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IN THE SUPREME COURT OF THE UNITED STATES

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ENVIRONMENTAL :

PROTECTION AGENCY, ET AL., :

Petitioners : No. 12-1182

v. :

EME HOMER CITY :

GENERATION, L.P., ET AL :

- - - - - x

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AMERICAN LUNG ASSOCIATION, ET AL., :

Petitioners : No. 12-1183

v. :

EME HOMER CITY :

GENERATION, L.P., ET AL :

- - - - - x

Washington, D.C.

Tuesday, December 10, 2013

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

APPEARANCES:

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Department of Justice, Washington, D.C.; on behalf of

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Petitioners.

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PETER KEISLER, ESQ., Washington, D.C.; on behalf of

Industry and Labor Respondents.

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P R O C E E D I N G S

(10:09 a.m.)

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

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONERS

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

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

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

1 contribute 1 percent or more of the relevant National
2 Air Quality -- Ambient Air Quality standard, or -- or
3 NAAQS, to that downwind receptor. And any State that
4 didn't contribute at least 1 percent to any of the
5 downwind -- any of the relevant downwind receptors was
6 determined not to contribute significantly to
7 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; and the thresholds
16 ultimately selected were for NAAQS, \$500 per ton. For
17 SO₂, the group 1 States were at a level of \$2,300 per
18 ton. The group 2 States were 5 -- \$500 per ton. And
19 the idea was let's see what emissions savings we can
20 achieve if additional control measures are implemented
21 up to those cost thresholds.

22 JUSTICE SCALIA: Of course, those -- those
23 savings would -- would not be evenly distributed among
24 the upwind States, right? So some upwind States that
25 are able to make those efficient changes will be

1 carrying more than their burden of reducing the
2 emissions that affect downwind States, right?

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

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

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

1 efficiently make the changes will be required to do more
2 than merely account for their proportion of the downwind
3 harm. Isn't that true?

4 MR. STEWART: Well --

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

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

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

23 MR. STEWART: I think it would be the case
24 that at least as -- yes, as compared to at least some
25 air-quality-only measures, the use of cost would have

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

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

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

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

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

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

24 MR. STEWART: Well, the statute says that
25 each State will adopt measures that prevent sources

1 within its borders from contributing significantly to
2 downwind nonattainment. And the purpose of the
3 provision is not to allocate blame for an existing state
4 of nonattainment or for prior pollution. It's a device
5 -- it's to devise a scheme that going forward will
6 prevent nonattainment from occurring. And the idea is
7 if each State lives up to its obligation, and if the
8 downwind States make commensurate commitments, then the
9 problem will be solved.

10 And in terms of the language "contribute
11 significantly," I think there are -- there are various
12 reasons to think that EPA reasonably construed that term
13 to include a component of difficulty of achievement.
14 That is, in common parlance, we might say that dunking a
15 basketball is a more significant achievement for
16 somebody who is 5 feet 10 than for somebody who is 6
17 feet 10. We might say that a \$100 charitable
18 contribution is more significant if it's made by a
19 person who makes \$10,000 a year than a 1,000
20 contribution by somebody who makes \$1 million a year.

21 CHIEF JUSTICE ROBERTS: That's -- I was just
22 going to say, that just is because of, in the latter
23 case, because contribution happens to be used in both an
24 affirmative and a negative sense. The question is, for
25 example, whether somebody who fatally stabs somebody and

1 someone who fatally shoots them have each significantly
2 contributed to the bad result.

3 MR. STEWART: I think --

4 CHIEF JUSTICE ROBERTS: Or -- or not
5 significantly contributed in -- in -- contributed in
6 varying degrees.

7 MR. STEWART: I would say if -- if you cause
8 death by alternative means, then both people would have
9 contributed as significantly. But to include -- to set
10 out a hypothetical that involves contribution to a bad
11 result, if you had a basketball team that lost a game by
12 one point, and the coach was asked to pinpoint the plays
13 that contributed significantly to the defeat, the coach
14 would be much more likely to identify a missed layup or
15 a turnover than the missed half court shot at the
16 buzzer. It's true that the missed half-court shot at
17 the buzzer would, in one sense, contribute
18 significantly, in that it was a but-for cause. If the
19 shot had been made, the outcome was -- would have been
20 different.

21 But if you're talking about significant
22 contributions to a bad result, you'd more likely to
23 focus on errors that could or -- and should have been
24 avoided, not simply the failure to accomplish something
25 that's extraordinarily difficult.

1 JUSTICE KAGAN: Can I ask a question?

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

10 MR. STEWART: I --

11 JUSTICE KENNEDY: Or don't you like that
12 answer?

13 MR. STEWART: I don't -- I don't quite want
14 to go there. I think there's a kernel of truth in
15 there -- in that, but that the point at which the
16 State's significant -- the point at which the State's
17 good neighbor obligation is triggered is by the
18 promulgation of a new National Air -- Ambient Air
19 Quality standard; and the State is required within 3
20 years of the promulgation of the NAAQS to promulgate a
21 State plan that includes good neighbor provisions for --
22 for the particular --

23 JUSTICE KENNEDY: How far back? How far
24 back do you go for the relevant NAAQ? 2006 or --

25 MR. STEWART: In this case, there are two

1 NAAQS that were implemented -- that were promulgated in
2 1997.

3 JUSTICE BREYER: Oh, '97.

4 MR. STEWART: One of them for annual
5 particulate matter, and one of them for ozone; and then
6 the 2006 NAAQS was for 24-hour particulate matter --
7 particulate matter, which is harder to achieve.

8 And -- and so when -- when we are asking
9 what are the States supposed to do as of the time that
10 the new NAAQS is promulgated, the States don't exactly
11 get credit for what they have done in the past; that is,
12 they can't do less than they are supposed to do in the
13 future, simply because they have done a lot in prior
14 years to prevent pollution. But the fact that sources
15 within the State have in the past installed various
16 pollution control devices or are using cleaner fuels,
17 that may make it easier for them to prevent significant
18 contributions to downwind nonattainment going forward.

19 JUSTICE KAGAN: Can I ask a question?
20 Following up on Justice Scalia about the statutory
21 language and how you read it, I think, you know, most
22 people, everybody, thinks that it's better to regulate
23 with attention to costs than to regulate without
24 attention to costs. We have this, our Trucking
25 Association decision where we said, well,

1 notwithstanding that everybody agrees that regulating
2 with attention to costs is better, when Congress says
3 the opposite we have to go with the opposite. And there
4 we said Congress had said the opposite because it had
5 talked about protecting the public health with an
6 adequate margin of safety.

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

13 MR. STEWART: Well, in the case of the NAAQS
14 I think it was -- it was not the case that requiring EPA
15 to establish the NAAQS without reference to cause -- to
16 cost, would call a silly result. That is, the ambient
17 air quality standards were supposed to be set based on
18 public health criteria. And the court in -- in the same
19 case, in American Trucking, said that, of course, you
20 can consider costs in deciding what is the most
21 efficient and appropriate way to implement those NAAQS.
22 And here I take your point that in order to conclude
23 that Congress barred consideration of costs at the
24 implementation stage, we would have to have very clear
25 language and "significant contribution" doesn't do it.

1 And the other thing I would say in addition
2 to the examples I've given of -- in common parlance, we
3 use significance to refer to ease or difficulty of
4 achievement, it's worth emphasizing that this is a
5 provision of law and it's designed to help allocate the
6 responsibility among different actors for alleviating a
7 shared problem.

8 And, for example, suppose --

9 JUSTICE SCALIA: The problem is that that
10 allocation among different actors is done State by
11 State, and simply taking costs into account as
12 determining who will do what simply eliminates the
13 requirement that each State not be -- not be required to
14 do more than its share of the pollution it's -- it's
15 causing downstream. It's the State-by-State requirement
16 that makes it very difficult to think that all Congress
17 wanted was the most efficient reduction of pollution no
18 matter where that pollution came from. That's simply
19 not what the statute envisions.

20 MR. STEWART: I guess --

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

23 MR. STEWART: I mean, the first thing I
24 would say is we -- we can accept the premise that each
25 State should alleviate no more than its share and there

1 still may be -- that each State should do no more than
2 its share, and yet there still may be different ways of
3 determining what a State's fair share is.

4 That is, one way would be to determine which
5 States had been the greatest polluters in the past and
6 say that the more pollution that had previously flowed
7 from your borders, the greater your reduction obligation
8 in the future. But another way would be to say in order
9 to ensure that each of the States that have shared
10 responsibility for the problem in the past bears its
11 fair share, we will ask each State to undertake
12 commensurate efforts as measured by the cost threshold.

13 For example, if it could be shown somehow
14 that the generation of electric power inherently
15 required the emission of some level of SO₂ and NO_x, that
16 there was simply no way to -- to generate electricity
17 through any technology known today without generating --
18 without emitting that minimum amount, I think we would
19 certainly say, well, Congress didn't intend to bury in
20 the good neighbor provision some prohibition against
21 particular States generating electricity. And EPA
22 could -- and EPA or the States could reasonably
23 determine that the unavoidable component of the
24 emissions, the part that couldn't be avoided even with
25 the best possible pollution control technology, that

1 would be regarded as legally insignificant; that the
2 only legally significant contribution would be
3 contribution that could have been avoided.

4 Now, clearly, EPA has gone one step farther,
5 because it hasn't just focused on emissions that
6 couldn't be avoided at all, at least with -- without
7 foregoing the generation of electric power. It has
8 said, we will treat as legally significant only the
9 extra increment of emissions that comes after we've
10 taken what we regard to be equitable and cost effective
11 pollution control measures.

12 JUSTICE KENNEDY: Just one more question on
13 cost. In -- in your answer to Justice Kagan's question,
14 there is at least a possible argument that you, the
15 regulator, the government, the EPA, can take cost into
16 account unless it's expressly prohibited from doing so.
17 You don't go that far. But you -- you even stop short
18 of that. You say that it might be difficult to apply
19 the cost rationale at the implementation stage? I -- I
20 think that's what you said and if so, I didn't quite
21 understand.

22 MR. STEWART: I misspoke. What the Court
23 said in American Trucking is that in -- in setting the
24 NAAQS, EPA was forbidden to consider cost, not because
25 the statute said in so many words cost can't be

1 considered, but because the criteria that were set out
2 in the statute for what the NAAQS had to achieve simply
3 couldn't be reconciled with consideration of costs. But
4 the Court in the same decision said, although you can't
5 consider costs in determining what the NAAQS will be,
6 what air quality standards have to be achieved, of
7 course you can and should consider costs in deciding
8 what implementation measures should be used to determine
9 which emissions will be reduced.

10 JUSTICE SCALIA: If Congress wanted that,
11 why couldn't Congress simply have said the EPA shall
12 prescribe minimum pollution reduction measures that have
13 to be taken by the States? That's a quite different
14 statute from what we have before us. But what you're
15 saying is, you know, you -- you reduce it this -- this
16 much, as much as efficiency will allow, or else you're
17 in violation of -- of the good neighbor rule. And
18 that's a very different statute from what Congress
19 wrote. Maybe it's a good idea. Maybe EPA ought to
20 control all -- all efficiency measures for reducing
21 pollution, but it's certainly not the statute that
22 Congress wrote.

23 MR. STEWART: Let me say three things in
24 response to that. The first is that, as I mentioned
25 before, the good neighbor provision is addressed in the

1 first instance to the States. That is, it's the State's
2 initial obligation to submit an implementation plan that
3 contains good neighbor provisions. And so if the Court
4 says costs can't be considered in defining significant
5 contribution, the effect is not simply that EPA can't
6 consider that factor when it steps into the State's
7 shoes. The effect is that a State can't consider cost
8 of achievement in attempting in good faith to implement
9 its own good neighbor provision.

10 The second thing I would say --

11 JUSTICE SCALIA: Excuse me. I don't
12 understand that. Please say that again.

13 MR. STEWART: The good neighbor provision --
14 we're dealing here with a situation where EPA was the
15 one that promulgated Federal implementation plans, but
16 that's only because the States didn't -- the relevant
17 upwind States did not discharge their obligation to
18 implement State -- promulgate State implementation plans
19 that contain good neighbor provisions. But the language
20 "contribute significantly" is in the portion of the
21 statute that deals with what a State plan is supposed to
22 contain. It's not dealing with -- it's not in a
23 provision that by its terms is addressed directly to
24 EPA.

25 And so if the Court said in defining

1 "contribute significantly" we can't take into account
2 the cost of emission control measures, that would mean
3 not simply that EPA can't consider that factor when it
4 steps into the State's shoes; it would also mean that
5 the State can't consider that factor.

6 JUSTICE KAGAN: Mr. Stewart --

7 CHIEF JUSTICE ROBERTS: Well, when you
8 mention the fact that the States didn't address the good
9 neighbor requirement, of course you hadn't come up with
10 their budgets that they had to meet at the time that
11 they had to promulgate their SIPs. Now, at a different
12 point in your brief you emphasize how incredibly
13 complicated it is for States to determine how much they
14 must reduce their emissions to take care of the fact
15 that they significantly contributed to downwind
16 pollution. And yet you would impose on those States the
17 burden to issue the good neighbor program without
18 knowing how much you expect them to -- to meet.

19 MR. STEWART: Well, it's the statute that
20 imposes the obligation on the States. And it may help
21 to draw the Court's attention to the relevant
22 provisions. On page 1a of the appendix to the
23 government's opening brief, the relevant provision is 32
24 U.S.C. 7410. And 7410(a)(1) begins by saying: "Each
25 State shall, after reasonable notice and public

1 hearings, adopt and submit to the administrator of EPA
2 within 3 years or such shorter period as the
3 administrator may prescribe after the promulgation of a
4 national primary ambient air quality standard, the
5 NAAQS." And then it goes on to say, "A plan which
6 provides for implementation, and so forth.

7 And then if you look to the bottom of -- or
8 to the top of page 2a -- I'm sorry -- subsection (2)
9 begins: "Each implementation plan submitted by a State
10 under this chapter shall be adopted by the State after
11 reasonable notice and public hearing. Each such plan
12 shall," and then if you look at the bottom of the page,
13 it says, "contain adequate provisions prohibiting,
14 consistent with the provisions of this subchapter, any
15 source or other type of emissions activity within the
16 State from emitting any air pollution in amounts which
17 will contribute significantly to nonattainment" --

18 CHIEF JUSTICE ROBERTS: So if you were
19 working for one of the upwind States and you were facing
20 this 3-year deadline and EPA had not told anyone how it
21 intended to interpret the State's obligations under the
22 good neighbor policy, what would you have told the State
23 to do.

24 MR. STEWART: Well, certainly EPA's basic
25 methodology of using -- using cost thresholds had been

1 embodied in the -- the NAAQS SIP call in 1998 and in
2 CARE, which I believe was promulgated in 2006.

3 CHIEF JUSTICE ROBERTS: Right. So -- but
4 the head of the State EPA comes to you and says: How
5 much do we have to reduce our emissions to satisfy our
6 requirements? And you would tell them what?

7 MR. STEWART: We would tell them, in all
8 honesty, we don't know yet. But that -- that's not a
9 fatal flaw in the argument. That is, it is inherent in
10 any legal context in which one person acts and then a
11 second person reviews, that the first person has to act
12 before the second person has -- has made up his or her
13 mind. And so a district court --

14 CHIEF JUSTICE ROBERTS: Well, but that kind
15 of glosses over the fact that, as you say elsewhere in
16 your brief, this is a -- is your analogy, right -- a
17 spaghetti matrix or something? And so there's no
18 possible way for the State to know how much of a burden
19 you expect them to address. And Yet you're saying,
20 well, you've got to do it and you've got to do it within
21 3 years, or we're going to take over the responsibility.

22 MR. STEWART: Well, certainly what EPA was
23 called upon to do was far more complicated than what any
24 particular State was going to be called upon to do,
25 because as a result of widespread noncompliance, EPA was

1 promulgating Federal implementation plans for close to
2 30 States and plans for -- for different NAAQS.

3 The second thing I would say is that --

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

11 MR. STEWART: Well, it certainly has the
12 data available to it that -- that EPA had available
13 about how much did each State contribute to the overage
14 at various nonattainer -- nonattainment receptors in the
15 past. It's certainly true that the States wouldn't
16 necessarily know exactly what policy judgment EPA would
17 ultimately make as to what the right cost threshold was.
18 But --

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

24 MR. STEWART: I guess the second -- the
25 other two points I would make are: First, the State's

1 role is to devise something, in this area as in others,
2 that it believes will carry out its own legal
3 obligations, not necessarily to predict just how EPA
4 would do it if the task fell to EPA. And so, for
5 example, when the States are undertaking a more -- the
6 more prosaic task of devising plans that will produce
7 attainment of the NAAQS within their own borders, they
8 have to make a variety of policy judgments about the
9 right mix of emission controls, what sources should be
10 allowed to emit in -- in what amounts.

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

15 JUSTICE SCALIA: Can you give us an example
16 of when EPA has done this in the past, where a -- a
17 crucial element of a -- of a NAAQS has not been defined
18 by the agency and yet the agency nonetheless requires
19 the States to -- to put together their SIPs without
20 knowing what their target is? And that's the problem
21 here. What's your best example of another case in which
22 the agency said, you -- you put together a SIP and we're
23 not going to tell you what the target is?

24 MR. STEWART: Well, the examples I would
25 point to are in the brief filed by the -- the Respondent

1 States that are on our side of the case, who identify
2 examples of instances where States did successfully
3 comply with their good neighbor obligations and -- and
4 persuaded EPA that what they had done was enough.

5 JUSTICE SCALIA: Well, that just means it's
6 pin the tail on the donkey. Some States got the tail.
7 I mean, you know, they pinned it in the right place.
8 That doesn't prove anything.

9 I want an example of another instance in
10 which EPA has -- has hidden the ball, has said, we're
11 not going to tell you what the target is; it's up to you
12 to come up -- up with a SIP and we'll tell you after the
13 fact whether that SIP happened to meet the target that
14 we've invented.

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

19 JUSTICE SCALIA: All right. Correct.

20 MR. STEWART: It released a great deal of
21 information at the time that the proposed rule was
22 announced in the -- the summer of 2010.

23 JUSTICE SCALIA: Okay.

24 MR. STEWART: But -- but I take your point
25 that -- the two additional things I would say, though,

1 are that for better or worse Congress did place this
2 obligation on the States. It evidently thought that, at
3 least in the mine run of States -- of cases, States were
4 capable of carrying out this task. And at least to the
5 extent that adopting a good -- a good neighbor provision
6 requires consideration of circumstances in other States,
7 in a sense this is just the flip side of what the
8 downwind States have to do all the time. That is, if
9 New York officials are trying to determine when a new
10 NAAQS comes out, how can we bring our own air quality
11 into compliance? What controls do we have to place on
12 our own sources in order to get air quality to the
13 desired level?

14 The New York officials have to take account
15 of the degree of pollution that is likely to travel to
16 their borders from other States. They can't analyze
17 emissions within their own borders in a vacuum. They
18 have to consider what the likely contributions of their
19 neighbors --

20 JUSTICE SCALIA: Yes. That just means
21 there's some facts that they don't know. Of course.
22 There is always going to be uncertainty about certain
23 facts. But here there is uncertainty about the target,
24 not just about the facts. We don't know what target
25 we're expected to hit.

1 MR. STEWART: I guess the final thing I
2 would say on -- on this part of the -- this particular
3 sub-issue of the case is that, even if you reach that
4 conclusion, even if you determine that it was just
5 practically infeasible for any State to adopt a
6 compliant State implementation plan with good neighbor
7 provisions for these NAAQS until EPA acted, then the
8 proposition of the opposing States still wouldn't
9 follow.

10 That is, the statute in the provisions that
11 I've pointed to says it's up to the States in the first
12 instance to devise the State implementation plans,
13 including good neighbor provisions. And then on page
14 10A of the same provision -- of the same appendix, I'm
15 sorry -- the statute describes what happens if a State
16 fails to satisfy that obligation.

17 And this is at the beginning of subsection
18 (c)(1) on page 10A. It says: "The Administrator shall
19 promulgate a Federal implementation plan at any time
20 within 2 years after the Administrator finds that a
21 State has failed to make a required submission or finds
22 that the plan or plan revision submitted by the State
23 does not satisfy the minimum criteria."

24 JUSTICE SOTOMAYOR: Mr. Stewart, below, the
25 government conceded that there was a theoretical

1 possibility that some States could be overcontrolled,
2 that they would be implementing measures that would
3 reduce their contributions to pollution below the 1
4 percent. Assume that -- I think there's a theoretical
5 possibility of that -- but that your approach was
6 basically fine.

7 What would we do about that? First of all,
8 are there measures States can take to get out of the FIP
9 if it's inappropriate to them because of overcontrol?
10 And if not -- and how do they do it? I mean, what's the
11 process? If we think there's a flaw, do we vacate the
12 rule? Do we leave it in place? What do we do? And
13 what -- and what's our power to do it?

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

23 Now, even if we win everything that's at
24 issue in this Court, the case is not over. There are a
25 variety of more specific challenges to the details of

1 the rule that the D.C. Circuit found it unnecessary to
2 address. And so if we won on the issues that are before
3 the Court, the case would be remanded and there would be
4 an opportunity for the court below to consider those.
5 And to the extent --

6 CHIEF JUSTICE ROBERTS: Including --
7 including the overcontrol argument, or would that have
8 been done?

9 MR. STEWART: Well, to -- to the extent that
10 any State had -- and I don't know the -- the pending
11 as-applied challenges at this level of detail. But to
12 the extent that any State has a properly preserved
13 challenge to the effect that it is actually likely to be
14 subject to overcontrol, then that could be heard by the
15 court of appeals. The court of appeals could determine
16 both whether that is, in fact, likely to happen and
17 whether, if it does happen, that would render the rule
18 arbitrary and capricious as to that State.

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

1 And I think that's an extraordinary standard
2 for an administrative agency to deal with; that is, you
3 know, it happens all the time that Federal agencies are
4 given authority to regulate, to address one problem, and
5 the regulation necessarily has spillover effects on
6 other conduct. And so for instance, if a Federal agency
7 was tasked with preventing the sale in interstate
8 commerce of contaminated food, it might require
9 inspections. It might require the recall of food after
10 one item in a shipment had been shown to be
11 contaminated. These measures might have spillover
12 effects on food that was not, in fact, contaminated.

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

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

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

1 as your question indicated, there is also a mechanism by
2 which a State can ask to have the Federal implementation
3 plan replaced by a plan of its own devising.

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

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

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

1 if it's could be --

2 JUSTICE KAGAN: Could you explain that to
3 me, Mr. Stewart? Because are you saying that the
4 straight proportionality approach that was applied in
5 the D.C. Circuit, are you saying that that's impossible
6 or are you saying it's complicated and dumb?

7 MR. STEWART: What -- at least what we
8 understand to be the straight proportionality approach
9 is impossible. That is, it might be possible with
10 respect to any particular downwind receptor, because you
11 could say that if one upwind State is contributing two
12 units and another four and another seven, the
13 proportional solution might be to require that any
14 necessary reduction would be in those proportions. One
15 State would do 2/13ths of the reduction, another would
16 do 4/13ths of the reduction and another would do 7/13ths
17 of the reduction.

18 That would be theoretically possible with
19 respect to any receptor. But with respect to another
20 receptor, the same States might be contributing in
21 entirely different proportions, and so there would be no
22 way of devising a solution that would be proportionate
23 as to both.

24 JUSTICE SCALIA: I suppose you could average
25 them out, couldn't you?

1 MR. STEWART: You might be able to average
2 them out.

3 JUSTICE SCALIA: I don't think that's any
4 more irrational than picking a number like 500 bucks
5 as -- as to, you know, what the -- who can do it more
6 efficiently. That's sort of arbitrary.

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

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

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

1 I mean, one of the ironic things about this
2 case is that the only ill consequence of overcontrol is
3 cost. That is, this is not a situation in which there
4 is some distinct public health benefit -- distinct
5 public health problem, I'm sorry, that is caused if
6 power plants are emitting too little NOx or SO2. The
7 only reason that people worry about overcontrol, about
8 reducing emissions more than they need to be, is that it
9 costs money.

10 And if that's the problem to be avoided, it
11 seems strange that EPA can't take account of costs in
12 theorizing a solution.

13 JUSTICE BREYER: Sir, I don't want you to --
14 finish your argument if you had something to say on what
15 you started out with in describing the plan. You said
16 there are three aspects. The first aspect was you cut
17 out anyone, any State that's contributing less than 1
18 percent. You said the second aspect was that you used a
19 metric of \$500 per ton of NOx reduced, and you applied
20 that to the States still in. And then you said there
21 were three, and you never got to three, and I want to be
22 sure you do if you had that.

23 MR. STEWART: The third part of the process
24 is that once each State's emissions budget has been
25 quantified, with respect to each State the EPA

1 essentially divides up the emissions that are allowed
2 among the different power plants within the State's
3 borders. And the way that it does that is it gives
4 allowances to the various power plants that add up to
5 the total number of tons of pollutants that are allowed
6 to be emitted.

7 And it's important to emphasize that the
8 States have not joined the industry's argument here that
9 cost -- even the States on the other side of the case
10 have not joined the industry's argument here that
11 states that costs can't be considered. Those States are
12 not quarreling with the methodology by which EPA
13 quantified their State emission budgets. Those States
14 are simply saying that once those had been quantified
15 they should have been given an opportunity to determine
16 on their own how the allowances should be allocated
17 without EPA doing it first.

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

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

10 And the second point worth emphasizing is
11 that there are State sovereign interests on both sides
12 of the case. It's true that by devising a Federal plan
13 in the first instance EPA has intruded to a degree on
14 the ability of the upwind States to decide how emissions
15 allowances should be allocated among their own 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 to 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 be
13 additional NAAQS implemented, and this Court's decision
14 would affect the way in which both the States and EPA
15 went about the business of determining how good neighbor
16 obligations should be carried out with respect to those
17 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 a
12 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 SIP that we cite on Pages 9
25 and 59 of our brief, and also in the sources of 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 they
4 have told the States that they are required to submit
5 good neighbor State -- SIPs before EPA has quantified
6 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. The States haven't come up with enough in our
14 opinion; and so now we go to the Federal process and we
15 put out our thing. And you comment on that. And then
16 if you feel that their thing is no good, propose your
17 own solutions again. That's what he's saying.

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

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

25 JUSTICE BREYER: Well, they objected to it

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

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

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

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

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

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

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

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

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

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

20 MR. MITCHELL: We represent a coalition of
21 States.

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

24 MR. MITCHELL: There's simply no consensus
25 among the States on that question.

1 (Laughter.)

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

4 (Laughter.)

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

8 MR. MITCHELL: Yes.

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

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

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

16 MR. MITCHELL: No, it takes months.

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

19 MR. MITCHELL: Yes.

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

23 MR. MITCHELL: Yes.

24 JUSTICE SCALIA: And then maybe they will
25 say your SIP is good enough, and maybe they won't.

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

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

12 MR. MITCHELL: Well, it's still an unlawful
13 use of the FIP authority for several reasons, and this
14 gets back to Justice Breyer's question, why is this
15 unlawful? And there's several reasons. The first is
16 that EPA has changed its interpretation of the statute,
17 and the key language from the NAAQS SIP call appears on
18 Pages 57,368 through 370, where EPA tells the States, we
19 don't want you to submit good neighbor SIPs that simply
20 take a guess at what you think the good neighbor
21 obligations are. We will quantify your obligations in a
22 rule first and then --

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

25 MR. MITCHELL: The statute --

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

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

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

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

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

25 MR. MITCHELL: What they said on a NAAQS SIP

1 call was they have to quantify the good neighbor
2 obligations. They have to tell the States what it means
3 to contribute significantly to another State's air
4 pollution.

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

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

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

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

8 Now, presumably there are lots of
9 conversations that can happen between the EPA and the
10 States during those 5 years, and maybe sometimes more of
11 those conversations happen and sometimes less of those
12 conversations happen. But I don't see that as different
13 constructions of the statute. It seems to me as the
14 statute sets up its framework: You go first, do it
15 within 3 years; then the EPA goes, it has to do it
16 within 2 years. The EPA just has very substantial
17 discretion under this statute as to what kinds of
18 conversations it wants to have when, within that broad
19 structure.

20 Why am I not reading it right?

21 MR. MITCHELL: I agree that the EPA has that
22 discretion. The problem is that in the NOx SIP Call in
23 1998 they asserted exclusive interpretative authority
24 over subsection (a)(2)(D), which is the good neighbor
25 provision of the Clean Air Act. And they said that EPA

1 is the institute might quantify the States' good
2 neighbor obligations. Until EPA fills in the blanks and
3 tells the States what this "contributes significantly"
4 phrase means, it's an empty requirement.

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

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

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

25 MR. MITCHELL: Three of the States have

1 challenged their --

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

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

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

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

19 MR. MITCHELL: But those judicial
20 proceedings have been stayed pending the outcome of this
21 proceeding.

22 JUSTICE SOTOMAYOR: Well, I don't know why,
23 but that's a different issue. Even though it has,
24 wouldn't it be more prudent for us to wait for that
25 administrative process to finish before we venture into

1 this question? That's my -- my point.

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

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

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

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

25 JUSTICE BREYER: But they may not know, you

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

8 MR. MITCHELL: Right.

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

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

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

24 MR. MITCHELL: EPA has done this before. I
25 mean, with the CAIR FIPS when they first quantified the

1 States' good neighbor obligations, they gave the States
2 an opportunity to submit SIPs before the CAIR Federal
3 implementation plans would take effect. And EPA agrees
4 that the States have no ability to guess accurately at
5 how EPA will quantify their good neighbor obligation.
6 They can't --

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

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

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

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

1 expires under the statute.

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

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

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

17 JUSTICE SOTOMAYOR: But this issue is what's
18 at issue there, part of the --

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

21 MR. MITCHELL: EPA invoked its corrections
22 power under (k)(6), but (k)(6) says that a correction
23 must be made, quote, "in the same manner as," end quote,
24 the decision being corrected. EPA's approvals of the
25 earlier SIPs went through notice and comment. Because

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

6 The United States tries to get out of this
7 problem by saying that they can use the good cause
8 exception to notice and comment rulemaking that's found
9 in the Administrative Procedure Act. That doesn't help
10 EPA at all, because the requirement comes not from the
11 Administrative Procedure Act; the requirement to use
12 notice and comment comes from (k)(6). It doesn't help
13 EPA to rely on an exception to a statute when the
14 statute providing that exception is not the statute that
15 imposes the requirement.

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

21 MR. MITCHELL: Because that caveat does not
22 appear in (k)(6).

23 JUSTICE KAGAN: Well, it's not a caveat.
24 It's just a different understanding of what that
25 language means. I mean, you say it has to be in the

1 exact same -- in the exact same way they previously
2 acted, and I guess I'm saying it could mean subject to
3 the exact same procedural requirements.

4 Was that not clear? Was that unclear?

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

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

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

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

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

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

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

22 MR. MITCHELL: The text says "in the same
23 manner as."

24 JUSTICE SCALIA: In the same manner?

25 MR. MITCHELL: In the same manner. So it's

1 looking back to the original decision and how it was
2 made. And that's the second reason we've provided for
3 why the D.C. Circuit decision should be affirmed.

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

8 CHIEF JUSTICE ROBERTS: You can finish your
9 sentence.

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Mr. Mitchell.

16 Mr. Keisler.

17 ORAL ARGUMENT OF PETER KEISLER

18 ON BEHALF OF THE INDUSTRY AND LABOR RESPONDENTS

19 MR. KEISLER: Mr. Chief Justice, and may it
20 please the Court:

21 The private party Respondents are focused on
22 the statutory limitations to the EPA's authority under
23 the good neighbor provision. And I'd like to begin by
24 addressing the issue that my friend from the government
25 focused on a lot, which is the use of cost, and to

1 explain not only what we think the statute requires in
2 this regard, but why, Justice Kagan, it would be neither
3 silly nor dumb; or, Justice Sotomayor, crazy to read the
4 statute the way we suggest.

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

12 What EPA has done here is assert that it has
13 the power to increase a State's reduction obligations
14 beyond what a focus on the effects of its emissions
15 would require, simply because EPA has decided that it
16 would be reasonably affordable for that State to bear a
17 higher burden. And what that means is that States here
18 which are making only a very slight contribution to air
19 quality problems in downwind States are nonetheless
20 required to make very substantial reductions, in many
21 cases far more than States that are making far greater
22 contributions to poor air quality in the same downwind
23 locations. There is no relationship at all under the
24 EPA's methodology between the amount a State contributes
25 and the amount it has to reduce, because the entire

1 driver is cost. Mr. Stewart said that cost was one
2 component. It's not one component. It is the entire
3 driver.

4 JUSTICE BREYER: Why is it wrong? That is,
5 I focused on your argument here in the briefs, which is
6 very clear and very good. And -- and the example that
7 comes to my mind is we have an overgrazing problem in
8 State A. All right? It's caused because cows come in
9 from State B and sheep come in from State C. The cow
10 men and the sheep men are in different States. They're
11 not friends.

12 (Laughter.)

13 JUSTICE BREYER: Now, it turns out -- it
14 turns out that EPA, which is in charge of preventing the
15 overgrazing, discovers that if the sheep men build a
16 fence, that will cure the problem, even though they only
17 contribute half or maybe less. Well, if we bury it --
18 you know, we divide it equally, you each have to pay --
19 you each have to cause half the problem because that
20 seems fair, it's going to end up that the people in
21 State A with the cows, they're going to starve to death.

22 So our choice is between taking two people,
23 two States, each of whom cause half the problem and
24 getting an overall plan where you solve the problem at
25 minimal cost or just dividing it 50/50, which seems fair

1 in mathematics, but leads to starvation, cost and death,
2 et cetera. Do you see what I'm driving at? And that's
3 what they've done here, the second method. They --
4 rather the -- they're not treating each State alike, you
5 are right. And the reason that they're not treating
6 each State alike is they know, one, all the States are
7 partly responsible in more than 1 percent, and with this
8 plan, we get the job done at much lower cost.

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

11 MR. KEISLER: I'll try to respond to that --
12 that fully, Justice Breyer. Certainly, it is the case
13 and we would acknowledge that there are always going to
14 be legitimate policy arguments in favor of the least
15 cost, most efficient solution to any problem. But we
16 would also say that there are countervailing policy
17 arguments at issue here, and we do believe the statute
18 sides with those countervailing policy arguments. And
19 the countervailing policy arguments here are focused on
20 the fact that in Your Honor's hypothetical, where
21 there's one State that it would cost more to reduce and
22 another State it would cost less.

23 The only scenario in which you get a
24 different result under the EPA's approach and our
25 approach is where the State that would cost more to

1 reduce is, in fact, contributing a lot more to the
2 downwind State's air problem than the other State. And
3 for several reasons we think when the statute looks at
4 that issue and asks the question of whether EPA should
5 have the authority to force the State which is, in fact,
6 contributing less to nonetheless reduce more simply
7 because it's costly, we think there are at least three
8 reasons why the statute embodies the policy choice that
9 says no, the State that contributes more, reduces more;
10 the State that contributes less, reduce less.

11 The first is the one that I mentioned at the
12 outset, which is the statutory text which we think quite
13 clearly is focused on the effects. "Significantly
14 contribute to nonattainment or interfere with
15 maintenance in downwind locations."

16 But the second is the whole structure of --

17 JUSTICE SCALIA: Amounts significantly
18 attribute, right? It's -- it's amounts.

19 MR. KEISLER: Amounts -- great. That
20 significantly contribute.

21 JUSTICE SCALIA: Yes, yes. Not conduct
22 significantly.

23 MR. KEISLER: No, that's right. And I don't
24 think the word "significantly" can bear the weight that
25 Mr. Stewart places on it. It modifies the words

1 "contribute to nonattainment." So it's about the degree
2 of causal contribution. And it doesn't modify at all
3 the phrase "interference with maintenance," and they've
4 used the same cost methodology to implement that as
5 well.

6 But the second beyond the text, the whole
7 structure of the Clean Air Act is focused on treating
8 the States as separate entities which are responsible
9 for the emissions that happen within their borders and
10 the effect that those emissions have on other States.
11 That's why this is in a SIP rather than some general EPA
12 regulation, and that's why the language of the statute
13 is what it is: Amounts of emissions within a State.

14 And in this regard, I think it's --it's
15 telling that in the reply brief, what the government
16 said was that it believes it has the kind of authority
17 here to consider cost that would be considered by a
18 chancellor at equity in a nuisance case. A chancellor
19 at equity in a nuisance case had private party
20 defendants before him or her. And so, of course, they
21 were allocating burdens on the basis of equity and
22 efficiency and all the kinds of things a common law
23 chancellor can take into account.

24 The EPA has before it separate States with
25 separate responsibilities who have a long, historic role

1 and responsibility of enforcing emissions control
2 procedures within their border, and Congress could
3 rightly or reasonably at least have concluded that it
4 didn't want EPA to have the same authority to shift
5 costs and efficiency and equity around among different
6 States to require --

7 JUSTICE BREYER: On that point. Now, you
8 remember, please, that -- that my cow/sheep example was
9 meant to pick up precisely the disproportion that you're
10 talking about. And -- and keep that in mind, because I
11 found it a helpful example.

12 Now, my point is: Did you find in
13 Congress -- and I'm interested in legislative history --
14 did you find anything in the legislative history that
15 suggests that where the EPA faces this kind of regional
16 problem, and it's a regional, not just a statewide
17 problem, that people in Congress thought they had an
18 answer or a glimmer of an answer as opposed to taking
19 this language which is pretty open and saying we're
20 going to leave it to -- we don't know, we don't have a
21 clue. The EPA is there to figure this thing out and
22 we're giving them the broad authority here.

23 Is there anything that cuts on your side
24 that you see as opposed to the other side of reading
25 this language?

1 MR. KEISLER: I think there's one thing I
2 can cite, Your Honor, and that is that the statutory
3 history in this case is that the predecessor version to
4 what we currently have before us simply said that States
5 were required to prohibit the amounts which prevent
6 attainment or maintenance. No word "significantly."
7 Just prevent attainment or maintenance. I think
8 certainly, looking at that language, there's nothing in
9 there that would suggest that costs can be taken into
10 account.

11 What Congress said in the committee report
12 in 1990, when it added the words "significantly
13 contribute to nonattainment and interfere with
14 maintenance," was that it was doing that precisely
15 because it recognized that this was a provision that
16 addressed causation of bad air quality effects. Because
17 what it was doing was not introducing some new element
18 of cost, but relaxing the causation standard, saying it
19 shouldn't be something like but-for causation where the
20 question just doesn't prevent attainment or maintenance.
21 It's enough if it contributes significantly to
22 nonattainment or interfere.

23 JUSTICE KAGAN: So, Mr. Keisler, I mean, you
24 have a statute here that clearly does not have any
25 language about no costs allowed, that also does not have

1 what the American Trucking Association statute had,
2 which was like public health only, sufficient margin of
3 safety; right? So none of that. What you have is
4 exactly what you said. You have a statute that focuses
5 on causal contribution, right? So this is a hard
6 problem, right? Because -- I mean, let me just sort of
7 give you a numerical example, which I'm sure is as
8 simplistic as the other numerical examples floating
9 around this case. But, you know, let's say that the
10 standard is a hundred. And there's a State that has
11 120, and there are two States, X and Y, that have each
12 contributed 20. Right?

13 So we -- you know, we only need 20 of those.
14 We have 40. And the question is how do you get from
15 those 40 to those 20. The D.C. Circuit would just say,
16 well, we take 10 from each. But if this -- if the
17 question is only about causal contribution and that's
18 all that the statute talks about, there have to be other
19 ways we can make that determination of what contribution
20 each should be legally responsible for, right?

21 And what the EPA said here was: We're going
22 to distinguish between -- we're going to distinguish
23 between States that have -- have put a lot of technology
24 and a lot of money into this already and on the other
25 hand States that have lots of cheap and dirty emissions.

1 And why isn't that a perfectly rational thing to do
2 under this very statute?

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

16 So we see that as fitting much more securely
17 within the statutory language than the kind of shifting
18 that Your Honor mentioned. Certainly one could imagine,
19 since the policy rationales that are behind Your Honor's
20 question are certainly legitimate and more than
21 plausible, certainly one could imagine a statute that
22 Congress could have written which would have said:
23 Treat it as a national playing field; ignore the fact
24 that there are State boundaries; think about what the
25 most efficient way to force reductions to achieve

1 attainment in downwind locations; locate those
2 reductions in the least cost areas, and impose those on
3 the States.

4 Surely, if that was what Congress had
5 intended it wouldn't have written the statute which
6 directs each State to include in its SIP provisions
7 that --

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

12 MR. KEISLER: Yes, Your Honor, but we think
13 the statute --

14 JUSTICE SOTOMAYOR: So if they couldn't
15 feasibly do it, doesn't the words "significantly
16 contribute" have to take into account in some way the
17 cost of reducing the amount?

18 MR. KEISLER: Your Honor, I'm here on behalf
19 of industry and labor, so certainly we believe that
20 there have to be mechanisms to deal with the kinds of
21 problems that Your Honor just identified. But we don't
22 think they come out of defining the amounts that
23 significantly contribute to nonattainment. We think
24 that those kinds of considerations come into play
25 elsewhere in the process.

1 In the American Trucking case that's been
2 referred to, the Court said that when States are
3 implementing the requirements of the EPA, for example,
4 by deciding to allocate among different sources what
5 the -- how the reduction would be distributed, they can
6 take costs into account. And there are other mechanisms
7 in the SIP process when that definition of what amount
8 significantly contributes is then translated into an
9 emission reduction obligation.

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

15 But that is a very different matter from
16 saying that EPA, in defining what amounts significantly
17 contribute, can do the same thing. And the reason it's
18 different, the reason it's not just, oh, we're locating
19 it in some different box what EPA wants to do in its
20 box, is that the box that we're locating it in makes
21 clear that it functions as the kind of break Your Honor
22 described. If something is unfeasible or economic,
23 there are ways to soften it out at the end.

24 JUSTICE SOTOMAYOR: Well, they found a way
25 to do that with the cost tradeoff with the cap and trade

1 system --

2 MR. KEISLER: Well --

3 JUSTICE SOTOMAYOR: -- because the industry
4 itself can make that choice, with the State presumably.
5 They're not stopping a SIP that stops a State from
6 participating.

7 MR. KEISLER: Well, the trading presents to
8 me issues under the statute. We support trading
9 anywhere it's appropriate, but this is a statute which
10 is focused on providing relief to downwind States. And
11 if, to take my other example, if Indiana is contributing
12 emissions into Delaware that hurt its air quality, it
13 does no good for Delaware if Indiana purchases
14 allowances from Tennessee, which isn't contributing to
15 Delaware.

16 JUSTICE BREYER: Yeah, but you're -- I mean,
17 you want me to write -- look what I would have to write
18 if I made it very specific. Two units floats over the
19 air from the cow State. Two units floats over the air
20 from the sheep State, or three. It happens that if we
21 treat them alike we're going to tell the cow State, your
22 unit is the same as the sheep State's unit, both make
23 the same significant contribution, and we have to say
24 that even if for you to remit your unit causes death and
25 destruction, destroys your economy.

1 See, and I have to write those words to
2 accept your argument, don't I? Because --

3 MR. KEISLER: I'd like to resist the role
4 Your Honor --

5 JUSTICE BREYER: Of course.

6 MR. KEISLER: -- has assigned me of bringing
7 death and destruction and starvation.

8 (Laughter.)

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

13 MR. KEISLER: But in some ways the
14 distinction is the one I was drawing in response to
15 Justice Sotomayor's question, which is that when you get
16 down to the level of implementing these things you can
17 take into account whether death, destruction, starvation
18 will be taken care of when the State is doing that as
19 part of a SIP process.

20 But that doesn't bear on how the amount of
21 significant contribution is defined, because when EPA
22 takes costs into account it's not simply preventing the
23 death and destruction and starvation. It's working the
24 other way, too. It's saying that, even though a
25 causation standard only would require you to reduce this

1 much, we the EPA can shift to you an additional burden
2 because we think another State has already done enough.

3 JUSTICE SOTOMAYOR: They say that's not a
4 theoretical possibility under the numbers they've worked
5 out. So why isn't this taken care of in the process
6 that permits individual States to challenge this as
7 applied?

8 MR. KEISLER: Let me make a distinction in
9 that regard, Your Honor, which is what the government
10 says is a theoretical possibility is simply whether a
11 State would be driven below the 1 percent threshold.
12 But what I'm saying really goes back to Justice Scalia's
13 very first question, which is, even apart from the 1
14 percent threshold, every time they are allocating on the
15 basis of cost and displacing what you would allocate on
16 the basis of what each State actually contributes, then
17 you are shifting burdens around, even apart from the 1
18 percent.

19 JUSTICE KENNEDY: But you're -- you're
20 saying that "significant" must mean only measurable
21 amounts. It can't mean -- pick your word --
22 culpability, feasibility, responsibility, feasibility.
23 One State finds it quite feasible from a cost standpoint
24 to reduce emissions by a factor of 10. The other State
25 is the -- Justice Breyer's example, finds that it can't

1 do it except if it's a factor of a hundred.

2 Can't you say that the contribution in one
3 case is more significant than the other based on
4 feasibility? Maybe you can't.

5 MR. KEISLER: I don't think so, Your Honor.
6 I don't think that is a proper definition of
7 "significant" when it's modifying "contribution to
8 nonattainment."

9 Mr. Stewart --

10 JUSTICE SCALIA: It isn't contributions to
11 nonattainment. It's the word "amounts." The statute
12 prohibits activity within the State from emitting any
13 air pollutant in amounts which will contribute
14 significantly.

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

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

19 JUSTICE KENNEDY: But the word -- the word
20 "significantly" does import a judgmental component. I
21 think, that's what the government is going to say. I
22 just wanted to ask you what --

23 MR. KEISLER: It's not a limitless --

24 JUSTICE KENNEDY: Maybe they'll have a
25 better answer.

1 MR. KEISLER: I don't think that
2 "significantly" means that any factor that might be
3 deemed relevant in a broad policy sense can be imported
4 in. I think when you have a statute here which talks
5 about amounts that contribute significantly to
6 nonattainment or interfere with maintenance --

7 JUSTICE BREYER: All right, so there's an
8 ambiguity here. Because I mean, when you use the word
9 "amounts," I think it does help you. Add the word
10 "amounts" to "significantly" and I think that Justice
11 Scalia's point might be -- he knows it better than I --
12 an amount is an amount. An amount is an amount. That's
13 what you want to say.

14 JUSTICE SCALIA: That's my point exactly.

15 (Laughter.)

16 JUSTICE BREYER: Yes. It is. And then
17 the -- the response is: Well, not always, because you
18 say an amount, you're talking about a specific amount
19 coming out of a State, and is the one, the cow one, as
20 significant as the sheep one. All right? And that's, I
21 think, where -- I think you hit the nail as to what the
22 issue is.

23 MR. KEISLER: Yes, and I guess our position
24 is that significant may have a range of meanings, but
25 it's not a limitless range of meanings. I think one

1 member of the Court once said the fact that yellow is
2 ambiguous doesn't mean it can mean purple.

3 And here, you know, we don't think a range
4 of meanings in the context of this provision accommodate
5 the government's definition.

6 JUSTICE KAGAN: But, Mr. Keisler, the nature
7 of this problem is that there's an allocation issue.
8 It's not just everybody gets down to a certain threshold
9 level. It's there's a level and we have to allocate.
10 And the question is: What are we going to allocate on
11 the basis of? And the word "amounts" doesn't tell you
12 what you're going to allocate on the basis of. So there
13 are lots of different choices for what we can allocate
14 on the basis of.

15 We can just divide, you know, and do it all
16 proportionally. We can take into account per capita.
17 We can take into account a State's population if we
18 wanted to. Or we can take into account, as the EPA did
19 here, costs on the understanding that costs reflect how
20 much of an investment a State has already made in
21 pollution technology.

22 So the statute, neither the word "amount"
23 nor anything else says anything about those different
24 methods of allocation, does it?

25 MR. KEISLER: I -- I disagree with that,

1 Your Honor. I think -- and, you know, I don't focus
2 exclusively on the word "amount" or the word
3 "significantly." It's the entire phrase, "amounts that
4 contribute significantly to nonattainment or interfere
5 with maintenance," which I do think ten out of ten
6 people who weren't in this courtroom and hadn't read the
7 Clean Air Act, if you sat down and asked them what does
8 it mean? They're talking about what the effect the
9 emissions in one state have on the other.

10 I don't think this is any more ambiguous in
11 referring to air quality effects as a standard than the
12 NAAQS statute at issue in American Trucking was in
13 talking about safety and health as a standard. It does
14 supply a content to what the EPA has to do and that
15 content isn't cost. It's this air quality effect
16 standard.

17 CHIEF JUSTICE ROBERTS: What is -- what is
18 your answer -- do you have an answer to Mr. Stewart's
19 basketball hypothetical? I mean, I thought that was
20 pretty good. If you ask the coach what significantly
21 contributed to the loss, he's going to talk about the
22 missed layup rather than the missed desperation throw,
23 even though as far as amount, each was going to count
24 for two points. Assuming one was within the --

25 (Laughter.)

1 MR. KEISLER: It's -- it's very hard for me
2 to translate the -- the amount concept into performance
3 on the basketball court, but Mr. Stewart's other example
4 was a contribution to a charity. And I certainly would
5 accept the notion that if Bill Gates and I each
6 contribute a hundred dollars to a charity, I've made the
7 more significant contribution, but that's because we're
8 using "contribution" in that context to mean something
9 else. We're using it to mean "donate" or "give." We're
10 not using it to talk about --

11 JUSTICE SCALIA: But the basketball thing
12 is -- to make it parallel to what's at issue here, the
13 question you should ask the coach, which -- which of
14 the -- you lost 101 to 100. Which of the 101 points
15 contributed most to your loss?

16 (Laughter.)

17 JUSTICE BREYER: As in the answer is that
18 some one point --

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

23 MR. KEISLER: But if there were different
24 teams playing in the league and you had an overall
25 result, you could actually determine, you know, which

1 team had contributed what to the overall result. And
2 when we're dealing with States, we are dealing with
3 groups that the statute conceptualizes as separate teams
4 which are entitled to be treated separately.

5 But I would like to make just one other
6 point because I see my white light is on. We have
7 raised a completely separate argument. It's the first
8 argument in our brief, which is independent of how the
9 Court decides EPA may define the amount that contributes
10 significantly, whether cost or air quality effects or
11 anything else; and that is that, however it's defined,
12 EPA cannot regulate beyond the point necessary to
13 achieve attainment or maintenance in downwind locations.
14 And here, although in the prior two good neighbor
15 rulemakings, it specifically said it examined the issue
16 and avoided overkill. Here, it didn't say that because
17 it didn't do that.

18 Apart from the cost versus air quality
19 issue, we had commenters that submitted evidence that
20 showed that EPA could achieve attainment and maintenance
21 at virtually all the same downwind locations at lower
22 levels of regulation. And EPA's response to that, on
23 Pet App 354(a) was they weren't going to look at lower
24 levels of regulation, because at lower levels of
25 regulation, some sources in some States might cease

1 operating existing controls. And that's all they said.

2 But if sources in some States could cease
3 operating existing controls and as the commenter said,
4 you would still achieve attainment and maintenance in
5 all the downwind locations that they are linked to, then
6 EPA has no authority under the good neighbor provision
7 to require those sources to continue operating their
8 existing controls.

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

18 If the Court has no further questions.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Stewart, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

23 ON BEHALF OF THE PETITIONERS

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

25 As Mr. Keisler indicated, in our reply brief

1 we cited the history of the Restatement as it bears on
2 the common law of nuisance. And as this Court indicated
3 in American Electric Power, if the Clean Air Act had not
4 been enacted, the remedy that downwind States would have
5 in a situation like this one would be a Federal common
6 law nuisance suit against upwind States or polluters in
7 upwind States.

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

18 The second is that, as the reply brief
19 citation to the law of nuisance indicates, the common
20 law court in that scenario would have been able to
21 consider the costs necessary to achieve reduction in
22 pollution upwind in deciding whether a particular remedy
23 would be appropriate or how much of a reduction an
24 upwind polluter should have to make. And there's no
25 reason, absent extraordinarily clear statutory language,

1 to deny EPA the same authority.

2 The third thing is, as the analogy to the
3 common law suit indicates, there are sovereign State
4 interests on both sides of this case. This is not a
5 matter of EPA versus the States. It's a matter of EPA
6 trying to act as an honest broker between the upwind and
7 downwind States.

8 The next thing I would say about the Clean
9 Air Act is that the statute as a whole is replete with
10 references to economic activity and harnessing the
11 profit motive. That is, both the States and EPA are
12 specifically authorized to provide for the trading of
13 allowances, the whole purpose of which is to achieve
14 emission reductions in the most cost-effective manner
15 possible.

16 And I think it's worth noting in this regard
17 that, although we talk about the transport rule as
18 regulating the emission of -- emissions of States, what
19 we're really regulating is emissions of power plants
20 within the States, and the good neighbor provision
21 itself talks about preventing significant contribution
22 from emissions sources or emissions activity within the
23 States. And one of the things that the EPA said in the
24 proposed rulemaking was that in some circumstances the
25 cumulative downwind impact of a particular upwind State

1 might be great, not because any particular power plant
2 was poorly regulated or emitting at a high level, but
3 because there were so many power plants in the same
4 State.

5 And one consequence of forbidding the EPA to
6 consider costs is that a particular power plant in an
7 upwind State might be required to install more expensive
8 pollution control measures and make greater reductions
9 simply because it happened to be located in a State with
10 a lot of other power plants.

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

21 And that's really the approach that EPA
22 used. It examined certain cost thresholds and it said:
23 At particular cost thresholds we feel confident that if
24 everyone, upwind and downwind States alike -- alike
25 makes pollution control efforts at these levels, the

1 problem will be solved or at least almost solved,
2 because there would still be slight residual
3 nonattainment.

4 And it seems perfectly rational to say that
5 the significant contribution is the amount over and
6 above what would occur if everyone adhered to an
7 approach which, if applied across the board, would solve
8 the problem.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel,
11 counsel.

12 The case is submitted.

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

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