

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

Supreme Court, U.S.  
FILED

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

*Petitioners,*

*and*

AMERICAN LUNG ASSOCIATION, *et al.*,

*Petitioners,*

*v.*

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

*Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE STATES OF NEW YORK,  
CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND,  
MASSACHUSETTS, NORTH CAROLINA,  
RHODE ISLAND, VERMONT, AND THE DISTRICT  
OF COLUMBIA, AND THE CITIES OF BALTIMORE,  
BRIDGEPORT, CHICAGO, NEW YORK,  
AND PHILADELPHIA AS RESPONDENTS  
IN SUPPORT OF PETITIONERS**

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## QUESTION PRESENTED

The Clean Air Act's "good neighbor" provision mandates that "[e]ach State shall" adopt an implementation plan to prohibit emissions in the State that "contribute significantly" to degradation of air quality in downwind States, or that interfere with downwind States' maintenance of air-quality standards. *See* 42 U.S.C. § 7410(a)(2)(D)(i). The Act authorizes the Environmental Protection Agency to issue a federal implementation plan for a State if that State fails to adopt a plan or if the State's plan fails to meet the Act's defined requirements. *Id.* § 7410(c)(1). The question presented is:

Whether States must meet their express statutory obligation to adopt a plan controlling pollution that affects the air quality of downwind States, even if EPA has not first specifically quantified that obligation.

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Maryland Department of the Environment, Comments on Proposed Transport Rule (Sept. 29, 2010), *available at* [www.regulations.gov](http://www.regulations.gov), EPA-HQ-OAR-2009-0491-2788 ..... 10

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-116a) is reported at 696 F.3d 7.

## JURISDICTION

A timely petition for rehearing or rehearing en banc was denied on Jan. 24, 2013. Pet. App. 1459a-1462a. The Court of Appeals issued its mandate to EPA on February 4, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The following statutory provision is reproduced in the petition appendix: 42 U.S.C. § 7410. *See* Pet. App. 1463a-1498a.

## INTRODUCTION

As this Court recognized more than a century ago, air pollution originating in one State can cause significant harm to the environment and public health in other States. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907). Congress specifically addressed the problem of interstate air pollution in the Clean Air Act through a measure known as the “good neighbor” provision, 42 U.S.C. § 7410(a)(2)(D), which requires States to take responsibility for the serious consequences of their air pollution on downwind States, *see* S. Rep. No. 95-127, at 42 (1977). EPA promulgated the rule at issue here, known as the Cross-State Air Pollution Rule (or Transport Rule), Pet. App. 117a-1458a (76 Fed. Reg. 48,208 (Aug. 8, 2011)), after nearly fifteen years in which many States failed to meet their good-neighbor

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obligations for two pollutants, ozone and fine particulate matter (also known as PM<sub>2.5</sub>).

Respondent States and Cities in Support of Petitioners file this brief to address the second question on which this Court granted certiorari: whether States must meet their independent obligation to address the downwind effects of their air pollution, even if EPA has not defined that obligation in a rulemaking such as the Transport Rule. The Clean Air Act unambiguously imposes such a duty. The Act's plain language requires States to take the lead in formulating and adopting implementation plans that satisfy their good-neighbor obligations. Only if a State fails to submit a plan or if the plan submission is inadequate does EPA then promulgate its own implementation plan to address that State's cross-state pollution—a federal backstop when state efforts fall short. The court of appeals' holding below reverses this structure, requiring EPA to act first to quantify the States' good-neighbor obligations, and permitting upwind States to ignore the effects of their air pollution on other States until EPA chooses to act. Because the plain language of the Clean Air Act precludes this interpretation of the statute's good-neighbor provision, this Court should reverse the judgment below.<sup>1</sup>

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<sup>1</sup> Respondent States and Cities in Support of Petitioners concur with Federal and Nongovernmental Petitioners that the court of appeals lacked jurisdiction to consider respondents' challenges to the Transport Rule, and that the court of appeals erred in holding that EPA impermissibly interpreted the statutory term "contribute significantly."

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## STATEMENT OF THE CASE

### A. Cooperative Federalism under the Clean Air Act

Congress enacted the modern Clean Air Act “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.” 42 U.S.C. § 7401(b)(1). The Act’s goals are met through a cooperative-federalism process that carefully defines the related responsibilities of the States and the federal government in improving and preserving air quality.

1. The first step in the process is the establishment or revision of air-quality standards. EPA must set national ambient air quality standards (NAAQS) for certain air pollutants, and then review those NAAQS every five years. *Id.* § 7409(a)(1), (d)(1). A NAAQS sets the maximum concentration of a particular pollutant in the ambient air that will not harm public health or welfare. *See id.* § 7409(b); *see e.g.*, 75 Fed. Reg. 35,520 (June 22, 2010) (NAAQS for sulfur dioxide).

EPA then designates areas in each State as in “attainment” if they satisfy the NAAQS, or in “nonattainment” if they do not.<sup>2</sup> 42 U.S.C. §§ 7407(c), (d), 7511(a)(1). Nonattainment areas must achieve permissible levels of NAAQS pollutants “as expeditiously as practicable,” but no later than five

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<sup>2</sup> Attainment classifications are pollutant-specific: an area may be as in attainment for one NAAQS pollutant, but in nonattainment for another pollutant.

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years after designation for most pollutants.<sup>3</sup> *Id.* § 7502(a)(2)(A); *see also* Pet. App. 449a. Once an area achieves attainment, it is required to have in place “maintenance” measures to ensure that its air quality does not slip back into nonattainment. *See* 42 U.S.C. § 7410(a)(1).

2. After this initial standard-setting, the responsibility for meeting the NAAQS shifts to the States, reflecting Congress’s judgment that preventing and controlling air pollution “at its source is the primary responsibility of States and local governments.” *Id.* § 7401(a)(3). The key vehicle for meeting a State’s obligations under the Clean Air Act is a state implementation plan (SIP), an umbrella term that describes the collection of state laws, regulations, and other measures that the State will use to achieve or maintain each NAAQS. *See id.* § 7407(a). The Act sets out thirteen measures that each State must adopt as part of its SIP. *Id.* § 7410(a)(2). For example, each SIP must “include enforceable emission limitations and other control measures” to meet or maintain the NAAQS according to defined “schedules and timetables for compliance,” *id.* § 7410(a)(2)(A), and each SIP must provide for “air quality modeling” to predict the “effect on ambient air quality of any emissions of any air pollutant” for which EPA has set a NAAQS, *id.* § 7410(a)(2)(K).

In addition, as relevant here, each SIP must address the State’s good-neighbor obligation to

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<sup>3</sup> More-specific sections of the Clean Air Act set deadlines of six or ten years for particulate matter and between three and twenty years for ozone, depending on the severity of the pollution in the area. 42 U.S.C. §§ 7511(a)-(b) & 7513(c).



prevent in-state emissions from seriously affecting downwind States' air quality. The Act's good-neighbor provision thus requires each SIP to contain "adequate" measures that

prohibit[] . . . 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 [a NAAQS].

*Id.* § 7410(a)(2)(D).

3. Once a State has had the opportunity to adopt a SIP for a NAAQS, responsibility shifts back to the federal government. EPA may disapprove a SIP submission in whole or in part if the plan fails to satisfy the Act's requirements, including the good-neighbor obligation. *Id.* § 7410(c)(1), (k)(3). If EPA disapproves a SIP submission or finds that a State failed to make a required SIP submission altogether, the Act provides that EPA "*shall* promulgate" a federal implementation plan (FIP) as a substitute for the missing or defective SIP provisions. *Id.* § 7410(c) (emphasis added). This federal authority guards against a State's failure to comply with its duties under the Act and ensures that States cannot unilaterally delay implementing necessary measures to control air pollution.

4. Because one of the goals of the Clean Air Act is to achieve attainment of the NAAQS "as expeditiously as practicable," *id.* § 7502(a)(2)(A), the statute imposes interlocking deadlines to ensure the prompt implementation of a plan to satisfy the

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NAAQS—regardless of whether that plan is of state or federal origin. Once EPA promulgates a new or revised NAAQS, States “shall . . . adopt and submit” SIPs “within 3 years” to address compliance with that NAAQS. *Id.* § 7410(a)(1). And when EPA disapproves a SIP submission or finds that a State failed to make a required SIP submission, EPA must promulgate a FIP “at any time within 2 years” of that disapproval or finding. *Id.* § 7410(c)(1). These short deadlines reflect the pressing need for measures to reduce air pollution to levels that are “*requisite* to protect the public health,” *id.* § 7409(b)(1) (emphasis added).

### **B. The Good-Neighbor Provision**

The Clean Air Act’s good-neighbor provision plays a critical role in the States’ ability to protect public health and welfare from the harm of air pollution. Pollution emitted in upwind States is carried on prevailing winds across state borders and degrades air quality in downwind States. But upwind States have little incentive to require reductions from in-state facilities when those reductions are not necessary to address their own problems with air quality. *See* S. Rep. No. 95-127, at 42. And downwind States generally cannot reach outside their borders to impose emissions controls on out-of-state sources. Congress included the good-neighbor provision among the other SIP requirements to ensure that upwind States would take responsibility for the downwind effects of their air pollution.

Since enacting the good-neighbor provision in 1970, Congress has amended it twice to strengthen the obligations of upwind States. The original version of the good-neighbor provision required “intergovernmental cooperation” to limit cross-state air pollution.

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See S. Rep. No. 91-1196, at 13 (1970); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 67 n.2 (1975). After courts interpreted “cooperation” to require only an exchange of information between States rather than affirmative steps to control pollution, see, e.g., *Natural Res. Def. Council, Inc. v. EPA*, 483 F.2d 690, 692 (8th Cir. 1973), Congress in 1977 amended the statute to clarify that States had an obligation not only to exchange information, but also to reduce emissions that would “prevent attainment or maintenance by any other State.” See Clean Air Act Amendments, Pub. L. No. 95-95, § 108(a)(4), 91 Stat. 685, 693 (1977); see also S. Rep. No. 95-127, at 42.

Even that stronger language was not enough. By the time Congress considered the statute again, so much out-of-state air pollution was flowing into downwind areas, such as New York City and Connecticut, that those areas could not have met the ozone NAAQS even if they had entirely eliminated their own emissions.<sup>4</sup> Thus, in 1990, Congress again strengthened the good-neighbor provision and adopted the current language, requiring upwind States to limit emissions even if those emissions are not the sole cause of the downwind area’s nonattainment. See S. Rep. No. 101-228, at 21.<sup>5</sup>

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<sup>4</sup> See S. Rep. 101-228, at 49 (1989); 4 *Legislative History of the Clean Air Act Amendments of 1990*, at 5076 (comp. by Cong. Research Serv. 1993) (comment of Sen. Lieberman, Senate debate, Jan. 31, 1990).

<sup>5</sup> See also Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution under the Clean Air Act of 1990*, 24 B.C. Envtl. Aff. L. Rev. 1, 20 (1996).

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But unchecked pollution from upwind States, including ozone and particulate matter, remains a problem for downwind States that cannot directly regulate it. Excess pollution imposes serious regulatory burdens on downwind States and on industry. *See* 42 U.S.C. §§ 7410(a), 7502(c)(5)-(6), 7503. Many downwind areas, particularly in the Northeast, still struggle to meet the ozone and particulate-matter NAAQS even though they have spent billions of dollars to achieve additional reductions of in-state emissions to compensate for out-of-state pollution.<sup>6</sup>

### C. Previous Regulation of Ozone and Particulate Matter

1. This case concerns EPA's efforts to ensure that States control emissions of ozone and particulate matter under three standards that EPA has promulgated: a 1997 eight-hour ozone NAAQS, *see* 62 Fed. Reg. 38,856 (July 18, 1997); a 1997 annual NAAQS for fine particulate matter, *see* 62 Fed. Reg. 38,652 (July 18, 1997); and a 2006 daily NAAQS for fine particulate matter, *see* 71 Fed. Reg. 61,144 (Oct. 17, 2006).

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<sup>6</sup> *See, e.g.*, Decl. of George S. Aburn (Aburn Decl.) ¶ 5, *Kansas v. EPA*, (D.C. Cir. No. 11-1329) (Doc. No. 1339060) (Baltimore); Decl. of David J. Shaw (Shaw Decl.) ¶ 16, *Kansas v. EPA* (D.C. Cir. No. 11-1329) (Doc. No. 1339060) (New York); Letter from N.Y. State Dep't of Env'tl. Conservation to EPA (June 20, 2012), *available at* [www.dec.ny.gov/chemical/93201.html](http://www.dec.ny.gov/chemical/93201.html); Letter from Governor Jodi M. Rell, Comments on the Proposed Transport Rule (Sept. 28, 2010), *available at* [www.regulations.gov](http://www.regulations.gov), EPA-HQ-OAR-2009-0491-2780 (Connecticut); *see also* Reply Br. for the Federal Pet'rs at 3-4 & nn.2-5, No. 12-1182 (U.S. S. Ct. filed June 2013) (collecting sources).

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Ozone forms in the atmosphere when other pollutants, including nitrogen oxides, react in the presence of sunlight. Fine particulate matter may be directly emitted through the combustion of fossil fuels or formed in the atmosphere from substances (including nitrogen oxides and sulfur dioxide) that are emitted from coal-fired power plants or other sources. Exposure to these pollutants harms public health by causing premature mortality and illness, including asthma and heart attacks. *See* Pet. App. 165a-168a.<sup>7</sup> These pollutants also harm public welfare by damaging forests and farm crops, creating haze and reducing visibility in scenic areas, acidifying lakes and streams, killing fish, and rendering waterways lifeless. *See* Pet. App. 627a-628a; Aburn Decl., *supra*, ¶ 10; Shaw Decl., *supra*, ¶¶ 19-25.

Both ozone and fine particulate matter have wide-ranging and harmful effects across the States because of their ability to be carried on the wind for miles across state borders. *See* 69 Fed. Reg. 4,566, 4,575 (Jan. 30, 2004); 63 Fed. Reg. 57,356, 57,360 (Oct. 27, 1998). For example, the northeastern States suffer from an “ozone plume” that originates in States to the west and south and travels east and north toward Maryland, New York, New Jersey, and

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<sup>7</sup> *See also* EPA, Integrated Science Assessment for Ozone and Related Photochemical Oxidants 1-4 (Feb. 2013) (EPA/600/R-10/076F), *available at* [cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492](http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492); EPA, Integrated Science Assessment for Particulate Matter 2-8 (Dec. 2009) (EPA/600/R-08/139F), *available at* [cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=216546](http://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=216546).

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on to New England. S. Rep. No. 101-228, at 49.<sup>8</sup> Ozone in the plume travels quickly and at high altitude during the night because of cooler temperatures; in the early morning, as temperatures rise, this ozone lowers and mixes with local ozone. On bad ozone days, “the Mid-Atlantic has lost the ozone battle before the sun comes up.”<sup>9</sup>

2. In 2005, after years of delays during which the States did not submit adequate good-neighbor SIPs, EPA issued formal findings that the States had failed to submit SIPs addressing their good-neighbor obligations under one or both of the two 1997 NAAQS. 70 Fed. Reg. 21,147 (Apr. 25, 2005). EPA then promulgated the Clean Air Interstate Rule (CAIR)—a rule regarding States’ good-neighbor responsibilities that preceded the Transport Rule—to establish a federal framework for limiting the downwind effects of interstate ozone and particulate matter pollution. 70 Fed. Reg. 25,162 (May 12, 2005). CAIR’s defining feature was a regional cap-and-trade program to accomplish these reductions. *See id.* at 25,273. To implement CAIR, EPA promulgated FIPs within the year. *See* 71 Fed. Reg. 25,328, 25,330 (April 28, 2006). It later approved good-neighbor SIP submissions from the majority of the CAIR States, but left EPA-promulgated FIPs partially or fully in place in six States for one or both of the NAAQS. (*See* C.A. App. 3171-3172, 3174, 3176-3178.)

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<sup>8</sup> *See also* Md. Dep’t of the Env’t, Comments on Proposed Transport Rule, App. F (Maryland’s Conceptual Model), at slides 21-22 (Sept. 29, 2010) (Md. Comments), *available at* [www.regulations.gov](http://www.regulations.gov), EPA-HQ-OAR-2009-0491-2788.

<sup>9</sup> *See* Md. Comments, *supra*, Attach. 1, at 22.

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Also in 2006, EPA issued the 2006 particulate-matter NAAQS, which updated, in part, the 1997 NAAQS for that pollutant.<sup>10</sup> CAIR did not address the States' good-neighbor obligations under the 2006 NAAQS; nor were those obligations addressed by EPA's CAIR FIPs, or by the States' SIP submissions under CAIR.

3. In 2008, the court of appeals vacated CAIR for not fully addressing the States' good-neighbor obligations under the Clean Air Act. *North Carolina v. EPA*, 531 F.3d 896, 908, 910-11 (D.C. Cir. 2008) (per curiam). In particular, the court found that CAIR's cap-and-trade program improperly permitted upwind States to evade their statutory duty to limit their contribution to air pollution in particular downwind nonattainment areas,<sup>11</sup> and failed to align the upwind States' deadlines for reducing interstate air pollution with downwind States' deadlines for achieving the NAAQS. *Id.* at 912. On petitions for rehearing, the court remanded CAIR without vacatur to preserve the limited air-quality benefits that CAIR provided. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

4. After *North Carolina*, EPA issued a guidance memorandum reminding States that CAIR did not address the 2006 particulate-matter NAAQS, and

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<sup>10</sup> The 1997 particulate-matter NAAQS included an annual and a daily standard. 62 Fed. Reg. 38,652. The 2006 revision strengthened the daily standard while retaining the annual standard. 71 Fed. Reg. 61,144; see also Pet. App. 166a.

<sup>11</sup> The program allowed States to "purchase enough . . . allowances to cover all their current emissions, resulting in no change" to their cross-state emissions. *North Carolina*, 531 F.3d at 907.

that the States were thus required to determine their good-neighbor obligations under that air-quality standard. (C.A. App. 3378.) But even a year after this guidance, twenty-nine States and territories “ha[d] not made a SIP submittal” to address this point. *See* 75 Fed. Reg. 32,673, 32,674 (June 9, 2010). EPA gave notice that this inaction triggered the two-year deadline for EPA to promulgate FIPs for the noncompliant States and territories. *Id.* at 32,674. Only three States—Georgia, Kansas, and Ohio—sought judicial review of these SIP disapprovals, in separate proceedings that were not consolidated with this action. *See* Pet. App. 74a.

Ten other States did submit SIPs with good-neighbor provisions regarding the 2006 particulate-matter NAAQS. But none of those States conducted a proper technical analysis or otherwise adequately demonstrated that their SIPs’ emissions-reduction measures would limit their cross-state pollution sufficiently to comply with their obligations under the 2006 NAAQS.<sup>12</sup> In addition, with regard to the 1997 ozone and particulate-matter NAAQS, twenty-two States maintained CAIR SIPs through 2011 despite CAIR’s invalidation. *See* Pet. App. 177a-178a.

#### **D. The Transport Rule**

In 2011, EPA replaced CAIR with the Transport Rule to address the States’ good-neighbor obligations under the 2006 particulate-matter NAAQS and the 1997 ozone and particulate-matter NAAQS. The

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<sup>12</sup> *See* C.A. App. 3168-3175 (discussing SIPs submitted by Alabama, Georgia, Indiana, Kansas, Kentucky, Michigan, New York, New Jersey, North Carolina, and Ohio).



Transport Rule used a formula that incorporated both air-quality and cost factors to identify upwind States whose emissions contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to these NAAQS. Pet. App. 128a-160a, 310a-316a. The formula incorporated a numerical threshold to determine whether an upwind State contributes significantly to a downwind State's air pollution; a group of States had suggested that threshold to EPA based on the States' own extensive analysis of cross-state air pollution.<sup>13</sup>

As part of the Transport Rule, EPA also issued FIPs for twenty-one States that had failed to submit good-neighbor SIPs adequately addressing the 2006 particulate-matter NAAQS. *See, e.g.*, Pet. App. 171a-172a n.12. These FIPs established statewide emissions "budgets" for certain pollutants and created pollution trading programs to provide sources with flexibility over how they reduced their emissions. Pet. App. 427a-428a. However, the Transport Rule invited States to submit SIPs to replace the FIPs in time for the SIPs to be in force by 2014.<sup>14</sup> *See* Pet. App. 669a-689a.

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<sup>13</sup> *See* Ozone Transport Commission (OTC) Letter to EPA at 5 (Sept. 10, 2009), *available at* [www.regulations.gov](http://www.regulations.gov), EPA-HQ-OAR-2009-0491-0013; OTC Letter to EPA Administrator at 2 (Sept. 2, 2009), *available at* [www.otcair.org/upload/Documents/Correspondence/Final%20Recommendation%20Letter\\_090902.pdf](http://www.otcair.org/upload/Documents/Correspondence/Final%20Recommendation%20Letter_090902.pdf); Northeast States for Coordinated Air Use Management, Comments on the Proposed Transport Rule (Oct. 1, 2010), *available at* [www.regulations.gov](http://www.regulations.gov), EPA-HQ-OAR-2009-0491-2694; *see also* 75 Fed. Reg. 45,210, 45,341 (Aug. 2, 2010); Pet. App. 256a.

<sup>14</sup> The Transport Rule also corrected EPA's prior approvals of SIP revisions for the 1997 ozone and particulate-matter NAAQS. EPA had issued those approvals based on the  
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EPA projected that the Transport Rule would enable a number of downwind States to timely attain the 1997 ozone NAAQS and almost all of the States to timely attain the 1997 and 2006 particulate-matter NAAQS. Pet. App. 449a-455a. EPA also estimated that the Transport Rule's anticipated emissions reductions would produce significant health benefits—including reducing premature deaths, heart attacks, chronic bronchitis, hospital admissions, and aggravated asthma—while avoiding millions of days of lost work and restricted activity due to respiratory illness. Pet. App. 601a-605a.

In rulemakings separate from the Transport Rule, EPA also approved Delaware's and Colorado's good-neighbor SIP submissions under the NAAQS at issue here. See 76 Fed. Reg. 53,638 (Aug. 29, 2011); 77 Fed. Reg. 1,027 (Jan. 9, 2012); 75 Fed. Reg. 31,306 (June 3, 2010). Each of these States had submitted a technical analysis based on its own modeling of interstate air pollution, which showed that the State did not contribute significantly to downwind nonattainment or interfere with maintenance of attainment. See 76 Fed. Reg. 2,853, 2,854 (Jan. 18, 2011); 75 Fed. Reg. 16,032, 16,034 (Mar. 31, 2010). EPA agreed with the States' conclusions based on its review of the States' analyses, the States' comments on the proposed rulemaking, and EPA's own data. 77 Fed.

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assumption that CAIR was valid. Because *North Carolina* found CAIR inconsistent with the Clean Air Act, EPA "rescind[ed] any statements" in those approvals suggesting that the SIPs satisfied the States' statutory good-neighbor obligations. Pet. App. 173a-174a; see also 42 U.S.C. § 7410(k)(6) (authorizing EPA to correct any action approving a SIP or SIP revision when the action was "in error").

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Reg. at 1,030; 75 Fed. Reg. at 31,307. As a result, neither Delaware nor Colorado was included in the Transport Rule. Pet. App. 143a-144a.

### **E. Proceedings Below**

A number of upwind States and industry groups challenged the Transport Rule. A divided panel of the court of appeals granted their petitions for review and vacated the rule on two independent grounds. First, the majority held that EPA had ignored three “red lines” that were implicit in the statute when it interpreted the term “contribute significantly” in the good-neighbor provision; as a result, the Transport Rule might impermissibly require upwind States to reduce their emissions by more than the Clean Air Act requires. Pet. App. 21a-41a.

Second, the majority held that EPA’s issuance of FIPs was improper because EPA did not give States a “reasonable time” to “implement” the Transport Rule’s good-neighbor standards. Pet. App. 47a. The majority decided that States are not required to evaluate their good-neighbor obligations or to submit an implementing SIP until EPA first specifies whether and how much States must reduce their emissions. Pet. App. 42a-61a.

Judge Rogers dissented. She would have held that the court lacked jurisdiction to address the argument that States have no independent good-neighbor obligations because the States had not raised that objection to EPA’s earlier SIP disapprovals. Pet. App. 70a-82a. Even if the court had jurisdiction, Judge Rogers found no textual support in the Act for the majority’s new rule that EPA must quantify the States’ obligations first. *See* Pet. App. 83a-95a. She therefore concluded that EPA had properly issued

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FIPs to implement the long-overdue measures required by the Act to reduce interstate air pollution. Pet. App. 93a-95a.

Judge Rogers would also have held that the court lacked jurisdiction to entertain petitioners' challenge to EPA's interpretation of the term "contribute significantly" in the Transport Rule because that challenge was not raised during the administrative proceedings. Pet. App. 95a-110a. Had the court possessed jurisdiction, however, she would have concluded that EPA's interpretation was consistent with the language of the good-neighbor provision. Pet. App. 110a-114a.

### SUMMARY OF ARGUMENT

The Clean Air Act's cooperative-federalism scheme carefully delineates the complementary responsibilities of EPA and the States to ensure that the Act's goals of reducing pollution are met. Once EPA promulgates or revises a NAAQS, the Act unambiguously requires States to adopt plans within three years to meet the new standard. And the Act's good-neighbor provision just as clearly requires those implementation plans to address in-state emissions that seriously affect the air quality of downwind States. The Act thus requires States to move first to interpret and apply the Act and to make the policy choices necessary to implement their statutory obligations.

If a State fails to meet its obligations, responsibility shifts to EPA. To ensure that state inaction will not interfere with the prompt achievement and maintenance of air-quality standards, the Act unambiguously requires EPA to issue a federal

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implementation plan within two years after finding that a State has failed to meet its obligations. This FIP backstop is crucial to achieving the Act's aim of limiting interstate air pollution because States have historically been reluctant to undertake costly measures to reduce pollution when the effects of that pollution are felt elsewhere.

Ignoring the Act's clear framework, the court of appeals distorted the division of responsibilities that Congress enacted by holding that the States' good-neighbor obligations are contingent on prior EPA rulemaking that quantifies those obligations. But no language in the statute supports this interpretation of the Act's requirements. To the contrary, the Act makes clear that the States are not passive implementers of EPA's policies; instead, the States are at the vanguard in defining and implementing the Clean Air Act, with EPA moving in to enforce the Act's requirements when a State's plan proves inadequate. There is no dispute that the States have the capability to play a lead role in preventing their own pollution from unduly harming downwind States, even without EPA's involvement—as demonstrated by their experience with both simple cross-border pollution problems and more complex issues requiring regional cooperation.

The court of appeals' decision turns the statute on its head. It puts States in a reactive posture when they address their good-neighbor obligations, rather than the lead role that the Act envisions. It allows upwind States to postpone the costs of air-pollution controls for years while, in the interim, downwind States and their residents are forced to suffer the present consequences of that pollution. It impedes EPA's ability to timely implement federal good-

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neighbor measures for States that have failed to fulfill their statutory duties. And it interjects a new step into the Act's carefully calibrated SIP process, unmoored from the express deadlines that Congress enacted to ensure prompt achievement and maintenance of essential air-quality standards. The Court should reverse the judgment of the court of appeals to preserve the Act's unambiguous framework to address interstate air pollution.

## ARGUMENT

### **I. The Clean Air Act Unambiguously Requires States to Implement Their Good-Neighbor Obligations in the First Instance and Mandates Federal Implementation Plans If States Fail to Do So.**

By its plain terms, the Clean Air Act makes the States initially responsible for adopting measures that adequately limit the effects of their pollution downwind. If a State fails to meet its good-neighbor obligation, the Act in turn compels EPA to issue substitute measures to resolve the effects of interstate air pollution. EPA adhered to this statutory "division of responsibilities," *Train*, 421 U.S. at 79, when it promulgated FIPs as part of the Transport Rule after finding that States had not adopted SIPs adequately addressing their good-neighbor obligations. Because these statutory mandates are unambiguous, EPA properly "appl[ie]d the statute according to its terms," *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

1. After EPA establishes or revises a NAAQS, the Clean Air Act allocates distinct responsibilities to the States and EPA to achieve that air-quality standard. The Act unambiguously requires the States to move

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first. Within three years of EPA's promulgation or revision of a NAAQS, "[e]ach State *shall* . . . adopt and submit to" EPA a SIP that "provides for implementation, maintenance, and enforcement" of the NAAQS. 42 U.S.C. § 7410(a)(1) (emphasis added). The Act requires each State to adopt a SIP that *both* (1) controls in-state emissions that degrade the State's own air quality, *see, e.g., id.* § 7410(a)(2)(A); *and* (2) contains adequate good-neighbor measures to address the effects of the State's air pollution on downwind States, *see id.* § 7410(a)(2)(D).

The Clean Air Act's delegation of initial authority gives the States a primary role in determining how to reduce air pollution from in-state sources. "[S]o long as the national standards [are] met," States have "the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976). Congress deliberately gave "the states the initiative and a broad responsibility regarding the means" to achieve the NAAQS through their own implementation plans. *Bethlehem Steel Co. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). The States are thus charged with "determining and enforcing the specific, source-by-source emissions limitations which are necessary" to meet the NAAQS. *Train*, 421 U.S. at 64, 79.

In *Train*, this Court recognized the breadth of the States' initial responsibility to devise and implement the SIP measures necessary to attain the NAAQS. That case addressed the SIP obligation that States adopt such "enforceable emission limitations" as are "necessary or appropriate" to reach or preserve attainment. 42 U.S.C. § 7410(a)(2)(A); *see Train*, 421 U.S. at 78-79. The Court explained that the States had broad discretion to interpret and apply this

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language, with EPA “relegated by the Act to a secondary role” of reviewing the States’ initial plan for statutory compliance.<sup>15</sup> *Train*, 421 U.S. at 79.

The States’ good-neighbor obligations are part and parcel of their other SIP obligations under the Clean Air Act. Congress intended the States to treat the in-state and out-of-state effects of their air pollution together, making each State “at least as responsible for polluting another State as it would be for polluting” within its borders. S. Rep. No. 95-127, at 42. The structure of the Act’s SIP provisions reflect this unified approach to addressing air pollution: far from being set apart, the Act’s good-neighbor provision appears in the same subsection as the other SIP provisions, in the middle of a list of duties that the Act requires the States to address in the same plan. Compare 42 U.S.C. § 7410(a)(2)(D), *with id.* § 7410(a)(2)(A)-(C), (E)-(M). There is no question that the States bear initial responsibility regarding the in-state subsections, and there is no indication that Congress intended the States to take on a different role for the identically styled interstate subsection.

Thus, under the plain language of the Act, the States have the principal and initial responsibility of devising and adopting a plan to achieve EPA’s air-

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<sup>15</sup> Indeed, as further proof of States’ discretion to choose how to regulate air pollution within their borders, States may adopt plans that are stricter than the national standards determined by EPA. *Union Elec. Co.*, 427 U.S. at 264-65. A State is free to make the “determination that it desires a particular air quality by a certain date and that it is willing to force technology to attain it—or lose a certain industry if attainment is not possible.” *Id.* at 265. EPA may not object to such a determination. *Id.*

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quality standards once those standards are promulgated. And the Act unambiguously designates the States' good-neighbor obligations as part of that plan. Nothing in the statute permits a State to defer its responsibility to limit interstate air pollution beyond the Act's express deadlines.

2. After the States have had the opportunity to adopt and implement their own plans, the Act requires EPA to review the States' SIP submissions for statutory compliance. *See id.* § 7410(k). That review authority is circumscribed. If EPA finds that a State's SIP meets all applicable requirements, then "[w]ithin 12 months," EPA "*shall* approve such submittal." *Id.* § 7410(k)(2)-(3) (emphasis added). As this Court has recognized, this language means that EPA "is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards," and has "no authority to question the wisdom of a State's choices." *Train*, 421 U.S. at 79 (emphasis added).

When, however, a State's SIP submission fails to satisfy the Act's requirements, or a State fails to timely make a required SIP submission altogether, the Act obligates EPA to fill the gap with its own implementation plan: EPA "*shall* promulgate" a FIP within two years of either (1) "find[ing] that a State has failed to make a required submission," or (2) "disapprov[ing] a [SIP] submission in whole or in part." 42 U.S.C. § 7410(c)(1) (emphasis added). Such a FIP is no half measure. Rather, EPA must "devise and promulgate a specific plan of its own" that will timely achieve the NAAQS. *Train*, 421 U.S. at 79. As Congress explained when it enacted this framework, the Act provides for "the substitution" of EPA authority for state authority to ensure that a plan is

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in place to “attain the quality of ambient air established” by the NAAQS. S. Rep. No. 91-1196, at 12.

Nor are FIPs optional. The Act frames EPA’s FIP responsibility in mandatory terms: EPA “*shall* promulgate” a FIP if certain predicate conditions are met. 42 U.S.C. § 7410(c)(1) (emphasis added). Indeed, Congress rejected a proposed amendment that would have left promulgation of FIPs solely to EPA’s discretion. *See Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 223 (9th Cir. 1992) (citing S. 1630, 101st Cong. § 105 (1989)).

Finally, the Act does not permit a delinquent State to interfere with EPA’s FIP responsibility after failing to meet its own duties to adopt an adequate SIP. As this Court has recognized, a State’s failure to develop adequate SIPs “forfeit[s] to the EPA control over implementation of the NAAQS,” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 479 (2001); *see also Virginia v. EPA*, 108 F.3d 1397, 1406-07 (D.C. Cir.) (inadequate SIP “rescinds state authority to make the many sensitive and policy choices that a pollution control regime demands” (quotations marks omitted)), *modified on other grounds on reh’g*, 116 F.3d 499 (D.C. Cir. 1997).

3. EPA’s promulgation of FIPs in the Transport Rule accords with the Act’s unambiguous delineation of state and federal responsibilities. The NAAQS at issue here were already five and fourteen years old when the Transport Rule was finalized—well past the States’ deadlines for submitting compliant SIPs. Every FIP in the Transport Rule followed EPA’s disapproval of a SIP or EPA’s finding that the covered State had failed to submit a SIP adequately addressing its good-neighbor obligations. Pet. App.

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177a-183a. Having made these determinations, EPA was required under the Clean Air Act to issue FIPs to govern the States' good-neighbor obligations.

These FIPs did not improperly intrude on upwind States' autonomy, as the court of appeals suggested. *See* Pet. App. 55a. Congress has already expressly recognized, through the good-neighbor provision, that downwind States' compelling interests in public health and welfare should not be sacrificed to preserve upwind States' sole control over emissions restrictions. And when, as here, upwind States fail to control the harmful effects of their emissions on their neighbors, the Act compels EPA to exercise its supervisory role to protect the downwind States' interests.

Contrary to the court of appeals' suggestion (Pet. App. 55a-56a), there is nothing unprecedented in EPA's issuance of FIPs in these circumstances. For example, EPA issued FIPs to implement CAIR less than a year after promulgating that rule. 71 Fed. Reg. at 25,330. To be sure, EPA intended for the CAIR FIPs to remain in place only until the States implemented SIPs that reflected their own approaches to achieving CAIR's standards.<sup>16</sup> *See id.* at 25,338-39. But EPA adopted a similar approach in the Transport Rule. Far from permanently displacing state authority, the Transport Rule expressly invites States to replace FIPs by later submitting adequate

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<sup>16</sup> EPA gave States notice of the FIP parameters before the deadline for States to submit their CAIR SIPs in order to give States the option of simply accepting the FIPs rather than devising their own SIPs. 71 Fed. Reg. at 25,338. Most CAIR States submitted SIPs that were approved, although six did not—leaving EPA's FIPs partially or fully in place. *See supra* at 10-11.

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SIPs to EPA for approval. And the rule permits replacement SIPs to take effect as early as 2014. *See* Pet. App. 669a-689a.

Thus, the Transport Rule exemplifies the Act's cooperative-federalism model. The States had at least three years after each NAAQS to address their good-neighbor obligations, and EPA stepped in only after that time to ensure that those obligations would be satisfied.

## **II. States Are Not Excused from Addressing Their Good-Neighbor Obligations until EPA First Defines or Quantifies Those Obligations.**

### **A. The Act's Plain Text Contains No Trigger for the States' Good-Neighbor Obligations Aside from EPA's Promulgation or Revision of a NAAQS.**

Ignoring the Clean Air Act's plain text, the court of appeals invented a new federal prerequisite for state action that is found nowhere in the statute. The court held that States have no duty to comply with their good-neighbor obligations until EPA first "defines or quantifies" those obligations. Pet. App. 47a. But the Act is silent about such a prerequisite, and the court of appeals thus impermissibly "engrafted" its "own notions of proper procedures upon agencies entrusted with substantive functions by Congress," *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978).

The Clean Air Act identifies only one trigger for the States' good-neighbor obligation: EPA's promul-

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gation or revision of a NAAQS. See *supra* at 3-4. As the NAAQS trigger demonstrates, when Congress intended for the States to wait for EPA, it knew how to require that, and it said so explicitly. In other, more specific provisions defining the States' SIP obligations, Congress likewise expressly made the States' duties conditional on prior EPA action: for example, requiring certain emissions-monitoring measures and reports "as may be prescribed" by the EPA, and such air-quality modeling as EPA "may prescribe." *Id.* § 7410(a)(2)(F), (K).

Congress also knew how to require EPA to provide advance guidance to the States—and again provided for that guidance explicitly. For example, the Act requires EPA to "promulgate minimum criteria that any [SIP] submission must meet." *Id.* § 7410(k)(1)(A). Likewise, when EPA issues what is known as a "SIP call" to require revisions to an existing "applicable implementation plan for any area," it must "notify the State of the inadequacies" and provide guidance and deadlines for the submission of a revised SIP.<sup>17</sup> *Id.* § 7410(k)(5).

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<sup>17</sup> The court of appeals suggested that EPA should have issued a SIP call under section 110(k)(5) here before imposing FIPs. See Pet. App. 47a-48a. But nothing in § 7410(c) makes a FIP conditional on a SIP call. Compare 42 U.S.C. § 7410(k)(5), with *id.* § 7410(c). Moreover, there must be a SIP or SIP provision in place for EPA to act under section 110(k)(5). See *Virginia*, 108 F.3d at 1410. Here, by contrast, nearly two dozen States did not submit any plans to address their good-neighbor obligations under the 2006 particulate-matter NAAQS. See *supra* at 12.

The States and localities supporting the decision below separately contended in the court of appeals that EPA was required to issue a SIP call because EPA had previously

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Outside the SIP procedures, the Clean Air Act contains other provisions that likewise expressly condition the States' statutory obligation on EPA's first defining the obligation. For example, before States must implement plans to improve visibility in national parks and wildlife areas, the statute requires EPA to "promulgate regulations" to "provide guidelines to the States . . . on appropriate techniques and methods." *Id.* § 7491(a)(4), (b)(1). The Act also directs EPA to "promulgate regulations establishing emission standards" for sources of hazardous air pollutants, *id.* § 7412(d), to aid States that are implementing plans addressing those pollutants, *see id.* § 7412(l)(2), (l)(5)(D).

The good-neighbor provision, by contrast, contains no similar "textual commitment of authority to the EPA," *Whitman*, 531 U.S. at 468. This Court presumes that Congress acts "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quotations marks omitted).

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approved some States' SIPs for the 1997 NAAQS under CAIR. *See* State and Local Pet'rs Opening Brief at 25, *EME Homer City Generation, L.P. v. EPA* (March 16, 2012) (D.C. Cir. No. 11-1302) (Doc. No. 1364206). The court of appeals did not address this issue (Pet. App. 48a-49a n.29) and it is not fairly raised by the questions on which this Court granted certiorari. In any event, EPA was not required to issue a SIP call before amending its previous approvals because the court of appeals had invalidated CAIR as inconsistent with the Clean Air Act. *See North Carolina*, 531 F.3d at 907-08. That invalidation gave EPA the authority to correct its erroneous prior SIP determinations, which assumed CAIR's validity, "without requiring any further submission from the State[s]," 42 U.S.C. § 7410(k)(6); *see* Pet. App. 173a-174a.

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Because Congress did not direct EPA to promulgate regulations defining the States' good-neighbor obligations in advance, this Court should not read such a requirement into the Act.

**B. Excusing States from Complying with Their Good-Neighbor Obligations Impedes Achievement of the Clean Air Act's Objectives.**

In addition to being unmoored from the text of the Clean Air Act, the court of appeals' invention of a new federal prerequisite conflicts with the Act's coordinated strategy to promptly achieve air-quality standards that are essential to protecting public health and welfare.

The Clean Air Act coordinates the States' obligations along three axes. First, the Act addresses in-state and out-of-state effects together during the SIP process, reflecting Congress's intent to mount a comprehensive response to air-quality problems. See 42 U.S.C. § 7410(a)(2). Second, the Act sets defined deadlines for the SIP process, including the unambiguous requirement that a State address its good-neighbor obligations within three years of the setting or revision of a NAAQS, *id.* § 7410(a)(1), to ensure that measures will be in place to achieve or preserve attainment "as expeditiously as practicable," *id.* §§ 7502(a)(2), 7511(a)(1), 7513(c). See *supra* at 5-6. And third, the Act aligns the deadlines for establishing emissions controls (whether the pollution affects in-state or out-of-state areas) with the corresponding deadlines for a State to attain the NAAQS—thus ensuring that the means are in place to achieve the Act's ends. See *North Carolina*, 531 F.3d at 912.

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The court of appeals' holding fragments this coordinated strategy. It applies different procedures to in-state and out-of-state pollution, forcing States to address piecemeal what Congress intended to be addressed together. It essentially ignores the statutory deadline for triggering good-neighbor protections, replacing the Act's clear three-year deadline with the open-ended contingency that EPA *might* promulgate a rule to define upwind States' good-neighbor obligations and the vague dictate that upwind States then implement that rule within a "reasonable time." Pet App. 47a; see *Union Elec. Co.*, 427 U.S. at 258 (noting that Congress adopted "stiff" deadlines for attaining NAAQS after rejecting a "reasonable time" standard).

Finally, by exempting only the good-neighbor provisions from the Clean Air Act's statutory deadlines, the court of appeals' holding requires downwind States to timely attain or preserve the NAAQS without any corresponding obligation on out-of-state sources to comply with the same timeline in addressing the pollution they send downwind. Because of this disparity, downwind States would be forced to meet their own statutory obligations in the first instance by mandating emissions reductions *only* from in-state sources, thereby expending enormous resources far in excess of what the Clean Air Act contemplates to offset emissions from upwind States.

For some States, even such draconian measures would not be enough, as demonstrated by the downwind areas that currently struggle to meet or maintain the ozone and particulate-matter NAAQS in the absence of adequate controls on out-of-state sources. See *supra* at 8 & n.6. The inability of these regions to attain or maintain those NAAQS results in increased illness, premature deaths, hospital

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admissions, and lost work days for their residents. See *supra* at 9. The pollutants also contribute to degradation of the natural environment, including loss of vegetation and recurrent dead zones in water bodies that threaten entire aquatic ecosystems. See *supra* at 9.

Under the court of appeals' holding, these delays, and their associated environmental and public-health harms, will be endemic. The Clean Air Act requires EPA to review and, as necessary, revise the ozone and particulate-matter NAAQS every five years. 42 U.S.C. § 7409(d)(1). Any future rulemaking to address States' failures to meet their good-neighbor obligations for newly promulgated or revised NAAQS would be subject to the same delays that the court of appeals' new requirement has imposed for the 1997 and 2006 NAAQS. By condoning further inaction by upwind States, the court of appeals' holding thwarts efforts by downwind States to address the problems caused by these pollutants, contravening Congress's firm "mandate for the achievement of primary air quality standards," *Union Elec. Co.*, 427 U.S. at 259.

### **C. States Can and Do Independently Determine Their Good-Neighbor Obligations.**

The court of appeals justified its engrafting of additional procedures to the Clean Air Act's carefully defined scheme on the ground that it is "impossible" for an upwind State to discern its good-neighbor obligations "until EPA defines the target." Pet. App. 50a. This reasoning rests on fundamental misconceptions of both the States' responsibilities under the Clean Air Act and their ability to study interstate air pollution.

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The faulty premise at the heart of the court of appeals' reasoning is the assumption that the States' objective in preparing SIPs is to predict how EPA will interpret the Clean Air Act. According to the court below, good-neighbor obligations are "federally determined" by EPA, with the States' only role "to implement reductions required by EPA." Pet. App. 2a, 4a. Because EPA is charged with "quantif[ying] each State's good neighbor obligations," the court reasoned, it makes no sense to require each State first to "take its own stab in the dark" to guess what EPA will do. Pet. App. 56a, 58a.

This reasoning inverts the Clean Air Act's cooperative-federalism process. The Act's SIP provisions do not place the States in a passive role, reduced to merely implementing policies established by EPA. To the contrary, section 110(a)(2), which includes the good-neighbor provision, charges the *States* with responsibility for implementing SIP requirements in the first instance: the statute provides that "[e]ach State shall . . . adopt" a SIP and that each SIP "shall . . . contain adequate provisions" addressing out-of-state impacts. 42 U.S.C. § 7410(a)(1) & (a)(2)(D)(i) (emphasis added). The Act thus obligates state authorities to interpret and apply the statute's terms in the first instance—not to helplessly await EPA's interpretation. See *supra* at 18-21.

The States are well-equipped to exercise their independent obligation to study and implement their good-neighbor obligations. The Clean Air Act requires States to "provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to . . . monitor, compile, and analyze data on ambient air quality," *id.* § 7410(a)(2)(B)(i),

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thereby expressly contemplating that States will have the capacity to monitor and model emissions and air quality. Those data are compiled and made publicly available, giving the States access not only to information about their own emissions and air quality, but also to data from upwind and downwind States.<sup>18</sup> States may take advantage of publicly available modeling software to analyze that data.<sup>19</sup> And the States have developed expertise by forming regional coalitions that regularly perform regional air-quality modeling for SIP development and other purposes, further facilitating States' understanding and analysis of cross-state air pollution. *See, e.g.*, 77 Fed. Reg. 45,992, 46,006 (Aug. 2, 2012) (modeling by regional state consortium); 77 Fed. Reg. 38,501, 38,506 (June 28, 2012) (modeling by coalition of States).

The States have also gained valuable experience under section 126 of the Act, 42 U.S.C. § 7426, a separate provision that gives States an alternative avenue to compel emissions reductions from upwind States. Under that provision, States may petition EPA for a finding that out-of-state sources are emitting air pollutants that significantly contribute to nonattainment or interfere with maintenance of a NAAQS in the petitioning State. *Id.* § 7426(b). To establish the basis for a petition, States perform their own air-pollution modeling of upwind sources—by necessity

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<sup>18</sup> *See* Pet. App. 198a; EPA, *2008 National Emissions Inventory: Data & Documentation*, [www.epa.gov/ttn/chieflnet/2008inventory.html](http://www.epa.gov/ttn/chieflnet/2008inventory.html).

<sup>19</sup> *See* Environ, *Download CAMx*, [www.camx.com/download/default.aspx](http://www.camx.com/download/default.aspx); *see also* Environ, *CAMx Applications in the U.S.*, [www.camx.com/about/us-camx-applications.aspx](http://www.camx.com/about/us-camx-applications.aspx).

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without EPA's involvement—to compel EPA action.<sup>20</sup> *See, e.g.*, 76 Fed. Reg. 69,052, 69,057-58 (Nov. 7, 2011) (describing modeling performed by New Jersey in support of its petition).

Congress has recognized and relied on the States' ability to study and implement measures to control cross-state air pollution in related programs under the Clean Air Act. For example, in 1990, at the same time that it enacted the current form of the good-neighbor provision, Congress defined an ozone-transport region specifically to address the cross-state effects of ozone. 42 U.S.C. § 7511c. The ozone-transport statute, which presents another alternative and nonexclusive avenue for reducing interstate air pollution, relies on the States to “develop recommendations for additional control measures” in the first instance, with subsequent review by EPA. *Id.* § 7511c(c)(1), (4). As with the SIP provision, the

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<sup>20</sup> The court of appeals here paradoxically relied on section 126 to *support* its conclusion that EPA lacked authority to implement the States' good-neighbor obligations in a FIP, reasoning that EPA's ability to implement good-neighbor obligations through section 126 implicitly displaced any such authority through the FIP process. *See* Pet. App. 55a. But this reasoning ignores the two procedures' complementary nature. The FIP process requires EPA to implement good-neighbor protections when it has found that an upwind State failed to do so. Section 126, by contrast, gives downwind States a remedy if EPA fails to perform this function, authorizing States “to force the hand of the EPA” to address upwind air pollution. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1042 (D.C. Cir. 2001). In other words, the FIP process gives EPA a remedy if States fail to act; section 126 gives States a remedy if EPA fails to act. There is no indication that Congress intended to allow only one of these complementary remedies to address the States' good-neighbor obligations.

ozone-transport statute reflects Congress's understanding that "States have taken the lead in environmental protection in general and in particular in putting together solutions that deal with some of the regional pollution problems." 4 *Legislative History of the Clean Air Act Amendments of 1990*, *supra*, at 5077 (comment of Sen. Lieberman).

Thus, contrary to the court of appeals' reasoning, it is far from "impossible" (Pet. App. 50a) for a State to independently study the effects of its air pollution on downwind States and to determine, without EPA's input, its good-neighbor obligations with respect to that pollution, either on its own or in conjunction with other States. Nor are the States' efforts to determine their own good-neighbor obligations "bound to fail." Pet. App. 60a. Indeed, with respect to the very NAAQS that are at issue here, Delaware and Colorado conducted the obligatory evaluation of their good-neighbor obligations, and EPA approved their SIP submissions. *See* 76 Fed. Reg. 53,638; 77 Fed. Reg. 1,027; 75 Fed. Reg. 31,306. Nothing prevents other States from pursuing the same path.

To be sure, in reviewing a SIP submission, EPA may ultimately disagree with a State's determination of its good-neighbor obligations and issue a FIP that provides its own determination of how to address interstate air pollution. But such disagreement is not a sign of dysfunction—Congress expressly authorized EPA to reject the States' SIP submissions in appropriate circumstances. 42 U.S.C. § 7410(c); *cf. Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489-90 (2004) (agreeing that EPA has "authority to guard against unreasonable [best available control technology] designations"). Indeed, disagreement is an inevitable feature of any oversight scheme in which

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Congress directs a federal agency to independently review States' implementation of a federal law. *See, e.g., Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004) (federal review of state Medicaid plans); *Env'tl. Improvement Div. of the N.M. Health & Env't Dep't v. Marshall*, 661 F.2d 860, 862-63 (10th Cir. 1981) (federal review of state occupational-safety-and-health plans); *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1275-76 (5th Cir. 1980) (federal review of state water-quality standards). The court of appeals' error was to construe this disagreement not as the end of a prescribed review process, but instead as the beginning of a wholly new administrative process subject to judicially created procedures and deadlines found nowhere in the Clean Air Act.

Notwithstanding EPA's review authority, nothing in the statute forbids EPA from voluntarily providing guidance before the States submit SIPs, engaging in ongoing dialogue with the States before issuing FIPs, or accepting state input after FIPs are proposed. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000) (approving of EPA's issuance of prospective guidance regarding the good-neighbor provision). EPA in fact did all of these with the Transport Rule. For example, the particular threshold that EPA adopted to determine if an upwind State contributes significantly to a downwind State's air-pollution problems was suggested by a group of States that collaborated to analyze the issue. *See supra* at 13 & n.13; *see also* 77 Fed. Reg. at 1,029 (noting that during the SIP-review process Colorado submitted revised regulations to address concerns expressed by EPA); 76 Fed. Reg. 43,128, 43,131 (July 20, 2011) (referencing multiple avenues of communication with

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EPA open to Alabama in developing its SIP). And in many cases, particularly for complex matters, it may be better policy for EPA to collaborate closely with the States both before and after the expiration of the Clean Air Act's three-year SIP deadline and two-year FIP deadline.

But the question in this case is not whether EPA *can* or *should* provide such guidance, but whether it *must* do so before the States have any duty to implement their SIP obligations—including the statutory requirement that they act as good neighbors. The plain language of the Clean Air Act belies any interpretation that would read into the statute such an additional federal prerequisite to state action.

### CONCLUSION

The judgment of the court of appeals should be reversed.

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