

Nos. 12-1182; 12-1183

IN THE
Supreme Court of the United States

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 PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITES STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

**BRIEF OF RESPONDENTS
CALPINE CORPORATION AND
EXELON CORPORATION
IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

Respondents Calpine Corporation and Exelon Corporation adopt and incorporate by reference the Questions Presented as set forth in the Petition For A Writ Of Certiorari Of The United States Environmental Protection Agency, et al., and in the Petition For A Writ Of Certiorari Of The American Lung Association, et al.

PARTIES TO THE PROCEEDING

Respondents Calpine Corporation and Exelon Corporation herein adopt by reference the parties to the proceeding listed in the Petition For A Writ Of Certiorari Of The United States Environmental Protection Agency, et al.

RULE 29.6 DISCLOSURE STATEMENT

Respondents Calpine Corporation and Exelon Corporation are publicly traded corporations and have no parent companies. No publicly-held company owns 10% or more of their stock.

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Respondents Calpine Corporation and Exelon Corporation respectfully submit this brief in support of the Petition For A Writ Of Certiorari Of The United States Environmental Protection Agency, et al. (“EPA Petition”) (No. 12-1182), and the Petition For A Writ Of Certiorari Of The American Lung Association, et al. (No. 12-1183) (“American Lung Ass’n Petition”). Both petitions were docketed on March 29, 2013.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 696 F.3d 7. The opinion may be found in the Appendix to the EPA Petition (hereinafter “App.”) at 1a-116a. The final rule of the EPA at issue in this case (App. 117a-1458a) is reported at 76 Fed. Reg. 48,208.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (App. 1459a-1462a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are set forth in the appendix to the EPA Petition at 117a-1458a and 1463a-1498a.

STATEMENT OF THE CASE

The petitioners here accurately describe EPA’s statutory mandate to address interstate air pollution, the regulatory and judicial history of EPA’s several efforts

to fulfill that mandate, including the Transport Rule, and the key errors committed by a divided panel of the court of appeals below in vacating the Transport Rule.¹ Since Congress crafted the “Good Neighbor” provision of the Clean Air Act (the “Act”), 42 U.S.C. § 7410(a)(2)(D), in its current form in 1990, EPA’s efforts to address interstate air pollution have focused primarily on the electric power generation industry to which respondents Calpine Corporation and Exelon Corporation belong. Electric generation plants, particularly older coal-fired plants lacking modern pollution controls, are the most significant sources of air pollution that travels across state borders, contributes to poor air quality in downwind areas, and often prevents those areas from meeting or maintaining national ambient air quality standards (“NAAQS”) prescribed by EPA to protect public health. In the Transport Rule, EPA determined that pollution from power plants in 27 different states impairs attainment or maintenance of three different NAAQS² in 26 areas located in downwind states.

1. EPA Petition at 2-11 (discussing relevant statutory provisions, the “NO_x SIP Call,” Clean Air Interstate Rule (“CAIR”) and the Cross-State Air Pollution Rule or Transport Rule, and the three court rulings addressing those efforts, *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 903, 904 (2001) (“*Michigan*”); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (“*North Carolina*”); and the decision below in *EME Homer City Generation, LP v. EPA*, 696 F.3d 7 (D.C. Cir. 2012)). Respondents also support and incorporate by reference similar statements set forth in the American Lung Ass’n Petition at 4-16.

2. The specific pollutants addressed by the Transport Rule are nitrogen oxides (“NO_x”) and sulfur dioxide (“SO₂”) which cause formation of ozone and fine particulate matter (“PM_{2.5}”) in the atmosphere. The relevant NAAQS are the 1997 PM_{2.5} annual NAAQS, the 2006 PM_{2.5} daily NAAQS and the 1997 8-hour ozone NAAQS. App. 168a.

EPA has been sensitive to how regulation might impact the electric power industry, and has implemented the Good Neighbor provision using the most flexible, cost-sensitive tools that the Act provides. Since 1998, when EPA first issued the rule known as the “NO_x SIP Call,” EPA has exercised its authority under the Act to develop market-based programs allowing regulated industries to reduce emissions on an industry-wide level, rather than on a potentially more costly source-specific basis.³ The NO_x SIP Call, CAIR and the Transport Rule are all such programs in which EPA established a total amount of permissible emissions for each covered state (in tons per year), created an equal number of tradable “allowances,” and required each power plant in those states to turn in one allowance for every ton of pollution it emits. The owner of any power plant is free to decide whether to buy allowances from other plants to cover its emissions, or to reduce its emissions (by installing or operating more regularly pollution controls or by reducing operations), enabling it to sell surplus allowances to other plants. *See* EPA Petition at 5 n.3. The electric power industry has uniformly preferred this market-based approach to the alternative: EPA-imposed limits on specific power plants affecting downwind states, or on all power plants, an approach commonly referred to as “command-and-control.”

3. The market-based system adopted in the NO_x SIP Call had its roots in recommendations of the Ozone Transport Assessment Group, comprised of 37 Eastern states. *See* Proposed NO_x SIP Call, 62 Fed. Reg. 60,318, 60,371-72 (Nov. 7, 1997); Supplemental Proposed NO_x SIP Call, 63 Fed. Reg. 25,902, 25,918-23 (May 11, 1998); Final NO_x SIP Call, 63 Fed. Reg. 57,356, 57,457-63 (Oct. 27, 1998).

Industry's preference for market-based emission reduction programs has dovetailed with Congress' plainly expressed intent that market-based regulation be widely deployed in implementing the Act, especially in the electric power sector. Congress amended the Act in 1990 to authorize the use of market-based approaches to achieve NAAQS to promote environmental improvement with maximum economic efficiency. *See* 42 U.S.C. § 7410(a)(2)(A) (providing that state implementation plans ("SIPs") can include "economic incentives" such as "marketable permits" to meet NAAQS); *id.* at § 7602(y) (defining "Federal implementation plan" ("FIP") to include economic incentives "such as marketable permits or auctions of emissions allowances" in order to achieve NAAQS); *see also* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). Congress also amended the Good Neighbor provision in 1990 to allow more implementation flexibility by addressing cumulative emissions from multiple sources rather than emissions from single stationary sources, EPA Petition at 3-4, thereby encouraging market-based approaches that can control multiple sources at lowest cost. The Congressional preference for market-based solutions in the electric power industry is also reflected in the Title IV Acid Rain Program, which recognized the peculiar suitability of interstate market-based systems for addressing pollution from power plants by creating a statutory market-based program for reducing SO₂ emissions. *See* 42 U.S.C. §§ 7651-7651o.⁴

4. This Congressional preference was reinforced by President George H.W. Bush, who remarked on signing the 1990 amendments to the Act:

The innovative use of market incentives in the bill represents the turning of a new page in our approach to environmental problems in this country. . . .

Indeed, the vexing and persistent problem of interstate transport of air pollution from the utility industry demands such an interstate approach, and in particular the sort of market-based approach both authorized and encouraged by Congress in the Act. Given the interconnected nature of wholesale electricity markets, when one state imposes strict emissions limits on power plants, electric generation will shift to plants in other states with less stringent requirements and therefore lower costs. These higher-emitting plants will simply export electricity into the controlled state and emit as much or even more pollution, which will be carried in the atmosphere to many downwind states. Without either a uniform command-and-control system which requires all power plants to install and operate the same controls or a market-based system that compensates for shifting generation patterns, pollution controlled in one state will simply be displaced to another, and could increase overall.

While EPA's earlier market-based programs provided important reductions in interstate pollution, they were not sufficient to address the increasing amount of interstate

By employing a system that generates the most environmental protection for every dollar spent, the trading system lays the groundwork for a new era of smarter government regulation; one that is more compatible with economic growth than using only the command and control approaches of the past.... The result will be the dawning of a new era in regulatory policy, one that relies on the market to reconcile the environment and the economy.

President's Statement on Signing of S. 1630, the Amendments to the Clean Air Act (Nov. 15, 1990), *reprinted in* 1 S. Comm. on Environment & Public Works, *A Legislative History of the Clean Air Amendments of 1990* at 727 (1998).

air pollution, nor did they keep pace with NAAQS that grew more stringent over time. As EPA's implementation of the Good Neighbor provision has evolved from the NO_x SIP Call through CAIR to the Transport Rule, EPA has established a clear methodology and trajectory that it considers necessary for more effective regulation of interstate pollution from power plants: EPA has pursued a market-based approach to regulation; the agency has expanded the scope of regulation as necessary to include additional states that fail to comply with the Good Neighbor provision; and the agency has required greater emissions reductions over time when necessary to achieve increasingly stringent NAAQS. The power industry has been well-aware of this path, and because the Act establishes deadlines for states to comply with NAAQS, a fact emphasized by the court of appeals in *North Carolina*, 531 F.3d at 912, the industry also has been well-aware of the *timing* when such additional reductions would be necessary.

Calpine Corporation, Exelon Corporation and many other power generators relied on the provisions of the Act, as interpreted by EPA for more than a decade, and on the decisions of the court of appeals in *Michigan* and *North Carolina*, and prepared for inevitable future constraints on emissions by investing in and operating modern electric generating units which emit little or no air pollution, including combined-cycle natural gas, nuclear, alternative energy and coal-fired units with state-of-the-art pollution control technologies. In contrast, other generators chose to delay such investments, hoping that new control costs could be avoided for as long as possible.

Respondents intervened in the proceedings below to support the Transport Rule because it provides the most cost-effective method to mitigate interstate pollution. The Rule employs a market-based approach ensuring that sources can make the necessary reductions through either operation of available control technologies or purchasing allowances from other sources, whichever is more cost-effective. All the industry parties to this proceeding have supported such a market-based approach to interstate pollution rather than a more costly and less flexible command-and-control approach.⁵

The court of appeals' decision, however, established new, non-statutory constraints on EPA's implementation of the Good Neighbor provision which renders such a market-based approach impossible. The decision forbids EPA to impose state budgets that (1) reduce any state's downwind impact to a level below the screening threshold for potential inclusion in the Transport Rule ("Threshold Constraint"); (2) require any state to reduce emissions except in proportion to the contributions of other upwind states ("Proportionality Constraint"); or (3) cause the cumulative reductions from all upwind states to reduce pollutants present in a downwind state to a level below the

5. When proposing the Transport Rule, EPA solicited comment on several alternatives to the market-based approach, including a command-and-control approach. No electric industry member commented in favor of the command-and-control approach. *See* Transport Rule Primary Response to Comments, 1554-1562 (June 2011), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4513> ("Response to Comments"). *See also, id.* at 883-889. The Response to Comments was part of the administrative record for the Rule. *See also* App. 430a-431a.

NAAQS (“Over-control Constraint”). *See* App. 22a-25a, 31a-41a. These constraints cripple EPA’s ability to design a cost-effective, market-based program to address interstate air pollution through the Good Neighbor provision. The court of appeals effectively abrogated those provisions of the Act that authorize and encourage EPA to adopt market-based solutions.

Moreover, by imposing these constraints, the court of appeals conflicts with its prior decisions in *Michigan* and *North Carolina* which acknowledged the propriety of EPA’s methodology in determining upwind states’ “significant contributions” to downwind states and in using market-based trading programs to satisfy the Act’s Good Neighbor provision. As a result, where states fail to comply with the Good Neighbor provision, EPA can correct this failure, if at all, only with costly, inflexible command-and-control requirements on the electric generation industry, frustrating the will of Congress and injuring industry while serving no environmental or public health goal.

REASONS FOR GRANTING THE PETITIONS

The split decision below represents a classic case of a court overstepping its authority and imposing its own policy determinations on complex technical issues with disastrous results. The court of appeals did not merely test the boundaries of its authority under the Act, it took a running start and leaped over the high walls erected by this Court in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) and its progeny, walls rooted in the Constitutional doctrine of the separation of powers. The court of appeals not only usurped the role reserved to the

Executive Branch, it ventured far beyond the realm of judicial competence and took upon itself the role of expert agency, reducing extremely complicated technical issues to over-simplified hypotheticals that collapse when tested against reality. The court of appeals' decision conflicts with prior rulings of the same court on the same statutory provision, and its encroachment on the exclusive province of EPA has led to substantial legal and factual errors and unworkable extra-statutory constraints on EPA's authority to implement the Good Neighbor provision.

The majority's assumption of EPA's role as expert administrative agency in a highly complex area frustrates effective implementation of the Act and, hence, Congressional intent. Congress required states to address the complex problem of interstate transport and mandated that EPA step in when states failed to do so, arming EPA with the power to impose the same type of market-based program that Congress developed for the electric power industry to address interstate pollution causing acid rain. The constraints created *sua sponte* by the court of appeals effectively prohibit the administrative agency from fulfilling this mandate. The court of appeals reached its decision on these constraints by considering a statutory argument never presented to the expert agency during the public comment period and created its own interpretation of a statutory term that the same court had previously found to be ambiguous. These departures from the accepted and usual course of judicial proceedings merit this Court's review.

The Court should grant review because of the importance of the issues implicated in this case. Ironically invoking the label of "cooperative federalism," the court

of appeals has deprived the many downwind states that looked to the Transport Rule to resolve disputes with their upwind neighbors of the only comprehensive remedy provided by the Act to address interstate air pollution. This case involves at its core the duties of upwind states to control pollution that harms downwind states. Had the states appearing in this action sought common law remedies against one another, the resulting cases would be before this Court as a matter of its original jurisdiction.⁶ *See* U.S. Const. art. III, § 2; 28 U.S.C. § 1251. *See also*, *New York v. New Jersey*, 256 U.S. 296, 301-302 (1921) (suit by New York to enjoin New Jersey from diverting sewage to New York Harbor); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (suit by Georgia to enjoin air pollution from facilities in Tennessee).

Hence, while millions of Americans are exposed to unhealthy levels of air pollution that their state governments are powerless to prevent, the court of appeals not only vacated the Transport Rule but also imposed judge-made constraints on EPA that will defer any remedy for years to come. Those constraints will harm the critically important electric power industry (including many of the petitioners below) by forcing EPA to abandon the market-based programs preferred by Congress and employed for over twenty years, and to fulfill its statutory mandate through a costly, inflexible command-and-control approach. It is not for the court of appeals to impose such devastating paradigm changes in

6. It is for this reason, among others, that nine states, the District of Columbia, and several large cities intervened in the case below to support the Transport Rule and are now supporting the petitions as well. *See Brief for the Respondent States and Cities in Support of Petitioners*, filed April 18, 2013.

long-standing administrative programs, particularly when the same court has previously upheld the very elements of those programs that it now rejects. Unless this Court exercises its supervisory powers to review the case and correct the majority's errors, EPA, the electric power industry, disadvantaged downwind states and millions of endangered American citizens will have to cope with their consequences for years to come.

A. FAILING TO OBSERVE THE PROSCRIPTIONS OF *CHEVRON*, THE COURT OF APPEALS CREATED AND IMPOSED UNREASONABLE LIMITATIONS UPON EPA'S AUTHORITY, IN CONFLICT WITH EPA'S REASONABLE INTERPRETATION OF THE ACT.

In *Chevron*, this Court clearly defined the duty of the court of appeals in reviewing EPA regulations in a highly complex area, mandating judicial deference to regulatory determinations based on a permissible construction of the statute. This Court explained that deference was founded upon well-established principles relating to the relative competencies of judges and expert administrative agencies and Constitutional principles of separation of powers:

[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full

understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.” [Citations and footnote omitted.]

. . . “If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”

Chevron, 467 U.S. at 844-45, citing *United States v. Shimer*, 367 U.S. 374, 382-383 (1961). The court of appeals failed faithfully to apply the *Chevron* analysis.

- 1. The court of appeals ignored its own precedent that found the Good Neighbor provision ambiguous.**

In *Michigan*, the court of appeals determined that the Good Neighbor provision, specifically the term “contribute significantly” as used in that provision, is undefined in the Act and ambiguous. *Michigan*, 213 F.3d at 674, 677-679. The court found that the language of the statute did not unambiguously conflict with EPA’s two-step approach for determining, first, which states contribute significantly to downwind nonattainment, and second, the amount of that contribution. *Id.* at 677-680 (upholding EPA’s two-step analysis as a reasonable “two-dimensional” approach). In *North Carolina*, the court again declined to disturb EPA’s use of the same two-step approach. *See North*

Carolina, 531 F.3d at 916-917. Because the *Michigan* court found the term to be ambiguous, *Chevron* required the court of appeals to afford EPA substantial discretion to interpret the critical statutory term “contribute significantly.” *Michigan*, 213 F.3d at 677-679 (deferring to EPA’s determination of that term based on highly cost-effective pollution controls). *See also Chevron*, 467 U.S. at 843; EPA Petition at 21-24.

Rather than beginning with its own finding in *Michigan* that the Good Neighbor provision is ambiguous and deferring to EPA’s expertise, the court of appeals, like the panel overturned in *Chevron*, developed its own interpretation of the Act, unmoored from legislative intent or agency expertise, and imposed constraints it declared to be unambiguously required by the statute. *See App. 23a-25a; see also id.* at 114a (the majority “proceeds to do violence to the plain text of the CAA and EPA’s permissible interpretations of the CAA.”) (Rogers, J., dissenting).

The “red lines” created by the court of appeals on the Threshold, Proportionality and Over-control Constraints, *see id.* at 22a-25a, appear nowhere in the statute. They also directly conflict with the court’s prior rulings. As noted above, *Michigan* approved, and *North Carolina* did not disturb, EPA’s same two-step method. Both courts expressly allowed EPA to determine “contribute significantly” without a proportionality test. *See North Carolina*, 531 F.3d at 908 (finding EPA’s determination of significant contribution need not “directly correlate with each state’s individualized air quality impact on downwind nonattainment relative to other upwind states”); *Michigan*, 213 F.3d at 679 (acknowledging that

EPA determination of “contribute significantly” could result in small contributors making reductions equivalent to higher emitting states); *see* App. 67a-69a, 102a-103a, 112a (Rogers, J., dissenting).

Nowhere did the court of appeals even acknowledge overruling *Michigan* and *North Carolina* on these points, much less provide a reasoned basis for doing so. Nor did the majority explain how it conjured its three very specific constraints from the notoriously unspecific Good Neighbor provision that it had previously found to be undefined and ambiguous. Nonetheless, by reversing itself and declaring, however obliquely, that the Act unambiguously imposes these three constraints, the court of appeals absolved itself from its responsibility to ask the next question required by *Chevron*: Is EPA’s interpretation reasonable?

2. The court of appeals failed to defer to the agency’s reasonable interpretation of ambiguous statutory terms in a highly technical area.

Had the court of appeals followed the dictates of *Chevron*, it would have concluded that EPA’s interpretation of the Good Neighbor provision was certainly reasonable. The problem of interstate air pollution is overwhelmingly complex. Such pollution does not simply arise from one or more sources contributing consistently proportional and large amounts of emissions to a single downwind state as the court of appeals suggests with its oversimplified hypotheticals. *See* App. 26a-29a. Rather, interstate pollution is a complex phenomenon where multiple upwind states can have multiple and varying impacts on multiple downwind states (which themselves may also be upwind

states), where small amounts from various upwind states can combine to have large collective impacts on more than one downwind state, and where states themselves may have widely varying control requirements such that costs of generation and control vary from state to state. *See* EPA Petition at 7-9, 21-28; *see infra*, 19-24.

These factors all point toward an interstate market-based solution that seeks to quantify these collective impacts by states, determine what controls and costs are required to reduce them, and then allow the required emissions reductions to be made in the most cost-effective manner to sources – either by operating controls or by purchasing allowances. That is the precise solution EPA developed in the Transport Rule.

Had the court of appeals properly considered EPA's informed administrative judgment, it would have given greater weight, for example, to the fact that EPA considered a proportionality requirement in the rulemaking similar to that ultimately imposed by judicial fiat, but concluded in its expert judgment that such a requirement would be neither feasible nor cost-effective. Rather, the court of appeals only briefly referred to this important fact in a footnote, without explaining why EPA's conclusion was not reasonable. *See* App. 40a n.24 (citing EPA, Alternative Significant Contribution Approaches Evaluated Technical Support Document (July 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-0077> (JA02311-12)). Nor was the court of appeals' imposition of the Over-control Constraint based on impermissible EPA interpretations. Neither the court of appeals nor any party identified any scenarios where the Transport Rule would create over-control. *See* App. 114a (recognizing that

instances of over-control were unsupported by the record) (Rogers, J., dissenting). Indeed, EPA had observed that even full implementation of the Transport Rule would still not ensure all downwind states could attain NAAQS. App. 130a, 232a, 311a-316a. With regard to the Threshold Constraint, the court of appeals disregarded EPA's explanation of how and why it used an air quality-based estimate of impacts (1% of NAAQS) only as a threshold first-step "Screening Analysis" for determining which states would potentially be subject to the Transport Rule. *See* EPA Petition at 6-7. Instead, the court of appeals held EPA's threshold to be a "floor" that prevented regulation of contributions to downwind states below 1%. Yet, as Judge Rogers noted in her dissent, the court of appeals' concern that a state may be required to reduce more than its threshold amount was based solely on a hypothetical and not on reality. App. 95a n.15 (Rogers, J., dissenting). The majority disregarded all these analyses and agency rationales, preferring to establish its own determination of what Congress intended "contribute significantly" to mean.⁷ *Cf. Chevron*, 467 U.S. at 863-66.

7. The majority's errors might have been avoided had the statutory construction argument and the hypotheticals adopted by the court been presented to EPA during public comments so that EPA could address the issues expressly, as required by the Act. Instead, the court failed to recognize statutory limits on its jurisdiction that permit it to consider "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment," 42 U.S.C. § 7607(d)(7)(B), so as to give the expert agency the opportunity to respond and provide a basis for judicial review under the applicable arbitrary and capricious standard, *id.* § 7607(d)(9)(A). *See* App. 95a-110a (Rogers, J., dissenting). *See also* EPA Petition at 18-21; American Lung Ass'n Petition at 16-20.

Had the court of appeals properly fulfilled the role set out for it by this Court in *Chevron* or followed its own prior rulings, the court of appeals would have inevitably concluded that EPA's interpretation and implementation of the Good Neighbor provision were reasonable, regardless of whether the judges would have preferred that EPA create a floor for reductions, or establish a proportionality requirement, or more rigorously avoid "over-control." See *Am. Elec. Power Co. Inc., et al. v. Connecticut, et al.*, 131 S. Ct. 2527, 2539 (2011) (on complex scientific and technical matters, EPA is the "first decider" in the case and the courts the second); *Chevron*, 467 U.S. at 843 (court should not "impose[] its own construction on the statute."). EPA properly relied on *Michigan* and *North Carolina* for guidance in developing the Transport Rule and its predecessor, CAIR. See App. 65a (EPA was entitled to rely on prior precedent that the majority "trampled") (Rogers, J., dissenting). In light of the majority's radical departure from settled law, this Court should review the court of appeals' decision to remove the constraints imposed by the majority on EPA's ability to interpret and implement the Good Neighbor provision.

B. THE MAJORITY'S JUDGE-MADE CONSTRAINTS ABROGATE EPA'S STATUTORY AUTHORITY TO IMPLEMENT MARKET-BASED EMISSION CONTROL PROGRAMS.

The Court should also review this petition because the court of appeals committed a cascade of technical errors when it departed from its proper limited role in overseeing expert agency decisions. By injecting its own policy decisions and technical analysis, the court of appeals directly contradicted this Court's instruction in

American Electric Power Co., Inc., that EPA, not the courts, is in the best position to undertake the complex balancing of policy and science that is essential to the implementation of the Act:

It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.... Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. *See generally* [*Chevron*, 467 U. S. at 865-866]. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.

Am. Elec. Power Co. Inc., 131 S. Ct. at 2539-2540. The court of appeals' failure to confine itself to the role established by Congress and this Court yielded technical errors which render it impossible for EPA, the expert agency chosen by Congress, to implement the Act in harmony with clear Congressional intent.

1. The court of appeals imposed constraints on EPA that cannot be met.

EPA's petition accurately explains why the agency's market-based approach is the most reasonable, cost-effective and lawful response to the technically complex problem of interstate pollution. EPA Petition at 7-9, 21-28. Lacking EPA's expertise and resources, the

court of appeals invented constraints which effectively prohibit EPA from taking such an approach to fulfill its Congressional mandate to address interstate pollution transport when states fail to act. The majority's Threshold, Proportionality, and Over-control Constraints cannot possibly be met simultaneously in the real world, as the examples below plainly demonstrate.

Threshold Constraint. The Threshold Constraint – forbidding a state to be required to reduce its contributions below 1% of the NAAQS – ignores the reality that many upwind states contribute small amounts of pollution to multiple downwind states. In its first-step Screening Analysis, EPA identified states that contribute to at least 1% of a NAAQS at any point where a downwind state fails to achieve NAAQS, or where long-term NAAQS compliance is at risk, so as to screen out the states that do not meet this threshold anywhere.

For example, EPA identified 21 states that contribute more than $0.35 \mu\text{g}/\text{m}^3$ to eight downwind states where $\text{PM}_{2.5}$ concentrations exceed the 24-hour $\text{PM}_{2.5}$ NAAQS of $35 \mu\text{g}/\text{m}^3$. See EPA's *Air Quality Modeling Final Rule Technical Support Document*, Appendix D-11 to D-12 (2011) (JA02710-11), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4140> (“Air Quality TSD”), which was part of the administrative record for the Transport Rule. Each of these 21 states contributes different amounts to each nonattainment area. Maryland, for example, contributes barely over 1% of the NAAQS ($0.36 \mu\text{g}/\text{m}^3$) to the nonattainment area in Cuyahoga County, OH, but contributes over 8% of the NAAQS ($2.84 \mu\text{g}/\text{m}^3$) to the one in Lancaster County, PA. *Id.* If EPA required even modest reductions by Maryland

to halve its contribution to Lancaster County, Maryland's contribution to Cuyahoga County would certainly be reduced below the 1% floor, in violation of the court of appeals' Threshold Constraint. *See* App. 34a-38a.

Theoretically, EPA might be able to satisfy the majority's Threshold Constraint, reducing Maryland's contribution to Lancaster County without materially reducing Maryland's contribution to Cuyahoga County, by imposing limits on specific power plants in Maryland, provided that different Maryland facilities affect the two nonattainment areas.⁸ However, the majority also held that EPA lacks authority to prescribe individual facility limits in the first instance, and must initially go no farther than giving states emission budgets to incorporate into their SIPs. App. 42a-45a. With no more refined tool at its disposal than its budget-fixing power, EPA cannot honor the Threshold Constraint while assuring that each upwind state's maximum contribution is reduced to the extent required by the Act.

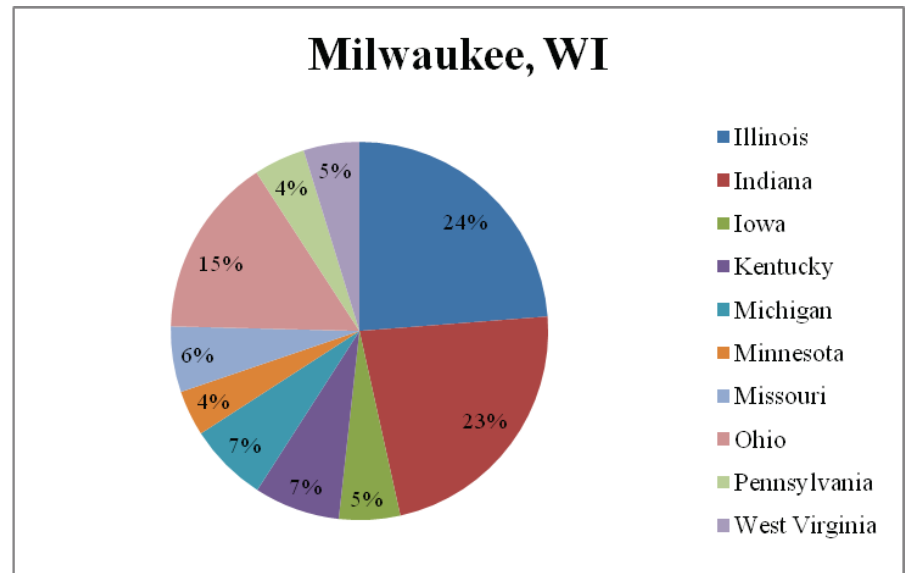
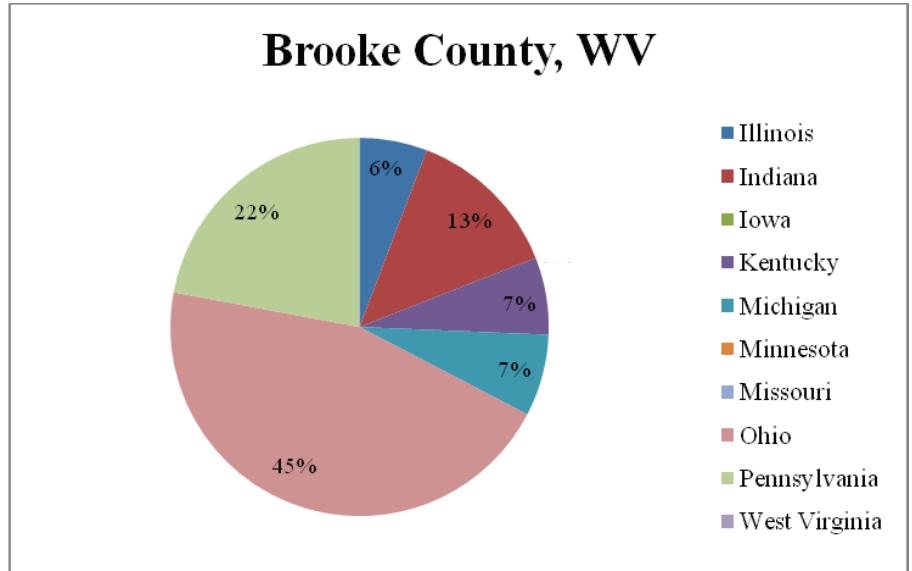
Proportionality Constraint. The court's Proportionality Constraint – emission budgets must “be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment” – is also impossible to accommodate. *See* App. 25a. The court's examples to “illustrate the point” are oversimplified and mistakenly assume that

8. EPA proposed such an alternative, *see* Proposed Transport Rule, 75 Fed. Reg. 45,210, 45,330 (Aug. 2, 2010), but it was universally rejected by industry (*see* Response to Comments at 1554-1562), and undermined the goals of economic efficiency for which market-based control systems were authorized in the Act. 75 Fed. Reg. at 45,333.

a group of states could contribute to a single downwind nonattainment area rather than multiple areas. App. 26a. Contrary to the court's examples, each nonattainment area is affected by multiple upwind states, most of which also contribute to other areas in differing proportions. If EPA meets the court's Proportionality Constraint for one nonattainment area, it will necessarily run afoul of this requirement at every other area. *See* EPA Petition at 22-24; American Lung Ass'n Petition at 25-28.

For example, the Milwaukee, WI nonattainment area receives contributions from 27 states, ten of which contribute more than 1% of the 24-hour $PM_{2.5}$ NAAQS. *See* Air Quality TSD, Appendix D-11 to D-12. The Brooke County, WV nonattainment area receives contributions from 30 upwind states, six of which exceed the 1% threshold. *Id.* Indiana (23%) and Illinois (24%) contribute roughly equal amounts to Milwaukee, while Ohio (15%) contributes less. To follow the court's directive, EPA would have to develop budgets for Indiana and Illinois that reduce contributions to Milwaukee by about the same amount, and a budget for Ohio requiring smaller reductions. The majority would also require that EPA's budgets reduce proportionately those states' contributions to Brooke County. However, Ohio (45%), Indiana (13%) and Illinois (6%) contribute to nonattainment in Brooke County in dramatically different proportions. Figure 1, derived from data in EPA's Air Quality TSD, Appendix D-11 to D-12, illustrates that the majority mandates what is mathematically impossible: that EPA devise budgets for Illinois, Indiana and Ohio that are both in a ratio of 5:5:3 and in a ratio of 1:2:6. This example is typical of the problem of interstate pollution transport.

FIGURE 1



The majority's acknowledgement that *complete* proportionality might not *always* be possible, and that EPA has some discretion in this regard, does not solve the unsolvable mathematical problem that the majority has imposed on EPA. *See* App. 29a. The majority certainly did not accord EPA any such discretion when reviewing EPA's determination of significant contribution, and failed even to discuss the agency's rationale for considering but rejecting a proportionality criteria in the rulemaking process. Further, the court's acknowledgement that some disproportionality may be unavoidable gives the agency no helpful guidance on how and when it can determine it is not technically feasible to observe the majority's Proportionality Constraint.

Over-control Constraint. It is also practically impossible for EPA to fulfill the court of appeals' Over-control Constraint – state budgets must “not produce more than necessary ‘over-control’ in the downwind States” (App. 27a) particularly when combined with the Threshold and Proportionality Constraints. Ohio contributes to five Pennsylvania nonattainment areas, at four of which (in Allegheny and Beaver Counties) Ohio is the largest upwind influence, contributing, on average, 11% of the NAAQS. *See* Air Quality TSD, Appendix D-11 to D-12. For Lancaster County, however, Ohio's contribution is relatively small, representing one-tenth of all upwind contributions, and just one-quarter of Maryland's contribution. *See supra*, 19-20. Yet, Maryland does not contribute above 1% in Allegheny and Beaver Counties. EPA cannot develop a budget for Ohio to eliminate its high contribution to Allegheny and Beaver Counties without also reducing Ohio's impact on Lancaster County far below the 1% floor created by the court of appeals. If the cumulative effect

of EPA's budgets for the seven states contributing to Lancaster County resulted in "over-control," the majority would require a proportional increase of state budgets for all seven contributors, App. 28a n.16, which would necessarily result in increases in Ohio's contribution to all Pennsylvania counties, including one that would not achieve attainment even under full implementation of the Rule. *See* Air Quality TSD, Appendix B-85 (Allegheny County receptor 420030064 projected to exceed NAAQS by 29% after implementation of the Transport Rule) (JA02630). The Threshold, Proportionality, and Over-control Constraints invented by the majority cannot be achieved in the real world.

2. The court of appeals' extra-statutory constraints bar EPA from addressing interstate pollution with a market-based system.

Even assuming that the court's three constraints could theoretically be met, these requirements effectively bar EPA from utilizing any market-based system to address interstate pollution from the electric power industry, contrary to clear expressions of Congressional intent. As noted above, Congress determined market-based programs to be the most appropriate method for addressing the problem of interstate air pollution from the power industry when it created the Title IV Acid Rain Program and specifically authorized the use of market-based approaches under Title I of the Act to achieve and maintain compliance with NAAQS because market-based programs promote environmental improvement with maximum economic efficiency. *See supra*, 4. *See also* Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air: or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers And*

What Should be Done About It (Yale University Press 1981).

In light of this clear Congressional preference for use of market-based systems, in the Transport Rule, as in CAIR and the NO_x SIP Call, EPA adopted an allowance trading program that allows the market to dictate where emission reductions will occur at the lowest cost. *See* EPA Petition at 5 n.3. Industry uniformly favors such systems due to their economic efficiency and flexibility, as compared to more expensive command-and-control approaches. Both supporters and detractors of the Transport Rule supported its market-based approach, and urged EPA not to adopt direct controls. *See supra*, note 5.

The Transport Rule was designed specifically for the electric generation industry, and to accommodate the competitive wholesale electricity markets that predominate in the states affected by the Transport Rule. There are two basic principles underlying these markets. First, owners of generation units typically offer their available generation capacity to the regional transmission organization at a price equal to or just above their operating costs. As electricity demand fluctuates, the regional transmission organization will activate or “dispatch” generation capacity beginning with the lowest bidder, and will add capacity with higher bids until demand is met. Second, all generators are paid the same price as the highest bidder whose generation capacity is necessary to meet demand. These principles have significant implications for interstate pollution transport.

Emission controls increase the operating cost of a power plant. With higher operating costs, a plant may be dispatched less, sell less electricity and sell its electricity

for a smaller profit than a plant without emission controls. If these operating costs are offset by the value of allowances that can be sold, it is in the owner's economic interest to operate the emission controls. If the costs are not offset, the control equipment is not used, except as necessary to achieve permit limits.

The Transport Rule uses the electricity market's structure to reduce emissions by limiting the number of available allowances, causing allowance prices to increase until the price justifies operation of emission controls. Emission reductions come from switching electric generation either to units using cleaner technologies or to those that have and operate pollution controls. For units that have controls, the cost of operating those controls to achieve reductions is offset by the sale of surplus allowances to units that operate without controls. The allowance cost will be incorporated into the operating costs of the uncontrolled unit, raising its minimum bid price into the wholesale electricity market. As the number of allowances is reduced and prices increase, the minimum bid of uncontrolled units may become so high that the units with no controls are dispatched less frequently, and cleaner units are dispatched more frequently. This effect reduces pollution further.

EPA cannot implement a state budget-based market system if it lacks either the data or the tools to predict that the market will produce reductions that actually "achieve something measurable" in response to those budgets. *North Carolina*, 531 F.3d at 907-908. EPA used sophisticated models to derive state budgets based on a given fixed cost to control emissions (in dollars per ton removed). In developing emission budgets, EPA used both

an air pollution transport model and an electric industry economic model to evaluate how pollution control costs would shift generation among power plants, and how downwind air quality would be affected by these shifts. These models allowed EPA to evaluate how emissions would change if, for example, generation units were required to incur an additional \$500 in costs for each ton of NO_x or SO₂ emitted. EPA used existing data to predict how individual sources within each state would respond to a certain fixed cost (yielding the state budgets), and how the resulting change in emission patterns would affect downwind pollution (eliminating most upwind contributions to nonattainment and maintenance).

The court of appeals discarded without discussion EPA's complex technical analysis which incorporated economics, market structure and atmospheric pollutant transport modeling, and instead substituted its own judgment, based primarily on oversimplified and unrealistic hypotheticals. In order to satisfy the Threshold, Proportionality and Over-control Constraints, assuming that it is theoretically possible to do so at all, EPA would have to incrementally adjust each state's budget by adjusting the control cost used for each state. Thus, while EPA used a control cost of \$500 per ton of emissions as a starting point in all states, EPA would need to use a lower control cost in some states (increasing their budgets) to attempt to tune each state's budget to comply with the majority's three constraints. Notably, the majority would prohibit EPA from tuning in the other direction, using higher control costs in certain states, resulting in more restrictive budgets. App. 11a.

Such an approach based on different control costs for each state effectively prohibits a market-based program

relying on *interstate* allowance trading, like the Transport Rule and all of its predecessors. Electric generation is fluid. If control costs are higher in State A than in State B, generation will shift from State A to State B, increasing emissions in State B to levels above its budget. If EPA cannot ensure that State B will stay within its budget, EPA cannot predict whether its downwind impact will be eliminated. When EPA used different SO₂ control costs in two groups of states, it needed to bar trading between those groups of Transport Rule states to ensure that emission reductions occur in the states where they are needed. Likewise, if EPA were to use different cost figures for each state to achieve the court of appeals' constraints, interstate trading would also have to be prohibited.⁹

The court of appeals thus effectively stripped EPA of the primary tool that the agency has used to address the “intractable” problem of interstate air pollution. The court of appeals found in *Michigan* that EPA's interpretation of the Good Neighbor provision is reasonable, and neither the Act nor *Michigan* nor *North Carolina*, nor any other authority suggests that EPA fundamentally erred in choosing the Transport Rule's system as a remedy. While the court characterized its holdings as extensions or clarifications of these earlier decisions, the practical consequences of its holdings are entirely inconsistent with the Act and with the D.C. Circuit's prior endorsement of EPA's fundamental market-based approach.

9. EPA considered an alternative without interstate trading in developing the Transport Rule, but industry uniformly opposed that alternative and EPA rejected it for technical reasons. *See, e.g.*, Response to Comments at 883-889; App. 430a-431a.

3. If allowed to stand, the court of appeals' decision will have far-reaching effects.

If left standing, the constraints imposed by the majority in this case will impede EPA's future efforts to utilize market-based approaches to ensure states meet NAAQS not at issue in this case, including more recently revised standards for PM_{2.5} and for other pollutants. *See, e.g.*, 78 Fed. Reg. 3086 (Jan. 15, 2013) (strengthening the annual PM_{2.5} NAAQS from 15 $\mu\text{g}/\text{m}^3$ to 12 $\mu\text{g}/\text{m}^3$). EPA had intended the Transport Rule to serve as a model for enforcement of additional NAAQS, EPA Petition at 12, 31-32, and if the court of appeals' extra-statutory constraints are allowed to stand, EPA will not be able to use this model.¹⁰ Moreover, the invalidation of the Transport Rule on the basis of judicial policy choices unmoored from the language of the Act creates great uncertainty about related regulations by EPA under the Act. *See id.* at 12, 30-32. Regulatory uncertainty poses a major problem for the electric generating industry, where companies must make large capital investments and strategic decisions far in advance, in anticipation of rules that may apply in the future. The court of appeals' injection of its own policy preferences, devoid of statutory basis or *Chevron* deference, creates a particularly high

10. EPA does not go as far as to say it can never develop a regulatory system to address the Good Neighbor provision, carefully stating that the court of appeals' unwarranted constraints "*may* leave the EPA enough latitude to at least *attempt* to craft a new regulatory approach that meets the court's requirements." EPA Petition at 30 (emphasis added). However, EPA further notes that without the ability to consider costs or collective contributions, EPA may be forced to adopt a rule that is less flexible and more burdensome on some states. *Id.*

level of uncertainty that should and need not exist. This Court's review is necessary to remove this uncertainty from the marketplace and to restore the latitude granted by Congress to EPA. This latitude is necessary for EPA to fulfill its mandate to ensure that downwind states and their residents are not endangered by upwind states that succumb to parochial economic interests, disregarding their wider responsibilities in our federal system.

CONCLUSION

The petitions for writs of certiorari in No. 12-1182 and No. 12-1183 should be granted.

Respectfully submitted,

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