good Neighbor Provision, the agency felt it could consider

factors beyond the mere volume of emissions contributions—including economic considerations—when resolving interstate air pollution problems. EPA’s present approach under the Transport Rule is consistent with this earliest interpretation, as the cost-effectiveness criterion is one reasonable way of setting “generally comparable emission limits for comparable sources.”

The Reagan Administration’s EPA went a step further and made costs an explicit factor that could be considered in assessing violations of the Good Neighbor Provision. For example, when the Reagan EPA finalized the above proceeding that the Carter EPA had initiated, it noted that the relative allocation of pollution abatement responsibilities among states “may vary depending on a number of circumstances, possibly including social and economic factors.” Interstate Pollution Abatement; Final Determination, 47 Fed. Reg. 6624, 6626 (Feb. 16, 1982). In developing a set of criteria for determining if an upwind state had violated the Good Neighbor Provision, the Reagan EPA listed “the relative costs of pollution abatement between sources that contribute to a violation.” Interstate Pollution Abatement; Proposed Determination, 49 Fed. Reg. 34,851, 34,859 (Sept. 4, 1984), *approved in* Final Determination under section 126 of the Clean Air Act (Interstate Pollution Abatement), 49 Fed. Reg. 48,152, 48,156-57 (Dec. 10, 1984) (noting the particular relevance of costs in determining the remedy for a violation of the Good Neighbor Provision).⁶

⁶ At the time, the statutory provision in effect was the old section 110(a)(2)(E), which—as discussed above—was worded

When EPA began to take more proactive steps during the Clinton Administration to regulate interstate air pollution directly under the Good Neighbor Provision, it based its criteria for determining which emissions “contribute significantly” to downwind nonattainment on “both air quality factors relating to amounts of upwind emissions and their ambient impact downwind, as well as cost factors relating to the costs of the upwind emissions reductions.” 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 Fed. Reg. 57,356, 57,376 (Oct. 27, 1998) [hereinafter NO_x SIP Call].

When President George W. Bush’s EPA updated and expanded the interstate air pollution rules under the Good Neighbor Provision, it, too, incorporated cost considerations into its criteria for addressing those states that “contribute significantly” to downwind pollution. Under the Clean Air Interstate Rule (CAIR), cost factors were one of EPA’s two primary considerations in determining significant contributions to interstate air pollution. 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 Fed. Reg. 25,162, 25,174 (May 12,

differently to prohibit upwind emissions that “prevent attainment or maintenance,” rather than “contribute significantly to nonattainment . . . or interfere with maintenance.” Nonetheless, EPA interpreted the “prevent attainment” language to prohibit “substantial” or “significant” contributions from upwind states, *see, e.g.*, 47 Fed. Reg. at 6628; 49 Fed. Reg. at 34,859.

2005) [hereinafter CAIR]. EPA took costs into account by “mandating emissions reductions in amounts that would result from application of highly cost-effective controls.” *Id.* at 25,175.

In the Transport Rule at issue here, in line with longstanding agency practice and recent court rulings, the Obama EPA incorporated a slightly modified consideration of costs into its assessment of whether upwind states’ emissions violate the Good Neighbor Provision. Transport Rule, 76 Fed. Reg. at 48,248. The Transport Rule analyzed “both cost and air quality improvement to identify the portion of a state’s contribution that constitutes its significant contribution to nonattainment and interference with maintenance.” *Id.* The Transport Rule “defines each state’s significant contribution to nonattainment and interference with maintenance as the emission reductions available at a particular cost threshold in a specific upwind state which effectively address nonattainment and maintenance of the relevant NAAQS in the linked downwind states of concern.” *Id.* Thus, under the Transport Rule, EPA interpreted the Good Neighbor Provision to authorize cost-effective strategies to implement interstate air pollution controls—much as agency actions under four previous presidential administrations had also interpreted the statute.

B. EPA Has Consistently Interpreted the Good Neighbor Provision to Allow for Interstate Emissions Trading Mechanisms as a Way to Achieve Cost-Effective Pollution Reductions

For over twenty years, presidents and their EPA administrators have interpreted the Clean Air Act to authorize the use of emissions trading systems as a

way to pursue cost-effective controls of interstate air pollution. Upon signing the 1990 Clean Air Act Amendments, which added new language on market incentives to section 110, President George H.W. Bush directed EPA to use the statute's multiple new provisions on flexibility and trading to "implement this bill in the most cost-effective manner possible." Statement on Signing the Bill Amending the Clean Air Act, 1990 Pub. Papers 1602, 1603 (Nov. 15, 1990). Though George H.W. Bush's EPA focused its attentions on the bill's related provisions creating cost-effective, market incentives to control interstate acid rain pollution, *see* E. Donald Elliott, *Lessons from Implementing the 1990 CAA Amendments*, 40 *Env'tl. L. Rep.* 10,592 (2010), each subsequent administration has utilized the Good Neighbor Provision to institute a cost-minimizing emissions trading system.

The Clinton EPA's signature effort to enforce the Good Neighbor Provision, the NO_x SIP Call, featured an optional trading program. 63 *Fed. Reg.* at 57,456. EPA "encourage[d] States to consider electric utility and large boiler controls under a cap-and-trade program as a cost-effective strategy." *Id.* at 57,359. It created a model program, which states could opt into. EPA explained in the rule that a regional trading system would allow states to achieve the required emissions reductions at the least cost. *Id.* at 57,400.

Likewise, the George W. Bush EPA crafted an interstate emissions trading mechanism in CAIR. Similar to the 1998 NO_x SIP Call, CAIR allowed states to opt into a model interstate emissions trading program. 70 *Fed. Reg.* at 25,229. The agency explained, "If States choose to . . . participate in the

cap and trade program, allowances could be freely traded, encouraging least-cost compliance over the entire region.” *Id.* at 25,231.

Building on the cost-effective trading approach in those two earlier efforts to implement the Good Neighbor Provision, in the Transport Rule, Obama’s EPA designed “air quality-assured trading programs” to “ensure that necessary reductions will occur within every covered state.” 76 Fed. Reg. at 48,210. EPA explained, “the trading component of the Transport Rule provides flexibility to the power sector and enables industry to comply with the emission reduction requirements in the most cost-effective manner . . . thus minimizing overall costs.” *Id.* at 48,347.

In short, EPA has long viewed interstate trading mechanisms as both authorized under the Good Neighbor Provision and as a key tool for pursuing cost-effective approaches to interstate air pollution. Through these trading regimes, EPA maintains the same overall level of air quality in the downwind states while allowing states to prioritize their abatement strategies in a cost-effective manner. If EPA and the states are authorized to use trading to implement the Good Neighbor Provision cost-effectively, the Good Neighbor Provision must also more generally authorize the consideration and minimization of costs.

III. EPA'S USE OF A COST-EFFECTIVENESS FRAMEWORK TO IMPLEMENT THE GOOD NEIGHBOR PROVISION IS A PERMISSIBLE, REASONABLE, AND PRUDENT STATUTORY INTERPRETATION

A. The Court Should Defer to the Agency's Reasonable and Longstanding Statutory Interpretations Since Congress Has Not Unambiguously Addressed the Precise Question

Where, as here, an agency adopts a reasonable interpretation of an ambiguous statutory provision, a court should defer to the agency's interpretation rather than substitute its own policy judgment. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). Under *Chevron*, a court reviewing "an agency's construction of the statute which it administers . . . is confronted with two questions." *Id.* at 842. First, the court must examine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute." *Id.* at 843. Instead, it moves to the second step of the analysis, wherein, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Here, because EPA has for decades consistently interpreted the Good Neighbor Provision to authorize the consideration and minimization of costs, the Court should afford additional deference to the agency. This Court has repeatedly recognized the importance of “accord[ing] particular deference to an agency interpretation of longstanding duration.” *Alaska Dept. of Env’tl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)) (internal quotation omitted). The Court has explained, “While not conclusive, it surely tends to show that the EPA’s current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years.” *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009) (holding that EPA’s use of cost-benefit analysis was permissible under section 1326(b) of the Clean Water Act, an interpretation that EPA had espoused since the late 1970s). The thirty-year history of agency interpretation in this case is remarkably similar, and EPA deserves a similar level of “particular deference” on interpreting the Good Neighbor Provision.

B. The Clean Air Act Does Not Clearly Prohibit EPA’s Interpretation of the Good Neighbor Provision and, in Fact, Supports the Agency’s Interpretation

The Good Neighbor Provision instructs:

Each [state implementation] plan shall— . . . (D) contain *adequate provisions*—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity

within the State from emitting any air pollutant in *amounts* which will—(I) *contribute significantly to nonattainment in, or interfere with maintenance by*, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2) (emphasis added). The Clean Air Act nowhere defines such key terms as “adequate,” “amounts,” “contribute significantly to nonattainment,” or “interfere with maintenance.” See, e.g., *Michigan v. EPA*, 213 F.3d 663, 674 (D.C. Cir. 2000) (“Nothing in the text of the new section or any other provision of the statute spells out a criterion for classifying ‘emissions activity’ as ‘significant.’”); *id.* at 697 (Sentelle, J., dissenting) (“Neither did it define amount.”). The plain language of Good Neighbor Provision does not unambiguously speak to the matter of cost-effectiveness.

At most, the statute is silent on the issue of cost-effectiveness. The question of whether perceived statutory silence indicates a clear congressional prohibition often turns on context. For example, in *Whitman v. American Trucking*, this Court held that EPA was not permitted to consider costs in the unique context of setting the National Ambient Air Quality Standards under section 109(b)(1) of the Clean Air Act. 531 U.S. 457, 471 (2001). However, as the Court later explained in *Entergy*, “*American Trucking* . . . stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion.” 556 U.S. at 223.

In particular, *American Trucking* draws a sharp contrast between sections of the Clean Air Act that

set air quality standards and sections that implement those standards. Section 109 directs EPA to set ambient air quality standards at levels “requisite to protect the public health” with “an adequate margin of safety.” 42 U.S.C. § 7409(b)(1). The question before the Court in *American Trucking* was whether that particular language vested EPA with “the power to determine whether implementation costs should moderate national air quality standards.” 531 U.S. at 468. Given that the fundamental purpose of the section was to set standards necessary to safeguard public health and welfare, the Court found it “implausible” that Congress would have wanted EPA to also consider costs and yet forgot to mention it in the statute. *Id.* The Court contrasted section 109(b)(1) with other provisions of the Clean Air Act—including section 110—that focused not on setting public health and welfare goals, but instead on implementing them. *Id.* at 469-70. The task of implementation, the Court said, “would be impossible . . . without considering which abatement technologies are most efficient, and most economically feasible.” *Id.* at 470. The question before the Court here—how to properly interpret the Good Neighbor Provision—deals with such a task of implementation that necessitates consideration of economic efficiency: indeed, the Good Neighbor Provision appears in section 110, which is entitled “State *Implementation* Plans.” 42 U.S.C. § 7410 (emphasis added).

The issue at stake now is not the level at which to set air quality standards to safeguard public health and welfare; those levels have already been independently set under section 109(b)(1), and will not be affected by the Transport Rule. Instead, the

Transport Rule is meant to implement those standards in the most cost-effective manner, by efficiently allocating abatement responsibilities between the states. The choice of a cost-effective trading mechanism will not affect the level of air quality achieved, but only the total cost of achieving it. Especially for such provisions that deal with issues of implementation, EPA should have broad discretion to pursue cost-effective and flexible strategies unless specifically prohibited by the plain text of the statute.

Therefore, to the extent that the Good Neighbor Provision is silent on cost considerations, the case is much more analogous to *Entergy* than to *American Trucking*. In *Entergy*, the Court noted that the relevant section was “silent not only with respect to [cost factors] but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing [the relevant section]—an obvious logical impossibility.” 556 U.S. at 222. Similarly, the Clean Air Act provides no instructions on the criteria EPA should use to determine which state regulations would be “adequate” to implement the Good Neighbor Provision’s prohibition on “amounts” of interstate pollution that “contribute significantly to” violations or “interfere with” air quality standards. As in *Entergy*, statutory context suggests that congressional silence on the criteria for implementing the Good Neighbor Provision does not unambiguously prohibit cost considerations. Rather, EPA has discretion to adopt any reasonable interpretation of the statutory language.

Cost-effectively apportioning the states' obligations to achieve air quality standards is a reasonable interpretation of the Good Neighbor Provision. In fact, the plain language, statutory context, and legislative history of the provision offer strong support for interpreting the language with cost-minimization principles in mind. For example, as explored in depth above, Congress explicitly provided that the "adequate provisions" required by the Good Neighbor Provision may utilize cost-minimizing tools like emissions trading. Similarly, the history of interstate emissions programs under the Clean Air Act reveals a consistent legislative intent to rationally weigh economic considerations and a consistent agency interpretation, going back decades, that has emphasized cost-effectiveness criteria.

Of all the terms in the Good Neighbor Provision that may support a reasonable interpretation with respect to cost-effectiveness, particular attention has been given to the phrase "contribute significantly" and especially the word "significant." In holding that "there is nothing in the text, structure, or history of [the Good Neighbor Provision] that bars EPA from considering cost in its application," *Michigan*, 213 F.3d at 679, the D.C. Circuit noted that, "In some contexts, 'significant' begs a consideration of costs." *Id.* at 677. Much like the term "minimize" in *Entergy*, "significant" is a word that "admits of degree." *Cf.* 556 U.S. at 219. There is no clear numerical threshold or percentage increase at which the tons of emissions contributed suddenly and obviously become "significant." Rather, the word has no singular definition, and this Court has ruled that ambiguous terms, like "best," can reasonably be

interpreted to mean the lowest cost. *Cf. id.* at 218. As the D.C. Circuit had repeatedly found in prior cases, where a “mandate directed to some environmental benefits is phrased in general quantitative terms (‘ample margin of safety,’ ‘substantial restoration,’ and ‘major’), and contains not a word alluding to non-health trade-offs[,] . . . the agency [i]s free to consider the costs of demanding higher levels of environmental benefit.” *Michigan*, 213 F.3d at 679 (citing *Natural Res. Def. Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998); and *Natural Res. Def. Council v. EPA*, 937 F.2d 641, 643-46 (D.C. Cir. 1991)); *see also George E. Warren Corp. v. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998) (holding that EPA’s consideration of factors other than air quality, such as the price and supply of gasoline, was permissible under the anti-dumping provisions of the reformulated gasoline program established by the 1990 Clean Air Act Amendments); *cf. Int’l Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1528-29 (D.C. Cir. 1984) (construing mandate to adopt “reasonable requirements” for safety as allowing consideration of cost).

C. The D.C. Circuit Majority Below Substituted Its Own Policy Judgment to Set Aside the Agency’s Reasonable Interpretation

While acknowledging that EPA has “significant discretion to implement the good neighbor provision,” the D.C. Circuit majority below contends that the statute’s text and previous circuit decisions in the *Michigan* and *North Carolina* cases “establish several red lines” that limit how EPA may reasonably interpret the requirements. *EME Homer*

City Generation, 696 F.3d at 19. However, neither text nor previous circuit precedent (nor, indeed, statutory structure nor history) actually mandates the limitations on implementing the Good Neighbor Provision that the majority below imagines. Even if the majority's readings of the text are permissible, they are not the only legitimate interpretations, and they should not trump the agency's own reasonable views on the statute.

For example, the majority asserts that EPA may not consider the cost-effectiveness of pollution controls in ways that violate the statute's purported "proportionality requirement." *Id.* at 26. Under this supposed statutory requirement, the allocation of emissions allowances between states must be proportional to their contributions to a downwind states' nonattainment. *Id.* at 21. The D.C. Circuit created this interpretation based upon its own policy judgment; proportionality is not required by the statutory text and runs contrary to prior D.C. Circuit precedent. As noted above, the *Michigan* court held, "there is nothing in the text, structure, or history of [the Good Neighbor Provision] that bars EPA from considering cost in its application." *Michigan*, 213 F.3d at 679. Moreover, the court observed that allocating reduction requirements solely on the basis of air quality impacts, without considering costs, would vitiate the efficient emissions trading system and would be a result "as extreme as it sounds." 213 F.3d at 676. It further puzzled over how the statutory text could possibly be interpreted to "exclude cost but admit equity." *Id.* at 678. A cost-blind proportionality requirement is also "at odds with *North Carolina* where the court concluded that EPA's measure of significant contribution need not

‘directly correlate with each State’s individualized air quality impact on downwind nonattainment *relative to other upwind states.*’” *EME Homer City Generation*, 696 F.3d at 59 (Rogers, J., dissenting) (quoting *North Carolina v. EPA*, 531 F.3d 896, 908 (D.C. Cir. 2008) (emphasis added)).

Moreover, the majority below does not address whether its interpretation is practicable. For instance, it fails to explain how proportionality can be determined when multiple upwind states’ emissions intermingle and affect multiple downwind states. An upwind state will contribute different proportions of emissions to different downwind states and, therefore, allocating emissions by proportional impact on downwind states would not be feasible.

In short, neither text nor precedent, nor structure nor history imposes a cost-blind “proportionality requirement” on implementation of the Good Neighbor Provision. Congress never required proportionality. Rather, the D.C. Circuit’s preference for proportionality is only one possible interpretation of the text. But another possible—and much more reasonable—interpretation of the text is the cost-effectiveness framework applied by EPA. The majority below should not have substituted its own policy judgment for that of the agency.

D. Best Regulatory Practices Confirm That the Cost-Effectiveness Framework Is Not Just Permissible and Reasonable, but Also a Prudent Interpretation of the Good Neighbor Provision

As explored above, Congress has never prohibited using a cost-effectiveness framework to implement the Good Neighbor Provision. Moreover, in light of statutory context and legislative history supporting the minimization of costs through tools like market mechanisms, the cost-effectiveness framework is a reasonable interpretation of any ambiguity in the Good Neighbor Provision. Under *Chevron*, the Court's inquiry should end there: agencies have discretion to adopt permissible and reasonable interpretations, even if they are not necessarily the best policy choices. Still, it is telling that the cost-effectiveness framework, in addition to being permissible and reasonable, is consistent with the administration's broader regulatory goals and best rulemaking practices.

The pursuit of cost-effective regulatory strategies and the use of market mechanisms to minimize costs are required by executive order where not prohibited by statute. Specifically, executive orders instruct federal agencies to "assess both the costs and the benefits of the intended regulation" and "design its regulations in the most cost-effective manner to achieve the regulatory objective," giving due consideration to the advantages of using "economic incentives" like "marketable permits." Exec. Order No. 12,866 §§ 1(b)(3)-(6) & 9, 58 Fed. Reg. 51,735, 51,736, 51,744 (Oct. 4, 1993); *see also* Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 21,

2011). Since the Clean Air Act does not prohibit the consideration of costs in implementing the Good Neighbor Provision, the clear presidential preference for cost-effective, incentive-based regulations makes EPA's interpretation a reasonable and prudent one.

In designing the Transport Rule, EPA drew on its decades of experience implementing such economically and scientifically complex interstate air pollution programs. EPA, in partnership with the states, oversees countless environmental programs that all compete for resources. In such circumstances, it is essential to consider and minimize the costs of achieving the desired targets for environmental quality. Cost-effectiveness is all the more critical "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Entergy*, 556 U.S. at 233 (Breyer, J., concurring and dissenting). Moreover, since the Transport Rule addresses only the allocation of responsibility for emissions reductions, not the ambient air quality standards that must be satisfied, it makes little sense to create a compliance framework that results in paying more to achieve a result that could be achieved more cheaply.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand the D.C. Circuit's decision in this case.

Respectfully submitted,

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