No. 12-1183

IN THE

# Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, *et al.*,

*Petitioners,*

*v.*

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

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## REPLY BRIEF


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In vacating the Transport Rule, the court of appeals rewrote core Clean Air Act provisions, greatly weakening protections for downwind states facing statutory attainment deadlines and for millions of Americans harmed by intractable interstate air pollution problems. The majority did "precisely what *Chevron* prevents," "'substituting [its] own interstitial lawmaking' for that of [the] agency," *City of Arlington v. FCC*, No. 11-1545, slip op. 14 (2013) (citation omitted).

As the petitions and supporting briefs demonstrated, this Court's review is warranted because the decision:

(1) took statutory language that is as interlaced with technical complexities and more ambiguous than that in *Chevron* itself ("stationary source"), and, oblivious to practical consequences, prescribed in place of the agency's reasonable interpretation a detailed code to govern future interstate transport regulations (Pet. 21-30; EPA Pet. 18-28; Calpine/Exelon Br. 14-29);

(2) rested its decision on statutory arguments that were not raised "during the period for public comment," 42 U.S.C. 7607(d)(7)(B) (Pet. 16-20; EPA Pet. 18-21); and

(3) overrode express statutory language to declare the Good Neighbor provision inoperative until EPA promulgates implementing regulations, thereby disabling EPA from ensuring timely reductions in interstate pollution (Pet. 30-34; EPA Pet. 30-34; State Supporting Br. 8-19).

The decision leaves the law governing interstate air pollution in disarray—as evidenced by respondents' heavy reliance, as a supposed reason to *deny* certiorari, on the continued operation of CAIR, the Transport Rule's precursor, which the D.C. Circuit *invalidated* five years ago, in part because it failed to deliver downwind states sufficiently timely relief and ignored the statute's "interfere with maintenance" requirement.

The briefs in opposition fail to rebut petitioners' and supporting respondents' showing that the decision violates fundamental principles of judicial review and hobbles Congress's chosen means to protect downwind states from air pollution they themselves cannot abate.

## I. The Court of Appeals Usurped the Agency's Role and Misread the Good Neighbor Provision in Ways that Seriously Weaken its Efficacy.

The Good Neighbor provision requires that state plans contain adequate provisions prohibiting emissions "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State[.]" 42 U.S.C. 7410(a)(2)(D). Despite having previously recognized the "ambiguity" of this provision, see *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000), here the D.C. Circuit construed it to impose an array of requirements that displace agency expertise in an especially "technical and complex arena," *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837, 863 (1984). The court never grappled with practical considerations and constraints that EPA identified in the record as

centrally important to any effort to implement Congress's directives. See Pet. 23-30; see also Calpine/Exelon Br. 24-28 (discussing decision's impact on EPA's ability to use the market-based regulatory devices overwhelmingly favored (*id.* at 3) by the electric power industry).

**"Over-Control."** Industry respondents contend that the Transport Rule would remove more pollution than the Act allows, and that less costly controls would have allowed downwind states to attain the NAAQS. See Ind. Opp. 12-14. However, EPA reasonably established thresholds for reductions based on careful analysis of market and air quality conditions. See ALA Pet. 23-24; App. 114a ("no support" for "collective over-control" ruling) (Rogers, J., dissenting).

EPA demonstrated that, under the Transport Rule, emissions reductions from *all* upwind "significant contributors" serve the goal of eliminating resulting attainment and maintenance problems at *all* downwind attainment and maintenance locations. See EPA Pet. 7-8; 27-28. Industry respondents complain that the Rule results in air quality at many downwind areas that is "*superior to* the relevant NAAQS[.]" Ind. Opp. 12 (citing JA 2964) (emphasis in original). But the Transport Rule focuses on eliminating upwind contributions to nonattainment and maintenance problems in the downwind locations with the poorest air quality, not the locations that achieve compliance most readily. See, *e.g.*, JA 2964 (Allegheny, Pennsylvania monitor projected to be just below or potentially over the NAAQS in 2014). After

balancing a number of factors, *including* avoidance of "over-control," see, *e.g.*, JA 2311-12, EPA chose an approach that most cost-effectively achieved and maintained the relevant NAAQS not only for Madison, Illinois, but also for Allegheny, Pennsylvania and other locations with more stubborn air quality problems. See also Pet. 23.

Industry respondents also allege that "less costly controls would still have allowed downwind States to attain [the] NAAQS[.]" Ind. Opp. 12 (citing JA 1066-68; 1374). This argument—on a matter squarely within EPA's expertise—is baseless. Further, industry respondents ignore EPA's explanation that lower cost thresholds would provide an economic incentive to cease operating *existing* pollution controls and would *increase* emissions and associated contributions to downwind areas. See 76 Fed. Reg. at 48256-57. Respondent Southern Company's own comments, JA 1374 at Table XI-3, showed that downwind attainment and maintenance benefits continue to accrue up to EPA's $500 per ton of $SO_2$ threshold. Moreover, EPA's adoption of a two-threshold approach for $SO_2$, with a $2,300 threshold for higher contributors and $500 for lower ones, was designed to take account of differences in relative contributions. 76 Fed. Reg. at 48252. Furthermore, industry respondents—like the D.C. Circuit majority—ignore the statute's mandate to address attainment *and* maintenance problems. See Ind. Opp. 11 (asserting, incorrectly, that "[o]nce a downwind location achieves attainment, EPA's authority to regulate upwind emissions ceases"). See *North Carolina v. EPA*, 531 F.3d 896, 908-11 (D.C.

Cir. 2008) (requiring EPA to give effect to the statutory phrase "interfere with maintenance").

**"Proportionality."** Industry respondents' defense of the D.C. Circuit majority's "proportionality" ruling, Opp. 24-30, also fails. As we demonstrated, Pet. 25-28, the majority's "proportionality" constraint cannot reasonably be derived from the statutory text and is impossible to satisfy whenever multiple upwind states contribute to nonattainment in multiple downwind states. *Cf.* App. 26a & n.15 (court's example, in which there is only a single downwind state). Industry respondents suggest, see Opp. 29, that the majority's requirement is not so rigid as to be arithmetically impossible, referencing the majority's statement that "it may not be possible to accomplish the ratcheting back in an entirely proportional manner among the upwind States," and that in those cases EPA has "some discretion about how to reasonably avoid such over-control." App. 29a. But that passage addresses not the proportionality requirement, but "over-control," *i.e.*, driving air quality below the NAAQS, an issue that industry respondents recognize is "independent," "distinct," and "separate," Opp. 24, from proportionality. See also App. 25a-27a, 29a.

Some measure of discretion to depart from proportionality when "ratcheting down" requirements to avoid over-control does not answer the more fundamental problem with the court's "proportionality" requirement. See JA 2312 (observing that "most upwind states contribute to multiple downwind monitors (in multiple states) and

would have a different reduction percentage for each one").

No rulemaking commenter raised the statutory theory that the court would later adopt, but EPA explained the infeasibility of a methodology driven by proportionality in connection with an analysis of possible policy alternatives. The panel ignored EPA's explication of the real-world problems with a "proportional" approach. See Pet. 26.

Respondents have no answer for the demonstrations, Pet. 26; see also EPA Pet. 22-23; Calpine/Exelon Br. 21-23, that the majority's requirements cannot survive real-world conditions. This impracticability underscores the perils of de novo judicial policymaking. See *Chevron*, 467 U.S. at 844; *City of Arlington*, slip op. at 13-14.

**Unexhausted Statutory Objections.** By reaching out to decide statutory theories that were not presented to the agency, see Pet. 16-20, 25, the court below acted without the benefit of a proper administrative record as it advanced its own analysis of how interstate transport policy should be structured. See, *e.g.*, Pet. 26. Industry respondents, Opp. 16-19, recapitulate the strained rationales cited by the majority, but none comports with the requirement 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).[1] Industry respondents fault ALA

[1] Like the theory that the 1% screening threshold in the first step of EPA's approach to defining states' significant contributions operates as a strict statutory limit, the majority's

petitioners for not having briefed waiver below, although their own opening brief below gave the 1% threshold theory scant attention as part of a broader arguments that EPA had misapplied the statutory "significant contribution" concept, see Industry Petitioners C.A. Br. 20-23 (Doc. 1357526). As ALA's counsel noted at oral argument, the 1% threshold issue had not been raised before the agency and was the "post hoc" creation of litigation counsel. Arg. Trans. 84 (April 13, 2012).

## II. The D.C. Circuit's Holding that States' Good Neighbor Obligations are Contingent Upon EPA Quantifying Regulations is Contrary to the Statute and Highly Problematic.

In an effort to find statutory support for the court of appeals' ruling that states need not fulfill their Good Neighbor obligations until defined by EPA, the state and local respondents, Opp. 21, attempt to rely on 42 U.S.C. 7602(y) (the definition of federal implementation plan). This provision, however, is of no assistance, because it merely defines a federal plan as "a plan (or portion thereof)" issued by EPA "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [state plan]." *Id.* In addressing EPA's power to issue FIPs, Congress specified that a "gap" exists when either a

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"proportionality" requirement was not raised in administrative proceedings. See Pet. 25; App. 111a (dissent). Industry respondents, Opp. 24 n.11, fail to point to any timely objection as to the latter issue, referring only to EPA's discussion of different policy approaches it considered, 75 Fed. Reg. at 45299; JA 2311-12. See also Pet. 26.

state fails to make a "required" submission or EPA disapproves such a submission; when such a "gap" exists, EPA must issue a FIP to remedy it. 42 U.S.C. 7410(c)(1). State and local respondents argue that the only "required" submissions are those "for which EPA has disclosed the requirements," State Opp. 22, but cite no authority for this proposition, because there is none. Instead, the "required" submissions are those that the Clean Air Act mandates, and the plain language of section 7410(a)(2)(D) requires states to submit SIPs that meet the Good Neighbor requirements. So if the state has not made the required Good Neighbor submission, EPA must issue a FIP, as it did here. Nothing in section 7410, or anywhere else in the Act, creates the additional administrative requirement, manufactured by the court, that EPA must first promulgate a rule that calculates the states' Good Neighbor SIP obligations for them. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978) (reviewing court not empowered to impose procedures not required by statute).

It is the decision below, not EPA's rulemaking, that disturbs cooperative federalism as Congress structured it in the statute. Under the statute, states are given the first opportunity to design Good Neighbor requirements tailored to the state's needs, and as petitioners pointed out, many states, on their own, develop transport plan provisions that EPA approves, Pet. at 33-34. See also State Supporting Br. 10-15. EPA steps in only if states fail to carry out their duties. State respondents suggest, however, that if a state makes "the *policy* decision to impose

no greater burdens on in-state sources than those EPA will mandate," then those states "can control in-state sources in the first instance . . . only after they know the overall reductions EPA will require." State Opp. 28-29 (emphasis added). But nothing in the statute authorizes this "wait and see" approach. Under the statute, the duty to promulgate "adequate" SIP provisions on interstate transport belongs to the states, 42 U.S.C. 7410(a)(2)(D), and there is no requirement that EPA promulgate quantifying regulations at all, let alone as a condition precedent to states' obligations.

## III. The Case Presents Questions of Great Importance to Air Quality and the Ongoing Administration of the Clean Air Act.

The decision below will operate to the serious detriment of the intended beneficiaries of the Good Neighbor provision: downwind states and their residents. It consistently slights downwind states' compelling interests, particularly their interests in obtaining *timely* reductions in transported pollution, improperly creates a set of extra-statutory requirements, and impairs the nation's ability to achieve Congressional goals of meeting air quality standards nationwide. State Supporting Br. 15-19.

The Good Neighbor provision is Congress's prime mechanism for fulfilling the federal government's responsibility to protect states from pollution emanating from beyond their borders. See Pet. 5-7. The court of appeals' decision, however, creates serious impediments to crafting any workable region-wide transport regulation, because the "red

lines" the court drew, App. 22a, are (to put it mildly) poorly attuned to the realities of interstate air pollution and the electric power market, see Pet. 21-22, 29-30; Calpine/Exelon Br. 25-28, and present serious practical problems likely to make interstate rulemakings all the more complicated (and heavily litigated). See Pet. 26-27; EPA Pet. 28-32.

As the many downwind states and municipalities supporting the petitions here have explained, the decision "renders the Act's NAAQS attainment deadlines a practical nullity for downwind States." State Supporting Br. 15. See also *id.* ("Delaying enforcement of the Good Neighbor provision beyond the three-year SIP deadline set by Congress makes adherence to the coordinated timeframes imposed by the Clean Air Act virtually impossible."); EPA Pet. 31-32 (noting that the decision will "substantially delay emissions reductions by upwind states that are necessary for downwind states to attain and maintain the NAAQS"); App. 114a (Rogers, J., dissenting).

Downwind states facing nonattainment problems will suffer continued harmful air pollution and risk statutory sanctions due to these delays. See Pet. 34-35; State Supporting Br. 18-19 (explaining that "continued delay imposes an especially intolerable burden on downwind States and cities" and citing examples). Indeed, the D.C. Circuit overturned CAIR in part because EPA had not ensured that reductions in interstate transport would occur in time for downwind states' attainment deadlines. *North Carolina*, 531 F.3d at 908-12. That holding now appears not only to have been effectively annulled, but to have been replaced with new

judicially prescribed procedures almost certain to serve as a major new source of delay. See, *e.g.*, EPA Pet. 16-17; State Supporting Br. 15-16.

Relying heavily on post-decisional air quality data from 2009-2011, industry respondents allege, Opp. 7, 13, 30-31, that the Transport Rule was overly stringent when promulgated and, in any event, unnecessary given current emissions trends under CAIR. But EPA promulgated the Transport Rule to replace the judicially invalidated CAIR, not to operate alongside it. EPA "recognized that, after CAIR is terminated, the emission limitations imposed by CAIR will cease to exist," and properly refused to assume that sources would operate controls or take other emissions control measures without any legal compulsion to do so, even as the agency took account of emissions reductions expected to occur due to other federal requirements, state laws, and consent decrees, as well as reductions expected due to other factors such as the replacement of some coal-fired generation with natural gas. 76 Fed. Reg. at 48223-24, 48251.

Respondents' suggestion that the problems the Rule addressed will simply go away is too optimistic. EPA's preliminary data for 2010-2012—a period coinciding with a nascent economic recovery—demonstrate downwind states' continued challenges in meeting air quality standards. Thus, whereas industry respondents allege that only one of the original 91 ozone nonattainment areas now has air quality that violates the NAAQS, Opp. 31 (citing EPA's *2011 Progress Report*), EPA's preliminary data for 2012 show that 24% of the 91 referenced ozone nonattainment areas currently violate the

1997 health-based air quality standard.[2] And this does not include the many areas in the East currently violating the more stringent 2008 ozone standard.[3] Industry respondents also claim that fewer than 8% of the 65 "nonattainment" and "maintenance" locations under the Transport Rule currently violate the relevant NAAQS. *Id.* While even an 8% violation rate represents a public health concern, EPA's preliminary 2012 data show an overall violation rate of over 17% for the 63 "nonattainment" and "maintenance" Transport Rule locations with current data, and a 90% violation rate for the Transport Rule's ozone locations specifically.[4]

Finally, and most importantly, respondents' arguments overlook that the D.C. Circuit decision establishes a set of new legal requirements that will bind future agency interpretation and, insofar as the decision professes to "follow[] from the unambiguous terms of the statute," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), constrain future efforts to ensure that downwind states can achieve air quality standards. Because the D.C. Circuit would very likely have exclusive jurisdiction over

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[2] See http://www.epa.gov/ttn/analysis/docs/Ozone_DesignValues_20102012_DRAFT_05_20_13.xlsx, Table 3b (see, *e.g.*, 2010-2012 "design values" for Baltimore, MD; Sheboygan, WI; Washington, DC; and Cincinnati, OH).

[3] See *id.* Tables 1a, 2.

[4] See Ind. Opp. n.13; compare http://www.epa.gov/ttn/analysis/docs/Ozone_DesignValues_20102012_DRAFT_05_20_13.xlsx, Table 6, and http://www.epa.gov/ttn/analysis/docs/PM2.5_DesignValues_20102012_DRAFT_05_20_13.xlsx, Table 5 (showing annual and 24-hour "design values"), with 76 Fed. Reg. at 48240-46.

any similar interstate air rule, see 42 U.S.C. 7607(b)(1); 76 Fed. Reg. at 48352, the court's extra-textual requirements will necessarily govern every transport rulemaking for each and every NAAQS revision going forward. A "circuit split," State Opp. 11, is therefore unlikely ever to emerge on these issues.

The lower court erroneously held that states have no Good Neighbor obligations until EPA has issued a quantifying rulemaking—this despite plain statutory language placing the Good Neighbor obligation directly on each state, see 42 U.S.C. 7410(a)(2)(D), and despite states' capacity to prepare their own transport SIPs, see State Supporting Br. 13-14. This error will magnify the importance of the court's other missteps because the very existence of the Clean Air Act's Good Neighbor obligation now hinges upon the ability of EPA's quantifying rulemakings to survive D.C. Circuit review under the unworkable regime created by *Michigan*, *North Carolina* and the decision below. The result is a "potentially endless loop of delay," State Supporting Br. 16, that imperils the protections Congress sought to provide downwind states and their citizens.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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