Nos. 12-1182, 12-1183

In The Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

v.

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

Respondents.

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

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

Respondents.

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

AMICUS CURIAE BRIEF OF LAW PROFESSORS ON ISSUE EXHAUSTION IN SUPPORT OF PETITIONERS

AMY J. WILDERMUTH
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
332 S. 1400 East, Room 101
Salt Lake City, UT 84112
(801) 585-6833
amy.wildermuth@utah.edu

SANNE H. KNUDSEN
Counsel of Record
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 221-7443
sknudsen@uw.edu

Counsel for Amici Curiae Law Professors

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION AND INTEREST OF THE AMICI CURIAE STATEMENT[1]

Amici Curiae are law professors who research, teach, and write on federal environmental and administrative law. They are concerned in this case by the majority's conclusion below that issues related to the interpretation of ambiguous statutory language could be reached even though they were never raised during the rulemaking process. This conclusion is contrary to the clear language of the issue exhaustion requirement articulated in Section 307(d)(7)(B) of the Clean Air Act and contrary to proper role of reviewing courts under *Chevron*. As a result, it could have far-reaching impacts for a wide array of administrative cases and agencies and should be corrected by the Court. More information about the specific interest of each professor is provided below.

Todd Aagaard is an Associate Professor at the Villanova University School of Law. His teaching and research focuses on environmental law and administrative law.

Lincoln L. Davies is a Professor of Law at the University of Utah S.J. Quinney College of Law.

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[1] In accordance with Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amici Curiae, has made a monetary contribution specifically for the preparation or submission of this brief. The parties' consent to the filing of this brief was filed with the Clerk of this Court.

Professor Davies' research and teaching interests center on energy and environmental law and policy, administrative law, and water law.

John C. Dernbach is Distinguished Professor of Law at Widener University in Harrisburg, Pennsylvania and co-director of Widener's Law Center. He teaches courses in environmental law, international environmental law, property, climate change, and sustainable development. Professor Dernbach has written on environmental law, sustainable development and climate change in more than 40 articles for law reviews and peer-reviewed journals. He is the principal author or editor of three books on sustainable development in the United States. Before joining Widener's faculty, Professor Dernbach worked at the Pennsylvania Department of Environmental Protection, where he counseled and helped manage numerous rulemakings.

Victor B. Flatt is the Tom & Elizabeth Taft Distinguished Professor in Environmental Law, and the Director of the Center for Law, Environment, Adaptation, and Resources (CLEAR) at the University of North Carolina School of Law. He also has an appointment as a Distinguished Scholar in Carbon Markets and Carbon Trading at the Global Energy Management Institute at the University of Houston's Bauer College of Business, and is a member scholar of the Center for Progressive Reform. Professor Flatt teaches courses in environmental law, natural resources, interagency environmental cooperation, international environmental law, climate change, and

the practice of carbon trading. His scholarship focuses on the administration and enforcement of environmental and resource statutes, particularly the Clean Water Act, the Clean Air Act, the Endangered Species Act, and NEPA.

Eric T. Freyfogle is a Swanlund Chair at the University of Illinois at Urbana-Champaign. He is the author or editor of a dozen books dealing with issues of humans and nature, and is the co-author of two casebooks, *Property Law: Power, Governance, and the Common Good* (Thomson/West 2012) and *Wildlife Law: Cases and Materials* (Foundation Press, 2002; 2d ed. 2010). Seven of his law review articles have been reprinted, as among the best articles of the year, in the annual volume *Land Use & Environment Law Review*.

Andy Hessick is a Professor of Law at the University of Utah's S.J. Quinney College of Law. He teaches and writes in the areas of administrative law, civil procedure, federal courts, and Supreme Court practice.

Elizabeth Kronk Warner is an Associate Professor of Law and Director of the Tribal Law and Government Center at the University of Kansas School of Law. Her research and teaching interests include Federal Indian law, tribal law, environment and natural resources, and property. In addition, Professor Warner serves as an appellate judge for the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals in Michigan.

Justin Pidot is an Assistant Professor of Law at the University of Denver Sturm College of Law, where his scholarship and teaching focus on environmental law, natural resources law, and federal courts. Prior to joining the University of Denver faculty, Professor Pidot was an appellate litigator at the Environment and Natural Resources Division of the U.S. Department of Justice.

Colette Routel is an Assistant Professor of Law at the William Mitchell College of Law. Her teaching and research interests include administrative law, federal Indian law, and environmental and natural resources law.

STATEMENT

The federal government typically issues between 600 to 800 notices of proposed rulemakings per year that involve everything from catch limits for the Hawaiian islands, http://www.regulations.gov/#!documentDetail;D=NOAA-NMFS-2013-0103-0001, to proposals to prohibit window covering cords, http://www.regulations.gov/#!documentDetail;D=CPSC-2013-0028-0001, to removing the gray wolf from the endangered species list, http://www.regulations.gov/#!documentDetail;D=FWS-HQ-ES-2013-0073-0001. As one commentator has noted, "[t]he volume and breadth of social and economic policymaking undertaken by the federal government on our behalf is breathtaking." Cynthia R. Farina, *False Comfort and Impossible*

Promises: Uncertainty, Information Overload, and the Unitary Executive, 12 U. PA. J. CONST. L. 357, 361 (2010). When a case implicates the basic rules governing proposed rulemakings, it has the potential to have broad, often unanticipated consequences, and therefore deserves the attention of this Court.

The present case involves one such rulemaking. The Cross-State Air Pollution Rule, also known as the Transport Rule, implements the good neighbor provision that was extended to state planning by the 1990 revisions to the Clean Air Act. That provision provides that a State Implementation Plan (SIP):

> contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . 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)(D) (2013). The Transport Rule sets emissions reduction responsibilities for 27 upwind States based on their contributions to downwind States' air quality problems. The methodology for defining "significant contribution" in this context is at the heart of this case.

As is often the case, the Transport Rule rulemaking was not the first go-around at the issue for the Environmental Protection Agency (EPA). In 1998, the EPA promulgated the NOx SIP Call, which required

NOx reductions for states contributing to ozone nonattainment in downwind states. 63 Fed. Reg. 57,356 (Oct. 27, 1998). That rule was largely upheld in *Michigan v. EPA*, 213 F.3d 663 (2000). In 2005, the agency issued the Clean Air Interstate Rule (CAIR), which was later vacated in 2008. *See North Carolina v. EPA,* 531 F.3d 896 (D.C. Cir. 2008). In response to concerns expressed in *North Carolina*, the EPA significantly revised the substance of CAIR, resulting in the new Transport Rule. In the case below, *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), the D.C. Circuit vacated the Transport Rule after concluding that the EPA had improperly determined which states would "contribute significantly" to downwind air pollution problems.

None of the briefs supporting the many petitions for review below, nor the majority opinion for the D.C. Circuit reviewing the Transport Rule, cite to anything in the rulemaking docket that challenges the EPA's statutory interpretation of "significant contribution." Instead, the majority relied on the CAIR proceedings several years ago to suggest the EPA knew that parties objected to its statutory interpretation in the revamped Transport Rule.

SUMMARY OF ARGUMENT

Clean Air Act (CAA) Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), requires that "[o]nly an objection to a rule or procedure which was raised with

reasonable specificity during the period for public comment . . . may be raised during judicial review." In this case, no such objection was made with respect to the EPA's significant contribution analysis, an approach that was detailed over many pages in the proposed rulemaking. By deciding an issue that was not raised during the rulemaking process, the court of appeals exceeded its jurisdiction. This conclusion is dictated not only by the CAA statute, but is also required as a matter of appropriate judicial review and as a matter of basic fairness to the parties.

ARGUMENT

I. ISSUE EXHAUSTION SAFEGUARDS JUDICIAL ECONOMY AND ADMINISTRATIVE AUTONOMY.

This Court has long held that "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). More recently, in *Sims v. Apfel*, the Court again reiterated that a petitioner may not object in court to an administrative action when a statute requires that objections first be presented to the agency. 530 U.S. 103, 107-08 (2000) (holding that a Social Security claimant need not raise issues during internal agency appeals

because, among other things, no rule or statute required it but also noting that "[a]lthough the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion.").

The underlying purposes of administrative exhaustion doctrines are well understood. Exhaustion serves the "twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *see also McKart v. United States*, 395 U.S. 185, 193-95 (1969) (recognizing that consistent enforcement of exhaustion requirements is supported by both respect for agency autonomy and by concern for judicial efficiency); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.").

Allowing agencies the first opportunity to respond to challenges supports judicial economy in at least two ways. First, agencies can resolve challenges and eliminate the need for judicial review. In *McKart v. United States*, this Court observed that the "complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." 395 U.S. at 195; *see*

also McCarthy, 503 U.S. at 145 (exhaustion promotes judicial efficiency because "[w]hen an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted.").

Even if the need for judicial review is not eliminated, allowing the agency an opportunity to respond to challenges generates a more complete factual record. *See McKart*, 395 U.S. at 194 ("[I]t is normally desirable to let the agency develop the necessary factual background upon which decisions should be based."). A fully developed factual record is particularly important where disputes involve complex issues within the special competence of the expert agencies. In that way, "[p]ractical considerations arising out of the agency's familiarity with the subject matter as well as institutional considerations caution strongly against courts' deciding ordinary, circumstance-specific matters that the parties have not raised before the agency." *Sims*, 530 U.S. at 116 (Breyer, J., dissenting).

Providing agencies the first opportunity to respond to rulemaking challenges also respects administrative autonomy, and is especially important where Congress has expressly provided an exhaustion requirement by statute. Indeed, this Court has acknowledged that the "requirements of administrative issue exhaustion are largely creatures of statute," *Sims*, 530 U.S. at 107, and that congressional intent is of "paramount importance to any exhaustion inquiry," *McCarthy*, 503 U.S. at 144 (internal quotation marks omitted). Most importantly, "where Congress

specifically mandates, exhaustion is required." *Id. Cf. Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the Court of Appeals lacked jurisdiction to review objections not raised before the agency because a statute provided that "[n]o objection that has not been urged before the Board . . . shall be considered by the court."); *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-98 (1955) ("[T]he court is . . . expressly precluded from considering an objection when, without prior application to the Commission, that objection is presented to the court by the party directly aggrieved.").

In those cases, like this one, in which a specific exhaustion requirement exists, the next question is whether Congress intended the exhaustion requirement to apply to a particular situation. That question is easily answered here because the statutory exhaustion requirement expressly applies to rulemakings like the one at issue here. In particular, the Clean Air Act provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B). The fact that the CAA expressly requires issue exhaustion in rulemakings like this one separates this case from those like *Sims* that have no such broad requirement. Indeed, complex problems like interstate air pollution transport are precisely the sort that Congress sought to give the EPA first crack at resolving. Invoking exhaustion to

give the EPA an opportunity to manage these complex problems in the first instance is also in line with this Court's observations.

The starting point of this analysis, therefore, is clear. If the challengers to the Transport Rule decided not to raise certain issues during the notice and comment rulemaking procedure, the D.C. Circuit should not have reviewed those issues. To do otherwise thwarts the express intent of Congress and the general principles underlying the issue exhaustion requirement. *Cf. Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

II. THE CLEAN AIR ACT'S ISSUE EXHAUSTION REQUIREMENT REQUIRES THAT AN AGENCY HAVE ADEQUATE NOTICE.

To say that the issue exhaustion requirement applies to judicial review of Clean Air Act petitions does not fully answer the question. The Clean Air Act provides that litigants raise issues before the agency with "reasonable specificity." 42 U.S.C. § 7607(d)(7)(B). On its own, this phrase sets no particular standard but rather relies on a test of reasonableness. Logically, then, whether a litigant raised an issue with adequate specificity would turn on the

underlying purposes of the exhaustion requirement as well as the specific context in which the issue arises. Here, the question is whether an issue is raised with sufficient specificity to put the EPA on notice of the challenges lodged against its proposed rulemaking. Notice, after all, is the ultimate touchstone of whether an agency had a meaningful opportunity to address and resolve the later-raised challenge. *See, e.g., Texas Mun. Power Agency v. EPA,* 89 F.3d 858, 871 (D.C. Cir. 1996) (declining to review challenges when the petitioner "has not demonstrated that it ever brought this specific complaint to the attention of the agency during an appropriate comment period"); *Natural Resources Def. Council v. Thomas,* 805 F.2d 410, 427 (D.C. Cir. 1986) (holding that "[a]lthough we think it worthy of the EPA's attention, we ultimately do not decide this difficult issue of statutory interpretation, for it appears no party raised it during the rulemaking's comment period, as required by the Act.").

Here, the Court would give due respect to the Clean Air Act's statutory language, serve the core functions of the exhaustion doctrine, and recognize broader considerations of justice if it judged "reasonable specificity" by considering whether the EPA was properly notified of the statutory challenge that industry petitioners raised for the first time on judicial review. Indeed, the D.C. Circuit's own interpretation of the Clean Air Act's issue exhaustion requirement in prior cases bars judicial review when adequate notice has not been provided. *See, e.g.,*

Mossville Envtl. Action Now v. EPA, 370 F.3d 1232, 1238 (D.C. Cir. 2004) ("Reasonable specificity requires something more than a general challenge to EPA's approach." (internal quotation marks omitted)). In particular, drawing on waiver in the litigation context, the D.C. Circuit has announced that "although we allow commenters 'some leeway in developing their argument before this court,' the comment must have provided 'adequate notification of the general substance of the complaint.'" *Natural Resources Def. Council v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009) (quoting *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006)). The D.C. Circuit has thus struck the balance between providing notice and the specificity required for that notice.

Important to considerations of fairness, the reasonable specificity requirement articulated by the CAA is consistent with notice requirements for all participants in the rulemaking process. The D.C. Circuit itself has long held that agencies must provide adequate notice to parties of its actions and decisions. For example, the D.C. Circuit has embraced the logical outgrowth test to determine whether an agency has provided adequate notice of a final rule. *See City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) ("'Under the "logical outgrowth" test . . . , the key question is whether commenters "should have anticipated" that EPA might' issue the final rule it did." (citations omitted)). The same court also recently discounted an addition made by the EPA

too late in a Clean Air Act rulemaking proceeding to be meaningful:

> A purpose of notice-and-comment provisions under the APA (and presumably of the more elaborate procedural safeguards in § 307 of the Clean Air Act) is "to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is likely to give real consideration to alternative ideas." *New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980). By waiting until the petition for reconsideration to respond to a comment that had been raised during the comment period, EPA deprives the affected party of the opportunity to respond to EPA's rationale and influence agency action at an earlier stage. Thus, just as we will not entertain an argument raised for the first time in a reply brief to prevent sandbagging of appellees and respondents, we are reluctant to affirm based on a factual assertion raised for the first time in an agency's denial of a petition for reconsideration when the agency had an opportunity to raise that point at an earlier point in the rulemaking process. *See Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011).

National Ass'n of Clean Water Agencies v. EPA, 2013 WL 4417438, *31 (August 20, 2013). These requirements illustrate that the principles of simple fairness have informed the administrative processes on all

sides, and reasonable notice is one of its basic requirements.

The problem in this particular case is that the D.C. Circuit failed to follow the requirements of the statute. It also did not adhere to its own standards. As a result, the court thwarted congressional intent and created the very problems that exhaustion doctrines were meant to avoid.

III. APPLYING THE ISSUE EXHAUSTION REQUIREMENT AS MANDATED BY THE CAA IS ALSO CONSISTENT WITH COMMON LAW.

The CAA's approach to the issue exhaustion requirement is consistent with the broader common law application of exhaustion doctrines by this Court and others. To that end, more than forty years ago this Court recognized the case-specific nature of the exhaustion inquiry and the importance of considering the underlying purpose of the doctrine:

> The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

McKart, 395 U.S. at 193.

In *McCarthy*, this Court recognized several exceptions to the exhaustion doctrine for cases where

there was no specific congressional mandate. *See* 503 U.S. at 146-50. Those exceptions include situations in which requiring parties to engage the administrative process before seeking judicial review would result in undue prejudice (e.g., where there would be unreasonable delay or plaintiff would suffer irreparable harm without immediate judicial review); where there is some doubt as to the agency's institutional competence to resolve the issue raised (e.g., there is a challenge to the constitutionality of the underlying statute or the agency's own procedures); or where the agency is shown to be biased or otherwise predetermined the issues before it. *See id.*

While the common law exceptions demonstrate a certain case-specific and flexible approach to the exhaustion requirement, none of those exceptions apply here, where Congress has required issue exhaustion as a condition of judicial review under the Clean Air Act. *Cf. McCarthy*, 503 U.S. at 152 (evaluating the individual and institutional interests at stake in the case "[b]ecause Congress has not *required* exhaustion of a federal prisoner's *Bivens* claim."). Even if they did apply, as a matter of substance, none of the exceptions fit this case.

It might be suggested that, because the court below viewed the agency as exceeding its statutory authority, the CAA's provision requiring any issue in a rulemaking to be raised with "reasonable specificity" may not apply. First, the language of § 7607(d)(7) admits of no such exception and the D.C. Circuit has never before interpreted it to make such an exception.

See Natural Resources Def. Council v. Thomas, 805 F.2d 410, 427 (D.C. Cir. 1986) (applying exhaustion requirement to statutory interpretation issues). Moreover, creating such an exception for this case misunderstands the nature of the statutory question at hand. This is not the rare case in which the agency has profoundly erred with respect to the statutory scheme it administers and no commenter raised the issue. Instead, the majority opinion's objections to the EPA's actions turn on questions of the reasonable interpretation of the statute. In such circumstances, the court is not authorized to substitute "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron USA, Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 843 n.11 (1983). Instead, the court only engages in limited review of the agency's action: "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Accordingly, it makes little sense to review an interpretation that has never been presented to the agency for its consideration and full explanation. This kind of statutory interpretation question – one that is left unanswered by Congress and one whose reasonableness turns on facts within the special competency of the agency – is precisely the kind that would benefit from the principles underlying the exhaustion doctrine. In particular, judging the reasonableness of an agency's interpretation in this case would have been aided by giving the agency an opportunity to explain how its interpretation best reconciles the language of

the statute with the practical difficulties of resolving interstate air transport problems.

IV. THE RESPONDENTS' STATUTORY CHALLENGE TO THE TRANSPORT RULE IS BARRED BY THE ISSUE EXHAUSTION REQUIREMENT.

Though some flexibility is inherent in the Clean Air Act's exhaustion requirement, and in the exhaustion doctrines as applied at common law, the doctrine must pay more than mere lip service to judicial economy, administrative autonomy, and congressional intent. Here, this case is not a close one and the D.C. Circuit's application is tantamount to rejecting the Clean Air Act's issue exhaustion requirement entirely. *Cf. EME Homer City Generation v. EPA*, 696 F.3d 7, 52 (D.C. Cir. 2012) (Rogers, J., dissenting) ("The jurisdictional question is not *close*; the court's efforts to avoid this court's well-settled precedent fails clearly.").

There are three particularly troubling aspects of the D.C. Circuit's application of the issue exhaustion doctrine in this case. First, the court concluded that the exhaustion requirement was met not because the *litigants* had raised their objections to the agency, but because the *court* had commented on the bounds of statutory authority in its previous review of earlier rulemakings. In other words, the court's own concerns about statutory authority were used to satisfy the exhaustion requirement, not objections made by

interested parties to the rulemaking at hand. Second, to satisfy the exhaustion requirement for the Transport Rule, the court allowed litigants to rely on objections made during previous rulemakings, at points earlier in the regulatory history of the agency's attempts to resolve interstate air pollution problems. But it is precisely the long regulatory history and the industry challengers' previous objections on similar issues that suggest their silence in response to the Transport Rule would reasonably have been interpreted by the EPA as a concession of authority. Finally, the court's review of the issue would have benefitted from the agency's analysis in the first instance.

A. The Issue Exhaustion Requirement Is Not Met By Relying on Language in Court Decisions Reviewing Previous Versions of the Challenged Rule.

In arguing that the issue exhaustion requirement was met, the majority opinion relies on its previous decision in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), where the court reviewed and vacated the 2005 CAIR, the predecessor to the Transport Rule.

In *North Carolina*, the D.C. Circuit suggested that the EPA would exceed the statutory authority of the good neighbor provision if it required upwind states to reduce their emissions beyond the portion that significantly contributes to downwind nonattainment. Based on the admonishments in *North*

Carolina, the majority concluded that the EPA should have had notice that its later-crafted Transport Rule exceeded the statutory authority of the good neighbor provision.

If the *North Carolina* decision was as clear as the majority argues, it stands to reason that some commenters would have raised an objection to the EPA's statutory authority in response to the proposed Transport Rule. The fact that no commenter read the *North Carolina* decision to obviously reject the approach that the EPA later embraced in the Transport Rule demonstrates one of two things. First, that the opinion could not fairly be said to put the EPA on notice that an approach like that taken in the Transport Rule would violate the statute. Or, second, none of the very interested and motivated challengers believed that the EPA exceeded its authority despite the admonishment of the court in *North Carolina*. Either way, the *North Carolina* decision cannot be bootstrapped to put the EPA on notice that the Transport Rule exceeds the bounds of the good neighbor provision.

As Judge Rogers explained in dissent, another problem with the majority's argument is that the statutory challenge raised for the first time on judicial review of the Transport Rule was not even one of the issues litigated in *North Carolina*. *See EME Homer City v. EPA,* 696 F.3d at 39-40 (Rogers, J., dissenting). In other words, while some commenters objected to the 2005 CAIR on the theory that it exceeded statutory authority of the good neighbor

provision, no commenters pursued that objection during judicial review of the 2005 CAIR. Then, after the *North Carolina* decision, no commenters raised the statutory authority argument in response to the proposed Transport Rule. As a result, the EPA has no obligation to respond to an objection that was unlitigated in response to CAIR and not raised in response to the Transport Rule.

This highlights an even more fundamental question, which is whether general and prospective admonishments made by a court in its response to one agency rule can even be treated as comments to a subsequently proposed agency rulemaking. This would mean that a litigant would satisfy the Clean Air Act's issue exhaustion requirement by assembling the relevant jurisprudence and arguing that the agency should have understood the precise bounds of its statutory authority; no further action would be necessary during rulemaking to notify the agency that it exceeded its authority in a particular proposed rule. Such an end-around the exhaustion requirement cuts against both the plain language of Section 307(d)(7)(B) and the goal of increasing transparency between the agency and commenters so that issues can be resolved or further developed during the administrative process.

In creating this end-around, the majority fundamentally conflated a statutory issue raised by the *court* in response to CAIR with issues raised by the *industry challengers* in their comments to the

Transport Rule now under challenge. This Court should not make a similar mistake.

B. Comments Made in a Previous Rulemaking Cannot Be Automatically Bootstrapped and Assumed to Apply to the Challenged Rule.

Just as the court below assumed that the exhaustion requirement could be met by bootstrapping issues raised by the court in its review of CAIR, the court similarly assumes that objections raised by commenters to the 2005 CAIR can be automatically renewed with respect to the 2011 Transport Rule. *See EME Homer City*, 696 F.3d at 39-40 (Rogers, J., dissenting) (explaining that the comments offered by the majority to support its review were comments made during the administrative proceedings of CAIR, which were not incorporated into the Transport Rule's administrative proceeding). By this logic, in cases where there is a long regulatory history and several iterations of a rule have been previously litigated, vacated, and revisited, the agency would have to assume that all previous objections remain live in the later revised rules. All objections made at any point in the regulatory history would automatically be carried forward without further action by the litigants.

This simply cannot be. Administrative rulemaking would be severely hampered and slowed, more so than it already is, if an agency were burdened with

reading the tea leaves of an entire regulatory history and compelled to assume that previous objections were automatically renewed. A better approach, and the one that clearly fits with the statutory language, is to require challengers to raise with reasonable specificity their objections to each rule. Of course, this could be done quite simply by cross-referencing previous objections. It must, however, be done. Basic communication dictates this be so.

Common sense also dictates that if an objection raised early on in a rule's regulatory history is not expressly renewed in subsequent stages, the commenter has decided the objection is not viable or otherwise not strategically worth pursuing. Here, the decision not to raise a statutory challenge in response to the Transport Rule is particularly troubling. Recall that the litigants had raised the issue in comments to CAIR and did not raise it here. The litigants' silence in this case, therefore, bears special meaning and suggests the issue of statutory authority had been resolved.

Embracing an approach under which an objection is presumed dead unless expressly renewed allows judicial review to work most efficiently with administrative rulemaking. At each stage in the review and with each new version of a rule, the agency can be assured that it has sufficiently satisfied the concerns of the courts and commenters if earlier raised objections are not subsequently renewed. This system, moreover, places no special burden on the commenters. It merely requires them to become familiar with

the regulatory history of a rulemaking and raise previous objections again if those objections remain valid. In the end, the basic rule of issue exhaustion articulated by the statute allows the rulemaking process in the more complex cases like this one to move forward, culling the issues and bringing increased clarity with each rulemaking attempt.

C. Interstate Air Transport Raises the Kind of Complex Problems That Would Benefit From Agency Review in the First Instance.

The reason for requiring exhaustion is particularly clear where, as here, complex problems within the special competency of the agency would have benefitted from the agency's response to the late-raised issues. *See McCarthy*, 503 U.S. at 145 ("Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise."). The sheer size of this particular rulemaking – which includes tens of thousands of comments and a 3000-page Primary Response to Comments (*see* EPA, Transport Rule Primary Response to Comments (June 2011), Docket No. EPA-HQ-OAR-2009-0491-4513, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQOAR-2009-0491-4513) – illustrates just how complex and difficult this rulemaking was. It is also no secret that interstate air pollution transport raises complex technical and

policy questions wrapped up in issues of public health, cost, and feasibility. *See* Petr. EPA Br. at 46-55.

Consider for instance the not-so-simple problem of determining which states are upwind states contributing to downwind nonattainment and which states are downwind states that are unwitting recipients of upwind pollution. In a modeling map produced by the EPA to explain its proposed Transport Rule, Texas is an upwind contributor of ozone to Louisiana. *See* EPA, Proposed Air Pollution Transport Rule, Slideshow Presentation, at slide 35, available at http://www.epa.gov/airquality/transport/pdfs/TRPresentationfinal_7-26_webversion.pdf. At the same time Texas is a downwind recipient of ozone from Oklahoma, Kansas, Arkansas, Illinois, Florida, and some states as far away as the Northeast. *Id.* Louisiana, in turn, is also downwind from the ozone emitted by Arkansas, Mississippi, and Georgia. *Id.* So which states are responsible for nonattainment in Louisiana? How much, for instance, should Texas be held responsible when it is also an unwitting downwind recipient of ozone? And this is just the complexity of figuring out who is doing what damage, never mind the public health and science determinations of what portion of emissions constitute excess or significant contributions.

Congress recognized the importance of addressing interstate air pollution when it included the good neighbor provision, 42 U.S.C. § 7410(a)(2)(D) (2013). But it also recognized the complex task of regulating

intermingled air pollution when it amended the good neighbor provision in 1990 to expand EPA's authority. Namely, the 1990 amendments permit regulation of upwind states that "significantly contribute" to downwind nonattainment, rather than requiring a stronger causal link wherein the upwind states "prevent" downwind nonattainment. *Compare* 42 U.S.C. § 7410(a)(2)(E) (1988) (requiring regulation of upwind states that would "prevent attainment" in a downwind State) *with* 42 U.S.C. § 7410(a)(2)(D) (2013) (requiring SIPs to regulate emissions that "contribute significantly" to nonattainment in downwind States). In this way, Congress expanded the EPA's regulatory authority to regulate upwind states that contribute to downwind nonattainment in combination with other states. *See EME Homer City*, 696 F.3d at 21 n.14 (explaining the statutory history of the good neighbor provision and noting the expanded authority). The point is simply that Congress already amended the good neighbor provision once in recognition that the issues are more complicated than superficial consideration would dictate.

In cases such as these, courts are less equipped to pass on the particular statutory bounds or to draw precise "red lines" when the record remains undeveloped on whether the court's contours are compatible with the technical and political realities that complicate the statutory mandate. Accordingly, this was a particularly bad context for the court to ignore the statutory exhaustion requirement.

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CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

AMY J. WILDERMUTH
UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW
332 S. 1400 East, Room 101
Salt Lake City, UT 84112
(801) 585-6833
amy.wildermuth@utah.edu

SANNE H. KNUDSEN
Counsel of Record
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
William H. Gates Hall
Box 353020
Seattle, WA 98195
(206) 221-7443
sknudsen@uw.edu