

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ENVIRONMENTAL :

4 PROTECTION AGENCY, ET AL., :

5 Petitioners : No. 12-1182

6 v. :

7 EME HOMER CITY :

8 GENERATION, L.P., ET AL :

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10 - - - - - x

11 AMERICAN LUNG ASSOCIATION, ET AL., :

12 Petitioners : No. 12-1183

13 v. :

14 EME HOMER CITY :

15 GENERATION, L.P., ET AL :

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17 Washington, D.C.

18 Tuesday, December 10, 2013

19

20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States
22 at 10:09 a.m.

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| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | MALCOLM L. STEWART, ESQ. | |
| 4 | On behalf of the Petitioners | 4 |
| 5 | ORAL ARGUMENT OF | |
| 6 | JONATHAN F. MITCHELL, ESQ. | |
| 7 | On behalf of State and Local Respondents | 37 |
| 8 | ORAL ARGUMENT OF | |
| 9 | PETER KEISLER, ESQ. | |
| 10 | On behalf of Industry and Labor Respondents | 56 |
| 11 | REBUTTAL ARGUMENT OF | |
| 12 | MALCOLM L. STEWART, ESQ. | |
| 13 | On behalf of the Petitioners | 78 |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 12-1182,
5 Environmental Protection Agency v. EME Homer City
6 Generation and the consolidated case American Lung
7 Association v. EME Homer City Generation.

8 Mr. Stewart.

9 ORAL ARGUMENT OF MALCOLM L. STEWART

10 ON BEHALF OF THE PETITIONERS

11 MR. STEWART: Mr. Chief Justice, and may it
12 please the Court:

13 In promulgating the Transport Rule, EPA
14 sought to protect the public health and to strike a fair
15 balance between the competing interests of upwind and
16 downwind States. EPA's analysis proceeded in three
17 basic steps.

18 First, EPA performed a screening analysis to
19 determine which upwind States would be covered by the
20 Transport Rule. And in order to do that, EPA first
21 identified the downwind receptors that were in a State
22 of nonattainment or had maintenance difficulties, and
23 then it determined which upwind States were linked to
24 those receptors.

25 And in order to be linked to a downwind

1 receptor, the upwind State had -- had to contribute one
2 percent or more of the relevant National Air Quality --
3 Ambient Air Quality standard, or -- or NAAQS, to that
4 downwind receptor. And any State that didn't contribute
5 at least one percent to any of the downwind -- any of
6 the relevant downwind receptors was determined not to
7 contribute significantly to nonattainment at that area.

8 Second, once the States that were to be
9 covered by the Transport Rule had been identified, EPA
10 set a State emissions budget for each State. And to do
11 that, it performed computer modeling to determine, in
12 addition to whatever emission control efforts were
13 already going on, what additional emission reductions
14 could be achieved by implementation of control measures
15 available at various cost thresholds.

16 And the thresholds ultimately selected were,
17 for NAAQS, \$500 per ton. For SO₂, the group 1 States
18 were at a level of \$2,300 per ton. The group 2 States
19 were 5 -- \$500 per ton. And the idea was let's see what
20 emissions savings we can achieve, if additional control
21 measures are implemented up to those cost thresholds.

22 And --

23 JUSTICE SCALIA: Of course, those -- those
24 savings would -- would not be evenly distributed among
25 the upwind States, right? So some upwind States that

1 are able to make those efficient changes will be
2 carrying more than their burden of reducing the
3 emissions that affect downwind States, right?

4 MR. STEWART: Well, there -- there were two
5 bases for distinguishing among the States. The first --
6 in terms of the \$500 per ton threshold for the group 2
7 States versus the \$2,300 per ton threshold; the way in
8 which States were divided into those categories is that
9 the States that were linked to the downwind receptors
10 that had the most severe pollution problems were treated
11 as group 1 States, and they were required to make
12 greater pollution control efforts because they had some
13 responsibility for the most serious problems.

14 Now, I guess the point of your question
15 would go to -- to the fact that, even among States that
16 were operating under constant cost control thresholds, a
17 State that had already implemented cost measures up to
18 that limit might have to do less in a sense because it
19 would have already taken the -- the steps that were
20 required, at least as compared to an air-quality-only
21 threshold.

22 JUSTICE SCALIA: Well, I don't mind a State
23 doing less. I think North Carolina said -- said that
24 you can use those cost figures to do less, and that's
25 not challenged here. But what the application of the

1 cost factor means is that some States that can more
2 efficiently make the changes will be required to do more
3 than merely account for their proportion of the downwind
4 harm. Isn't that true?

5 MR. STEWART: Well --

6 JUSTICE SCALIA: Yes or no? I mean, I think
7 it's an easy yes or no answer.

8 MR. STEWART: I think it is -- no, I think
9 it is the case that, if you adopted an air-quality-only
10 threshold, then it would be more likely to be the case
11 that States that had already done a lot to control air
12 pollution would have to take additional steps, even if
13 it was done at a non-cost -- in a non-cost-effective
14 way.

15 JUSTICE SCALIA: Have you answered my
16 question? Does -- does the fact that you begin with --
17 what the statute says is that each upwind State has to
18 account for its -- its effect on the downwind States,
19 but once having identified that effect, you -- you then
20 say those upwind States that can make the reductions
21 more efficiently have to make more reductions than
22 they -- than their mere proportion of the harm requires.
23 Isn't that so?

24 MR. STEWART: I think it would be the case
25 that at least as -- yes, as compared to at least some

1 air-quality-only measures, the use of cost would have
2 the effect of distributing the burden in a somewhat
3 different way than it would have if you considered air
4 quality factors only.

5 JUSTICE KAGAN: Is the idea, Mr. Stewart,
6 that the States that are required to do more are the
7 States that haven't done much already?

8 MR. STEWART: That's correct. And that was
9 what I was trying -- trying to get out earlier, that
10 if -- if States have to do less in order to meet the
11 \$500 -- in order to be in a position where they've
12 implemented all the cost -- all the emission control
13 measures that are available at \$500 per ton, if a
14 particular State has to do less in order to achieve
15 that, it's probably because that State has already
16 implemented most of those measures on its own.

17 JUSTICE SCALIA: And what provision of the
18 statute allows you to take that into account?

19 MR. STEWART: Well, the -- the term that
20 we're --

21 JUSTICE SCALIA: I mean, as opposed to each
22 State, whether it's inefficient or efficient, has to
23 merely reduce its contribution to the downwind State
24 pollution, right? That's what the statute says.

25 MR. STEWART: Well, the statute says that

1 each State will adopt measures that prevent sources
2 within its borders from contributing significantly to
3 downwind nonattainment. And the purpose of the
4 provision is not to allocate blame for an existing state
5 of nonattainment or for prior pollution.

6 It's a -- it's to devise a scheme that going
7 forward will prevent nonattainment from occurring. And
8 the idea is, if each State lives up to its obligation
9 and if the downwind States make commensurate
10 commitments, then the problem will be solved.

11 And in terms of the language, "contribute
12 significantly," I think there are -- there are various
13 reasons to think that EPA reasonably construed that term
14 to include a component of difficulty of achievement;
15 that is, in common parlance, we might say that dunking a
16 basketball is a more significant achievement for
17 somebody who is 5 feet 10 than for somebody who is 6
18 feet 10.

19 We might say that a \$100 charitable
20 contribution is more significant if it's made by a
21 person who makes \$10,000 a year than a 1,000
22 contribution by somebody who makes \$1 million a year.

23 CHIEF JUSTICE ROBERTS: That's -- I was just
24 going to say, that just is because of, in the latter
25 case, because contribution happens to be used in both an

1 affirmative and a negative sense. The question is, for
2 example, whether somebody who fatally stabs somebody and
3 someone who fatally shoots them have each significantly
4 contributed to the bad result.

5 MR. STEWART: I think --

6 CHIEF JUSTICE ROBERTS: Or -- or not
7 significantly contributed in -- in -- contributed in
8 varying degrees.

9 MR. STEWART: I would say if -- if you cause
10 death by alternative means, then both people would have
11 contributed as significantly. But to include -- to set
12 out a hypothetical that involves contribution to a bad
13 result, if you had a basketball team that lost a game by
14 one point, and the coach was asked to pinpoint the plays
15 that contributed significantly to the defeat, the coach
16 would be much more likely to identify a missed layup or
17 a turnover than the missed half-court shot at the
18 buzzer.

19 It's true that the missed half-court shot at
20 the buzzer would, in one sense, contribute
21 significantly, in that it was a but-for cause. If the
22 shot had been made, the outcome was -- would have been
23 different.

24 But if you're talking about significant
25 contributions to a bad result, you'd more likely to

1 focus on errors that could or -- and should have been
2 avoided, not simply the failure to accomplish something
3 that's extraordinarily difficult.

4 JUSTICE KAGAN: Can I ask a question?

5 JUSTICE KENNEDY: Is part your -- your
6 answer to Justice Kagan's question and Justice Scalia's
7 question that it depends on the time point, at the time
8 at which you measure? That is to say, if you take a
9 look at a State which, for 5 years, has been trying to
10 ameliorate pollution, you can measure it from the point
11 5 years ago; and if you do that, then they're not having
12 to contribute more.

13 MR. STEWART: I --

14 JUSTICE KENNEDY: Or don't you like that
15 answer?

16 MR. STEWART: I don't -- I don't quite want
17 to go there. I think there's a kernel of truth in
18 there -- in that, but that the point at which the
19 State's significant -- the point at which the State's
20 good neighbor obligation is triggered is by the
21 promulgation of a new National Air -- Ambient Air
22 Quality standard.

23 And the State is required, within 3 years of
24 the promulgation of the NAAQS, to promulgate a State
25 plan that includes good neighbor provisions for -- for

1 the particular --

2 JUSTICE KENNEDY: How far back -- how far
3 back do you go for the relevant NAAQ? 2006 or --

4 MR. STEWART: In this case, there are two
5 NAAQS that were implemented -- that were promulgated in
6 1997.

7 JUSTICE BREYER: Oh, '97.

8 MR. STEWART: One of them for annual
9 particulate matter and one of them for ozone; and then
10 the 2006 NAAQS was for 24-hour particular matter --
11 particulate matter, which is harder to achieve.

12 And -- and so when -- when we are asking
13 what are the States supposed to do, as of the time that
14 the new NAAQS is promulgated, the States don't exactly
15 get credit for what they have done in the past; that is,
16 they can't do less than they are supposed to do in the
17 future, simply because they have done a lot in prior
18 years to prevent pollution.

19 But the fact that sources within the State
20 have, in the past, installed various pollution control
21 devices or are using cleaner fuels, that may make it
22 easier for them to prevent significant contributions to
23 downwind nonattainment, going forward.

24 JUSTICE KAGAN: Can I ask a question?
25 Following up on Justice Scalia about the statutory

1 language and how you read it, I think -- you know, most
2 people, everybody, thinks that it's better to regulate
3 with attention to costs than to regulate without
4 attention to costs.

5 We have this -- our Trucking Association
6 decision, where we said, well, notwithstanding that
7 everybody agrees that regulating with attention to costs
8 is better, when Congress says the opposite, we have to
9 go with the opposite. And, there, we said Congress had
10 said the opposite because it had talked about protecting
11 the public health with an adequate margin of safety.

12 Now, I'm wondering, what does it take in a
13 statute to make us say, look, Congress has demanded that
14 the regulation here occur without any attention to
15 costs? In other words, essentially, Congress has
16 demanded that the regulation has occurred in a
17 fundamentally silly way.

18 MR. STEWART: Well, I mean in the case of the
19 NAAQS, I think it was -- it was not the case that
20 requiring EPA to establish the NAAQS without reference
21 to cause -- to cost, would cause a silly result; that is,
22 the Ambient Air Quality Standards were supposed to be
23 set based on public health criteria.

24 And the Court in -- in the same case, in
25 American Trucking, said that, of course, you can

1 consider costs in deciding what is the most efficient
2 and appropriate way to implement those NAAQS. And,
3 here, I take your point that, in order to conclude that
4 Congress barred consideration of costs at the
5 implementation stage, we would have to have very clear
6 language, and "significant contribution" doesn't do it.

7 And the other thing I would say, in addition
8 to the examples I've given of -- in common parlance, we
9 use "significance" to refer to ease or difficulty of
10 achievement. It's worth emphasizing that this is a
11 provision of law, and it's designed to help allocate the
12 responsibility among different actors for alleviating a
13 shared problem.

14 And, for example, suppose --

15 JUSTICE SCALIA: The problem is that that
16 allocation among different actors is done State by
17 State, and simply taking costs into account as
18 determining who will do what simply eliminates the --
19 the requirement that each State not be -- not be
20 required to do more than its share of the pollution
21 it's -- it's causing downstream.

22 It's the State-by-State requirement that
23 makes it very difficult to think that all Congress
24 wanted was the most efficient reduction of pollution, no
25 matter where that pollution came from. That's simply

1 not what the statute envisions.

2 MR. STEWART: I guess --

3 JUSTICE SCALIA: And maybe that'd be a
4 better statute. Maybe it shouldn't be State by State.

5 MR. STEWART: I mean, the first thing I
6 would say is we -- we can accept the premise that each
7 State should alleviate no more than its share, and there
8 still may be -- that each State should do no more than
9 its share, and yet, there still may be different ways of
10 determining what a State's fair share is; that is, one
11 way would be to determine which States had been the
12 greatest polluters in the past and say that, the more
13 pollution that had previously flowed from your borders,
14 the greater your reduction obligation in the future.

15 But another way would be to say, in order to
16 ensure that each of the States that have shared
17 responsibility for the problem in the past bears its
18 fair share, we will ask each State to undertake
19 commensurate efforts, as measured by the cost threshold.

20 For example, if it could be shown, somehow,
21 that the generation of electric power inherently
22 required the emission of some level of SO₂ and NO_x, that
23 there was simply no way to -- to generate electricity
24 through any technology known today, without
25 generating -- without emitting that minimum amount, I

1 think we would certainly say, well, Congress didn't
2 intend to bury in the good neighbor provision some
3 prohibition against particular States generating
4 electricity.

5 And EPA could -- EPA or the States could
6 reasonably determine that the unavoidable component of
7 the emissions, the part that couldn't be avoided, even
8 with the best possible pollution control technology,
9 that would be regarded as legally insignificant; that
10 the only legally significant contribution would be
11 contribution that could have been avoided.

12 Now, clearly, EPA has gone one step farther
13 because it hasn't just focused on emissions that
14 couldn't be avoided at all, at least with -- without
15 foregoing the generation of electric power. It has
16 said, we will treat as legally significant only the
17 extra increment of emissions that comes after we've
18 taken what we regard to be equitable and cost-effective
19 pollution control --

20 JUSTICE KENNEDY: Just one more question on
21 cost. In -- in your answer to Justice Kagan's question,
22 there is at least a possible argument that you, the
23 regulator, the government, the EPA, can take cost into
24 account, unless it's expressly prohibited from doing so.
25 You don't go that far.

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1 But you -- you even stop short of that. You
2 say that it might be difficult to apply the cost
3 rationale at the implementation stage? I -- I think
4 that's what you said, and if so, I didn't quite
5 understand.

6 MR. STEWART: I misspoke. What the Court
7 said in American Trucking is that in -- in setting the
8 NAAQS, EPA was forbidden to consider cost, not because
9 the statute said, in so many words, cost can't be
10 considered, but because the criteria that were set out
11 in the statute for what the NAAQS had to achieve simply
12 couldn't be reconciled with consideration of costs.

13 JUSTICE KENNEDY: I understand.

14 MR. STEWART: But the Court in the same decision said,
15 although you can't consider costs in determining what
16 the NAAQS will be -- what air quality standards have to
17 be achieved, of course, you can and should consider
18 costs in deciding what implementation measures should be
19 used to determine which emissions will be reduced.

20 JUSTICE SCALIA: If Congress wanted that,
21 why couldn't Congress simply have said, the EPA shall
22 prescribe minimum pollution reduction measures that have
23 to be taken by the States? That's a quite different
24 statute from what we have before us. But what you're
25 saying is -- you know, you -- you reduce it this -- this
26 much, as much as efficiency will allow, or else, you're

1 in violation of -- of the good neighbor rule.

2 And that's a very different statute from
3 what Congress wrote. Maybe it's a good idea. Maybe EPA
4 ought to control all -- all efficiency measures for
5 reducing pollution, but it's certainly not the statute
6 that Congress wrote.

7 MR. STEWART: Let me say three things in
8 response to that. The first is that, as I mentioned
9 before, the good neighbor provision is addressed in the
10 first instance to the States; that is, it's the State's
11 initial obligation to submit an implementation plan that
12 contains good neighbor provisions.

13 And so if the Court says costs can't be
14 considered in defining significant contribution, the
15 effect is not simply that EPA can't consider that factor
16 when it steps into the State's shoes. The effect is
17 that a State can't consider cost of achievement
18 in attempting, in good faith, to implement its own good
19 neighbor provision.

20 The second thing I would say --

21 JUSTICE SCALIA: Excuse me. I don't
22 understand that. Please say that again.

23 MR. STEWART: The good neighbor provision --
24 we're dealing here with a situation where EPA was the
25 one that promulgated Federal implementation plans, but

1 that's only because the States didn't -- the relevant
2 upwind States did not discharge their obligation to
3 implement State -- promulgate State implementation plans
4 that contain good neighbor provisions.

5 But the language "contribute significantly"
6 is in the portion of the statute that deals with what a
7 State plan is supposed to contain. It's not dealing
8 with -- it's not in a provision that, by its terms, is
9 addressed directly to EPA.

10 And so if the Court said, in defining
11 "contribute significantly," we can't take into account
12 the cost of emission control measures, that would mean
13 not simply that EPA can't consider that factor when it
14 steps into the State's shoes; it would also mean that
15 the State can't consider that factor.

16 JUSTICE SOTOMAYOR: Mr. Stewart --

17 CHIEF JUSTICE ROBERTS: Well, when you
18 mention the fact that the States didn't address the good
19 neighbor requirement -- of course, you hadn't come up
20 with their budgets that they had to meet at the time
21 that they had to promulgate their SIPs.

22 Now, at a different point in your brief, you
23 emphasize how incredibly complicated it is for States to
24 determine how much they must reduce their emissions to
25 take care of the fact that they significantly

1 contributed to downwind pollution.

2 And yet, you would impose on those States
3 the burden to issue the good neighbor program without
4 knowing how much you expect them to -- to meet.

5 MR. STEWART: Well, it's the statute that
6 imposes the obligation on the States. And it may help
7 to draw the Court's attention to the relevant
8 provisions. On page 1a of the appendix to the
9 government's opening brief, the relevant provision is 42
10 USC 7410.

11 And 7410(a)(1) begins by saying, "Each State
12 shall, after reasonable notice and public hearings,
13 adopt and submit to the administrator of EPA within 3
14 years or such shorter period as the administrator may
15 prescribe after the promulgation of a national primary
16 ambient air quality standard, the NAAQS." And then it
17 goes on to say, "A plan which provides for
18 implementation," and so forth.

19 And then, if you look to the bottom of -- or
20 to the top of page 2a -- I'm sorry -- subsection (2)
21 begins, "Each implementation plan submitted by a State
22 under this chapter shall be adopted by the State after
23 reasonable notice and public hearing. Each such plan
24 shall," and then if you look at the bottom of the page,
25 it says, "contain adequate provisions prohibiting,

1 consistent with the provisions of this subchapter, any
2 source or other type of emissions activity within the
3 State from emitting any air pollution in amounts which
4 will contribute significantly to nonattainment" --

5 CHIEF JUSTICE ROBERTS: So -- so if you were
6 working for one of the upwind States and you were facing
7 this 3-year deadline and EPA had not told anyone how it
8 intended to interpret the State's obligations under the
9 good neighbor policy, what would you have told the State
10 to do?

11 MR. STEWART: Well, certainly, EPA's basic
12 methodology of using -- using cost thresholds had been
13 embodied in the -- the NAAQS SIP call in 1998, and in
14 CAIR, which I believe was promulgated in 2006.

15 CHIEF JUSTICE ROBERTS: Right. So -- but
16 the head of the State EPA comes to you and says, how
17 much do we have to reduce our emissions to satisfy our
18 requirements? And you would tell them what?

19 MR. STEWART: We would tell them, in all
20 honesty, we don't know yet. But that -- that's not a
21 fatal flaw in the argument; that is, it is inherent in
22 any legal context in which one person acts and then a
23 second person reviews, that the first person has to act
24 before the second person has -- has made up his or her
25 mind.

1 And so a district court --

2 CHIEF JUSTICE ROBERTS: Well, but that kind
3 of glosses over the fact that, as you say elsewhere in
4 your brief, this is a -- is your analogy, right -- a
5 spaghetti matrix or something? And so there's no
6 possible way for the State to know how much of a burden
7 you expect them to address, and yet, you're saying,
8 well, you've got to do it, and you've got to do it
9 within 3 years, or we're going to take over the
10 responsibility.

11 MR. STEWART: Well, certainly, what EPA was
12 called upon to do was far more complicated than what any
13 particular State was going to be called upon to do
14 because, as a result of widespread noncompliance, EPA
15 was promulgating Federal implementation plans for close
16 to 30 States and plans for -- for different NAAQS.

17 The second thing I would say is that --

18 CHIEF JUSTICE ROBERTS: But could I address
19 the first thing first? I'm not sure that's right. I
20 think EPA has an easier job dealing with it as a group.
21 They say, look, here are these States, here's what you
22 have to do. But any individual State has no idea what
23 its particular role is going to be in your group
24 resolution.

25 MR. STEWART: Well, it certainly has the

1 data available to it that -- that EPA had available
2 about how much did each State contribute to the overage
3 at various nonattainer -- nonattainment receptors in the
4 past.

5 It's certainly true that the States wouldn't
6 necessarily know exactly what policy judgment EPA would
7 ultimately make as to what the right cost threshold was.
8 But --

9 JUSTICE SCALIA: Oh, but that's crucial. I
10 mean, it would have no idea whether EPA would use any or
11 would pick \$500 or would pick whatever. I mean, I don't
12 know how it could sensibly design a -- a program without
13 knowing that.

14 MR. STEWART: I guess the second -- the
15 other two points I would make are, first, the State's
16 role is to devise something, in this area, as in others,
17 that it believes will carry out its own legal
18 obligations, not necessarily to predict just how EPA
19 would do it if the task fell to EPA.

20 And so, for example, when the States are
21 undertaking a more -- the more prosaic task of devising
22 plans that will produce attainment of the NAAQS within
23 their own borders, they have to make a variety of policy
24 judgments about the right mix of emission controls, what
25 sources should be allowed to emit, in -- in what

1 amounts.

2 If a particular State just didn't do it,
3 that task would fall to EPA. And it's very unlikely
4 that anything the particular State would come up with
5 would exactly match what EPA would ultimately devise.

6 JUSTICE SCALIA: Can you give us an example
7 of when EPA has done this in the past, where a -- a
8 crucial element of a -- of a NAAQS has not been defined
9 by the agency, and yet, the agency, nonetheless,
10 requires the States to -- to put together their SIPs
11 without knowing what their target is?

12 And that's the problem here. What's your
13 best example of another case in which the agency said,
14 you -- you put together a SIP, and we're not going to
15 tell you what the target is.

16 MR. STEWART: Well, the examples I would
17 point to are in the brief filed by the -- the Respondent
18 States that are on our side of the case, who identify
19 examples of instances where States did successfully
20 comply with their good neighbor obligations and -- and
21 persuaded EPA that what they had done was enough.

22 JUSTICE SCALIA: Well, that just means it's
23 pin the tail on the donkey. Some States got the tail.
24 I mean -- you know, they pinned it in the right place.
25 That doesn't prove anything.

1 I want an example of another instance in
2 which EPA has -- has hidden the ball, has said, we're
3 not going to tell you what the target is, it's up to you
4 to come up -- up with a SIP, and we'll tell you after
5 the fact whether that SIP happened to meet the target
6 that we've invented.

7 MR. STEWART: I don't -- I wouldn't
8 characterize what EPA is doing as hiding the ball; that
9 is, it didn't kind of fail to divulge information that
10 it had its -- at its disposal.

11 JUSTICE SCALIA: All right. All right.

12 MR. STEWART: It released a great deal of
13 information at the time that the proposed rule was
14 announced in the -- the summer of 2010.

15 JUSTICE SCALIA: Okay.

16 MR. STEWART: But -- but I take your point
17 that -- the two additional things I would say, though,
18 are that, for better or worse, Congress did place this
19 obligation of the States. It evidently thought that, at
20 least in the mine run of -- of cases, States were
21 capable of carrying out this task.

22 And at least to the extent that adopting a
23 good -- a good neighbor provision requires consideration
24 of circumstances in other States, in a sense, this is
25 just the flip side of what the downwind States have to

1 do all the time; that is, if New York officials are
2 trying to determine, when a new NAAQS comes out, how can
3 we bring our own air quality into compliance? What
4 controls do we have to place on our own sources, in
5 order to get air quality to the desired level?

6 The New York officials have to take account
7 of the degree of pollution that is likely to travel to
8 their borders from other States. They can't analyze
9 emissions within their own borders in a vacuum. They
10 have to consider what the likely contributions of their
11 neighbors --

12 JUSTICE SCALIA: Yes. That just means
13 there's some facts that they don't know. Of course,
14 there are always going to be uncertainty about certain
15 facts. But here, there is uncertainty about the target,
16 not just about the facts. We don't know what target
17 we're expected to hit.

18 MR. STEWART: I guess the final thing I
19 would say on -- on this part of the -- this particular
20 sub-issue of the case is that, even if you reach that
21 conclusion, even if you determine that it was just
22 practically infeasible for any State to adopt a
23 compliant State implementation plan with good neighbor
24 provisions for these NAAQS until EPA acted, then the
25 proposition of the opposing States still wouldn't

1 follow; that is, the statute in the provisions that I've
2 pointed to says it's up to the States in the first
3 instance to devise the State implementation plans,
4 including good neighbor provisions.

5 And then, on page 10a of the same
6 provision -- of the same appendix, I'm sorry -- the
7 statute describes what happens if a State fails to
8 satisfy that obligation.

9 And this is at the beginning of subsection
10 (c) (1) on page 10A, it says, "The Administrator shall
11 promulgate a Federal implementation plan at any time
12 within 2 years after the Administrator finds that a
13 State has failed to make a required submission or finds
14 that the plan or plan revision submitted by the State
15 does not satisfy the minimum criteria."

16 And --

17 JUSTICE SOTOMAYOR: Mr. Stewart, below, the
18 government conceded that there was a theoretical
19 possibility that some States could be overcontrolled,
20 that they would be implementing measures that would
21 reduce their contributions to pollution below the one
22 percent. Assume that -- I think there's a theoretical
23 possibility of that -- but that your approach was
24 basically fine.

25 What would we do about that? First of all,

1 are there measures States can take to get out of the
2 FIP, if it's inappropriate to them, because of
3 overcontrol? And if not -- and how do they do it? I
4 mean, what's the process?

5 If we think there's a flaw, do we vacate the
6 rule? Do we leave it in place? What do we do? And
7 what -- and what's our power to do it?

8 MR. STEWART: I mean, I think, in the
9 circumstance you describe, if you reach the conclusion
10 that there was a theoretical possibility that this could
11 happen and that it would be a problem if it did, but
12 that the methodology used by EPA was, on the whole,
13 rational, I think the task for the Court at this stage
14 of the case is to rule on the more big picture
15 objections that are properly before it and -- and that
16 the court of appeals ruled on.

17 Now, even if we win everything that's at
18 issue in this Court, the case is not over. There are a
19 variety of more specific challenges to the details of
20 the rule that the D.C. Circuit found it unnecessary to
21 address. And so, if we won on the issues that are
22 before the Court, the case would be remanded, and there
23 would be an opportunity for the court below to consider
24 those.

25 And to the extent --

1 CHIEF JUSTICE ROBERTS: Including --
2 including the overcontrol argument? Or would that have
3 been done?

4 MR. STEWART: Well, to -- to the extent that
5 any State had -- and I don't know the -- the pending
6 as-applied challenges at this level of detail. But to
7 the extent that any State has a properly preserved
8 challenge to the effect that it is actually likely to be
9 subject to overcontrol, then that could be heard by the
10 court of appeals.

11 The court of appeals could determine both
12 whether that is, in fact, likely to happen and whether,
13 if it does happen, that would render the rule arbitrary
14 and capricious as to that State.

15 But the -- the real problem with the court
16 of appeals methodology was that it said the fact that
17 EPA can't absolutely rule out the possibility that it
18 might happen renders the rule invalid on its face, and
19 in other portions of the opinion, the court faulted EPA
20 for failing to ensure that its regime would not lead to
21 overcontrol.

22 And I think that's an extraordinary standard
23 for an administrative agency to deal with; that is --
24 you know, it happens all the time that Federal agencies
25 are given authority to regulate -- to address one

1 problem, and the regulation necessarily has spillover
2 effects on other conduct.

3 And so, for instance, if a Federal agency
4 was tasked with preventing the sale in interstate
5 commerce of contaminated food, it might require
6 inspections, it might require the recall of food after
7 one item in a shipment had been shown to be
8 contaminated. These measures might have spillover
9 effects on food that was not, in fact, contaminated.

10 But that wouldn't be a flaw in the rule. Of
11 course, an agency could go overboard and impose a regime
12 that was so onerous in comparison to the health benefits
13 that it was arbitrary and capricious.

14 But nobody would ever say that it's the duty
15 of the agency to ensure that there is no other means of
16 achieving the same health benefits at lower cost to the
17 public.

18 The other thing that the States could do --
19 I mentioned that one way in which a State that believed
20 itself to be unfairly or inappropriately treated by the
21 rule was to pursue any adequately preserved legal
22 challenge it may have in the judicial proceedings.

23 And as your question indicated, there is
24 also a mechanism by which a State can ask to have the
25 Federal implementation plan replaced by a plan of its

1 own devising.

2 And so the consequence of the State's
3 failure to achieve their good neighbor obligations in
4 time and EPA's stepping into their shoes, that -- the
5 consequence was not that they're forever barred from
6 devising their own plans. The consequence was simply
7 that the Federal implementation plan would remain in
8 effect for a fairly limited period of time, subject to
9 replacement by a State plan.

10 JUSTICE SOTOMAYOR: If we were to rule
11 against you and affirm the decision below, how long do
12 you think it would take to get a new rule in place?

13 MR. STEWART: I don't have an estimate on
14 the time, but if the Court affirms on the ground that
15 EPA may not consider costs -- part of the problem -- I
16 think it would be an extraordinary undertaking for EPA
17 to try to achieve; that is, part of the difficulty here
18 is that nobody has identified a concrete alternative;
19 that is, a plan that would not consider costs and
20 that -- yet that would disperse the burdens of
21 compliance among the States in proportion to their prior
22 contributions and also would address the nonattainment
23 problem at all of the downwind receptors.

24 I don't know if it could be --

25 JUSTICE KAGAN: Could you explain that to

1 me, Mr. Stewart? Because are you saying that the
2 straight proportionality approach that was applied in
3 the D.C. Circuit, are you saying that that's impossible?
4 Or are you saying it's complicated and dumb?

5 MR. STEWART: What -- at least what we
6 understand to be the straight proportionality approach
7 is impossible; that is, it might be possible with
8 respect to any particular downwind receptor because you
9 could say that, if one upwind State is contributing two
10 units and another four and another seven, the
11 proportional solution might be to require that any
12 necessary reduction would be in those proportions.

13 One State would do 2/13ths of the reduction,
14 another would do 4/13ths of the reduction, and another
15 would do 7/13ths of the reduction. That would be
16 theoretically possible, with respect to any receptor.
17 But with respect to another receptor, the same States
18 might be contributing in entirely different proportions,
19 and so there would be no way of devising a solution that
20 would be proportionate as to both.

21 JUSTICE SCALIA: I suppose you could average
22 them out, couldn't you?

23 MR. STEWART: You might be able to average
24 them out.

25 JUSTICE SCALIA: I don't think that's any

1 more irrational than picking a number like 500 bucks
2 as -- as to -- you know, what the -- who can do it more
3 efficiently. That's sort of arbitrary.

4 MR. STEWART: Well, I mean, the purpose of
5 the cost threshold was not to increase or decrease the
6 total amount of reductions that would be necessary. It
7 would be to ensure that the reductions that had to take
8 place were done in the most cost-effective manner
9 possible. And part of the irony --

10 JUSTICE SCALIA: I understand that, but my
11 point is that is certainly a pretty -- pretty arbitrary
12 number, and -- and I think averaging for all the
13 receptors is certainly no more arbitrary.

14 MR. STEWART: Well, I think the cost
15 methodology is one that EPA had used often in the past.
16 Indeed, even before the term "contribute significantly"
17 was added to the statute in 1990, EPA had interpreted
18 the prior reading of the statute to allow relief for a
19 downwind State, if an upwind State was contributing
20 significantly to downwind pollution, and it had
21 interpreted that standard as allowing consideration of
22 cost and compliance burdens.

23 I mean, one of the ironic things about this
24 case is that the only ill consequence of overcontrol is
25 cost; that is, this is not a situation in which there is

1 some distinct public health benefit -- distinct public
2 health problem -- I'm sorry -- that is caused if power
3 plants are emitting too little NOx or SO2. The only
4 reason that people worry about overcontrol, about
5 reducing emissions more than they need to be, is that it
6 costs money.

7 And if that's the problem to be avoided, it
8 seems strange that EPA can't take account of costs in
9 devising a solution.

10 JUSTICE BREYER: Sir, I don't want you to --
11 finish your argument, if you had something to say on
12 what you started out with in describing the plan. You
13 said there are three aspects. The first aspect was you
14 cut out anyone -- any State that's contributing less
15 than one percent.

16 You said the second aspect was that you used
17 a metric of \$500 per ton of NOx reduced, and you applied
18 that to the States still in, and then you said there
19 were three, and you never got to three, and I want to be
20 sure you do, if you had that.

21 MR. STEWART: The third part of the process
22 is that, once each State's emissions budget has been
23 quantified, with respect to each State, the EPA
24 essentially divides up the emissions that are allowed
25 among the different power plants within the State's

1 borders. And the way that it does that is it gives
2 allowances to the various power plants that add up to
3 the total number of tons of pollutants that are allowed
4 to be emitted.

5 And it's important to emphasize that the
6 States have not joined the industry's argument here that
7 cost -- even the States on the other side of the case
8 have not joined the industry's argument here that
9 states -- that costs can't be considered.

10 Those States are not quarreling with the
11 methodology by which EPA quantified their State emission
12 budgets. Those States are simply saying that, once
13 those had been quantified, they should have been given
14 an opportunity to determine, on their own, how the
15 allowances should be allocated without EPA doing it
16 first.

17 In some situations, that might have been a
18 rational way for EPA to proceed; that is, the statute
19 says that once the -- once EPA finds that a particular
20 State has either failed to submit a good neighbor SIP or
21 has -- or EPA has disapproved the good neighbor SIP,
22 once that happens, the statute says that EPA, at any
23 time within 2 years, can promulgate its own Federal
24 implementation plan.

25 And in some circumstances, it might be

1 rational for EPA to wait the full 2 years and give
2 additional guidance to States, in order to give them
3 every opportunity to devise compliant plans. There
4 were basically two reasons that EPA didn't do that here.
5 The first is that it was subject to the D.C. Circuit's
6 mandate in North Carolina, which said get something in
7 place that works as soon as possible, and EPA felt
8 constrained by that to act as quickly as it could.

9 And the second point worth emphasizing is
10 that there are State sovereign interests on both sides
11 of the case. It's true that, by devising a Federal
12 plan, in the first instance, EPA has intruded to a
13 degree on the ability of the upwind States to decide how
14 emissions allowances should be allocated among their own
15 sources.

16 But the downwind States are subject to their
17 own obligations to comply with the NAAQS within their
18 own borders, and to the extent that they can't get
19 relief from the upwind States, their task is made more
20 difficult.

21 JUSTICE KAGAN: I'm sure I should know this
22 after reading all these briefs, but if we -- if we
23 reverse the D.C. Circuit, what would happen, going
24 forward? In other words, the States have had this time
25 to -- to go first and do their SIPs, then they were

1 found not to comply, so the EPA does its FIP.

2 But that's not the end of the game, is it?

3 I mean, isn't the EPA under a continuing obligation to
4 look at, review its NAAQS, to give the States further
5 opportunities to come back?

6 MR. STEWART: Yes. I mean, with respect to
7 the particular NAAQS that are at issue here, the
8 States -- it's unclear to what extent they've been
9 working on this in the interim, but the States certainly
10 could, even under the terms of the transport rule,
11 propose State implementation plans to replace the FIPs.

12 Now, it's to be contemplated that there will
13 be additional NAAQS implemented, and this Court's
14 decision would affect the way in which both the States
15 and EPA went about the business of determining how good
16 neighbor obligations should be carried out with respect
17 to those future NAAQS.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Mitchell, why don't you give us 30
20 seconds or so?

21 Mr. Mitchell.

22 ORAL ARGUMENT OF JONATHAN F. MITCHELL

23 ON BEHALF OF THE STATE AND LOCAL RESPONDENTS

24 MR. MITCHELL: Mr. Chief Justice, and may it
25 please the Court:

1 EPA's actions in this case have written the
2 States out of the Clean Air Act. EPA cannot impose a
3 good neighbor FIP on the States when EPA has left the
4 States completely in the dark about the meaning of the
5 phrase "contribute significantly."

6 EPA's approach requires the States to submit
7 SIPs that can only guess at how EPA will quantify their
8 good neighbor obligations under Section 7410(a)(2)(D).

9 CHIEF JUSTICE ROBERTS: Well, it's -- it's
10 certainly -- it's certainly hard, but it is what the
11 statute says; and it seems to me that, if EPA had taken
12 a different view, it would have been contrary to the
13 statute.

14 MR. MITCHELL: EPA's actions are unlawful
15 for several independent reasons. The first is EPA's
16 actions in this case represent an arbitrary and
17 capricious change in the way that the Agency has
18 interpreted the statute.

19 For 15 years, starting with the NAAQS SIP
20 call in 1998, EPA told the States not to submit good
21 neighbor State -- good neighbor SIPs before EPA had
22 quantified the State's obligations under (a)(2)(D). And
23 EPA repeated that stance numerous times, including in
24 the disapproval of Nevada's SIP that we cite on Pages 9
25 and 59 of our brief, and also in the sources that the D.C.

1 Circuit cites on pages 51, 52, and 56 of the Petition
2 Appendix.

3 EPA has now done a 180-degree shift, and
4 they have told the States that they are required to
5 submit good neighbor State -- SIPs before EPA has
6 quantified their obligations under Subsection (a)(2)(D).

7 JUSTICE BREYER: Well, they don't know
8 exactly how to do it. I mean, this is a tough problem.
9 So it sounds as if what you're making is a procedural
10 objection here, to which the government's point was,
11 you're right, we'd all been talking about this. We
12 wanted to see what the States would come up with, so we
13 look.

14 The States haven't come up with enough, in
15 our opinion; and so, now, we go to the Federal process,
16 and we put out our thing, and you comment on that. And
17 then, if you feel that their thing is no good, propose
18 your own solutions again. That's what he's saying.

19 But it's supposed to advance the ball. So
20 there is a procedure for the States to come in, if they
21 can come up with a better plan, that's what you've just
22 heard, and so do it. So what's -- what's arbitrary or
23 capricious about such a system?

24 MR. MITCHELL: Because that's the approach
25 EPA rejected in the NAAQS SIP call.

1 JUSTICE BREYER: Well, they objected it
2 once. Now, they think it works here. I mean, all the
3 time it happens, that people change their minds about
4 how problems are best solved, or they cite this
5 problem's better solved one way and better another way.
6 So if your only point is, once they did it a different
7 way, they'll say, well, what's unreasonable about
8 changing our way? We're trying to get the job done.

9 MR. MITCHELL: EPA is allowed to change
10 their interpretation of the statute, but if they're
11 going to do that, they have to acknowledge, in the
12 transport rule, that they're abandoning the prior
13 construction of the statute --

14 JUSTICE BREYER: Well, years and years, the
15 neighbor board -- the labor board decided things in
16 adjudications, rules. One day, they say, no, we think
17 we should preside rulemaking processes, like other
18 agencies. Does anything in the law prevent that?

19 MR. MITCHELL: No, they're not prevented
20 from making the change, but the arbitrary and capricious
21 standard --

22 JUSTICE SOTOMAYOR: But you're not prevented
23 from giving a counter SIP, is what they were being told.
24 You can -- you can counter, is what the government is
25 saying, and so it's not clear, to me, that they've

1 estopped you from doing your own SIP.

2 MR. MITCHELL: But we can propose and submit
3 the SIP only after the FIP has already been imposed on
4 States.

5 JUSTICE SOTOMAYOR: So what's the
6 difference? If you think they're wrong, you give a
7 counter SIP, and you duke it out with them in terms of
8 what you think -- where you think they are wrong as
9 applied to you.

10 But let me ask you something fundamental
11 about this. Are you challenging the transport rule
12 using cost? Or are you just challenging the process in
13 which that was achieved? Because, if I understand all
14 the amici briefs and the theory of this, not even you
15 would want a command-and-control regulation; is that
16 correct?

17 MR. MITCHELL: We do not have a position on
18 the question of whether EPA can consider costs.

19 JUSTICE SOTOMAYOR: It'd be crazy if they
20 didn't, right?

21 MR. MITCHELL: We represent a coalition of
22 States --

23 JUSTICE SOTOMAYOR: Right. And for some of
24 them, it would really be a bad idea, wouldn't it?

25 MR. MITCHELL: There's simply no consensus

1 among the States on that question.

2 (Laughter.)

3 MR. MITCHELL: So we are remaining agnostic
4 on that point.

5 (Laughter.)

6 JUSTICE SCALIA: Can I ask, until you
7 propose your SIP to replace the FIP, right, the FIP
8 remains in effect?

9 MR. MITCHELL: Yes.

10 JUSTICE SCALIA: And you're bound by that
11 until they approve your new SIP. How long does such a
12 transaction normally take?

13 MR. MITCHELL: It depends. It really does.
14 We don't know exactly what our obligations are.

15 JUSTICE SCALIA: You think that's a quick
16 process? I mean, as soon as --

17 MR. MITCHELL: No, it takes months. And --

18 JUSTICE SCALIA: If you'll have to develop a
19 new SIP, that'll take you some time?

20 MR. MITCHELL: Yes.

21 JUSTICE SCALIA: And then that SIP is -- is
22 submitted to EPA, and -- and they chew on it for as long
23 as they want, right?

24 MR. MITCHELL: Yes.

25 JUSTICE SCALIA: And then maybe they will

1 say, your SIP is good enough, and maybe they won't.

2 MR. MITCHELL: Right. We're still waiting
3 for EPA to decide on the SIP that we submitted to
4 implement the good neighbor obligations for the 2006
5 particulate matter standard.

6 JUSTICE KENNEDY: But at least if you've
7 adopted a SIP or proposed a SIP, you've given reasons,
8 you have a -- you have a rational plan, and the EPA then
9 must give a reasoned response to it; whereas, if the EPA
10 is the first one, they're writing on a blank slate; and
11 it seems to me that, in some respects, the EPA is more
12 constrained under this process to which you object.

13 MR. MITCHELL: Well, it's still an unlawful
14 use of the FIP authority for several reasons -- and this
15 gets back to Justice Breyer's question, why is this
16 unlawful? And there are several reasons.

17 The first is that EPA has changed its
18 interpretation of the statute, and the key language from
19 the NAAQS SIP call appears on Pages 57,368 through 370,
20 where EPA tells the States, we don't want you to submit
21 good neighbor SIPs that simply take a guess at what you
22 think the good neighbor obligations are, we will
23 quantify your obligations in a rule first and then --

24 JUSTICE SCALIA: And that means the statute
25 doesn't require you to do that, I assume.

1 MR. MITCHELL: The statute --

2 JUSTICE SCALIA: I mean, when they say that,
3 that -- that's an affirmation by them that the statute
4 does not require you to do it, I assume. Is that your
5 point?

6 MR. MITCHELL: Not only that, they said, in
7 the NAAQS SIP calls, that they are adopting an
8 interpretation of the statute that prohibits us from
9 doing that, that the interpretation of the statute that
10 EPA adopted is that EPA, and only EPA, is the
11 institution that is charged with the responsibility of
12 quantifying a State's good neighbor obligations.

13 The States had argued for a different
14 approach back in 1998. We wanted to have the
15 prerogative to decide what the good neighbor obligations
16 mean; and EPA said, no, we are the sole entity with that
17 prerogative, and you need to wait until we issue a rule
18 that quantifies your obligations.

19 EPA has now changed that approach without
20 explaining or acknowledging in the transport rule that
21 they were abandoning their earlier interpretation of the
22 statute.

23 JUSTICE SOTOMAYOR: But they were doing that
24 with respect to the NAAQS. I thought that was them
25 saying they had to quantify the NAAQS.

1 MR. MITCHELL: What they said on a NAAQS SIP
2 call was they have to quantify the good neighbor
3 obligations. They have to tell the States what it means
4 to contribute significantly to another State's air
5 pollution.

6 And that leads to a second statutory problem
7 with this regime in the transport rule. The States have
8 the prerogative, under the Clean Air Act, to do what the
9 Federal minimum requirements are for clean air and to go
10 no further.

11 EPA's approach here requires the States,
12 when they submit or propose SIPs, and they have to take
13 a wild guess as to what their good neighbor obligations
14 are, it effectively compels the States to overcontrol
15 and overregulate because, if they want EPA to approve
16 the SIP and they don't know what their good neighbor
17 obligations will be, they have to overshoot and
18 overcontrol and overregulate or risk that EPA will deny
19 their SIP and impose a FIP on the State.

20 And what EPA is essentially doing is telling
21 the States that, if you want to do only what the Federal
22 floor requires and to go no further, the price of that
23 is that you have to accept an EPA-imposed FIP that
24 defines those obligations, rather than giving the State
25 the opportunity to distribute regulatory burdens in a

1 SIP as it sees fits.

2 JUSTICE KAGAN: Mr. Mitchell, I might just
3 not be understanding you, but this goes back to the
4 Chief Justice's question. The statute says, look, after
5 these standards are originally promulgated, the State
6 gets 3 years to make its best pitch, and then the
7 administrator shall promulgate a FIP at any time within
8 two years after that.

9 Now, presumably, there are lots of
10 conversations that can happen between the EPA and the
11 States during those 5 years, and maybe, sometimes, more
12 of those conversations happen and, sometimes, less of
13 those conversations happen. But I don't see that as
14 different constructions of the statute.

15 It seems to me, as the statute sets up its
16 framework, you go first, do it within 3 years; then the
17 EPA goes, it has to do it within 2 years. The EPA just
18 has very substantial discretion under this statute as to
19 what kinds of conversations it wants to have when,
20 within that broad structure.

21 Why am I not reading it right?

22 MR. MITCHELL: I agree that the EPA has that
23 discretion. The problem is that, in the NAAQS SIP Call
24 in 1998, they asserted exclusive interpretative
25 authority over subsection (a)(2)(D), which is the good

1 neighbor provision of the Clean Air Act. And they said
2 that EPA is the institution might quantify the States'
3 good neighbor obligations. Until EPA fills in the
4 blanks and tells the States what this "contribute
5 significantly" phrase means, it's an empty requirement.

6 EPA could have taken a different approach in
7 the NAAQS SIP Call. They could have told the States,
8 you can take the first crack at defining what
9 "contribute significantly" means, and we'll review your
10 submission and approve or disapprove it. But what they
11 said, 15 years ago, was that the States need to wait for
12 EPA to quantify the obligations in a rule.

13 Once EPA asserts that exclusive interpretive
14 authority over the provision, the States have no
15 obligation to guess at what EPA might do in the future,
16 when they submit the SIP. And that leads to a second
17 independent problem with EPA's transport rule because
18 EPA had no authority to impose Federal implementation
19 plans for the 1997 standards on the 22 States that
20 already had EPA-approved SIPs in place for those
21 standards.

22 EPA --

23 JUSTICE SOTOMAYOR: Haven't some States
24 already challenged that? Isn't that pending below? Why
25 should we be looking at that issue here, when States

1 have challenged that?

2 MR. MITCHELL: Three of the States have
3 challenged their --

4 JUSTICE SOTOMAYOR: I don't know why the
5 rest didn't, but three of them have. So why should we
6 enter the fray anticipatorily? Isn't that an issue we
7 should wait and see what EPA says below?

8 MR. MITCHELL: The United States is
9 suggesting that we're somehow launching an improper
10 collateral attack because the States could have
11 challenged the earlier SIP disapprovals or earlier
12 findings of failure to submit --

13 JUSTICE SOTOMAYOR: No, no, no. This is a
14 very discrete question, that they've already approved
15 some -- some SIPs. Three States have already challenged
16 the fact that they shouldn't be required to meet a new
17 standard because they've already had an old standard
18 approved.

19 That seems, to me, a very discrete
20 challenge, and three States have undertaken it.

21 MR. MITCHELL: But those judicial
22 proceedings have been stayed, pending the outcome of
23 this proceeding.

24 JUSTICE SOTOMAYOR: Well, I don't know why,
25 but that's a different issue. Even though it has,

1 wouldn't it be more prudent for us to wait for that
2 administrative process to finish before we venture into
3 this question? That's my -- my point.

4 MR. MITCHELL: I don't think the Court
5 should wait because the issues that we're raising are
6 discrete from what's being challenged by those three
7 States in their separate proceedings. The arguments
8 we're making are that, first, EPA has no authority to
9 impose a FIP on the States before quantifying the good
10 neighbor obligations under (a) (2) (D); and, second, EPA
11 improperly invoked the corrections --

12 JUSTICE GINSBURG: And that's because --
13 because EPA did it that way -- you don't get that from
14 the statute. You get it from what EPA did in the first
15 round; is that right?

16 MR. MITCHELL: We're not relying solely on
17 the statute, Justice Ginsburg, that's correct. Our
18 argument is that EPA has changed its interpretation of
19 the statute from the NAAQS SIP Call to the transport
20 rule, without adequately acknowledging or explaining how
21 its new interpretation is consistent with the statute.

22 But we're also relying on the statute as
23 well because, as I mentioned earlier, (a) (2) (D) requires
24 the States to eliminate pollution that contributes
25 significantly to another State's nonattainment.

1 JUSTICE BREYER: But they may not know --
2 you know. They may not know. There's six States that
3 contribute to the seventh State's pollution, and how
4 much each State can cut back depends. It depends on
5 what it costs. It depends on how much they contribute.
6 It depends upon what the other States will do. It
7 depends upon where the wind blows, and that changes all
8 the time.

9 MR. MITCHELL: Right.

10 JUSTICE BREYER: So they have a tough
11 problem. They can't tell you exactly how much you
12 should cut back until they know what they have in mind
13 or what others have in mind for solving the problem. So
14 it sounds to me as if you're asking them to do the
15 impossible, and they'd had a very good reason for not
16 doing what they did before; namely, it would be
17 impossible here to have a -- or not actually impossible,
18 but very tough and very expensive.

19 So that's why, I gather, they went the way
20 they did. Now, I don't know anything in the law that
21 tells them that this statute was meant to force them to
22 proceed in a way that would either be hugely more
23 expensive and perhaps impossible.

24 What's your -- what's your reaction?

25 MR. MITCHELL: EPA has done this before. I

1 mean, with the CAIR FIPs when they first quantified the
2 States' good neighbor obligations, they gave the States
3 an opportunity to submit SIPs before the CAIR Federal
4 implementation plans would take effect.

5 And EPA agrees that the States have no
6 ability to guess accurately at how EPA will quantify
7 their good neighbor obligation. They can't --

8 JUSTICE SCALIA: Well, they have done the
9 impossible here, haven't they? I mean, they have the
10 transport rule. The only question is whether it should
11 have come out sooner or later, right? The only question
12 is whether it should have come out before the States
13 were obliged to submit their SIPs.

14 MR. MITCHELL: It's not impossible for EPA
15 to decide what "contribute significantly" means. That's
16 their job. They've asserted that prerogative. They can
17 choose any reasonable interpretation of that phrase.

18 JUSTICE SCALIA: You started to give us a
19 second statutory reason. I was really eager to see what
20 that was.

21 MR. MITCHELL: Yes, that's the Section
22 7410(k)(6) issue that we mentioned in the brief. EPA
23 had previously approved good neighbor SIPs for 22 States
24 that implemented the 1997 standards for ozone in
25 particulate matter. Once EPA approves a State's SIP, its

1 ability to impose a FIP on the SIP -- on that State
2 expires under the statute.

3 So EPA had a problem for those 22 States:
4 How would they be able to impose FIPs when they had
5 previously approved SIPs? EPA says, in the transport
6 rule, that they are going to invoke the corrections
7 power of (k) (6), and (k) (6) says that, if EPA determines
8 that a prior decision approving a SIP was in error, then
9 EPA --

10 JUSTICE SOTOMAYOR: Isn't that the issue
11 that the three States are challenging below, just that
12 discrete issue, about whether the EPA can call this a
13 corrective action or not? Isn't that entire issue being
14 determined in -- in those proceedings?

15 MR. MITCHELL: Well, it's not being
16 determined because the proceedings have been stayed.
17 But, yes, three States, Kansas, Georgia and Ohio, have
18 challenged --

19 JUSTICE SOTOMAYOR: But that issue is what's
20 at issue there, part of the --

21 JUSTICE SCALIA: Would you finish describing
22 the issue? I really didn't hear it.

23 MR. MITCHELL: EPA invoked its corrections
24 power under (k) (6), but (k) (6) says that a correction
25 must be made, quote, "in the same manner as," end quote,

1 the decision being corrected. EPA's approvals of the
2 earlier SIPs went through notice and comment.

3 Because of that, (k)(6) requires that the
4 corrections, likewise, go through notice and comment,
5 and the corrections here did not go through notice and
6 comment. There's no disagreement between the
7 Petitioners and the Respondents on that point.

8 And the United States tries to get out of
9 this problem by saying that they can use the good cause
10 exception to notice and comment rulemaking that's found
11 in the Administrative Procedure Act. That doesn't help
12 EPA at all because the requirement comes not from the
13 Administrative Procedure Act; the requirement to use
14 notice and comment comes from (k)(6).

15 It doesn't help EPA to rely on an exception
16 to a statute when the statute providing that exception
17 is not the statute that imposes the requirement.

18 JUSTICE KAGAN: Well, why can't -- this is,
19 of course, a statute on which EPA gets substantial
20 Chevron deference. Why couldn't we read that language
21 to essentially mean subject to the same procedural
22 requirements as the original?

23 MR. MITCHELL: Because that caveat does not
24 appear in (k)(6).

25 JUSTICE KAGAN: Well, it's not a caveat.

1 It's just a different understanding of what that
2 language means. I mean, you say it has to be in the
3 exact same -- in the exact same way they previously
4 acted, and I guess I'm saying it could mean subject to
5 the exact same procedural requirements.

6 Was that not clear? Might not have been clear.

7 MR. MITCHELL: I think your argument or
8 suggestion is that EPA could rely on the normal rule set
9 forth in the Administrative Procedure Act --

10 JUSTICE KAGAN: Whatever procedural
11 requirements constrained EPA when it approved the SIP,
12 those were the same procedural requirements that
13 constrained EPA when it's disapproved the SIP. But
14 we're just asking, are they -- you know, both are --
15 have to be subject to the same procedural requirements.
16 EPA can act differently, as long as they are acting
17 within that same set of rules.

18 MR. MITCHELL: We don't think that's a
19 tenable construction of (k)(6). I mean, (k)(6)
20 authorizes EPA to make corrections, but it says,
21 specifically, the corrections must be made in the same
22 manner as the decision being corrected. If the decision
23 being corrected went through notice and comment, the
24 corrections have to go through notice and comment as
25 well. If the decision being corrected went through

1 formal adjudication, then the correction must also go
2 through formal adjudication.

3 And EPA doesn't try to make that argument in
4 their brief about what (k)(6) means. They are just
5 trying to say that the good cause exception in the APA
6 to notice and comment rulemaking should carry over here,
7 and there's --

8 JUSTICE KAGAN: Well, I think that they are
9 trying to make that argument. They are saying, in the
10 initial version, we could have done it by notice and
11 comment rulemaking, or we could have done it if we had
12 good cause, so, too, when we reverse that initial
13 determination.

14 MR. MITCHELL: If that's what the statute
15 means, then (k)(6) doesn't constrain the agency much at
16 all because --

17 JUSTICE SCALIA: Well, I think -- I think
18 it would follow that if you did it for good cause to --
19 to apply the rule, you can do it for good cause to
20 abolish it, not that you can do it by rulemaking when
21 you adopt it and then used good cause when you -- when
22 you abolish it. It would seem, to me, to square with
23 the text.

24 MR. MITCHELL: The text says, "in the same
25 manner as."

1 JUSTICE SCALIA: "In the same manner"?

2 MR. MITCHELL: "In the same manner." So
3 it's looking back to the original decision and how it
4 was made. And it's the second reason we've provided
5 for why the D.C. Circuit decision should be affirmed.

6 Now, if the Court were to reach the (k)(6)
7 issue, there's also the question of whether the FIPs can
8 be severed because the (k)(6) argument doesn't -- I see
9 my time's expired.

10 CHIEF JUSTICE ROBERTS: You can finish your
11 sentence.

12 MR. MITCHELL: The (k)(6) argument doesn't
13 knock out all of the steps on -- standing alone. It
14 would require -- announces the severability question.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Mitchell.

18 Mr. Keisler.

19 ORAL ARGUMENT OF PETER KEISLER

20 ON BEHALF OF THE INDUSTRY AND LABOR RESPONDENTS

21 MR. KEISLER: Mr. Chief Justice, and may it
22 please the Court:

23 The private party Respondents are focused on
24 the statutory limitations to the EPA's authority under
25 the good neighbor provision. And I'd like to begin by

1 addressing the issue that my friend from the government
2 focused on a lot, which is the use of cost, and to
3 explain not only what we think the statute requires in
4 this regard, but why, Justice Kagan, it would be neither
5 silly nor dumb; or, Justice Sotomayor, crazy to read the
6 statute the way we suggest.

7 And we begin with the text of the statute,
8 which authorizes the prohibition only of amounts that
9 contribute significantly to nonattainment or interfere
10 with maintenance in downwind locations. The focus of
11 that language, we think, is quite clearly on the effects
12 of a State's emissions on other States and not on the
13 cost of reducing them.

14 What EPA has done here is assert that it has
15 the power to increase a State's reduction obligations
16 beyond what a focus on the effects of its emissions
17 would require, simply because EPA has decided that it
18 would be reasonably affordable for that State to bear a
19 higher burden.

20 And what that means is that States here
21 which are making only a very slight contribution to air
22 quality problems in downwind States are nonetheless
23 required to make very substantial reductions, in many
24 cases, far more than States that are making far greater
25 contributions to poor air quality in the same downwind

1 locations.

2 There is no relationship at all, under the
3 EPA's methodology, between the amount a State
4 contributes and the amount it has to reduce because the
5 entire driver is cost. Mr. Stewart said that cost was
6 one component. It's not one component. It is the
7 entire driver --

8 JUSTICE BREYER: Why is it wrong? That is,
9 I focused on your argument here in the briefs, which is
10 very clear and very good. And -- and the example that
11 comes to my mind is we have an overgrazing problem in
12 State A. All right?

13 It's caused because cows come in from State
14 B and sheep come in from State C. The cow men and the
15 sheep men are in different States. They're not friends.

16 (Laughter.)

17 JUSTICE BREYER: Now, it turns out -- it
18 turns out that EPA, which is in charge of preventing the
19 overgrazing, discovers that, if the sheep men build a
20 fence, that will cure the problem, even though they only
21 contribute half or maybe less.

22 Well, if we bury it -- you know, we divide
23 it equally, you each have to pay -- you each have to
24 cause half the problem because that seems fair, it's
25 going to end up that the people in State A with the

1 cows, they're going to starve to death.

2 So our choice is between taking two people,
3 two States, each of whom cause half the problem and
4 getting an overall plan where you solve the problem at
5 minimal cost or just dividing it 50/50, which seems fair
6 in mathematics, but leads to starvation, cost and death,
7 et cetera. Do you see what I'm driving at?

8 And that's what they've done here, the
9 second method. They -- rather the -- they're not
10 treating each State alike, you are right. And the
11 reason that they're not treating each State alike is
12 they know, one, all the States are partly responsible in
13 more than one percent, and with this plan, we get the
14 job done at much lower cost.

15 Now, where in the statute does it say they
16 can't do that?

17 MR. KEISLER: I'll try to respond to that --
18 that fully, Justice Breyer. Certainly, it is the case
19 and we would acknowledge that there are always going to
20 be legitimate policy arguments in favor of the least
21 cost, most efficient solution to any problem.

22 But we would also say that there are
23 countervailing policy arguments at issue here, and we do
24 believe the statute sides with those countervailing
25 policy arguments. And the countervailing policy

1 arguments here are focused on the fact that, in Your
2 Honor's hypothetical, where there's one State that it
3 would cost more to reduce and another State it would
4 cost less.

5 The only scenario in which you get a
6 different result under the EPA's approach and our
7 approach is where the State that would cost more to
8 reduce is, in fact, contributing a lot more to the
9 downwind State's air problem than the other State.

10 And for several reasons, we think when the
11 statute looks at that issue and asks the question of
12 whether EPA should have the authority to force the State
13 which is, in fact, contributing less to nonetheless
14 reduce more simply because it's costly, we think there
15 are at least three reasons why the statute embodies the
16 policy choice that says, no, the State that contributes
17 more, reduces more; the State that contributes less,
18 reduce less.

19 The first is the one that I mentioned at the
20 outset, which is the statutory text, which we think
21 quite clearly is focused on the effects. "Significantly
22 contribute to nonattainment or interfere with
23 maintenance in downwind locations."

24 But the second is the whole structure of --

25 JUSTICE SCALIA: Amounts significantly

1 attribute, right? It's -- it's amounts.

2 MR. KEISLER: Amounts -- correct -- that
3 significantly contribute.

4 JUSTICE SCALIA: Yes, yes. Not conducts
5 significantly.

6 MR. KEISLER: No, that's right. And I don't
7 think the word "significantly" can bear the weight that
8 Mr. Stewart places on it. It modifies the words
9 "contribute to nonattainment." So it's about the degree
10 of causal contribution. And it doesn't modify, at all,
11 the phrase "interference with maintenance," and they've
12 used the same cost methodology to implement that as
13 well.

14 But the second, beyond the text, the whole
15 structure of the Clean Air Act is focused on treating
16 the States as separate entities, which are responsible
17 for the emissions that happen within their borders and
18 the effect that those emissions have on other States.
19 That's why this is in a SIP, rather than some general
20 EPA regulation, and that's why the language of the
21 statute is what it is, amounts of emissions within a
22 State.

23 And in this regard, I think it's --it's
24 telling that, in the reply brief, what the government
25 said was that it believes it has the kind of authority

1 here to consider cost that would be considered by a
2 chancellor at equity in a nuisance case. A chancellor
3 at equity in a nuisance case had private party
4 defendants before him or her. And so, of course, they
5 were allocating burdens on the basis of equity and
6 efficiency and all the kinds of things a common law
7 chancellor can take into account.

8 The EPA has before it separate States, with
9 separate responsibilities, who have a long, historic
10 role and responsibility of enforcing emissions control
11 procedures within their border, and Congress could
12 rightly or reasonably at least have concluded that it
13 didn't want EPA to have the same authority to shift
14 costs and efficiency and equity around among different
15 States to require --

16 JUSTICE BREYER: On that point -- now, you
17 remember, please, that -- that my cow/sheep example was
18 meant to pick up precisely the disproportion that you're
19 talking about. And -- and keep that in mind because I
20 found it a helpful example.

21 Now, my point is, did you find in
22 Congress -- and I'm interested in legislative history --
23 did you find anything in the legislative history that
24 suggests that, where the EPA faces this kind of regional
25 problem, and it's a regional, not just a statewide

1 problem, that people in Congress thought they had an
2 answer or a glimmer of an answer, as opposed to taking
3 this language, which is pretty open, and saying, we're
4 going to leave it to -- we don't know, we don't have a
5 clue. The EPA is there to figure this thing out, and
6 we're giving them a broad authority here.

7 Is there anything that cuts on your side
8 that you see, as opposed to the other side of reading
9 this language?

10 MR. KEISLER: I think there's one thing I
11 can cite, Your Honor, and that is that the statutory
12 history in this case is that the predecessor version to
13 what we currently have before us simply said that States
14 were required to prohibit the amounts which prevent
15 attainment or maintenance, no word "significantly," just
16 prevent attainment or maintenance. I think, certainly,
17 looking at that language, there's nothing in there that
18 would suggest that costs can be taken into account.

19 What Congress said in the committee report
20 in 1990, when it added the words "significantly
21 contribute to nonattainment and interfere with
22 maintenance," was that it was doing that precisely
23 because it recognized that this was a provision that
24 addressed causation of bad air quality effects because
25 what it was doing was not introducing some new element

1 of cost, but relaxing the causation standard, saying it
2 shouldn't be something like but-for causation, where the
3 question is just does it prevent attainment or maintenance.
4 It's enough if it contributes significantly to
5 nonattainment or interfere.

6 JUSTICE KAGAN: So, Mr. Keisler, I mean, you
7 have a statute here that clearly does not have any
8 language about no costs allowed, that also does not have
9 what the American Trucking Association statute had,
10 which was like public health only, sufficient margin of
11 safety; right? So none of that. What you have is
12 exactly what you said. You have a statute that focuses
13 on causal contribution, right?

14 So this is a hard problem, right?
15 Because -- I mean, let me just sort of give you a
16 numerical example, which I'm sure is as simplistic as
17 the other numerical examples floating around this case.
18 But -- you know, let's say that the standard is a
19 hundred. And there's a State that has 120, and there
20 are two States, X and Y, that have each contributed 20.
21 Right.

22 So we -- you know, we only need 20 of those.
23 We have 40. And the question is how do you get from
24 those 40 to those 20? The D.C. Circuit would just say,
25 well, we take 10 from each. But if this -- if the

1 question is only about causal contribution and that's
2 all that the statute talks about, there have to be other
3 ways we can make that determination of what contribution
4 each should be legally responsible for, right?

5 And what the EPA said here was, we're going
6 to distinguish between -- we're going to distinguish
7 between States that have -- have put a lot of technology
8 and a lot of money into this already and, on the other
9 hand, States that have lots of cheap and dirty
10 emissions. And why isn't that a perfectly rational
11 thing to do under this very statute?

12 MR. KEISLER: Well, first of all, I think,
13 in the example that Your Honor gave, where you had the
14 two States and should they be each reduced to ten, the
15 reason in favor of doing it that way, from a statutory
16 perspective, is that that then gives a consistent
17 application to the same causal language in the statute,
18 which means that the same causal effect from one upwind
19 State on a downwind State isn't significant if it comes
20 from Indiana to Delaware, but insignificant if it comes
21 from Tennessee; and that, when the statute says that
22 States must prohibit the amounts they significantly
23 contribute, then the more they contribute, the more they
24 reduce.

25 So we see that as fitting much more securely

1 within the statutory language than the kind of shifting
2 that Your Honor mentioned. Certainly, one could
3 imagine, since the policy rationales that are behind
4 Your Honor's question are certainly legitimate and more
5 than plausible, certainly, one could imagine a statute
6 that Congress could have written, which would have said,
7 treat it as national playing field, ignore the fact
8 that there are State boundaries, think about what the
9 most efficient way to force reductions to achieve
10 attainment in downwind locations, locate those
11 reductions in the least cost areas, and impose those on
12 the States.

13 Surely, if that was what Congress had
14 intended, it wouldn't have written the statute which
15 directs each State to include in its SIP provisions
16 that --

17 JUSTICE SOTOMAYOR: Do you battle
18 Mr. Stewart's point that Congress surely didn't intend
19 to shut down these plants if they didn't or couldn't
20 feasibly reduce their contributions?

21 MR. KEISLER: Yes, Your Honor, but we think
22 the statute --

23 JUSTICE SOTOMAYOR: So if they couldn't
24 feasibly do it, doesn't the words "significantly
25 contribute" have to take into account, in some way, the

1 cost of reducing the amount?

2 MR. KEISLER: Your Honor, I'm here on behalf
3 of industry and labor, so certainly, we believe that
4 there have to be mechanisms to deal with the kinds of
5 problems that Your Honor just identified, but we don't
6 think they come out of defining the amounts that
7 significantly contribute to nonattainment. We think
8 that those kinds of considerations come into play
9 elsewhere in the process.

10 In the American Trucking case that's been
11 referred to, the Court said that, when States are
12 implementing the requirements of the EPA, for example,
13 by deciding to allocate among different sources what
14 the -- how the reduction would be distributed, they can
15 take costs into account. And there are other mechanisms
16 in the SIP process when that definition of what amount
17 significantly contributes is then translated into an
18 emission reduction obligation.

19 We do think there are occasions, and we've
20 noted them in Note 17 of our brief, where the State in
21 then formulating its SIP can say, okay, this is the
22 amount we have to reduce, but we're going to do it in
23 this way because costs have to be taken into account.

24 But that is a very different matter from
25 saying that EPA, in defining what amounts significantly

1 contribute, can do the same thing. And the reason it's
2 different -- the reason it's not just, oh, you know, we're
3 locating it in some different box what EPA wants to do
4 in its box, is that the box that we're locating it in
5 makes clear that it functions as the kind of break Your
6 Honor described.

7 If something is unfeasible or economic,
8 there are ways to soften it out at the --

9 JUSTICE SOTOMAYOR: Well, they found a way
10 to do that with the cost tradeoff with the cap and trade
11 system --

12 MR. KEISLER: Well --

13 JUSTICE SOTOMAYOR: -- because the industry
14 itself can make that choice, with the State, presumably.
15 They're not stopping a SIP that stops a State from
16 participating.

17 MR. KEISLER: Well, the trading presents
18 unique issues under this statute. We support trading
19 anywhere it's appropriate, but this is a statute which
20 is focused on providing relief to downwind States. And
21 if -- to take my other example, if Indiana is
22 contributing emissions into Delaware that hurt its air
23 quality, it does no good for Delaware if Indiana
24 purchases allowances from Tennessee, which isn't
25 contributing into Delaware.

1 JUSTICE BREYER: Yes, but you're -- I mean,
2 you want me to write -- look what I would have to write,
3 if I made it very specific. Two units floats over the
4 air from the cow State. Two units floats over the air
5 from the sheep State -- or three.

6 It happens that, if we treat them alike,
7 we're going to tell the cow State, your unit is the same
8 as the sheep State's unit, both make the same
9 significant contribution, and we have to say that, even
10 if for you to remit your unit causes death and
11 destruction, destroys your economy, see, and I have to
12 write those words to accept your argument, don't I?
13 Because --

14 MR. KEISLER: I'd like to resist the role
15 Your Honor --

16 JUSTICE BREYER: Of course.

17 MR. KEISLER: -- has assigning me of bringing
18 death and destruction and starvation.

19 (Laughter.)

20 JUSTICE BREYER: Well, I'm trying to use the
21 most -- I'm trying to use the most extreme words I can,
22 so that, then, you will either have to draw a
23 distinction or something. That's why I'm --

24 MR. KEISLER: But in some ways, the
25 distinction is the one I was drawing in response to

1 Justice Sotomayor's question, which is that, when you
2 get down to the level of implementing these things, you
3 can take into account whether death, destruction,
4 starvation will be taken care of, when the State is
5 doing that as part of a SIP process.

6 But that doesn't bear on how the amount of
7 significant contribution is defined because, when EPA
8 takes costs into account it's not simply preventing the
9 death and destruction and starvation. It's working the
10 other way, too.

11 It's saying that, even though a causation
12 standard only would require you to reduce this much, we,
13 the EPA, can shift to you an additional burden because
14 we think another State has already done enough.

15 JUSTICE SOTOMAYOR: They say that's not a
16 theoretical possibility, under the numbers they've
17 worked out. So why isn't this taken care of in the
18 process that permits individual States to challenge this
19 as applied?

20 MR. KEISLER: Let me make a distinction in
21 that regard, Your Honor, which is what the government
22 says is a theoretical possibility is simply whether a
23 State would be driven below the one percent threshold.
24 But what I'm saying really goes back to Justice Scalia's
25 very first question, which is, even apart from the one

1 percent threshold, every time they are allocating on the
2 basis of cost and displacing what you would allocate on
3 the basis of what each State actually contributes, then
4 you are shifting burdens around, even apart from the one
5 percent.

6 JUSTICE KENNEDY: But you're -- you're
7 saying that "significant" must mean only measurable
8 amounts. It can't mean -- pick your word --
9 culpability, feasibility, responsibility, feasibility.
10 One State finds it quite feasible, from a cost
11 standpoint, to reduce emissions by a factor of 10. The
12 other State is the -- Justice Breyer's example, finds
13 that it can't do it, except if it's a factor of a
14 hundred.

15 Can't you say that the contribution in one
16 case is more significant than the other, based on
17 feasibility? Maybe you can't.

18 MR. KEISLER: I don't think so, Your Honor.
19 I don't think that is a proper definition of
20 "significant," when it's modifying "contribution to
21 nonattainment."

22 Mr. Stewart --

23 JUSTICE SCALIA: It isn't contributions to
24 nonattainment. It's the word "amounts." The statute
25 prohibits activity within the State from emitting any

1 air pollutant in amounts which will contribute
2 significantly.

3 MR. KEISLER: We agree, Your Honor, and we
4 would emphasize that language as well.

5 JUSTICE SCALIA: Okay. Amounts are amounts.
6 I mean, it doesn't --

7 JUSTICE KENNEDY: But the word -- the word
8 "significantly" does import a judgmental component. I
9 think that's what the government is going to say. I
10 just wanted to ask you what --

11 MR. KEISLER: It's not a -- it's not a
12 limitless --

13 JUSTICE KENNEDY: Maybe they'll have a
14 better answer.

15 MR. KEISLER: I don't think that
16 "significantly" means that any factor that might be
17 deemed relevant in a broad policy sense can be imported
18 in. I think when you have a statute here which talks
19 about amounts that contribute significantly to
20 nonattainment or interfere with maintenance --

21 JUSTICE BREYER: All right. So there's an
22 ambiguity here because, I mean, when you use the word
23 "amounts," I think it does help you. Add the word
24 "amounts" to "significantly," and I think that Justice
25 Scalia's point might be -- he knows it better that I --

1 an amount is an amount. An amount is an amount. That's
2 what you want to say.

3 JUSTICE SCALIA: That's my point exactly.

4 (Laughter.)

5 JUSTICE BREYER: Yes. Yes. It is. And
6 then the -- the response is, well, not always because
7 you say, an amount, you're talking about a specific
8 amount coming out of a State, and is the one -- the cow
9 one, as significant as the sheep one. All right?

10 And that's, I think, where -- I think you
11 hit the nail as to what the issue is.

12 MR. KEISLER: Yes, and I guess our position
13 is that significant may have a range of meanings, but
14 it's not a limitless range of meanings. I think one
15 member of the Court once said the fact that yellow is
16 ambiguous doesn't mean it can mean purple.

17 And here -- you know, we don't think the range
18 of meanings in the context of this provision accommodate
19 the government's definition.

20 JUSTICE KAGAN: But, Mr. Keisler, the nature
21 of this problem is that there's an allocation issue.
22 It's not just everybody gets down to a certain threshold
23 level. It's there's a level, and we have to allocate.
24 And the question is, what are we going to allocate on
25 the basis of?

1 And the word "amounts" doesn't tell you what
2 you're going to allocate on the basis of. So there are
3 lots of different choices for what we can allocate on
4 the basis of.

5 We can just divide -- you know, and do it
6 all proportionally. We can take into account per
7 capita. We can take into account a State's population,
8 if we wanted to. Or we can take into account, as the
9 EPA did here, costs on the understanding that costs
10 reflect how much of an investment a State has already
11 made in pollution technology.

12 So the statute -- neither the word "amount"
13 nor anything else says anything about those different
14 methods of allocation, does it?

15 MR. KEISLER: I -- I disagree with that,
16 Your Honor. I think -- and -- you know, I don't focus
17 exclusively on the word "amount" or the word
18 "significantly." It's the entire phrase, "amounts that
19 contribute significantly to nonattainment or interfere
20 with maintenance," which I do think ten out of ten
21 people who weren't in this courtroom and hadn't read the
22 Clean Air Act, if you sat down and asked them, what does
23 it mean? They're talking about what the effect the
24 emissions in one state have on the other.

25 I don't think this is any more ambiguous in

1 referring to air quality effects as a standard than the
2 NAAQS statute at issue in American Trucking was in
3 talking about safety and health as a standard. It does
4 supply a content to what the EPA has to do, and that
5 content isn't cost. It's this air quality effect
6 standard.

7 CHIEF JUSTICE ROBERTS: What is -- what is
8 your answer -- do you have an answer to Mr. Stewart's
9 basketball hypothetical? I mean, I thought that was
10 pretty good. If you ask the coach what significantly
11 contributed to the loss, he's going to talk about the
12 missed layup, rather than the missed desperation throw,
13 even though, as far as amount, each was going to count
14 for two points.

15 Assuming one was within the --

16 (Laughter.)

17 MR. KEISLER: Well, it's very hard -- it's
18 very hard for me to translate the -- the amount concept
19 into performance on the basketball court, but
20 Mr. Stewart's other example was a contribution to a
21 charity.

22 And I certainly would accept the notion that
23 if Bill Gates and I each contribute a hundred dollars to
24 a charity, I've made the more significant contribution,
25 but that's because we're using "contribution" in that

1 context to mean something else. We're using it to mean
2 "donate" or "give."

3 We're not using it to talk about --

4 JUSTICE SCALIA: But the basketball thing
5 is -- to make it parallel to what's at issue here, the
6 question you should ask the coach, which -- which of
7 the -- you lost 101 to 100. Which of the 101 points
8 contributed most to your loss?

9 (Laughter.)

10 JUSTICE BREYER: As in the answer is that
11 some one point --

12 JUSTICE SCALIA: It's -- it's the one that
13 was the layup. I mean, he would not answer the one that
14 was the layup. He'd say what do you mean? All -- all
15 of the 101.

16 MR. KEISLER: But if there were different
17 teams playing in the league and you had an overall
18 result, you could actually determine -- you know, which
19 team had contributed what to the overall result. And
20 when we're dealing with States, we are dealing with
21 groups that the statute conceptualizes as separate teams
22 which are entitled to be treated separately.

23 But I would like to make just one other
24 point because I see my white light is on. We have
25 raised a completely separate argument. It's the first

1 argument in our brief, which is independent of how the
2 Court decides EPA may define the amount that contributes
3 significantly, whether cost or air quality effects or
4 anything else, and that is that, however it's defined,
5 EPA cannot regulate beyond the point necessary to
6 achieve attainment or maintenance in downwind locations.

7 And here, although in the prior two good
8 neighbor rulemakings, it specifically said it examined
9 the issue and avoided overkill, here, it didn't say that
10 because it didn't do that.

11 Apart from the cost versus air quality
12 issue, we had commenters that submitted evidence that
13 showed that EPA could achieve attainment and maintenance
14 at virtually all the same downwind locations at lower
15 levels of regulation.

16 And EPA's response to that, on Pet App
17 354(a), was they weren't going to look at lower levels
18 of regulation because, at lower levels of regulation,
19 some sources in some States might cease operating
20 existing controls, and that's all they said.

21 But if sources in some States could cease
22 operating existing controls and as the commenter said,
23 you would still achieve attainment and maintenance in
24 all the downwind locations that they are linked to, then
25 EPA has no authority under the good neighbor provision

1 to require those sources to continue operating their
2 existing controls.

3 There may be authority under other
4 provisions, but not this one. And the EPA, in this
5 particular proceeding, said nothing else, gave no other
6 reason for refusing to act on the evidence that
7 commenters submitted, that lower levels of regulation at
8 most upwind States would still achieve attainment and
9 maintenance at downwind locations, and they had no
10 authority to regulate beyond the point necessary to
11 achieve attainment and maintenance.

12 If the Court has no further questions, I thank
13 the Court.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Stewart, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

17 ON BEHALF OF THE PETITIONERS

18 MR. STEWART: Thank you, Mr. Chief Justice.

19 As Mr. Keisler indicated, in our reply
20 brief, we cited the -- the history of the restatement as
21 it bears on the common law of nuisance. And as this
22 Court indicated in *American Electric Power*, if the Clean
23 Air Act had not been enacted, the remedy that downwind
24 States would have in a situation like this one would be
25 a Federal common law nuisance suit against upwind States

1 or polluters in upwind States.

2 And I think there are three lessons to draw
3 from that fact. The first is that, as the briefs and
4 argument in this case indicate, judicial resolution of
5 such a suit would have been a Herculean task. And the
6 prospect of doing that through judicial processes should
7 reinforce the wisdom of Congress' choice to replace that
8 mechanism with the Clean Air Act, and it counsels in
9 favor of deference to the expert agency that has been
10 placed in the position that a common law court would
11 previously have been placed in.

12 The second is that, as the reply brief
13 citation to the law of nuisance indicates, the common
14 law court in that scenario would have been able to
15 consider the costs necessary to achieve reduction in
16 pollution upwind in deciding whether a particular remedy
17 would be appropriate or how much of a reduction an
18 upwind polluter should have to make. And there's no
19 reason, absent extraordinarily clear statutory language,
20 to deny EPA the same authority.

21 The third thing is, as the analogy to the
22 common law suit indicates, there are sovereign State
23 interests on both sides of this case. This is not a
24 matter of EPA versus the States. It's a matter of EPA
25 trying to act as an honest broker between the upwind and

1 downwind States.

2 The next thing I would say about the Clean
3 Air Act is that the statute, as a whole, is replete with
4 references to economic activity and harnessing the
5 profit motive; that is, both the States and EPA are
6 specifically authorized to provide for the trading of
7 allowances, the whole purpose of which is to achieve
8 emission reductions in the most cost-effective manner
9 possible.

10 And I think it's worth noting in this regard
11 that, although we talk about the transport rule as
12 regulating the emission of -- emissions of States, what
13 we're really regulating is emissions of power plants
14 within the States, and the good neighbor provision,
15 itself, talks about preventing significant contribution
16 from emissions sources or emissions activity within the
17 States.

18 And one of the things that the EPA said in
19 the proposed rulemaking was that, in some circumstances,
20 the cumulative downwind impact of a particular upwind
21 State might be great, not because any particular power
22 plant was poorly regulated or emitting at a high level,
23 but because there were so many power plants in the same
24 State.

25 And one consequence of forbidding the EPA to

1 consider costs is that a particular power plant in an
2 upwind State might be required to install more expensive
3 pollution control measures and make greater reductions,
4 simply because it happened to be located in a State with
5 a lot of other power plants.

6 And the last thing I would say is this is --
7 the statute, as I've said before, has prospective focus.
8 It's intended to be implemented by State officials, and
9 if you ask how would a State official assure herself or
10 feel confident that her own State implementation plan
11 was satisfying good neighbor obligations, when she
12 wasn't really sure what other States might be doing, and
13 one way is if a State official said, if everybody else
14 did what I'm doing, I can feel confident that the
15 problem would be solved.

16 And that's really the approach that EPA
17 used. It examined certain cost thresholds, and it said,
18 at particular cost thresholds, we feel confident that if
19 everyone, upwind and downwind State alike -- alike
20 makes pollution control efforts at these levels, the
21 problem will be solved or at least almost solved because
22 there would still be slight residual nonattainment.

23 And it seems perfectly rational to say that
24 the significant contribution is the amount over and
25 above what would occur, if everyone adhered to an

1 approach which, if applied across the board, would solve
2 the problem.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Counsel.

6 The case is submitted.

7 (Whereupon, at 11:39 a.m., the case in the
8 above-entitled matter was submitted.)

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25

| A | | | | |
|---|---|--|---|--|
| abandoning 40:12 44:21 | action 52:13 | agencies 29:24 40:18 | ambient 5:3 11:21 13:22 20:16 | 65:17 |
| ability 36:13 51:6 52:1 | actions 38:1,14,16 | agency 1:4 4:5 24:9 24:9,13 29:23 | ambiguity 72:22 | applied 32:2 34:17 41:9 70:19 82:1 |
| able 6:1 32:23 52:4 79:14 | activity 21:2 71:25 80:4,16 | agrees 13:7 51:5 | ambiguous 73:16 74:25 | apply 17:2 55:19 |
| abolish 55:20,22 | actors 14:12,16 | air 5:2,3 7:11 8:3 11:21,21 13:22 | ameliorate 11:10 | approach 27:23 32:2,6 38:6 39:24 44:14,19 45:11 47:6 60:6,7 81:16 82:1 |
| aboveentitled 1:20 82:8 | acts 21:22 | ago 11:11 47:11 | american 1:11 4:6 13:25 17:7 64:9 67:10 75:2 78:22 | appropriate 14:2 68:19 79:17 |
| absent 79:19 | add 35:2 72:23 | agree 46:22 72:3 | amici 41:14 | approvals 53:1 |
| absolutely 29:17 | added 33:17 63:20 | agrees 13:7 51:5 | amount 15:25 33:6 58:3,4 67:1,16,22 70:6 73:1,1,1,1,7 73:8 74:12,17 75:13,18 77:2 81:24 | approve 42:11 45:15 47:10 |
| accept 15:6 45:23 69:12 75:22 | addition 5:12 14:7 | air 5:2,3 7:11 8:3 11:21,21 13:22 17:16 20:16 21:3 26:3,5 38:2 45:4,8 45:9 47:1 57:21 57:25 60:9 61:15 63:24 68:22 69:4 69:4 72:1 74:22 75:1,5 77:3,11 78:23 79:8 80:3 | amounts 21:3 24:1 57:8 60:25 61:1,2 61:21 63:14 65:22 67:6,25 71:8,24 72:1,5,5,19,23,24 74:1,18 | approved 48:14,18 51:23 52:5 54:11 |
| accommodate 73:18 | additional 5:13,20 7:12 25:17 36:2 37:13 70:13 | airqualityonly 6:20 7:9 8:1 | analogy 22:4 79:21 | approves 51:25 |
| accomplish 11:2 | address 19:18 22:7 22:18 28:21 29:25 31:22 | al 1:4,8,11,15 | analysis 4:16,18 | approving 52:8 |
| account 7:3,18 8:18 14:17 16:24 19:11 26:6 34:8 62:7 63:18 66:25 67:15 67:23 70:3,8 74:6 74:7,8 | addressed 18:9 19:9 63:24 | alike 59:10,11 69:6 81:19,19 | analyze 26:8 | arbitrary 29:13 30:13 33:3,11,13 38:16 39:22 40:20 |
| accurately 51:6 | addressing 57:1 | alleviate 15:7 | announced 25:14 | area 5:7 23:16 |
| achieve 5:20 8:14 12:11 17:11 31:3 31:17 66:9 77:6 77:13,23 78:8,11 79:15 80:7 | adequate 13:11 20:25 | alleviating 14:12 | announces 56:14 | areas 66:11 |
| achieved 5:14 17:17 41:13 | adequately 30:21 49:20 | allocate 9:4 14:11 67:13 71:2 73:23 73:24 74:2,3 | annual 12:8 | argued 44:13 |
| achievement 9:14 9:16 14:10 18:17 | adhered 81:25 | allocated 35:15 36:14 | answer 7:7 11:6,15 16:21 63:2,2 72:14 75:8,8 76:10,13 | argument 1:21 3:2 3:5,8,11 4:4,9 16:22 21:21 29:2 34:11 35:6,8 37:22 49:18 54:7 55:3,9 56:8,12,19 58:9 69:12 76:25 77:1 78:16 79:4 |
| achieving 30:16 | adjudication 55:1,2 | allocating 62:5 71:1 | answered 7:15 | arguments 49:7 59:20,23,25 60:1 |
| acknowledge 40:11 59:19 | adjudications 40:16 | allocation 14:16 73:21 74:14 | anticipated 48:6 | as applied 29:6 |
| acknowledging 44:20 49:20 | administrative 29:23 49:2 53:11 53:13 54:9 | allow 17:26 33:18 | apa 55:5 | asked 10:14 74:22 |
| act 21:23 36:8 38:2 45:8 47:1 53:11 53:13 54:9,16 61:15 74:22 78:6 78:23 79:8,25 80:3 | administrator 20:13,14 27:10,12 46:7 | allowances 35:2,15 36:14 68:24 80:7 | apart 70:25 71:4 77:11 | asking 12:12 50:14 54:14 |
| acted 26:24 54:4 | adopt 9:1 20:13 26:22 55:21 | allowed 23:25 34:24 35:3 40:9 64:8 | app 77:16 | asks 60:11 |
| acting 54:16 | adopted 7:9 20:22 43:7 44:10 | allowing 33:21 | appeals 28:16 29:10,11,16 | aspect 34:13,16 |
| | adopting 25:22 44:7 | allows 8:18 | appear 53:24 | aspects 34:13 |
| | advance 39:19 | alternative 10:10 31:18 | appearances 1:23 | assert 57:14 |
| | affect 6:3 37:14 | | appears 43:19 | asserted 46:24 51:16 |
| | affirm 31:11 | | appendix 20:8 27:6 39:2 | asserts 47:13 |
| | affirmation 44:3 | | application 6:25 | assigning 69:17 |
| | affirmative 10:1 | | | |
| | affirmed 56:5 | | | |
| | affirms 31:14 | | | |
| | affordable 57:18 | | | |

| | | | | |
|--|---|---|---|--|
| <p>association 1:11 4:7 13:5 64:9 assume 27:22 43:25 44:4 assuming 75:15 assure 81:9 attack 48:10 attainment 23:22 63:15,16 64:3 66:10 77:6,13,23 78:8,11 attempting 18:18 attention 13:3,4,7 13:14 20:7 attribute 61:1 austin 2:2 authority 29:25 43:14 46:25 47:14 47:18 49:8 56:24 60:12 61:25 62:13 63:6 77:25 78:3 78:10 79:20 authorized 80:6 authorizes 54:20 57:8 available 5:15 8:13 23:1,1 average 32:21,23 averaging 33:12 avoided 11:2 16:7 16:11,14 34:7 77:9</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>b 58:14 back 12:2,3 37:5 43:15 44:14 46:3 50:4,12 56:3 70:24 bad 10:4,12,25 41:24 63:24 balance 4:15 ball 25:2,8 39:19 barred 14:4 31:5 based 13:23 71:16 bases 6:5</p> | <p>basic 4:17 21:11 basically 27:24 36:4 basis 62:5 71:2,3 73:25 74:2,4 basketball 9:16 10:13 75:9,19 76:4 battle 66:17 bear 57:18 61:7 70:6 bears 15:17 78:21 beginning 27:9 begins 20:11,21 behalf 1:25 2:3,4 3:4,7,10,13 4:10 37:23 56:20 67:2 78:17 believe 21:14 59:24 67:3 believed 30:19 believes 23:17 61:25 benefit 34:1 benefits 30:12,16 best 16:8 24:13 40:4 46:6 better 13:2,8 15:4 25:18 39:21 40:5 40:5 72:14,25 beyond 57:16 61:14 77:5 78:10 big 28:14 bill 75:23 blame 9:4 blank 43:10 blanks 47:4 blows 50:7 board 40:15,15 82:1 border 62:11 borders 9:2 15:13 23:23 26:8,9 35:1 36:18 61:17 bottom 20:19,24 bound 42:10</p> | <p>boundaries 66:8 box 68:3,4,4 break 68:5 breyer 12:7 34:10 39:7 40:1,14 50:1 50:10 58:8,17 59:18 62:16 69:1 69:16,20 72:21 73:5 76:10 breyers 43:15 71:12 brief 19:22 20:9 22:4 24:17 38:25 51:22 55:4 61:24 67:20 77:1 78:20 79:12 briefs 36:22 41:14 58:9 79:3 bring 26:3 bringing 69:17 broad 46:20 63:6 72:17 broker 79:25 bucks 33:1 budget 5:10 34:22 budgets 19:20 35:12 build 58:19 burden 6:2 8:2 20:3 22:6 57:19 70:13 burdens 31:20 33:22 45:25 62:5 71:4 bury 16:2 58:22 business 37:15 butfor 10:21 64:2 buzzer 10:18,20</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c 1:17,25 2:4 3:1 4:1 27:10 28:20 32:3 36:5,23 38:25 56:5 58:14 64:24 cair 21:14 51:1,3</p> | <p>call 21:13 38:20 39:25 43:19 45:2 46:23 47:7 49:19 52:12 called 22:12,13 calls 44:7 cant 12:16 17:9,15 18:13,15,17 19:11 19:13,15 26:8 29:17 34:8 35:9 36:18 50:11 51:7 53:18 59:16 71:8 71:13,15,17 cap 68:10 capable 25:21 capita 74:7 capricious 29:14 30:13 38:17 39:23 40:20 care 19:25 70:4,17 carolina 6:23 36:6 carried 37:16 carry 23:17 55:6 carrying 6:2 25:21 case 4:4,6 7:9,10,24 9:25 12:4 13:18 13:19,24 24:13,18 26:20 28:14,18,22 33:24 35:7 36:11 38:1,16 59:18 62:2,3 63:12 64:17 67:10 71:16 79:4,23 82:6,7 cases 25:20 57:24 categories 6:8 causal 61:10 64:13 65:1,17,18 causation 63:24 64:1,2 70:11 cause 10:9,21 13:21 13:21 53:9 55:5 55:12,18,19,21 58:24 59:3 caused 34:2 58:13 causes 69:10 causing 14:21</p> | <p>caveat 53:23,25 cease 77:19,21 certain 26:14 73:22 81:17 certainly 16:1 18:5 21:11 22:11,25 23:5 33:11,13 37:9 38:10,10 59:18 63:16 66:2 66:4,5 67:3 75:22 cetera 59:7 challenge 29:8 30:22 48:20 70:18 challenged 6:25 47:24 48:1,3,11 48:15 49:6 52:18 challenges 28:19 29:6 challenging 41:11 41:12 52:11 chancellor 62:2,2,7 change 38:17 40:3 40:9,20 changed 43:17 44:19 49:18 changes 6:1 7:2 50:7 changing 40:8 chapter 20:22 characterize 25:8 charge 58:18 charged 44:11 charitable 9:19 charity 75:21,24 cheap 65:9 chevron 53:20 chew 42:22 chief 4:3,11 9:23 10:6 19:17 21:5 21:15 22:2,18 29:1 37:18,24 38:9 46:4 56:10 56:16,21 75:7 78:14,18 82:4 choice 59:2 60:16 68:14 79:7</p> |
|--|---|---|---|--|

| | | | | |
|---|--|--|---|--|
| <p>choices 74:3 choose 51:17 circuit 28:20 32:3 36:23 39:1 56:5 64:24 circuits 36:5 circumstance 28:9 circumstances 25:24 35:25 80:19 citation 79:13 cite 38:24 40:4 63:11 cited 78:20 cites 39:1 city 1:7,14 4:5,7 clean 38:2 45:8,9 47:1 61:15 74:22 78:22 79:8 80:2 cleaner 12:21 clear 14:5 40:25 54:6,6 58:10 68:5 79:19 clearly 16:12 57:11 60:21 64:7 close 22:15 clue 63:5 coach 10:14,15 75:10 76:6 coalition 41:21 collateral 48:10 come 19:19 24:4 25:4 37:5 39:12 39:14,20,21 51:11 51:12 58:13,14 67:6,8 comes 16:17 21:16 26:2 53:12,14 58:11 65:19,20 coming 73:8 commandandcon... 41:15 commensurate 9:9 15:19 comment 39:16 53:2,4,6,10,14 54:23,24 55:6,11</p> | <p>commenter 77:22 commenters 77:12 78:7 commerce 30:5 commitments 9:10 committee 63:19 common 9:15 14:8 62:6 78:21,25 79:10,13,22 compared 6:20 7:25 comparison 30:12 compels 45:14 competing 4:15 completely 38:4 76:25 compliance 26:3 31:21 33:22 compliant 26:23 36:3 complicated 19:23 22:12 32:4 comply 24:20 36:17 37:1 component 9:14 16:6 58:6,6 72:8 computer 5:11 conceded 27:18 concept 75:18 conceptualizes 76:21 conclude 14:3 concluded 62:12 conclusion 26:21 28:9 concrete 31:18 conduct 30:2 conducts 61:4 confident 81:10,14 81:18 Congress 13:8,9,13 13:15 14:4,23 16:1 17:20,21 18:3,6 25:18 62:11,22 63:1,19 66:6,13,18 79:7</p> | <p>consensus 41:25 consequence 31:2,5 31:6 33:24 80:25 consider 14:1 17:8 17:15,17 18:15,17 19:13,15 26:10 28:23 31:15,19 41:18 62:1 79:15 81:1 consideration 14:4 17:12 25:23 33:21 considerations 67:8 considered 8:3 17:10 18:14 35:9 62:1 consistent 21:1 49:21 65:16 consolidated 4:6 constant 6:16 constrain 55:15 constrained 36:8 43:12 54:11,13 construction 40:13 54:19 constructions 46:14 construed 9:13 contain 19:4,7 20:25 contains 18:12 contaminated 30:5 30:8,9 contemplated 37:12 content 75:4,5 context 21:22 73:18 76:1 continue 78:1 continuing 37:3 contrary 38:12 contribute 5:1,4,7 9:11 10:20 11:12 19:5,11 21:4 23:2 33:16 38:5 45:4 47:4,9 50:3,5</p> | <p>51:15 57:9 58:21 60:22 61:3,9 63:21 65:23,23 66:25 67:7 68:1 72:1,19 74:19 75:23 contributed 10:4,7 10:7,11,15 20:1 64:20 75:11 76:8 76:19 contributes 49:24 58:4 60:16,17 64:4 67:17 71:3 77:2 contributing 9:2 32:9,18 33:19 34:14 60:8,13 68:22,25 contribution 8:23 9:20,22,25 10:12 14:6 16:10,11 18:14 57:21 61:10 64:13 65:1,3 69:9 70:7 71:15,20 75:20,24,25 80:15 81:24 contributions 10:25 12:22 26:10 27:21 31:22 57:25 66:20 71:23 control 5:12,14,20 6:12,16 7:11 8:12 12:20 16:8,19 18:4 19:12 62:10 81:3,20 controls 23:24 26:4 77:20,22 78:2 conversations 46:10,12,13,19 correct 8:8 41:16 49:17 61:2 corrected 53:1 54:22,23,25 correction 52:24 55:1 corrections 49:11</p> | <p>52:6,23 53:4,5 54:20,21,24 corrective 52:13 cost 5:15,21 6:16 6:17,24 7:1 8:1,12 13:21 15:19 16:21 16:23 17:2,8,9 18:17 19:12 21:12 23:7 30:16 33:5 33:14,22,25 35:7 41:12 57:2,13 58:5,5 59:5,6,14 59:21 60:3,4,7 61:12 62:1 64:1 66:11 67:1 68:10 71:2,10 75:5 77:3 77:11 81:17,18 costeffective 16:18 33:8 80:8 costly 60:14 costs 13:3,4,7,15 14:1,4,17 17:12 17:15,18 18:13 31:15,19 34:6,8 35:9 41:18 50:5 62:14 63:18 64:8 67:15,23 70:8 74:9,9 79:15 81:1 couldnt 16:7,14 17:12,21 32:22 53:20 66:19,23 counsel 37:18 78:14 82:4,5 counsels 79:8 count 75:13 counter 40:23,24 41:7 countervailing 59:23,24,25 course 5:23 13:25 17:17 19:19 26:13 30:11 53:19 62:4 69:16 court 1:1,21 4:12 13:24 17:6,14 18:13 19:10 22:1</p> |
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| | | | | |
|--|---|--|---|---|
| <p>28:13,16,18,22,23 29:10,11,15,19 31:14 37:25 49:4 56:6,22 67:11 73:15 75:19 77:2 78:12,13,22 79:10 79:14 courtroom 74:21 courts 20:7 37:13 covered 4:19 5:9 cow 58:14 62:17 69:4,7 73:8 cows 58:13 59:1 crack 47:8 crazy 41:19 57:5 crazy 41:19 57:5 credit 12:15 criteria 13:23 17:10 27:15 crucial 23:9 24:8 culpability 71:9 cumulative 80:20 cure 58:20 currently 63:13 cut 34:14 50:4,12 cuts 63:7</p> <hr/> <p style="text-align: center;">D</p> <p>d 1:17,25 2:4 4:1 28:20 32:3 36:5 36:23 38:8,22,25 39:6 46:25 49:10 49:23 50:15 56:5 64:24 dark 38:4 data 23:1 day 40:16 deadline 21:7 deal 25:12 29:23 67:4 dealing 18:24 19:7 22:20 76:20,20 deals 19:6 death 10:10 59:1,6 69:10,18 70:3,9 december 1:18 decide 36:13 43:3</p> | <p>44:15 51:15 decided 40:15 57:17 decides 77:2 deciding 14:1 17:18 67:13 79:16 decision 13:6 17:14 31:11 37:14 52:8 53:1 54:22,22,25 56:3,5 decrease 33:5 deemed 72:17 defeat 10:15 defendants 62:4 deference 53:20 79:9 define 77:2 defined 24:8 70:7 77:4 defines 45:24 defining 18:14 19:10 47:8 67:6 67:25 definition 67:16 71:19 73:19 degree 26:7 36:13 61:9 degrees 10:8 delaware 65:20 68:22,23,25 demand 13:13 13:16 deny 45:18 79:20 department 1:25 depends 11:7 42:13 50:4,4,5,6,7 deputy 1:24 describe 28:9 described 68:6 describes 27:7 describing 34:12 52:21 design 23:12 designed 14:11 desired 26:5 desperation 75:12</p> | <p>destroys 69:11 destruction 69:11 69:18 70:3,9 detail 29:6 details 28:19 determination 55:13 65:3 determine 4:19 5:11 15:11 16:6 17:19 19:24 26:2 26:21 29:11 35:14 76:18 determined 4:23 5:6 52:14,16 determines 52:7 determining 14:18 15:10 17:15 37:15 develop 42:18 devices 12:21 devise 9:6 23:16 24:5 27:3 36:3 devising 23:21 31:1 31:6 32:19 34:9 36:11 didnt 5:4 16:1 17:4 19:1,18 24:2 25:9 36:4 41:20 48:5 52:22 62:13 66:18 66:19 77:9,10 difference 41:6 different 8:3 10:23 14:12,16 15:9 17:23 18:2 19:22 22:16 32:18 34:25 38:12 40:6 44:13 46:14 47:6 48:25 54:1 58:15 60:6 62:14 67:13,24 68:2,3 74:3,13 76:16 differently 54:16 difficult 11:3 14:23 17:2 36:20 difficulties 4:22 difficulty 9:14 14:9 31:17</p> | <p>directly 19:9 directs 66:15 dirty 65:9 disagree 74:15 disagreement 53:6 disapproval 38:24 disapprovals 48:11 disapprove 47:10 disapproved 35:21 54:13 discharge 19:2 discovers 58:19 discrete 48:14,19 49:6 52:12 discretion 46:18,23 disperse 31:20 displacing 71:2 disposal 25:10 disproportion 62:18 distinct 34:1,1 distinction 69:23 69:25 70:20 distinguish 65:6,6 distinguishing 6:5 distribute 45:25 distributed 5:24 67:14 distributing 8:2 district 22:1 divide 58:22 74:5 divided 6:8 divides 34:24 dividing 59:5 divulge 25:9 doesnt 14:6 24:25 43:25 53:11,15 55:3,15 56:8,12 61:10 66:24 70:6 72:6 73:16 74:1 doing 6:23 16:24 25:8 35:15 41:1 44:9,23 45:20 50:16 63:22,25 65:15 70:5 79:6 81:12,14</p> | <p>dollars 75:23 donate 76:2 donkey 24:23 dont 6:22 11:14,16 11:16 12:14 16:25 18:21 21:20 23:11 25:7 26:13,16 29:5 31:13,24 32:25 34:10 37:19 39:7 42:14 43:20 45:16 46:13 48:4 48:24 49:4,13 50:20 54:18 61:6 63:4,4 67:5 69:12 71:18,19 72:15 73:17 74:16,25 downstream 14:21 downwind 4:16,21 4:25 5:4,5,6 6:3,9 7:3,18 8:23 9:3,9 12:23 20:1 25:25 31:23 32:8 33:19 33:20 36:16 57:10 57:22,25 60:9,23 65:19 66:10 68:20 77:6,14,24 78:9 78:23 80:1,20 81:19 draw 20:7 69:22 79:2 drawing 69:25 driven 70:23 driver 58:5,7 driving 59:7 duke 41:7 dumb 32:4 57:5 dunking 9:15 duty 30:14</p> <hr/> <p style="text-align: center;">E</p> <p>e 3:1 4:1,1 eager 51:19 earlier 8:9 44:21 48:11,11 49:23 53:2 ease 14:9</p> |
|--|---|--|---|---|

| | | | | |
|---|--|---|--|--|
| <p>easier 12:22 22:20 easy 7:7 economic 68:7 80:4 economy 69:11 effect 7:18,19 8:2 18:15,16 29:8 31:8 42:8 51:4 61:18 65:18 74:23 75:5 effectively 45:14 effects 30:2,9 57:11 57:16 60:21 63:24 75:1 77:3 efficiency 17:26 18:4 62:6,14 efficient 6:1 8:22 14:1,24 59:21 66:9 efficiently 7:2,21 33:3 efforts 5:12 6:12 15:19 81:20 either 35:20 50:22 69:22 electric 15:21 16:15 78:22 electricity 15:23 16:4 element 24:8 63:25 eliminate 49:24 eliminates 14:18 embodied 21:13 embodies 60:15 eme 1:7,14 4:5,7 emission 5:12,13 8:12 15:22 19:12 23:24 35:11 67:18 80:8,12 emissions 5:10,20 6:3 16:7,13,17 17:19 19:24 21:2 21:17 26:9 34:5 34:22,24 36:14 57:12,16 61:17,18 61:21 62:10 65:10 68:22 71:11 74:24</p> | <p>80:12,13,16,16 emit 23:25 emitted 35:4 emitting 15:25 21:3 34:3 71:25 80:22 emphasize 19:23 35:5 72:4 emphasizing 14:10 36:9 empty 47:5 enacted 78:23 enforcing 62:10 ensure 15:16 29:20 30:15 33:7 enter 48:6 entire 52:13 58:5,7 74:18 entirely 32:18 entities 61:16 entitled 76:22 entity 44:16 environmental 1:3 4:5 envisions 15:1 epa 4:13,18,20 5:9 9:13 13:20 16:5,5 16:12,23 17:8,21 18:3,15,24 19:9 19:13 20:13 21:7 21:16 22:11,14,20 23:1,6,10,18,19 24:3,5,7,21 25:2,8 26:24 28:12 29:17 29:19 31:15,16 33:15,17 34:8,23 35:11,15,18,19,21 35:22 36:1,4,7,12 37:1,3,15 38:2,3,7 38:11,20,21,23 39:3,5,25 40:9 41:18 42:22 43:3 43:8,9,11,17,20 44:10,10,10,16,19 45:15,18,20 46:10 46:17,17,22 47:2 47:3,6,12,13,15</p> | <p>47:18,22 48:7 49:8,10,13,14,18 50:25 51:5,6,14 51:22,25 52:3,5,7 52:9,12,23 53:12 53:15,19 54:8,11 54:13,16,20 55:3 57:14,17 58:18 60:12 61:20 62:8 62:13,24 63:5 65:5 67:12,25 68:3 70:7,13 74:9 75:4 77:2,5,13,25 78:4 79:20,24,24 80:5,18,25 81:16 epaapproved 47:20 epaimposed 45:23 epas 4:16 21:11 31:4 38:1,6,14,15 45:11 47:17 53:1 56:24 58:3 60:6 77:16 equally 58:23 equitable 16:18 equity 62:2,3,5,14 error 52:8 errors 11:1 esq 1:24 2:2,4 3:3,6 3:9,12 essentially 13:15 34:24 45:20 53:21 establish 13:20 estimate 31:13 estopped 41:1 et 1:4,8,11,15 59:7 evenly 5:24 everybody 13:2,7 73:22 81:13 evidence 77:12 78:6 evidently 25:19 exact 54:3,3,5 exactly 12:14 23:6 24:5 39:8 42:14 50:11 64:12 73:3 examined 77:8</p> | <p>81:17 example 10:2 14:14 15:20 23:20 24:6 24:13 25:1 58:10 62:17,20 64:16 65:13 67:12 68:21 71:12 75:20 examples 14:8 24:16,19 64:17 exception 53:10,15 53:16 55:5 exclusive 46:24 47:13 exclusively 74:17 excuse 18:21 existing 9:4 77:20 77:22 78:2 expect 20:4 22:7 expected 26:17 expensive 50:18,23 81:2 expert 79:9 expired 56:9 expires 52:2 explain 31:25 57:3 explaining 44:20 49:20 expressly 16:24 extent 25:22 28:25 29:4,7 36:18 37:8 extra 16:17 extraordinarily 11:3 79:19 extraordinary 29:22 31:16 extreme 69:21</p> | <p>60:1,8,13 66:7 73:15 79:3 factor 7:1 18:15 19:13,15 71:11,13 72:16 factors 8:4 facts 26:13,15,16 fail 25:9 failed 27:13 35:20 failing 29:20 fails 27:7 failure 11:2 31:3 48:12 fair 4:14 15:10,18 58:24 59:5 fairly 31:8 faith 18:18 fall 24:3 far 12:2,2 16:25 22:12 57:24,24 75:13 farther 16:12 fatal 21:21 fatally 10:2,3 faulted 29:19 favor 59:20 65:15 79:9 feasibility 71:9,9 71:17 feasible 71:10 feasibly 66:20,24 federal 18:25 22:15 27:11 29:24 30:3 30:25 31:7 35:23 36:11 39:15 45:9 45:21 47:18 51:3 78:25 feel 39:17 81:10,14 81:18 feet 9:17,18 fell 23:19 felt 36:7 fence 58:20 field 66:7 figure 63:5 figures 6:24</p> |
|---|--|---|--|--|

| | | | | |
|---|--|---|---|--|
| <p>filed 24:17 fills 47:3 final 26:18 find 62:21,23 findings 48:12 finds 27:12,13 35:19 71:10,12 fine 27:24 finish 34:11 49:2 52:21 56:10 fip 28:2 37:1 38:3 41:3 42:7,7 43:14 45:19,23 46:7 49:9 52:1 fips 37:11 51:1 52:4 56:7 first 4:4,18,20 6:5 15:5 18:8,10 21:23 22:19,19 23:15 27:2,25 34:13 35:16 36:5 36:12,25 38:15 43:10,17,23 46:16 47:8 49:8,14 51:1 60:19 65:12 70:25 76:25 79:3 fits 46:1 fitting 65:25 flaw 21:21 28:5 30:10 flip 25:25 floating 64:17 floats 69:3,4 floor 45:22 flowed 15:13 focus 11:1 57:10,16 74:16 81:7 focused 16:13 56:23 57:2 58:9 60:1,21 61:15 68:20 focuses 64:12 follow 27:1 55:18 following 12:25 food 30:5,6,9 forbidden 17:8</p> | <p>forbidding 80:25 force 50:21 60:12 66:9 foregoing 16:15 forever 31:5 formal 55:1,2 formulating 67:21 forth 20:18 54:9 forward 9:7 12:23 36:24 found 28:20 37:1 53:10 62:20 68:9 four 32:10 framework 46:16 fray 48:6 friend 57:1 friends 58:15 fuels 12:21 full 36:1 fully 59:18 functions 68:5 fundamental 41:10 fundamentally 13:17 further 37:4 45:10 45:22 78:12 future 12:17 15:14 37:17 47:15</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>g 4:1 game 10:13 37:2 gates 75:23 gather 50:19 general 1:24 2:2 61:19 generate 15:23 generating 15:25 16:3 generation 1:8,15 4:6,7 15:21 16:15 georgia 52:17 getting 59:4 ginsburg 49:12,17 give 24:6 36:1,2 37:4,19 41:6 43:9</p> | <p>51:18 64:15 76:2 given 14:8 29:25 35:13 43:7 gives 35:1 65:16 giving 40:23 45:24 63:6 glimmer 63:2 glosses 22:3 go 6:15 11:17 12:3 13:9 16:25 30:11 36:25 39:15 45:9 45:22 46:16 53:4 53:5 54:24 55:1 goes 20:17 46:3,17 70:24 going 5:13 9:6,24 12:23 22:9,13,23 24:14 25:3 26:14 36:23 40:11 52:6 58:25 59:1,19 63:4 65:5,6 67:22 69:7 72:9 73:24 74:2 75:11,13 77:17 good 11:20,25 16:2 18:1,3,9,12,18,18 18:23 19:4,18 20:3 21:9 24:20 25:23,23 26:23 27:4 31:3 35:20 35:21 37:15 38:3 38:8,20,21 39:5 39:17 43:1,4,21 43:22 44:12,15 45:2,13,16 46:25 47:3 49:9 50:15 51:2,7,23 53:9 55:5,12,18,19,21 56:25 58:10 68:23 75:10 77:7,25 80:14 81:11 government 16:23 27:18 40:24 57:1 61:24 70:21 72:9 governments 20:9 39:10 73:19</p> | <p>great 25:12 80:21 greater 6:12 15:14 57:24 81:3 greatest 15:12 ground 31:14 group 5:17,18 6:6 6:11 22:20,23 groups 76:21 guess 6:14 15:2 23:14 26:18 38:7 43:21 45:13 47:15 51:6 54:4 73:12 guidance 36:2</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hadnt 19:19 74:21 half 58:21,24 59:3 halfcourt 10:17,19 hand 65:9 happen 28:11 29:12,13,18 36:23 46:10,12,13 61:17 happened 25:5 81:4 happens 9:25 27:7 29:24 35:22 40:3 69:6 hard 38:10 64:14 75:17,18 harder 12:11 harm 7:4,22 harnessing 80:4 hasnt 16:13 havent 8:7 39:14 47:23 51:9 head 21:16 health 4:14 13:11 13:23 30:12,16 34:1,2 64:10 75:3 hear 4:3 52:22 heard 29:9 39:22 hearing 20:23 hearings 20:12 hed 76:14 help 14:11 20:6 53:11,15 72:23</p> | <p>helpful 62:20 herculean 79:5 heres 22:21 hes 39:18 75:11 hidden 25:2 hiding 25:8 high 80:22 higher 57:19 historic 62:9 history 62:22,23 63:12 78:20 hit 26:17 73:11 homer 1:7,14 4:5,7 honest 79:25 honesty 21:20 honor 63:11 65:13 66:2,21 67:2,5 68:6 69:15 70:21 71:18 72:3 74:16 honors 60:2 66:4 hugely 50:22 hundred 64:19 71:14 75:23 hurt 68:22 hypothetical 10:12 60:2 75:9</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>id 56:25 69:14 idea 5:19 8:5 9:8 18:3 22:22 23:10 41:24 identified 4:21 5:9 7:19 31:18 67:5 identify 10:16 24:18 ignore 66:7 ill 33:24 59:17 im 13:12 20:20 22:19 27:6 34:2 36:21 54:4 59:7 62:22 64:16 67:2 69:20,21,23 70:24 81:14 imagine 66:3,5 impact 80:20</p> |
|---|--|---|---|--|

| | | | | |
|--|--|--|--|--|
| <p>implement 14:2 18:18 19:3 43:4 61:12 implementation 5:14 14:5 17:3,18 18:11,25 19:3 20:18,21 22:15 26:23 27:3,11 30:25 31:7 35:24 37:11 47:18 51:4 81:10 implemented 5:21 6:17 8:12,16 12:5 37:13 51:24 81:8 implementing 27:20 67:12 70:2 import 72:8 important 35:5 imported 72:17 impose 20:2 30:11 38:2 45:19 47:18 49:9 52:1,4 66:11 imposed 41:3 imposes 20:6 53:17 impossible 32:3,7 50:15,17,17,23 51:9,14 improper 48:9 improperly 49:11 inappropriate 28:2 inappropriately 30:20 include 9:14 10:11 66:15 includes 11:25 including 27:4 29:1 29:2 38:23 increase 33:5 57:15 incredibly 19:23 increment 16:17 independent 38:15 47:17 77:1 indiana 65:20 68:21,23 indicate 79:4 indicated 30:23</p> | <p>78:19,22 indicates 79:13,22 individual 22:22 70:18 industry 2:5 3:10 56:20 67:3 68:13 industrys 35:6,8 inefficient 8:22 infeasible 26:22 information 25:9 25:13 inherent 21:21 inherently 15:21 initial 18:11 55:10 55:12 insignificant 16:9 65:20 inspections 30:6 install 81:2 installed 12:20 instance 18:10 25:1 27:3 30:3 36:12 instances 24:19 institution 44:11 47:2 intend 16:2 66:18 intended 21:8 66:14 81:8 interested 62:22 interests 4:15 36:10 79:23 interfere 57:9 60:22 63:21 64:5 72:20 74:19 interference 61:11 interim 37:9 interpret 21:8 interpretation 40:10 43:18 44:8 44:9,21 49:18,21 51:17 interpretative 46:24 interpreted 33:17 33:21 38:18 interpretive 47:13</p> | <p>interstate 30:4 introducing 63:25 intruded 36:12 invalid 29:18 invented 25:6 investment 74:10 invoke 52:6 invoked 49:11 52:23 involves 10:12 ironic 33:23 irony 33:9 irrational 33:1 isnt 7:4,23 37:3 47:24 48:6 52:10 52:13 65:10,19 68:24 70:17 71:23 75:5 issue 20:3 28:18 37:7 44:17 47:25 48:6,25 51:22 52:10,12,13,19,20 52:22 56:7 57:1 59:23 60:11 73:11 73:21 75:2 76:5 77:9,12 issues 28:21 49:5 68:18 itd 41:19 item 30:7 ive 14:8 27:1 75:24 81:7</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>job 22:20 40:8 51:16 59:14 joined 35:6,8 jonathan 2:2 3:6 37:22 judgment 23:6 judgmental 72:8 judgments 23:24 judicial 30:22 48:21 79:4,6 justice 1:25 4:3,11 5:23 6:22 7:6,15</p> | <p>8:5,17,21 9:23 10:6 11:4,5,6,6,14 12:2,7,24,25 14:15 15:3 16:20 16:21 17:13,20 18:21 19:16,17 21:5,15 22:2,18 23:9 24:6,22 25:11,15 26:12 27:17 29:1 31:10 31:25 32:21,25 33:10 34:10 36:21 37:18,24 38:9 39:7 40:1,14,22 41:5,19,23 42:6 42:10,15,18,21,25 43:6,15,24 44:2 44:23 46:2 47:23 48:4,13,24 49:12 49:17 50:1,10 51:8,18 52:10,19 52:21 53:18,25 54:10 55:8,17 56:1,10,16,21 57:4,5 58:8,17 59:18 60:25 61:4 62:16 64:6 66:17 66:23 68:9,13 69:1,16,20 70:1 70:15,24 71:6,12 71:23 72:5,7,13 72:21,24 73:3,5 73:20 75:7 76:4 76:10,12 78:14,18 82:4 justices 46:4</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>k 51:22 52:7,7,24 52:24 53:3,14,24 54:19,19 55:4,15 56:6,8,12 kagan 8:5 11:4 12:24 31:25 36:21 46:2 53:18,25 54:10 55:8 57:4</p> | <p>64:6 73:20 kagans 11:6 16:21 kansas 52:17 keep 62:19 keisler 2:4 3:9 56:18,19,21 59:17 61:2,6 63:10 64:6 65:12 66:21 67:2 68:12,17 69:14,17 69:24 70:20 71:18 72:3,11,15 73:12 73:20 74:15 75:17 76:16 78:19 kennedy 11:5,14 12:2 16:20 17:13 43:6 71:6 72:7,13 kernel 11:17 key 43:18 kind 22:2 25:9 61:25 62:24 66:1 68:5 kinds 46:19 62:6 67:4,8 knock 56:13 know 13:1 17:25 21:20 22:6 23:6 23:12 24:24 26:13 26:16 29:5,24 31:24 33:2 36:21 39:7 42:14 45:16 48:4,24 50:1,2,2 50:12,20 54:14 58:22 59:12 63:4 64:18,22 68:2 73:17 74:5,16 76:18 knowing 20:4 23:13 24:11 known 15:24 knows 72:25</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>l 1:8,15,24 3:3,12 4:9 78:16 labor 2:5 3:10 40:15 56:20 67:3</p> |
|--|--|--|--|--|

| | | | | |
|--|--|---|--|--|
| <p>language 9:11 13:1 14:6 19:5 43:18 53:20 54:2 57:11 61:20 63:3,9,17 64:8 65:17 66:1 72:4 79:19 laughter 42:2,5 58:16 69:19 73:4 75:16 76:9 launching 48:9 law 14:11 40:18 50:20 62:6 78:21 78:25 79:10,13,14 79:22 layup 10:16 75:12 76:13,14 lead 29:20 leads 45:6 47:16 59:6 league 76:17 leave 28:6 63:4 left 38:3 legal 21:22 23:17 30:21 legally 16:9,10,16 65:4 legislative 62:22,23 legitimate 59:20 66:4 lessons 79:2 level 5:18 15:22 26:5 29:6 70:2 73:23,23 80:22 levels 77:15,17,18 78:7 81:20 light 76:24 likewise 53:4 limit 6:18 limitations 56:24 limited 31:8 limitless 72:12 73:14 linked 4:23,25 6:9 77:24 little 34:3 lives 9:8</p> | <p>local 2:3 3:7 37:23 locate 66:10 located 81:4 locating 68:3,4 locations 57:10 58:1 60:23 66:10 77:6,14,24 78:9 long 31:11 42:11,22 54:16 62:9 look 11:9 13:13 20:19,24 22:21 37:4 39:13 46:4 69:2 77:17 looking 47:25 56:3 63:17 looks 60:11 loss 75:11 76:8 lost 10:13 76:7 lot 7:11 12:17 57:2 60:8 65:7,8 81:5 lots 46:9 65:9 74:3 lower 30:16 59:14 77:14,17,18 78:7 lung 1:11 4:6</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>m 1:22 4:2 82:7 maintenance 4:22 57:10 60:23 61:11 63:15,16,22 64:3 72:20 74:20 77:6 77:13,23 78:9,11 making 39:9 40:20 49:8 57:21,24 malcolm 1:24 3:3 3:12 4:9 78:16 mandate 36:6 manner 33:8 52:25 54:22 55:25 56:1 56:2 80:8 margin 13:11 64:10 match 24:5 mathematics 59:6 matrix 22:5 matter 1:20 12:9,10 12:11 14:25 43:5</p> | <p>51:25 67:24 79:24 79:24 82:8 mean 7:6 8:21 13:18 15:5 19:12 19:14 23:10,11 24:24 28:4,8 33:4 33:23 37:3,6 39:8 40:2 42:16 44:2 44:16 51:1,9 53:21 54:2,4,19 64:6,15 69:1 71:7 71:8 72:6,22 73:16,16 74:23 75:9 76:1,1,13,14 meaning 38:4 meanings 73:13,14 73:18 means 7:1 10:10 24:22 26:12 30:15 43:24 45:3 47:5,9 51:15 54:2 55:4 55:15 57:20 65:18 72:16 meant 50:21 62:18 measurable 71:7 measure 11:8,10 measured 15:19 measures 5:14,21 6:17 8:1,13,16 9:1 17:18,22 18:4 19:12 27:20 28:1 30:8 81:3 mechanism 30:24 79:8 mechanisms 67:4 67:15 meet 8:10 19:20 20:4 25:5 48:16 member 73:15 men 58:14,15,19 mention 19:18 mentioned 18:8 30:19 49:23 51:22 60:19 66:2 mere 7:22 merely 7:3 8:23</p> | <p>method 59:9 methodology 21:12 28:12 29:16 33:15 35:11 58:3 61:12 methods 74:14 metric 34:17 million 9:22 mind 6:22 21:25 50:12,13 58:11 62:19 minds 40:3 mine 25:20 minimal 59:5 minimum 15:25 17:22 27:15 45:9 minutes 78:15 missed 10:16,17,19 75:12,12 misspoke 17:6 mitchell 2:2 3:6 37:19,21,22,24 38:14 39:24 40:9 40:19 41:2,17,21 41:25 42:3,9,13 42:17,20,24 43:2 43:13 44:1,6 45:1 46:2,22 48:2,8,21 49:4,16 50:9,25 51:14,21 52:15,23 53:23 54:7,18 55:14,24 56:2,12 56:17 mix 23:24 modeling 5:11 modifies 61:8 modify 61:10 modifying 71:20 money 34:6 65:8 months 42:17 morning 4:4 motive 80:5</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>n 3:1,1 4:1 naaq 12:3 naaqs 5:3,17 11:24</p> | <p>12:5,10,14 13:19 13:20 14:2 17:8 17:11,16 20:16 21:13 22:16 23:22 24:8 26:2,24 36:17 37:4,7,13 37:17 38:19 39:25 43:19 44:7,24,25 45:1 46:23 47:7 49:19 75:2 nail 73:11 national 5:2 11:21 20:15 66:7 nature 73:20 necessarily 23:6,18 30:1 necessary 32:12 33:6 77:5 78:10 79:15 need 34:5 44:17 47:11 64:22 negative 10:1 neighbor 11:20,25 16:2 18:1,9,12,19 18:23 19:4,19 20:3 21:9 24:20 25:23 26:23 27:4 31:3 35:20,21 37:16 38:3,8,21 38:21 39:5 40:15 43:4,21,22 44:12 44:15 45:2,13,16 47:1,3 49:10 51:2 51:7,23 56:25 77:8,25 80:14 81:11 neighbors 26:11 neither 57:4 74:12 nevada 38:24 never 34:19 new 11:21 12:14 26:1,2,6 31:12 42:11,19 48:16 49:21 63:25 nonattainer 23:3 nonattainment</p> |
|--|--|---|--|--|

| | | | | |
|--|--|--|--|---|
| <p>4:22 5:7 9:3,5,7 12:23 21:4 23:3 31:22 49:25 57:9 60:22 61:9 63:21 64:5 67:7 71:21 71:24 72:20 74:19 81:22</p> <p>noncompliance 22:14</p> <p>noncost 7:13</p> <p>noncosteffective 7:13</p> <p>normal 54:8</p> <p>normally 42:12</p> <p>north 6:23 36:6</p> <p>note 67:20</p> <p>noted 67:20</p> <p>notice 20:12,23 53:2,4,5,10,14 54:23,24 55:6,10</p> <p>noting 80:10</p> <p>notion 75:22</p> <p>notwithstanding 13:6</p> <p>nox 15:22 34:3,17</p> <p>nuisance 62:2,3 78:21,25 79:13</p> <p>number 33:1,12 35:3</p> <p>numbers 70:16</p> <p>numerical 64:16,17</p> <p>numerous 38:23</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>o 3:1 4:1</p> <p>object 43:12</p> <p>objected 40:1</p> <p>objection 39:10</p> <p>objections 28:15</p> <p>obligation 9:8 11:20 15:14 18:11 19:2 20:6 25:19 27:8 37:3 47:15 51:7 67:18</p> <p>obligations 21:8 23:18 24:20 31:3</p> | <p>36:17 37:16 38:8 38:22 39:6 42:14 43:4,22,23 44:12 44:15,18 45:3,13 45:17,24 47:3,12 49:10 51:2 57:15 81:11</p> <p>obliged 51:13</p> <p>occasions 67:19</p> <p>occur 13:14 81:25</p> <p>occurred 13:16</p> <p>occurring 9:7</p> <p>official 81:9,13</p> <p>officials 26:1,6 81:8</p> <p>oh 12:7 23:9 68:2</p> <p>ohio 52:17</p> <p>okay 25:15 67:21 72:5</p> <p>old 48:17</p> <p>once 5:8 7:19 34:22 35:12,19,19,22 40:2,6 47:13 51:25 73:15</p> <p>onerous 30:12</p> <p>open 63:3</p> <p>opening 20:9</p> <p>operating 6:16 77:19,22 78:1</p> <p>opinion 29:19 39:15</p> <p>opportunities 37:5</p> <p>opportunity 28:23 35:14 36:3 45:25 51:3</p> <p>opposed 8:21 63:2 63:8</p> <p>opposing 26:25</p> <p>opposite 13:8,9,10</p> <p>oral 1:20 3:2,5,8 4:9 37:22 56:19</p> <p>order 4:20,25 8:10 8:11,14 14:3 15:15 26:5 36:2</p> <p>original 53:22 56:3</p> <p>originally 46:5</p> <p>ought 18:4</p> | <p>outcome 10:22 48:22</p> <p>outset 60:20</p> <p>overage 23:2</p> <p>overall 59:4 76:17 76:19</p> <p>overboard 30:11</p> <p>overcontrol 28:3 29:2,9,21 33:24 34:4 45:14,18</p> <p>overcontrolled 27:19</p> <p>overgrazing 58:11 58:19</p> <p>overkill 77:9</p> <p>overregulate 45:15 45:18</p> <p>overshoot 45:17</p> <p>ozone 12:9 51:24</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p 1:8,15 4:1</p> <p>page 3:2 20:8,20,24 27:5,10</p> <p>pages 38:24 39:1 43:19</p> <p>parallel 76:5</p> <p>parlance 9:15 14:8</p> <p>part 11:5 16:7 26:19 31:15,17 33:9 34:21 52:20 70:5</p> <p>participating 68:16</p> <p>particular 8:14 12:1,10 16:3 22:13,23 24:2,4 26:19 32:8 35:19 37:7 78:5 79:16 80:20,21 81:1,18</p> <p>particulate 12:9,11 43:5 51:25</p> <p>partly 59:12</p> <p>party 56:23 62:3</p> <p>pay 58:23</p> <p>pending 29:5 47:24 48:22</p> | <p>people 10:10 13:2 34:4 40:3 58:25 59:2 63:1 74:21</p> <p>percent 5:2,5 27:22 34:15 59:13 70:23 71:1,5</p> <p>perfectly 65:10 81:23</p> <p>performance 75:19</p> <p>performed 4:18 5:11</p> <p>period 20:14 31:8</p> <p>permits 70:18</p> <p>person 9:21 21:22 21:23,23,24</p> <p>perspective 65:16</p> <p>persuaded 24:21</p> <p>pet 77:16</p> <p>peter 2:4 3:9 56:19</p> <p>petition 39:1</p> <p>petitioners 1:5,12 2:1 3:4,13 4:10 53:7 78:17</p> <p>phrase 38:5 47:5 51:17 61:11 74:18</p> <p>pick 23:11,11 62:18 71:8</p> <p>picking 33:1</p> <p>picture 28:14</p> <p>pin 24:23</p> <p>pinned 24:24</p> <p>pinpoint 10:14</p> <p>pitch 46:6</p> <p>place 24:24 25:18 26:4 28:6 31:12 33:8 36:7 47:20</p> <p>placed 79:10,11</p> <p>places 61:8</p> <p>plan 11:25 18:11 19:7 20:17,21,23 26:23 27:11,14,14 30:25,25 31:7,9 31:19 34:12 35:24 36:12 39:21 43:8 59:4,13 81:10</p> <p>plans 18:25 19:3</p> | <p>22:15,16 23:22 27:3 31:6 36:3 37:11 47:19 51:4</p> <p>plant 80:22 81:1</p> <p>plants 34:3,25 35:2 66:19 80:13,23 81:5</p> <p>plausible 66:5</p> <p>play 67:8</p> <p>playing 66:7 76:17</p> <p>plays 10:14</p> <p>please 4:12 18:22 37:25 56:22 62:17</p> <p>point 6:14 10:14 11:7,10,18,19 14:3 19:22 24:17 25:16 33:11 36:9 39:10 40:6 42:4 44:5 49:3 53:7 62:16,21 66:18 72:25 73:3 76:11 76:24 77:5 78:10</p> <p>pointed 27:2</p> <p>points 23:15 75:14 76:7</p> <p>policy 21:9 23:6,23 59:20,23,25,25 60:16 66:3 72:17</p> <p>pollutant 72:1</p> <p>pollutants 35:3</p> <p>polluter 79:18</p> <p>polluters 15:12 79:1</p> <p>pollution 6:10,12 7:12 8:24 9:5 11:10 12:18,20 14:20,24,25 15:13 16:8,19 17:22 18:5 20:1 21:3 26:7 27:21 33:20 45:5 49:24 50:3 74:11 79:16 81:3 81:20</p> <p>poor 57:25</p> <p>poorly 80:22</p> <p>population 74:7</p> |
|--|--|--|--|---|

| | | | | |
|--|---|--|--|--|
| <p>portions 29:19 position 8:11 41:17 73:12 79:10 possibility 27:19,23 28:10 29:17 70:16 70:22 possible 16:8,22 22:6 32:7,16 33:9 36:7 80:9 power 15:21 16:15 28:7 34:2,25 35:2 52:7,24 57:15 78:22 80:13,21,23 81:1,5 practically 26:22 precisely 62:18 63:22 predecessor 63:12 predict 23:18 premise 15:6 prerogative 44:15 44:17 45:8 51:16 prescribe 17:22 20:15 presents 68:17 preserved 29:7 30:21 preside 40:17 presumably 46:9 68:14 pretty 33:11,11 63:3 75:10 prevent 9:1,7 12:18 12:22 40:18 63:14 63:16 64:3 prevented 40:19,22 preventing 30:4 58:18 70:8 80:15 previously 15:13 51:23 52:5 54:3 79:11 price 45:22 primary 20:15 prior 9:5 12:17 31:21 33:18 40:12 52:8 77:7</p> | <p>private 56:23 62:3 probably 8:15 problem 9:10 14:13 14:15 15:17 24:12 28:11 29:15 30:1 31:15,23 34:2,7 39:8 45:6 46:23 47:17 50:11,13 52:3 53:9 58:11 58:20,24 59:3,4 59:21 60:9 62:25 63:1 64:14 73:21 81:15,21 82:2 problems 6:10,13 40:4,5 57:22 67:5 procedural 39:9 53:21 54:5,10,12 54:15 procedure 39:20 53:11,13 54:9 procedures 62:11 proceed 35:18 50:22 proceeded 4:16 proceeding 48:23 78:5 proceedings 30:22 48:22 49:7 52:14 52:16 process 28:4 34:21 39:15 41:12 42:16 43:12 49:2 67:9 67:16 70:5,18 processes 40:17 79:6 produce 23:22 profit 80:5 program 20:3 23:12 prohibit 63:14 65:22 prohibited 16:24 prohibiting 20:25 prohibition 16:3 57:8 prohibits 44:8</p> | <p>71:25 promulgate 11:24 19:3,21 27:11 35:23 46:7 promulgated 12:5 12:14 18:25 21:14 46:5 promulgating 4:13 22:15 promulgation 11:21,24 20:15 proper 71:19 properly 28:15 29:7 proportion 7:3,22 31:21 proportional 32:11 proportionality 32:2,6 proportionally 74:6 proportionate 32:20 proportions 32:12 32:18 propose 37:11 39:17 41:2 42:7 45:12 proposed 25:13 43:7 80:19 proposition 26:25 prosaic 23:21 prospect 79:6 prospective 81:7 protect 4:14 protecting 13:10 protection 1:4 4:5 prove 24:25 provide 80:6 provided 56:4 provides 20:17 providing 53:16 68:20 provision 8:17 9:4 14:11 16:2 18:9 18:19,23 19:8</p> | <p>20:9 25:23 27:6 47:1,14 56:25 63:23 73:18 77:25 80:14 provisions 11:25 18:12 19:4 20:8 20:25 21:1 26:24 27:1,4 66:15 78:4 prudent 49:1 public 4:14 13:11 13:23 20:12,23 30:17 34:1,1 64:10 purchases 68:24 purple 73:16 purpose 9:3 33:4 80:7 pursue 30:21 put 24:10,14 39:16 65:7</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 5:2,3 8:4 11:22 13:22 17:16 20:16 26:3,5 57:22,25 63:24 68:23 75:1,5 77:3 77:11 quantified 34:23 35:11,13 38:22 39:6 51:1 quantifies 44:18 quantify 38:7 43:23 44:25 45:2 47:2,12 51:6 quantifying 44:12 49:9 quarreling 35:10 question 6:14 7:16 10:1 11:4,6,7 12:24 16:20,21 30:23 41:18 42:1 43:15 46:4 48:14 49:3 51:10,11 56:7,14 60:11 64:3,23 65:1 66:4</p> | <p>70:1,25 73:24 76:6 questions 78:12 quick 42:15 quickly 36:8 quite 11:16 17:4,23 57:11 60:21 71:10 quote 52:25,25</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>r 4:1 raised 76:25 raising 49:5 range 73:13,14,17 rational 28:13 35:18 36:1 43:8 65:10 81:23 rationale 17:3 rationales 66:3 reach 26:20 28:9 56:6 reaction 50:24 read 13:1 53:20 57:5 74:21 reading 33:18 36:22 46:21 63:8 real 29:15 really 41:24 42:13 51:19 52:22 70:24 80:13 81:12,16 reason 34:4 50:15 51:19 56:4 59:11 65:15 68:1,2 78:6 79:19 reasonable 20:12 20:23 51:17 reasonably 9:13 16:6 57:18 62:12 reasoned 43:9 reasons 9:13 36:4 38:15 43:7,14,16 60:10,15 rebuttal 3:11 78:16 recall 30:6 receptor 5:1,4 32:8 32:16,17</p> |
|--|---|--|--|--|

| | | | | |
|--|--|--|--|---|
| <p>receptors 4:21,24 5:6 6:9 23:3 31:23 33:13 recognized 63:23 reconciled 17:12 reduce 8:23 17:25 19:24 21:17 27:21 58:4 60:3,8,14,18 65:24 66:20 67:22 70:12 71:11 reduced 17:19 34:17 65:14 reduces 60:17 reducing 6:2 18:5 34:5 57:13 67:1 reduction 14:24 15:14 17:22 32:12 32:13,14,15 57:15 67:14,18 79:15,17 reductions 5:13 7:20,21 33:6,7 57:23 66:9,11 80:8 81:3 refer 14:9 reference 13:20 references 80:4 referred 67:11 referring 75:1 reflect 74:10 refusing 78:6 regard 16:18 57:4 61:23 70:21 80:10 regarded 16:9 regime 29:20 30:11 45:7 regional 62:24,25 regulate 13:2,3 29:25 77:5 78:10 regulated 80:22 regulating 13:7 80:12,13 regulation 13:14,16 30:1 41:15 61:20 77:15,18,18 78:7 regulator 16:23 regulatory 45:25</p> | <p>reinforce 79:7 rejected 39:25 relationship 58:2 relaxing 64:1 released 25:12 relevant 5:2,6 12:3 19:1 20:7,9 72:17 relief 33:18 36:19 68:20 rely 53:15 54:8 relying 49:16,22 remain 31:7 remaining 42:3 78:15 remains 42:8 remanded 28:22 remedy 78:23 79:16 remember 62:17 remit 69:10 render 29:13 renders 29:18 repeated 38:23 replace 37:11 42:7 79:7 replaced 30:25 replacement 31:9 replete 80:3 reply 61:24 78:19 79:12 report 63:19 represent 38:16 41:21 require 30:5,6 32:11 43:25 44:4 56:14 57:17 62:15 70:12 78:1 required 6:11,20 7:2 8:6 11:23 14:20 15:22 27:13 39:4 48:16 57:23 63:14 81:2 requirement 14:19 14:22 19:19 47:5 53:12,13,17 requirements</p> | <p>21:18 45:9 53:22 54:5,11,12,15 67:12 requires 7:22 24:10 25:23 38:6 45:11 45:22 49:23 53:3 57:3 requiring 13:20 residual 81:22 resist 69:14 resolution 22:24 79:4 respect 32:8,16,17 34:23 37:6,16 44:24 respects 43:11 respond 59:17 respondent 24:17 respondents 2:3,5 3:7,10 37:23 53:7 56:20,23 response 18:8 43:9 69:25 73:6 77:16 responsibilities 62:9 responsibility 6:13 14:12 15:17 22:10 44:11 62:10 71:9 responsible 59:12 61:16 65:4 rest 48:5 restatement 78:20 result 10:4,13,25 13:21 22:14 60:6 76:18,19 reverse 36:23 55:12 review 37:4 47:9 reviews 21:23 revision 27:14 right 5:25 6:3 8:24 21:15 22:4,19 23:7,24 24:24 25:11,11 39:11 41:20,23 42:7,23 43:2 46:21 49:15 50:9 51:11 58:12</p> | <p>59:10 61:1,6 64:11,13,14,21 65:4 72:21 73:9 rightly 62:12 risk 45:18 roberts 4:3 9:23 10:6 19:17 21:5 21:15 22:2,18 29:1 37:18 38:9 56:10,16 75:7 78:14 82:4 role 22:23 23:16 62:10 69:14 round 49:15 rule 4:13,20 5:9 18:1 25:13 28:6 28:14,20 29:13,17 29:18 30:10,21 31:10,12 37:10 40:12 41:11 43:23 44:17,20 45:7 47:12,17 49:20 51:10 52:6 54:8 55:19 80:11 ruled 28:16 rulemaking 40:17 53:10 55:6,11,20 80:19 rulemakings 77:8 rules 40:16 54:17 run 25:20</p> | <p>55:9 63:3 64:1 67:25 70:11,24 71:7 says 7:17 8:24,25 13:8 18:13 20:25 21:16 27:2,10 35:19,22 38:11 46:4 48:7 52:5,7 52:24 54:20 55:24 60:16 65:21 70:22 74:13 scalia 5:23 6:22 7:6 7:15 8:17,21 12:25 14:15 15:3 17:20 18:21 23:9 24:6,22 25:11,15 26:12 32:21,25 33:10 42:6,10,15 42:18,21,25 43:24 44:2 51:8,18 52:21 55:17 56:1 60:25 61:4 71:23 72:5 73:3 76:4,12 scalias 11:6 70:24 72:25 scenario 60:5 79:14 scheme 9:6 screening 4:18 second 5:8 18:20 21:23,24 22:17 23:14 34:16 36:9 45:6 47:16 49:10 51:19 56:4 59:9 60:24 61:14 79:12 seconds 37:20 section 38:8 51:21 securely 65:25 see 5:19 39:12 46:13 48:7 51:19 56:8 59:7 63:8 65:25 69:11 76:24 sees 46:1 selected 5:16 sense 6:18 10:1,20 25:24 72:17 sensibly 23:12</p> |
|--|--|--|--|---|

| | | | | |
|--|--|--|--|--|
| <p>sentence 56:11 separate 49:7 61:16 62:8,9 76:21,25 separately 76:22 serious 6:13 set 5:10 10:11 13:23 17:10 54:8 54:17 sets 46:15 setting 17:7 seven 32:10 seventh 50:3 severability 56:14 severe 6:10 severed 56:8 share 14:20 15:7,9 15:10,18 shared 14:13 15:16 sheep 58:14,15,19 62:17 69:5,8 73:9 shift 39:3 62:13 70:13 shifting 66:1 71:4 shipment 30:7 shoes 18:16 19:14 31:4 shoots 10:3 short 17:1 shorter 20:14 shot 10:17,19,22 shouldnt 15:4 48:16 64:2 showed 77:13 shown 15:20 30:7 shut 66:19 side 24:18 25:25 35:7 63:7,8 sides 36:10 59:24 79:23 significance 14:9 significant 9:16,20 10:24 11:19 12:22 14:6 16:10,16 18:14 65:19 69:9 70:7 71:7,16,20 73:9,13 75:24</p> | <p>80:15 81:24 significantly 5:7 9:2,12 10:3,7,11 10:15,21 19:5,11 19:25 21:4 33:16 33:20 38:5 45:4 47:5,9 49:25 51:15 57:9 60:21 60:25 61:3,5,7 63:15,20 64:4 65:22 66:24 67:7 67:17,25 72:2,8 72:16,19,24 74:18 74:19 75:10 77:3 silly 13:17,21 57:5 simplistic 64:16 simply 11:2 12:17 14:17,18,25 15:23 17:11,21 18:15 19:13 31:6 35:12 41:25 43:21 57:17 60:14 63:13 70:8 70:22 81:4 sip 21:13 24:14 25:4,5 35:20,21 38:19,24 39:25 40:23 41:1,3,7 42:7,11,19,21 43:1,3,7,7,19 44:7 45:1,16,19 46:1 46:23 47:7,16 48:11 49:19 51:25 52:1,8 54:11,13 61:19 66:15 67:16 67:21 68:15 70:5 sips 19:21 24:10 36:25 38:7,21 39:5 43:21 45:12 47:20 48:15 51:3 51:13,23 52:5 53:2 sir 34:10 situation 18:24 33:25 78:24 situations 35:17 six 50:2</p> | <p>slate 43:10 slight 57:21 81:22 so2 5:17 15:22 34:3 soften 68:8 sole 44:16 solely 49:16 solicitor 1:24 2:2 solution 32:11,19 34:9 59:21 solutions 39:18 solve 59:4 82:1 solved 9:10 40:4,5 81:15,21,21 solving 50:13 somebody 9:17,17 9:22 10:2,2 somewhat 8:2 soon 36:7 42:16 sooner 51:11 sorry 20:20 27:6 34:2 sort 33:3 64:15 sotomayor 19:16 27:17 31:10 40:22 41:5,19,23 44:23 47:23 48:4,13,24 52:10,19 57:5 66:17,23 68:9,13 70:15 sotomayors 70:1 sought 4:14 sounds 39:9 50:14 source 21:2 sources 9:1 12:19 23:25 26:4 36:15 38:25 67:13 77:19 77:21 78:1 80:16 sovereign 36:10 79:22 spaghetti 22:5 specific 28:19 69:3 73:7 specifically 54:21 77:8 80:6 spillover 30:1,8 square 55:22</p> | <p>stabs 10:2 stage 14:5 17:3 28:13 stance 38:23 standard 5:3 11:22 20:16 29:22 33:21 40:21 43:5 48:17 48:17 64:1,18 70:12 75:1,3,6 standards 13:22 17:16 46:5 47:19 47:21 51:24 standing 56:13 standpoint 71:11 started 34:12 51:18 starting 38:19 starvation 59:6 69:18 70:4,9 starve 59:1 state 2:3 3:7 4:21 5:1,4,10,10 6:17 6:22 7:17 8:14,15 8:22,23 9:1,4,8 11:9,23,24 12:19 14:16,17,19 15:4 15:4,7,8,18 18:17 19:3,3,7,15 20:11 20:21,22 21:3,9 21:16 22:6,13,22 23:2 24:2,4 26:22 26:23 27:3,7,13 27:14 29:5,7,14 30:19,24 31:9 32:9,13 33:19,19 34:14,23 35:11,20 36:10 37:11,23 38:21 39:5 45:19 45:24 46:5 50:4 52:1 57:18 58:3 58:12,13,14,25 59:10,11 60:2,3,7 60:9,12,16,17 61:22 64:19 65:19 65:19 66:8,15 67:20 68:14,15 69:4,5,7 70:4,14</p> | <p>70:23 71:3,10,12 71:25 73:8 74:10 74:24 79:22 80:21 80:24 81:2,4,8,9 81:10,13,19 statebystate 14:22 states 1:1,21 4:16 4:19,23 5:8,17,18 5:25,25 6:3,5,7,8 6:9,11,15 7:1,11 7:18,20 8:6,7,10 9:9 11:19,19 12:13,14 15:10,11 15:16 16:3,5 17:23 18:10,10,16 19:1,2,14,18,23 20:2,6 21:6,8 22:16,21 23:5,15 23:20 24:10,18,19 24:23 25:19,20,24 25:25 26:8,25 27:2,19 28:1 30:18 31:2,21 32:17 34:18,22,25 35:6,7,9,10,12 36:2,13,16,19,24 37:4,8,9,14 38:2,3 38:4,6,20,22 39:4 39:12,14,20 41:4 41:22 42:1 43:20 44:12,13 45:3,4,7 45:11,14,21 46:11 47:2,4,7,11,14,19 47:23,25 48:2,8 48:10,15,20 49:7 49:9,24,25 50:2,3 50:6 51:2,2,5,12 51:23,25 52:3,11 52:17 53:8 57:12 57:12,15,20,22,24 58:15 59:3,12 60:9 61:16,18 62:8,15 63:13 64:20 65:7,9,14 65:22 66:12 67:11 68:20 69:8 70:18</p> |
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| | | | | |
|---|---|--|--|---|
| <p>74:7 76:20 77:19 77:21 78:8,24,25 79:1,24 80:1,5,12 80:14,17 81:12 statewide 62:25 statute 7:17 8:18 8:24,25 13:13 15:1,4 17:9,11,24 18:2,5 19:6 20:5 27:1,7 33:17,18 35:18,22 38:11,13 38:18 40:10,13 43:18,24 44:1,3,8 44:9,22 46:4,14 46:15,18 49:14,17 49:19,21,22 50:21 52:2 53:16,16,17 53:19 55:14 57:3 57:6,7 59:15,24 60:11,15 61:21 64:7,9,12 65:2,11 65:17,21 66:5,14 66:22 68:18,19 71:24 72:18 74:12 75:2 76:21 80:3 81:7 statutory 12:25 45:6 51:19 56:24 60:20 63:11 65:15 66:1 79:19 stayed 48:22 52:16 step 16:12 stepping 31:4 steps 4:17 6:19 7:12 18:16 19:14 56:13 stewart 1:24 3:3,12 4:8,9,11 6:4 7:5,8 7:24 8:5,8,19,25 10:5,9 11:13,16 12:4,8 13:18 15:2 15:5 17:6,14 18:7 18:23 19:16 20:5 21:11,19 22:11,25 23:14 24:16 25:7 25:12,16 26:18</p> | <p>27:17 28:8 29:4 31:13 32:1,5,23 33:4,14 34:21 37:6 58:5 61:8 71:22 78:15,16,18 stewarts 66:18 75:8 75:20 stop 17:1 stopping 68:15 stops 68:15 straight 32:2,6 strange 34:8 strike 4:14 structure 46:20 60:24 61:15 subchapter 21:1 subissue 26:20 subject 29:9 31:8 36:5,16 53:21 54:4,15 submission 27:13 47:10 submit 18:11 20:13 35:20 38:6,20 39:5 41:2 43:20 45:12 47:16 48:12 51:3,13 submitted 20:21 27:14 42:22 43:3 77:12 78:7 82:6,8 subsection 20:20 27:9 39:6 46:25 substantial 46:18 53:19 57:23 successfully 24:19 sufficient 64:10 suggest 57:6 63:18 suggesting 48:9 suggestion 54:8 suggests 62:24 suit 78:25 79:5,22 summer 25:14 supply 75:4 support 68:18 suppose 14:14 32:21</p> | <p>supposed 12:13,16 13:22 19:7 39:19 supreme 1:1,21 sure 22:19 34:20 36:21 64:16 81:12 surely 66:13,18 system 39:23 68:11</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>t 3:1,1 tail 24:23,23 take 7:12 8:18 11:8 13:12 14:3 16:23 19:11,25 22:9 25:16 26:6 28:1 31:12 33:7 34:8 42:12,19 43:21 45:12 47:8 51:4 62:7 64:25 66:25 67:15 68:21 70:3 74:6,7,8 taken 6:19 16:18 17:23 38:11 47:6 63:18 67:23 70:4 70:17 takes 42:17 70:8 talk 75:11 76:3 80:11 talked 13:10 talking 10:24 39:11 62:19 73:7 74:23 75:3 talks 65:2 72:18 80:15 target 24:11,15 25:3,5 26:15,16 task 23:19,21 24:3 25:21 28:13 36:19 79:5 tasked 30:4 team 10:13 76:19 teams 76:17,21 technology 15:24 16:8 65:7 74:11 tell 21:18,19 24:15 25:3,4 45:3 50:11</p> | <p>69:7 74:1 telling 45:20 61:24 tells 43:20 47:4 50:21 ten 65:14 74:20,20 tenable 54:19 tennessee 65:21 68:24 term 8:19 9:13 33:16 terms 6:6 9:11 19:8 37:10 41:7 texas 2:3 text 55:23,24 57:7 60:20 61:14 thank 37:18 56:15 56:16 78:12,14,18 82:3,4 thatd 15:3 thatll 42:19 thats 6:24 8:8,24 9:23 11:3 14:25 17:4,23 18:2 19:1 21:20 22:19 23:9 24:12 28:17 29:22 32:3,25 33:3 34:7 34:14 37:2 39:18 39:21,24 42:15 44:3 48:25 49:3 49:12,17 50:19 51:15,21 53:10 54:18 55:14 59:8 61:6,19,20 65:1 67:10 69:23 70:15 72:9 73:1,3,10 75:25 77:20 81:16 theoretical 27:18 27:22 28:10 70:16 70:22 theoretically 32:16 theory 41:14 theres 11:17 22:5 26:13 27:22 28:5 41:25 50:2 53:6 55:7 56:7 60:2 63:10,17 64:19</p> | <p>72:21 73:21,23 79:18 theyll 40:7 72:13 theyre 11:11 31:5 40:10,12,19 41:6 43:10 58:15 59:1 59:9,11 68:15 74:23 theyve 8:11 37:8 40:25 48:14,17 51:16 59:8 61:11 70:16 thing 14:7 15:5 18:20 22:17,19 26:18 30:18 39:16 39:17 63:5,10 65:11 68:1 76:4 79:21 80:2 81:6 things 18:7 25:17 33:23 40:15 62:6 70:2 80:18 think 6:23 7:6,8,8 7:24 9:12,13 10:5 11:17 13:1,19 14:23 16:1 17:3 22:20 27:22 28:5 28:8,13 29:22 31:12,16 32:25 33:12,14 40:2,16 41:6,8,8 42:15 43:22 49:4 54:7 54:18 55:8,17,17 57:3,11 60:10,14 60:20 61:7,23 63:10,16 65:12 66:8,21 67:6,7,19 70:14 71:18,19 72:9,15,18,23,24 73:10,10,14,17 74:16,20,25 79:2 80:10 thinks 13:2 third 34:21 79:21 thought 25:19 44:24 63:1 75:9 three 4:16 18:7</p> |
|---|---|--|--|---|

| | | | | |
|--|--|--|---|--|
| <p>34:13,19,19 48:2 48:5,15,20 49:6 52:11,17 60:15 69:5 79:2 threshold 6:6,7,21 7:10 15:19 23:7 33:5 70:23 71:1 73:22 thresholds 5:15,16 5:21 6:16 21:12 81:17,18 throw 75:12 time 11:7,7 12:13 19:20 25:13 26:1 27:11 29:24 31:4 31:8,14 35:23 36:24 40:3 42:19 46:7 50:8 71:1 times 38:23 56:9 today 15:24 told 21:7,9 38:20 39:4 40:23 47:7 ton 5:17,18,19 6:6 6:7 8:13 34:17 tons 35:3 top 20:20 total 33:6 35:3 tough 39:8 50:10 50:18 trade 68:10 tradeoff 68:10 trading 68:17,18 80:6 transaction 42:12 translate 75:18 translated 67:17 transport 4:13,20 5:9 37:10 40:12 41:11 44:20 45:7 47:17 49:19 51:10 52:5 80:11 travel 26:7 treat 16:16 66:7 69:6 treated 6:10 30:20 76:22</p> | <p>treating 59:10,11 61:15 tries 53:8 triggered 11:20 trucking 13:5,25 17:7 64:9 67:10 75:2 true 7:4 10:19 23:5 36:11 truth 11:17 try 31:17 55:3 59:17 trying 8:9,9 11:9 26:2 40:8 55:5,9 69:20,21 79:25 tuesday 1:18 turnover 10:17 turns 58:17,18 two 6:4 12:4 23:15 25:17 32:9 36:4 46:8 59:2,3 64:20 65:14 69:3,4 75:14 77:7 type 21:2</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 5:16 23:7 24:5 unavoidable 16:6 uncertainty 26:14 26:15 unclear 37:8 understand 17:5,13 18:22 32:6 33:10 41:13 understanding 46:3 54:1 74:9 undertake 15:18 undertaken 48:20 undertaking 23:21 31:16 unfairly 30:20 unfeasible 68:7 unique 68:18 unit 69:7,8,10 united 1:1,21 48:8</p> | <p>53:8 units 32:10 69:3,4 unlawful 38:14 43:13,16 unnecessary 28:20 unreasonable 40:7 upwind 4:15,19,23 5:1,25,25 7:17,20 19:2 21:6 32:9 33:19 36:13,19 65:18 78:8,25 79:1,16,18,25 80:20 81:2,19 usc 20:10 use 6:24 8:1 14:9 23:10 43:14 53:9 53:13 57:2 69:20 69:21 72:22</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6,13 4:5,7 vacate 28:5 vacuum 26:9 variety 23:23 28:19 various 5:15 9:12 12:20 23:3 35:2 varying 10:8 venture 49:2 version 55:10 63:12 versus 6:7 77:11 79:24 view 38:12 violation 18:1 virtually 77:14</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 36:1 44:17 47:11 48:7 49:1,5 waiting 43:2 want 11:16 25:1 34:10,19 41:15 42:23 43:20 45:15 45:21 62:13 69:2 73:2 wanted 14:24 17:20 39:12 44:14 72:10</p> | <p>74:8 wants 46:19 68:3 washington 1:17 1:25 2:4 wasnt 81:12 way 6:7 7:14 8:3 13:17 14:2 15:11 15:15,23 22:6 30:19 32:19 35:1 35:18 37:14 38:17 40:5,5,7,8 49:13 50:19,22 54:3 57:6 65:15 66:9 66:25 67:23 68:9 70:10 81:13 ways 15:9 65:3 68:8 69:24 wed 39:11 weight 61:7 went 37:15 50:19 53:2 54:23,25 weve 16:17 25:6 56:4 67:19 whats 24:12 28:4,7 39:22,22 40:7 41:5 49:6 50:24 50:24 52:19 76:5 white 76:24 widespread 22:14 wild 45:13 win 28:17 wind 50:7 wisdom 79:7 won 28:21 wondering 13:12 wont 43:1 word 61:7 63:15 71:8,24 72:7,7,22 72:23 74:1,12,17 74:17 words 13:15 17:9 36:24 61:8 63:20 66:24 69:12,21 worked 70:17 working 21:6 37:9 70:9</p> | <p>works 36:7 40:2 worry 34:4 worse 25:18 worth 14:10 36:9 80:10 wouldnt 23:5 25:7 26:25 30:10 41:24 49:1 66:14 write 69:2,2,12 writing 43:10 written 38:1 66:6 66:14 wrong 41:6,8 58:8 wrote 18:3,6</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,9,10,16 64:20</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>y 64:20 year 9:21,22 years 11:9,11,23 12:18 20:14 22:9 27:12 35:23 36:1 38:19 40:14,14 46:6,8,11,16,17 47:11 yellow 73:15 york 26:1,6 youd 10:25 youll 42:18 youre 10:24 17:24 17:26 22:7 39:9 39:11 40:22 42:10 50:14 62:18 69:1 71:6,6 73:7 74:2 youve 22:8,8 39:21 43:6,7</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>000 9:21,21 09 1:22 4:2</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 5:17 6:11 9:21,22</p> |
|--|--|--|---|--|

| | | | | |
|----------------------------|----------------------------|--|--|--|
| 20:11 27:10 | 39 82:7 | | | |
| 10 1:18,22 4:2 9:17 | 3year 21:7 | | | |
| 9:18,21 64:25 | | | | |
| 71:11 | 4 | | | |
| 100 9:19 76:7 | 4 3:4 32:14 78:15 | | | |
| 101 76:7,7,15 | 40 64:23,24 | | | |
| 10a 27:5,10 | 42 20:9 | | | |
| 11 82:7 | 5 | | | |
| 120 64:19 | 5 5:19 9:17 11:9,11 | | | |
| 121182 1:5 4:4 | 46:11 | | | |
| 121183 1:12 | 50 59:5,5 | | | |
| 13ths 32:13,14,15 | 500 5:17,19 6:6 | | | |
| 15 38:19 47:11 | 8:11,13 23:11 | | | |
| 17 67:20 | 33:1 34:17 | | | |
| 180degree 39:3 | 51 39:1 | | | |
| 1990 33:17 63:20 | 52 39:1 | | | |
| 1997 12:6 47:19 | 56 3:10 39:1 | | | |
| 51:24 | 57 43:19 | | | |
| 1998 21:13 38:20 | 59 38:25 | | | |
| 44:14 46:24 | 6 | | | |
| 1a 20:8 | 6 9:17 51:22 52:7,7 | | | |
| 2 | 52:24,24 53:3,14 | | | |
| 2 5:18,18 6:6,7 | 53:24 54:19,19 | | | |
| 20:20 27:12 32:13 | 55:4,15 56:6,8,12 | | | |
| 35:23 36:1 38:8 | 7 | | | |
| 38:22 39:6 46:17 | 7 32:15 | | | |
| 46:25 49:10,23 | 7410 20:10,11 38:8 | | | |
| 20 64:20,22,24 | 51:22 | | | |
| 2006 12:3,10 21:14 | 78 3:13 | | | |
| 43:4 | 8 | | | |
| 2010 25:14 | 9 | | | |
| 2013 1:18 | 9 38:24 | | | |
| 22 47:19 51:23 52:3 | 97 12:7 | | | |
| 24hour 12:10 | | | | |
| 2a 20:20 | | | | |
| 3 | | | | |
| 3 11:23 20:13 22:9 | | | | |
| 46:6,16 | | | | |
| 30 22:16 37:19 | | | | |
| 300 5:18 6:7 | | | | |
| 354 77:17 | | | | |
| 368 43:19 | | | | |
| 37 3:7 | | | | |
| 370 43:19 | | | | |