

Nos. 12-1182 and 12-1183

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IN THE  
**Supreme Court of the United States**

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UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, *ET AL.*,  
*Petitioners,*

v.

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

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AMERICAN LUNG ASSOCIATION, *ET AL.*,  
*Petitioners,*

v.

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

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**On Writs of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

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**BRIEF OF THE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA AS  
*AMICUS CURIAE* IN SUPPORT OF  
RESPONDENTS**

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### **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates its members’ interests before Congress, the Executive Branch, and the courts, and regularly files *amicus* briefs in cases raising issues of concern to the Nation’s business community.

This case presents a question of vital importance to the Chamber and its members: whether EPA’s Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), exceeds the agency’s authority under the Clean Air Act, 42 U.S.C. §§7401 *et seq.* The Act’s “good-neighbor” provision requires state implementation plans to address emissions from upwind States that “contribute significantly” to “nonattainment” of air quality standards in downwind States. 42 U.S.C. §7410(a)(2)(D)(i)(I). In the rule under review, however, EPA disregarded the express limits on its authority under that provision, imposing air quality controls to reduce emissions regardless of whether the emissions contribute to nonattainment and regardless of whether attainment could be achieved with less extensive controls. Rather than adhere to its statutory mandate, EPA effectively treated the Act as a

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* made such a contribution. All parties consented to the filing of this brief. Copies of the letters granting consent have been filed with the Clerk.

license to regulate interstate air pollution to whatever extent it deemed to be in the public interest.

That leveraging of the good-neighbor provision into a license for general regulation of interstate emissions is a matter of grave concern to the Chamber and its members. Many of the Chamber's members produce regulated emissions subject to EPA's rule. Those members have a strong interest in ensuring that EPA does not impose burdensome regulations beyond those authorized by the Clean Air Act.

The Chamber has repeatedly participated in other cases addressing the scope of EPA's statutory authority. See, e.g., *Gen. Motors Corp. v. United States*, 496 U.S. 530 (1990); *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), cert. denied, 130 S. Ct. 1735 (2010). The Chamber has both a unique perspective on the question presented and a substantial interest in ensuring that the Act is interpreted consistent with Congress's design.

## BACKGROUND

### I. THE CLEAN AIR ACT'S GOOD-NEIGHBOR PROVISION

Congress enacted the Clean Air Act "to encourage and assist the development and operation of regional air pollution prevention and control programs," including programs addressing interstate air pollution. 42 U.S.C. § 7401. The Act requires EPA to issue national ambient air quality standards ("NAAQS") for emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7408(a)(1)(A). EPA identifies geographic areas that are out of compliance with its NAAQS. *Id.* § 7407(d)(1)(B). Each State then assumes primary responsibility for creating a state implementation plan, subject to EPA approval, to bring those areas into compliance. *Id.* § 7502.

This case concerns the Act’s “good-neighbor” provision. Because air pollution can have effects across state lines, the good-neighbor provision addresses emissions from upwind States that have a detrimental effect on the ability of neighboring downwind States to comply with air quality standards. Under that provision, a state implementation plan must

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)(D)(i)(I) (emphasis added).

The provision thus authorizes EPA to require States to regulate emissions to the extent the “amounts” emitted will otherwise “contribute significantly” to “nonattainment” of air quality standards in downwind States (or “interfere with maintenance” of standards already met). *If* the amounts emitted will contribute significantly to nonattainment, EPA may proscribe them. But EPA cannot “over-control” by imposing restrictions to regulate emissions that go beyond what is necessary to secure attainment.

## II. EPA’S PRIOR ATTEMPTS TO REGULATE UNDER THE GOOD-NEIGHBOR PROVISION

### A. The 1998 NO<sub>x</sub> SIP Call

In 1998, EPA implemented the good-neighbor provision through a rule known as the NO<sub>x</sub> SIP Call. See 63 Fed. Reg. 57,356 (Oct. 27, 1998) (final rule); 62 Fed. Reg. 60,318 (Nov. 7, 1997) (proposed rule). That rule required

certain upwind States to revise their implementation plans to reduce emissions of nitrogen oxide (NO<sub>x</sub>), a precursor to ozone. The rule required adoption of controls costing up to \$2,000/ton by all upwind States that contributed significantly to downwind nonattainment or interfered with the maintenance of downwind attainment. 63 Fed. Reg. at 57,358, 57,377.

In ordering those measures, EPA specifically addressed the issue of over-control. EPA “determined that none of the upwind States affected by [the NO<sub>x</sub> SIP Call] are affected by ‘overkill,’ that is, required reductions that are *more than necessary to ameliorate downwind nonattainment.*” 63 Fed. Reg. at 57,379 (emphasis added); see also *id.* at 57,403 (“[T]here is no instance of ‘overkill,’ so that none of the upwind reductions required under today’s action is more than necessary to ameliorate downwind nonattainment.”).

In *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1225 (2001), the D.C. Circuit upheld EPA’s use of cost considerations in the NO<sub>x</sub> SIP Call to determine whether upwind States “contribute significantly” to downwind nonattainment. *Id.* at 679. The court found “no evidence of the requisite ‘clear congressional intent to preclude consideration of cost.’” *Ibid.* (quoting *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)).

### **B. The 2005 Clean Air Interstate Rule**

In 2005, EPA supplemented the NO<sub>x</sub> SIP Call with the Clean Air Interstate Rule (“CAIR”). See 70 Fed. Reg. 25,162 (May 12, 2005) (final rule); 69 Fed. Reg. 4,566 (Jan. 30, 2004) (proposed rule). CAIR required certain upwind States to reduce emissions of both NO<sub>x</sub> and sulfur dioxide (SO<sub>2</sub>). 70 Fed. Reg. at 25,162. NO<sub>x</sub> affects attainment of the NAAQS for ozone, while both NO<sub>x</sub> and

SO<sub>2</sub> affect attainment of the NAAQS for fine particulate matter (PM<sub>2.5</sub>). *Ibid.*

Once again, EPA was careful to determine that its measures addressed only emissions that would contribute to nonattainment. “[T]he 2015 CAIR controls,” it found, “are not more than are necessary to attain the NAAQS \* \* \*.” 70 Fed. Reg. at 25,194; see also *id.* at 25,195 (“[T]he amount of upwind reductions is not more than necessary to prevent interference with maintenance of the standards \* \* \*.”); *id.* at 25,175 (“[PM<sub>2.5</sub>] regional controls are not more than is necessary for downwind areas to attain.”).

In *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), the D.C. Circuit invalidated CAIR, holding that EPA had not tailored its cost measures to each upwind State’s respective contribution to nonattainment. *Id.* at 907-908. EPA’s region-wide approach improperly made “one state’s significant contribution depend on another state’s cost of eliminating emissions.” *Id.* at 919-920. The court remanded for further proceedings, but without vacating the rule. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

### III. THE RULE UNDER REVIEW

#### A. The Transport Rule

In 2011, EPA promulgated the Cross-State Air Pollution Rule, or “Transport Rule,” to replace CAIR. See 76 Fed. Reg. 48,208 (Aug. 8, 2011) (final rule); 75 Fed. Reg. 45,210 (Aug. 2, 2010) (proposed rule). That rule used a three-step process to impose emission controls under the good-neighbor provision.

First, EPA projected which downwind States would be in nonattainment absent good-neighbor emission controls in upwind States. See 76 Fed. Reg. at 48,211.

Second, EPA used air quality modeling to “determine which upwind states [were] projected to contribute at or above threshold levels to the air quality problems in those areas.” 76 Fed. Reg. at 48,211. Upwind States that contributed more than 1% of the applicable NAAQS were deemed “linked” to that nonattainment and required to adopt emission controls. *Id.* at 48,236. States that fell below that threshold were exempt. *Ibid.*

Third, and most relevant here, EPA determined what emission reduction obligations to impose. EPA developed “cost curves” to assess the reductions that “would be achieved in [an upwind] state if all [sources] \* \* \* in that state used all emission controls and emission reduction measures available at [various] cost threshold[s].” 76 Fed. Reg. at 48,248. EPA then used a model to determine what impact the reductions would have in each downwind area. *Id.* at 48,249.

EPA next identified “significant cost thresholds,” which it described as “point[s] along the cost curves where a noticeable change occurred in downwind air quality,” for example “because a certain type of emissions control strategy becomes cost-effective.” 76 Fed. Reg. at 48,249. Thus, rather than determining the minimum cost threshold at which attainment could be achieved, EPA selected cost thresholds where returns began to diminish rapidly, regardless of whether a lower cost threshold also could have achieved the required reductions. Using those thresholds, EPA chose cost controls of \$500/ton for NO<sub>x</sub>, \$2,300/ton for SO<sub>2</sub> for certain “Group 1” States, and \$500/ton for SO<sub>2</sub> for other “Group 2” States. *Id.* at 48,249, 48,251-52.

EPA, however, did not examine whether attainment could be achieved through less burdensome measures. Instead, if it thought a proposed cost threshold was cost-

effective, it imposed that threshold. For example, EPA “examined various cost thresholds for ozone season NO<sub>x</sub> and identified a cost threshold with rapidly diminishing returns at \$500/ton.” 76 Fed. Reg. at 48,256. It accordingly imposed that threshold. *Ibid.* EPA did not consider whether a lower threshold would achieve attainment, either generally or if applied to particular States. *Ibid.* Similarly, EPA determined that a \$500/ton threshold for SO<sub>2</sub> in Group 2 States would “resolve the nonattainment and maintenance problems.” *Id.* at 48,257. But it nowhere addressed whether some lower threshold, such as \$400/ton, would likewise resolve those problems.

Commenters brought that over-control to EPA’s attention. They provided evidence that less extensive controls could achieve the same attainment goals. See, e.g., Utility Air Regulatory Group Comments 72 (Oct. 1, 2010) (urging little to no benefit from proposed reductions as compared to existing controls); Southern Company Comments 43 (Oct. 1, 2010) (objecting that there was “little to no downwind benefit” from proposed reductions). EPA’s only response was that a lower cost threshold was “inappropriate” because States might “stop operating existing pollution control equipment.” 76 Fed. Reg. at 48,257.

### **B. The Decision Below**

The D.C. Circuit overturned the Transport Rule, holding that it exceeded EPA’s authority in three independent respects. Pet. App. 31a-41a. First, EPA improperly ignored its 1% insignificance threshold—used at its second step to determine whether an upwind State contributed significantly to nonattainment—in evaluating the impact of its emission controls. Pet. App. 36a. In other words, EPA mandated controls designed to reduce upwind States’ contributions without regard to whether

they would be driven below the 1% floor it had already deemed insignificant. *Id.* at 37a-38a.

Second, the court held that EPA's use of uniform cost measures conflicted with the good-neighbor provision's proportionality requirement. Pet. App. 38a. Uniform cost measures, the court ruled, forced some upwind States to eliminate more than their "statutory fair share" of emissions. *Id.* at 39a.

Third, the court ruled that EPA had "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." Pet. App. 39a. The good-neighbor provision, it noted, gives EPA authority only over emissions that contribute to nonattainment. *Ibid.* That provision is "not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS." *Id.* at 28a. Rather, EPA must limit "upwind States' obligations to the level of reductions necessary and sufficient to produce attainment in the downwind States." *Ibid.*

The court conceded that "there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States' emissions," and thus "EPA must have some discretion about how to reasonably avoid such over-control." Pet. App. 28a-29a. But "EPA must avoid using the good neighbor provision in a manner that would result in unnecessary over-control in the downwind States." *Id.* at 29a. "Otherwise, EPA would be exceeding its statutory authority, which is expressly tied to achieving attainment in the downwind States." *Ibid.*

The Transport Rule disregarded that principle. EPA "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce

unnecessary over-control in the downwind States.” Pet. App. 39a. Because “EPA’s statutory authority \* \* \* is limited to attaining the NAAQS in the downwind States,” “EPA may not require upwind States to do more than necessary for the downwind States to achieve the NAAQS.” *Id.* at 39a-40a. EPA “did not try to take steps to avoid such over control.” *Id.* at 40a.

### ARGUMENT

By its plain terms, the Clean Air Act’s good-neighbor provision allows EPA to require emission controls for upwind States only where—and only to the extent that—the State emits “amounts” of pollutants that will “contribute significantly” to downwind “nonattainment.” The statute does not permit EPA to require such controls absent downwind nonattainment. Nor does it allow EPA to curtail amounts of emissions in an upwind State more than necessary to achieve downwind nonattainment.

By design and in effect, the Transport Rule runs afoul of those express textual limitations. EPA did not seek to impose emission limits solely to the extent necessary to avoid downwind nonattainment. Rather, departing from its prior practice, EPA established limits by asking whether particular reductions would be “cost-effective” without regard to whether they were necessary to avoid downwind nonattainment. That approach defies the statutory text. The good-neighbor provision is directed solely at “amounts” of emissions that “contribute significantly” to “nonattainment.” It does not license EPA to regulate in whatever manner it deems cost-effective or in the public interest.

Predictably, EPA’s methodology produced results that departed from the statutory mandate. EPA required upwind States to adopt additional emission controls even where downwind States had already achieved attainment

of NAAQS. And it required adoption of controls that go far beyond what is necessary to achieve attainment. The court below properly set aside EPA’s rule as inconsistent with the careful boundaries Congress imposed in the Act.

**I. EPA’S AUTHORITY OVER UPWIND EMISSIONS IS LIMITED TO AMOUNTS THAT WILL CONTRIBUTE TO NONATTAINMENT**

The good-neighbor provision is not a general license to regulate emissions in the public interest. Instead, EPA’s authority is limited to emissions in “amounts” that will “contribute significantly” to “nonattainment” in downwind States. That restriction is not merely explicit in the statutory text. It is also confirmed by the statute’s history, longstanding agency practice, and unchallenged precedent.

**A. The Statutory Text Unambiguously Limits EPA’s Authority To Emissions In “Amounts” That Will “Contribute Significantly” To Downwind “Nonattainment”**

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court set out the two-step approach courts must apply when reviewing an agency’s implementation of the statute entrusted to it for administration. First, applying ordinary tools of statutory construction, a court must determine “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-843. Only if “the statute is silent or ambiguous with respect to the specific issue” does the Court proceed to the second question of “whether the agency’s answer is based on a permissible

construction of the statute.” *Id.* at 843; see also *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

In applying those principles, courts must be guided by the plain meaning of the statutory text. This Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992); see also *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013). In this case, the statutory text could not be clearer.

The Clean Air Act’s good-neighbor provision requires a state implementation plan to

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)(D)(i)(I) (emphasis added). The good-neighbor provision thus requires plans to prohibit only particular “amounts” of emissions that will “contribute significantly” to “nonattainment” of NAAQS in another State (or “interfere with maintenance” of attainment already achieved). EPA may prescribe controls only where—and only to the extent that—the downwind State is not already in compliance or would not already be in compliance absent the particular controls the agency proposes.

Dictionaries confirm that plain meaning. To “attain” something is to “reach, arrive at, gain, [or] accomplish” it. 1 *The Oxford English Dictionary* 760-761 (2d ed. 1991);

see also *Random House Unabridged Dictionary* 133 (2d ed. 1993) (“to reach, achieve, or accomplish”). “Non-attainment” is therefore the condition of *not* reaching or achieving some status. EPA may regulate only if, and only to the extent that, a downwind State has not reached or will not reach the relevant NAAQS.

The statute also permits regulation only to the extent that emissions “contribute significantly” to nonattainment. To “contribute to” something is to “do a part in bringing (it) about; to have a part or share in producing” it. <sup>3</sup> *The Oxford English Dictionary, supra*, at 848-849; see also *Random House Unabridged Dictionary, supra*, at 442 (“to be an important factor in; help to cause”). Where a downwind State is already in compliance, the upwind State by definition cannot be “contribut[ing] significantly” to nonattainment. Similarly, if particular controls would be sufficient to secure attainment, any *additional* restrictions cannot be said to prohibit emissions in amounts that “contribute significantly” to nonattainment. Attainment would be achieved with or without those additional controls.

Indeed, the good-neighbor provision focuses, not on “emissions” generally, but on emissions in “amounts” that will contribute significantly to nonattainment. 42 U.S.C. § 7410(a)(2)(D)(i)(I). If restriction of a particular “amount” of emissions would suffice to achieve attainment, any additional “amounts” cannot be contributing to nonattainment. The Act thus restricts regulation to the minimum extent necessary to ensure that emissions do not “contribute significantly” to nonattainment.<sup>2</sup>

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<sup>2</sup> The Act’s separate reference to emissions that “interfere with maintenance” of air quality standards does not alter that analysis. 42 U.S.C. § 7410(a)(2)(D)(i)(I). Regardless of whether the question is whether an emission will “contribute significantly” to nonattainment

“Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.” *City of Arlington*, 133 S. Ct. at 1868. Congress plainly took the former approach here. The good-neighbor provision imposes a narrow and carefully defined mandate. EPA may insist on controls necessary to prevent upwind States from emitting “amounts” that will “contribute significantly” to downwind “nonattainment.” It may not impose air pollution controls merely because it deems them cost-effective, desirable, or otherwise consistent with its view of sound policy.

Congress’s specific approach here contrasts with other statutes that authorize agencies to promulgate regulations in the “public interest” or under some similarly flexible standard. See, *e.g.*, 15 U.S.C § 78l(b)(1) (authorizing the Securities and Exchange Commission to promulgate “rules and regulations \* \* \* as necessary or appropriate in the public interest or for the protection of investors”); 47 U.S.C. § 201(a) (authorizing the Federal Communications Commission to regulate interconnections and rates as “necessary or desirable in the public interest”); 21 U.S.C. § 823(a) (authorizing the Attorney General to reg-

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or “interfere with maintenance” of attainment already achieved, the relevant point is the same: The agency may not prohibit “amounts” of emissions absent some showing that those particular amounts have a causal connection to either actual or threatened “nonattainment.” In practice, the agency treats the two inquiries slightly differently because it evaluates contribution to nonattainment based on a downwind site’s *average* projected pollution level while evaluating interference with maintenance based on its *maximum* projected pollution level. See 76 Fed. Reg. at 48,227-28. But even under the more aggressive standard applied to interference, EPA ignored its statutory mandate and went far beyond what was necessary to avoid nonattainment. See pp. 21-24, *infra*.

ister controlled substance manufacturers if “consistent with the public interest”); 23 U.S.C. § 109(a)(1) (authorizing the Secretary of Transportation to regulate highway projects “in a manner that is conducive to safety, durability, and economy of maintenance”). Congress did not adopt that approach in the good-neighbor provision. Instead, it limited EPA to imposing controls that are necessary to ensure that emission amounts from upwind States do not “contribute significantly” to “nonattainment” across state lines.

### **B. The Clean Air Act’s History Confirms The Good-Neighbor Provision’s Narrow Scope**

The history of Congress’s legislation on interstate air pollution confirms the good-neighbor provision’s limited scope. Congress has consistently acted cautiously, incrementally expanding EPA’s authority while articulating precise standards to govern the agency’s actions.

Congress first addressed interstate air pollution in 1963. That statute assigned primary responsibility to the States, authorizing them to “negotiate and enter into agreements or compacts” for the “prevention and control of air pollution and the enforcement of their respective laws relating thereto.” Pub. L. No. 88-206, §2(c), 77 Stat. 392, 393 (1963). The federal government was authorized only to undertake research and “encourage cooperative activities by the States and local governments.” *Id.* §§2(a), 3, 77 Stat. at 393-394.

In 1970, Congress took an incremental step toward more federal oversight, adding the foundations for the current regime. It created the NAAQS and required States to develop implementation plans. See Pub. L. No. 91-604, §4(a), 84 Stat. 1676, 1679 (1970). Yet it continued to tread lightly, requiring plans to include only “adequate provisions for intergovernmental cooperation.” *Id.* §4(a),

84 Stat. at 1681. That provision was construed to require only “exchange of information,” not “binding enforcement agreements.” *Natural Res. Def. Council, Inc. v. EPA*, 483 F.2d 690, 692 (8th Cir. 1973).

In 1977, Congress enacted the first version of the good-neighbor provision. Under that version, state implementation plans had to include “adequate” provisions “prohibiting any stationary source within the State from emitting any air pollutant in amounts which will \* \* \* prevent attainment or maintenance [of NAAQS] by any other State.” Pub. L. No. 95-95, §108, 91 Stat. 685, 693 (1977). Congress limited the provision’s scope by requiring that downwind nonattainment be linked to a specific individual “source” and that the emissions actually “prevent” attainment. *Ibid.*

Finally, in 1990, Congress took another incremental step by enacting the current provision. Congress dispensed with the requirement that nonattainment be linked to a specific source, instead permitting regulation based on state emissions as a whole. 42 U.S.C. §7410(a)(2)(D)(i)(I). But Congress retained the basic approach of prior law: Primary responsibility for developing implementation plans remained with the States, and EPA could intervene only to curtail “amounts” of emissions that “contribute significantly” to “nonattainment.” *Ibid.*

That history confirms the statute’s narrow scope. From the outset, Congress has been careful to cabin EPA authority by imposing specific standards governing its regulation of interstate air pollution. While taking incremental steps to extend the agency’s authority, Congress has consistently reaffirmed its basic approach of assigning primary responsibility to the States, subject to EPA oversight only in specific, defined respects.

### C. EPA's Prior Positions Confirm The Provision's Narrow Scope

The good-neighbor provision's limited scope is confirmed by EPA's longstanding approach to implementing the provision. In sharp contrast to the approach it took here, in the past EPA had consistently recognized its narrow mandate.

For example, in the NO<sub>x</sub> SIP Call—EPA's first rule implementing the provision—the agency recognized that downwind nonattainment was a precondition for regulation: “The initial prong under section 110(a)(2)(D) is whether sources ‘contribute significantly’ to ‘nonattainment \* \* \*’ with respect to the NAAQS. The initial inquiry for this prong is to identify and determine the geographic scope of ‘nonattainment’ downwind.” 62 Fed. Reg. at 60,324. EPA issued the rule only after specifically finding that “none of the upwind States affected by [the NO<sub>x</sub> SIP Call were] affected by ‘overkill,’ that is, required reductions that are *more than necessary to ameliorate downwind nonattainment.*” 63 Fed. Reg. at 57,379 (emphasis added); see also *id.* at 57,403 (“[T]here is no instance of ‘overkill,’ so that none of the upwind reductions required under today’s action is more than necessary to ameliorate downwind nonattainment.”).

In defending its rule in the D.C. Circuit, EPA emphasized its efforts to avoid over-control, stressing that it had imposed the minimum burdens necessary to achieve attainment. The agency explained that it had “reviewed the modeling results to assure that no upwind State would be required to implement more controls than necessary to allow attainment downwind.” EPA Br. in *Michigan v. EPA* at 19, 1999 WL 34841134 (D.C. Cir. filed Aug. 27, 1999). “[I]f there was any imprecision in the amount of required emissions reductions, it was on

the side of undercontrol, not overcontrol.” *Id.* at 50. EPA made the same point in opposing certiorari. See Br. in Opp. in No. 00-445 at 11 n.7 (Jan. 2001) (“[I]f anything, EPA erred on the side of under-control rather than over-control.”).

EPA adhered to that understanding when it promulgated CAIR to replace the NO<sub>x</sub> SIP Call. In that rule-making, the agency repeatedly emphasized its efforts to limit upwind emission restrictions to those necessary to redress nonattainment. See 70 Fed. Reg. at 25,175 (“[PM<sub>2.5</sub>] regional controls are *not more than is necessary* for downwind areas to attain.” (emphasis added)); *id.* at 25,194 (“[T]he 2015 CAIR controls are *not more than are necessary* to attain the NAAQS \* \* \* .” (emphasis added)); *id.* at 25,195 (“[T]he amount of upwind reductions is *not more than necessary* to prevent interference with maintenance of the standards \* \* \* .” (emphasis added)). The good-neighbor provision, EPA observed, “requires upwind States to prohibit the *amount of emissions that contribute significantly* to downwind nonattainment, but does not require the upwind States to prohibit sufficient emissions to assure that the downwind areas attain.” *Id.* at 25,177 (emphasis added).

The agency thus consistently recognized that the good-neighbor provision grants it only narrow authority to regulate upwind emissions in defined circumstances.

#### **D. Unchallenged Precedent Confirms The Provision’s Narrow Scope**

Finally, the good-neighbor provision’s plain meaning is confirmed by court of appeals precedent interpreting the statute—precedent EPA has not challenged before and does not challenge now. In decisions reviewing EPA’s prior rulemakings, the D.C. Circuit has consistently ruled that EPA lacks authority to “over-control” upwind

emissions. Nowhere does EPA claim that those rulings are incorrect.

First, in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), the court relied on the Act's prohibition against over-control to hold that EPA had improperly included Wisconsin in the NO<sub>x</sub> SIP Call. Wisconsin, it ruled, did not emit pollution that contributed to "nonattainment in any other state." *Id.* at 681. Although EPA contended that Wisconsin significantly contributed to ozone over Lake Michigan, the agency had not "show[n] on the record that Wisconsin's ozone contribution affects any on-shore state nonattainment." *Ibid.* Accordingly, EPA had "acted unlawfully by including Wisconsin in a SIP call limited by statute to states contributing significantly to nonattainment in any other state." *Ibid.*

In *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), the court reiterated that EPA lacks authority to over-control upwind emissions. The statute, it explained, "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions." *Id.* at 921. EPA could regulate each State's own "significant contribution" to downwind nonattainment. *Ibid.* But it could not "require some states to *exceed* the mark." *Ibid.* (emphasis added).

EPA never challenged either of those two rulings. It opposed certiorari in *Michigan*. Br. in Opp. in No. 00-445 (Jan. 2001). And it declined to seek review in *North Carolina*. Nor does the agency dispute those principles now. One can search EPA's brief in vain for any suggestion that the good-neighbor provision authorizes it to regulate amounts of emissions that do not contribute to nonattainment. The statute's plain meaning is as uncontested as it is incontestable.

## **II. THE TRANSPORT RULE CONTEMPLATES AND PRODUCES PRECISELY THE OVER-CONTROL THE GOOD-NEIGHBOR PROVISION PROSCRIBES**

The record of EPA’s rulemaking shows that the agency did not even attempt to limit its rule to amounts of emissions that contribute significantly to nonattainment. Far from treating the provision as the limited mandate Congress enacted, EPA treated it as license to regulate emissions whenever it thought doing so was cost-effective or otherwise appropriate. And the empirical data—including EPA’s own air-quality projections—make clear that the Transport Rule in fact produced precisely the over-control the statute forbids.

### **A. EPA Did Not Design The Transport Rule To Avoid Over-Control**

In adopting the Transport Rule, EPA made no serious attempt to limit itself to its statutory mandate. As EPA describes its own method, the agency used “cost curves” to determine the “emission reductions that would be achieved in a state if all [sources] \* \* \* in that state used all emission controls and emission reduction measures available at that cost threshold.” 76 Fed. Reg. at 48,248. EPA then chose cost thresholds it deemed “cost-effective” or “reasonable,” without reference to whether they were actually necessary to avoid contributing to nonattainment. *Id.* at 48,257, 48,259.

In its proposed rule, EPA explained that it had selected “[b]reakpoints \* \* \* where a large reduction occurs because a certain type of emissions control becomes cost-effective.” 75 Fed. Reg. at 45,271. EPA used “a multi-factor assessment to evaluate whether one or more of the potential breakpoints represent a reasonable cost at which to define significant contribution.” *Id.* at 45,274. EPA thus justified its regulatory authority, not on

whether controls were necessary to prevent contributions to nonattainment, but simply on whether it deemed the controls “reasonable.”

Likewise, in its final rule, EPA explained that it considered “a significant cost threshold to be a point \* \* \* where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective.” 76 Fed. Reg. at 48,249. That determination once again depended, not on whether the controls were necessary to avoid contributing to nonattainment, but on whether EPA deemed them reasonable. For example, EPA declined to “consider cost thresholds below \$500/ton for ozone-season NO<sub>x</sub>” because it deemed that control level a “reasonable threshold” and “reasonable cost level”—not because attainment was impossible at lower thresholds. *Id.* at 48,256.

EPA’s disregard of statutory limits contrasts sharply with its prior rulemakings. In those proceedings, EPA represented that it had carefully limited reductions to avoid “‘overkill,’ that is, required reductions that are more than necessary to ameliorate downwind nonattainment.” 63 Fed. Reg. at 57,379; see also 70 Fed. Reg. at 25,175 (controls were “not more than is necessary for downwind areas to attain”); pp. 16-17, *supra*. Such a representation is wholly absent from the Transport Rule. An agency may not “depart from a prior policy *sub silentio*” without a “reasoned explanation for its action.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency’s silence here speaks volumes.

In its brief in this Court, EPA all but admits that it did not limit its rule to avoid over-control. The agency explains that it “examined \* \* \* cost and air quality information to identify ‘significant cost thresholds,’ *i.e.*, ‘point[s] where large upwind emission reductions become

available because a certain type of emissions controls strategy becomes cost-effective.’” EPA Br. 11. For example, once EPA determined that “all downwind nonattainment and maintenance problems were solved at a \$500/ton threshold,” the agency simply “adopted that threshold”—without further analysis of whether contributions to nonattainment could be avoided through lower thresholds. *Ibid.*

EPA insists that its emission limits are “both feasible from the upwind States’ perspective and appropriate in terms of the air-quality needs of the downwind areas.” EPA Br. 52; see also *id.* at 53 (citing “beneficial and appropriate downwind results”). That proves rather than refutes EPA’s disregard of the statute’s limited scope. The good-neighbor provision permits regulation only of emissions in “amounts” that would otherwise “contribute significantly” to “nonattainment.” It does not permit regulation beyond that point merely because EPA believes such regulation would be “feasible,” “beneficial,” or “appropriate.”

### **B. The Transport Rule In Fact Results In Over-Control**

Given that history, it is no surprise that the Transport Rule in fact produces substantial over-control.

For one thing, the rule imposes costly controls on upwind States even where EPA projected no attainment problems in downwind locations at all. For example, EPA required Texas to adopt emission controls based solely on PM<sub>2.5</sub> pollution it allegedly caused in Madison, Illinois. 76 Fed. Reg. at 48,242. But in fact EPA’s own data showed that air quality in Madison *already satisfied* the applicable standard, and EPA projected further declines in emissions in both Texas and Illinois even with-

out the Transport Rule.<sup>3</sup> Similarly, EPA required both Florida and South Carolina to adopt additional emission controls in 2014 based solely on ozone pollution they allegedly caused at certain sites in Harris, Texas. 76 Fed. Reg. at 48,246. But EPA projected that, by 2014, those sites would have no attainment or maintenance problems *even without any good-neighbor restrictions*.<sup>4</sup>

Those are not isolated examples. EPA required emission reductions based on numerous downwind areas that EPA's own forecasts predicted would be free of attainment problems even absent good-neighbor restrictions—even under the stricter standard EPA applies to “interference with maintenance” claims. See 76 Fed. Reg. at 48,307-08; pp. 12-13 n.2, *supra*. According to other EPA data, moreover, the substantial majority of downwind sites that EPA projected to be in nonattainment or to have difficulty maintaining attainment *were already in attainment* due to existing controls by the time EPA promulgated its rule.<sup>5</sup> Yet the Transport Rule would im-

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<sup>3</sup> See Industry C.A. Br. 39 (citing 76 Fed. Reg. 29,652, 29,654 (May 23, 2011); EPA, *Transport Rule Primary Response to Comments* 564 (June 2011); and EPA, *Emissions Inventory Final Rule Technical Support Document* 104-106 (June 28, 2011)).

<sup>4</sup> See Industry Resp. Br. 19-20 (citing EPA, *Air Quality Modeling Final Rule Technical Support Document*, at B30-B31 (June 2011)).

<sup>5</sup> According to EPA's own data, 14 of the 16 downwind areas for annual PM<sub>2.5</sub> already satisfied the applicable air quality standard; 38 of the 41 areas for 24-hour PM<sub>2.5</sub> already satisfied the applicable standard; and 14 of the 16 areas for ozone already satisfied the applicable standard. See Industry C.A. Br. 38-39 (citing EPA, *PM2.5 Site Design Value History Listing, 1999-2001 Through 2008-2010*, tbl.6, cols. J, AC, AW, [http://www.epa.gov/airtrends/pdfs/PM25\\_DesignValues\\_20082010\\_FinalRevised.xlsx](http://www.epa.gov/airtrends/pdfs/PM25_DesignValues_20082010_FinalRevised.xlsx); EPA, *Monitoring Site Listing for the 2008 8-Hour Ozone NAAQS*, tbl.7, cols. G & L, [http://www.epa.gov/airtrends/pdfs/Ozone\\_DesignValues\\_20082010\\_UPDATE.xlsx](http://www.epa.gov/airtrends/pdfs/Ozone_DesignValues_20082010_UPDATE.xlsx); and EPA, *Air Quality Modeling Final Rule Techni-*

pose additional reductions nonetheless. See 76 Fed. Reg. 70,091, 70,099 (Nov. 10, 2011) (noting that the Transport Rule “mandates even greater reductions than have already occurred under CAIR”). An upwind State cannot possibly be contributing to nonattainment or interfering with maintenance of attainment where the nonattainment problems do not actually exist.

The Transport Rule also imposes emission reductions that improve downwind air quality far beyond the level necessary to comply with the applicable NAAQS. For example, EPA forecasted annual  $\text{PM}_{2.5}$  pollution in Fulton, Georgia, of  $15.07 \mu\text{g}/\text{m}^3$  for 2013 absent good-neighbor restrictions—just barely above the applicable limit of  $15 \mu\text{g}/\text{m}^3$ . 76 Fed. Reg. at 48,233. Nonetheless, EPA required upwind States to reduce emissions so much that Fulton would have annual  $\text{PM}_{2.5}$  pollution of only  $12.99\text{--}13.07 \mu\text{g}/\text{m}^3$ —far *below* the limit of  $15 \mu\text{g}/\text{m}^3$ . See EPA, *Significant Contribution and State Emissions Budgets Final Rule TSD* 35 (July 2011). EPA’s rule thus overcorrects Fulton’s projected  $0.07 \mu\text{g}/\text{m}^3$  nonattainment *nearly 30-fold*.

The Transport Rule results in similar overcorrections elsewhere. While the limit for annual  $\text{PM}_{2.5}$  pollution is  $15 \mu\text{g}/\text{m}^3$ , the Transport Rule forces upwind States to drive down that pollution below  $13 \mu\text{g}/\text{m}^3$ —almost 15% below the limit—in *fully half* the nonattaining downwind areas. See *Significant Contribution and State Emissions Budgets Final Rule TSD*, *supra*, at 35–36. Similarly, while the limit for 24-hour  $\text{PM}_{2.5}$  pollution is  $35 \mu\text{g}/\text{m}^3$ , the Transport Rule forces upwind States to drive down that pollution below  $30 \mu\text{g}/\text{m}^3$ —again, almost 15%

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*cal Support Document* 28–33 tbls.IV-1 to IV-6 (June 2011)). See generally EPA, *Progress Report 2011: Environmental and Health Results* 14 (2013).

below the limit—in *more than half* the nonattaining downwind areas. See *ibid.*

The good-neighbor provision does not authorize EPA to regulate *all* emissions from upwind States whenever there is any degree of nonattainment downwind. EPA can regulate only the “amounts” of emissions that “contribute significantly” to “nonattainment.” EPA never adequately explained why it was requiring upwind States to reduce downwind pollution to levels so far *below* the applicable NAAQS. It did not examine whether more modest reductions would suffice to achieve and maintain attainment. Nor did it examine whether attainment could be achieved if less burdensome controls were imposed on only particular States or particular subgroups of States.

EPA’s sole explanation for not adopting lower or variable cost thresholds was that it wanted to avoid creating incentives for upwind States to “stop operating existing pollution control equipment.” 76 Fed. Reg. at 48,257. But if lower cost controls would yield downwind attainment, EPA lacks authority to require more costly measures. EPA may believe that \$500/ton is a cost-effective and reasonable threshold. But if attainment is also achieved at \$400/ton for a particular State, EPA cannot proscribe additional emissions merely to create incentives to retain existing controls. The good-neighbor provision allows EPA to regulate only to avoid significant contributions to nonattainment, not to pursue whatever policy objectives the agency deems desirable.

### **C. EPA’s Responses Are Unpersuasive**

None of EPA’s attempted defenses of its over-control is persuasive.

### 1. *EPA's Waiver Arguments Fail*

Unable to defend its actions on the merits, EPA strenuously attempts to avoid review by asserting—for the first time—that respondents waived the over-control issue before the agency. EPA Br. 36. “Neither the court [below] nor respondents,” it urges, “have identified any comment in the Transport Rule record asserting, with anything approaching reasonable specificity, that the EPA’s approach” crossed any of the “three ‘red lines that cabin EPA’s authority.’” *Ibid.* That argument is both wrong and itself waived.

First, while an objection must be raised before the agency with “‘reasonable specificity,’” “the word ‘reasonable’ cannot be read out of the statute in favor of a hair-splitting approach.” *Appalachian Power Co. v. EPA*, 135 F.3d 791, 817 (D.C. Cir. 1998) (quoting 42 U.S.C. §7607(d)(7)(B)). The Act “does not require that precisely the same argument that was made before the agency be rehearsed again, word for word, on judicial review.” *Id.* at 817-818. “[C]ommenters must be given some leeway in developing their argument before this court, so long as the comment to the agency was adequate notification of the general substance of the complaint.” *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006), clarified on denial of reh’g, 489 F.3d 1245 (D.C. Cir. 2007).

That standard is amply met here. Commenters repeatedly objected before EPA that the Transport Rule burdens areas already in or anticipated to achieve attainment.<sup>6</sup> They objected to EPA’s failure to consider

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<sup>6</sup> See, e.g., EPA, *Transport Rule Primary Response to Comments* 354 (June 2011) (Midwest Ozone Group comment that “over 80% of the sites predicted by EPA to be in nonattainment of the ozone or PM<sub>2.5</sub> standards in 2012 are already in attainment” and that “over

existing emission controls in assessing nonattainment.<sup>7</sup> And they objected that the rule imposes more extensive controls than necessary to achieve attainment.<sup>8</sup>

The argument was thus clearly preserved. Contrary to EPA's suggestion, the fact that commenters may not have asserted in so many words that the agency exceeded its *statutory authority* as a result of those defects (EPA Br. 36) is beside the point. The Act clearly defines the agency's authority in terms of "nonattainment." 42 U.S.C. §7410(a)(2)(D)(i)(I). An argument that EPA regulated in the absence of nonattainment, or went be-

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80% of the PM<sub>2.5</sub> 2012 maintenance sites and 1/3 of the ozone 2012 maintenance sites are no longer maintenance sites as of 2009"); *id.* at 383 (We Energies comment that "EPA has recently released monitoring data that reflects reductions in ozone and PM<sub>2.5</sub> emission precursors showing that more than 80 percent of monitoring sites projected by the EPA still to be out of attainment in 2012 for ozone or PM<sub>2.5</sub> were already in attainment as of 2009"); *id.* at 650 (Dayton Power & Light Company commenting that "caps similar to those developed for the CAIR rule are adequate to eliminate inappropriate transport" from Ohio and that "lower [Transport Rule] caps for Ohio are unnecessary to achieve overall attainment").

<sup>7</sup> See, *e.g.*, Southern Company Comments 30 (Oct. 1, 2010) (urging that "EPA's method ignored real emissions reductions from CAIR (still in place and operating) and local SIP-related controls," creating "an overestimate of projected nonattainment/maintenance"); EPA, *Transport Rule Primary Response to Comments* 345 (June 2011) (Consumers Energy comment that rule "deliberately ignores the implementation of CAIR, which remains in effect"); *id.* at 286 (Ameren Services Company comment that "EPA has assumed as part of its regulatory analysis that the CAIR program is not in place" and that this "assumption is in error").

<sup>8</sup> See, *e.g.*, Southern Company Comments 11 (Oct. 1, 2010) (urging that "replacement of CAIR with the Transport Rule will increase our costs" while "results indicate \* \* \* essentially no difference in the desired air quality result"); *id.* at 43 (objecting that "there is little to no downwind benefit from requiring NO<sub>x</sub> emission reductions at the \$500 per ton level").

yond what was necessary to redress nonattainment, necessarily asserts that the agency strayed beyond its statutory authority. EPA's insistence on "magic words" to preserve a statutory objection is precisely the "hair-splitting approach" the law rejects. *Appalachian Power*, 135 F.3d at 817.

In any event, EPA's waiver argument is itself waived. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Before this Court, EPA vociferously argues that respondents did not preserve their statutory arguments in the agency proceedings. EPA Br. 34-42. But EPA invoked waiver only obliquely in the court of appeals, and only with respect to a *different* issue: whether the agency should have adopted an "air quality-only approach." See EPA C.A. Br. 30. EPA never claimed that respondents waived the over-control issue they assert here. EPA cannot make the argument for the first time now.

## 2. *Respondents Were Not Required To Pursue Objections In State-Specific Proceedings*

EPA also seeks to avoid review on the theory that respondents must pursue any challenges piecemeal on a State-by-State basis. If the Transport Rule is "too stringent with regard to any particular State," the agency urges, respondents "were free to raise such State-specific concerns in rulemaking comments, and to seek judicial review." EPA Br. 53. That argument ignores the settled standards governing facial challenges and defies EPA's own analysis in this Court.

This Court routinely permits facial challenges to unlawful agency regulations. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). A facial

challenge is a “proper response” when there is a “systemic disparity between the statutory standard and the [regulation].” *Sullivan v. Zebley*, 493 U.S. 521, 536 n.18 (1990). That is the case here.

The problem with the Transport Rule is not that the agency properly attempted to determine the minimum emission reductions necessary to avoid significant contributions to nonattainment, but then miscalculated that amount for certain States. Rather, the agency never conducted the required analysis at all—for *any* State. EPA used a cost-curve analysis wholly divorced from the point at which attainment would be achieved. See pp. 6-7, *supra*. It selected its cost thresholds because it concluded that further reductions would not be cost-effective, not because the thresholds represented the point at which emissions would no longer contribute to nonattainment. EPA never found that *any* State’s mandated reductions were the minimum necessary.

An agency must engage in “reasoned decisionmaking,” considering the relevant factors under the proper statutory standard. *Judulang v. Holder*, 132 S. Ct. 476, 483-484 (2011). EPA did not do that here, for *any* State. Because the agency’s errors permeate its entire rule, they represent a “systemic disparity” between the statute and the regulation.

EPA’s assertion that individual States should have sought relief on a piecemeal basis also defies the central theme of its submission to this Court—that interstate air pollution is a problem involving “hundreds of overlapping linkages among dozens of upwind states and downwind areas” and a “web of interconnecting upwind/downwind linkages.” EPA Br. 51. Even if the Transport Rule’s controls coincidentally satisfy statutory requirements for certain States, it strains credulity to suggest that the

Rule's many invalid applications could be stricken while leaving the remainder as a coherent, functioning whole. A regulation is severable only if partial invalidation "will not impair the function of the [regulation] as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). That clearly is not the case here.

3. *Residual Nonattainment In Certain Areas Does Not Justify Over-Control In Others*

On the merits, EPA suggests that, even though it never set out to avoid over-control in its rulemaking, it may have stumbled into that result nonetheless. The Transport Rule, it claims, "hardly can be said to have imposed any significant amount of avoidable over-control" because, "in the EPA's final air-quality modeling, several populous locations were projected to continue experiencing nonattainment or maintenance problems despite the emission reductions required." EPA Br. 53. That assertion is neither well-taken nor well-supported.

As an initial matter, EPA cannot invoke that theory in this Court because it never relied on the theory when it promulgated the Transport Rule. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). This Court "will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544 (2008). Unlike EPA's prior rulemakings in this area, see pp. 16-17, *supra*, the Transport Rule nowhere asserts that EPA avoided over-control or otherwise limited itself to proscribing only those emission amounts that would contribute to actual nonattainment.

EPA cannot supply that omitted analysis for the first time in its brief to this Court.

In any event, EPA's argument fails on the merits. EPA points to a mere "four areas" projected to continue experiencing residual nonattainment for 24-hour  $PM_{2.5}$ —Chicago, Detroit, Lancaster, and Allegheny. EPA Br. 53 (citing 76 Fed. Reg. at 48,210). But many more areas are being driven far *below* the NAAQS. See pp. 23-24, *supra*. EPA cannot rely on residual nonattainment at a mere handful of sites to justify massive overcorrections at numerous others.

Moreover, EPA has imposed costly emission reductions in numerous States even though it admits that many do not contribute to the residual nonattainment in the "four areas" it cites. For example, Georgia is subject to the Transport Rule for 24-hour  $PM_{2.5}$  solely because it contributes to nonattainment in Jefferson, Alabama, an area that EPA predicts will be brought well within air quality limits under its rule. See 76 Fed. Reg. at 48,242-43; *Significant Contribution and State Emissions Budgets Final Rule TSD* 36 (July 2011). EPA never explains how residual nonattainment in four *unrelated* areas justifies excessive controls for Georgia. Other regulated States not linked to the four areas for 24-hour  $PM_{2.5}$  include Alabama, Kansas, Minnesota, Nebraska, and Texas. 76 Fed. Reg. at 48,242-43.

Simply put, EPA has never identified any causal connection between the myriad cases of overcorrection and the four areas of residual nonattainment it now cites. Absent such a connection, the residual nonattainment is irrelevant. EPA cannot justify exceeding statutory limits in numerous areas based on nonattainment elsewhere if its overcorrections could be remedied without material effect on that nonattainment. EPA's refusal to accept

that limitation is simply one more manifestation of its refusal to acknowledge its limited statutory mandate: to regulate emissions that “contribute significantly” to downwind nonattainment.

4. *EPA Cannot Avoid Review On The Ground That Complying With Statutory Limitations Is Too Complicated*

Finally, EPA contends that this Court should disregard any over-control because it is too hard to comply with the Act’s restrictions. EPA Br. 51. That argument likewise comes too late. As already explained, agency decisions must be judged based on the rationale that appears in the order itself. *Chenery*, 318 U.S. at 87. EPA never invoked an impossibility defense when it promulgated the Transport Rule, so it cannot raise the theory *post hoc* on appeal.

In any event, EPA fails to show that complying with the good-neighbor provision would be impossible. EPA complains that tailoring emission reductions is like trying to stop “on a dime.” EPA Br. 51. Where an upwind State contributes to nonattainment in multiple downwind States, it urges, the agency may have to “incidentally bring some [areas] \* \* \* below the level needed for attainment” to ensure attainment in others. *Ibid.* Even if true, that does not justify the rule EPA promulgated.

For example, even though Georgia contributes to 24-hour PM<sub>2.5</sub> nonattainment or maintenance at only two locations in Jefferson, Alabama, the Transport Rule over-corrects maximum projected pollution levels at those locations to under 32  $\mu\text{g}/\text{m}^3$ , far below the limit of 35  $\mu\text{g}/\text{m}^3$ . See 76 Fed. Reg. at 48,242-43; *Significant Contribution and State Emissions Budgets Final Rule TSD* 36 (July 2011). Other States like Texas and Minnesota contribute to only one or a few downwind sites, yet there are signifi-

cant overcorrections there as well. See 76 Fed. Reg. at 48,242-43; EPA, *Significant Contribution and State Emissions Budgets Final Rule TSD* 36 (July 2011). EPA did not need to stop “on a dime” to avoid glaring defects like those. It missed the mark by hundreds of millions of dollars.

Even where the linkages are more complicated, EPA’s argument fails. EPA never even *attempted* to avoid over-correction. It did not merely “incidentally bring some [areas] \* \* \* below the level needed for attainment” in order to comply with the statute elsewhere. EPA Br. 51. EPA ignored the statutory standard throughout. This is not a case where an agency accidentally overshot despite its best efforts. EPA made no effort to comply with the express limits Congress placed on its authority.

EPA offers no explanation for why it could not limit emission reductions to individual state contributions rather than applying one-size-fits-all cost curves that result in substantial over-control. That the necessary calculations may be complicated is no excuse. Technical challenges are delegated to agencies precisely because of their expertise. And EPA in fact did use different SO<sub>2</sub> cost controls for different States (\$2,300/ton for some and \$500/ton for others). 76 Fed. Reg. at 48,251-52. The court below thus did not require EPA to do anything it was not already doing: If EPA could use multiple cost measures for SO<sub>2</sub>, there is no reason it could not use multiple cost measures for each State or for smaller groups of States. EPA may not be able to achieve absolute perfection. But that does not excuse it from even trying.

Finally, if it were truly impossible to achieve substantial compliance with the statutory limits, EPA’s remedy would lie with Congress. An agency cannot unilaterally ignore statutory commands merely because it thinks they

are too hard to comply with. See, e.g., *Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 180 n.19 (2d Cir. 2006) (“If Congress’s timeline presents any problems for the agency, its remedy is to seek relief from the legislative branch.”). That an agency may view a particular approach as a “better regime” does not mean it is “the one that Congress established.” *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994). “Congress has established a clear line” in requiring nonattainment as a condition for regulation, and EPA “cannot go beyond it.” *City of Arlington*, 133 S. Ct. at 1874.

\* \* \* \* \*

EPA treats the good-neighbor provision as a general license to impose far-reaching “cost-effective” reductions, even where they exceed what is necessary to eliminate contributions to nonattainment. There is nothing wrong with considering cost-effectiveness in carrying out a statutory mandate, and much to commend that approach when the statute permits it. But an agency cannot exercise powers Congress has withheld from it merely because it purports to do so in a “cost-effective” fashion. That is what EPA did here.

Congress did not seek to remedy interstate air pollution at all costs, much less grant EPA unfettered discretion in deciding how to do so. It preserved the primary role of States in developing implementation plans and assigned EPA only a specific and carefully defined role: to ensure that plans restrict “amounts” of upwind emissions that “contribute significantly” to downwind “nonattainment” (or “interfere with maintenance” of attainment already achieved). Because EPA exceeded that limited authority, the Transport Rule must be set aside.

**CONCLUSION**

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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