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1        IN THE SUPREME COURT OF THE UNITED STATES

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3    ENVIRONMENTAL                    :

4    PROTECTION AGENCY, ET AL.,       :

5         Petitioners               :    No. 12-1182

6        v.                          :

7    EME HOMER CITY                   :

8    GENERATION, L.P., ET AL          :

9    - - - - - - - - - - - - - - - - - x

10   - - - - - - - - - - - - - - - - - x

11   AMERICAN LUNG ASSOCIATION, ET AL.,:

12        Petitioners               :    No. 12-1183

13       v.                          :

14   EME HOMER CITY                   :

15   GENERATION, L.P., ET AL          :

16   - - - - - - - - - - - - - - - - - x

17              Washington, D.C.

18              Tuesday, December 10, 2013

19

20        The above-entitled matter came on for oral

21   argument before the Supreme Court of the United States

22   at 10:09 a.m.

23   APPEARANCES:

24   MALCOLM L. STEWART, ESQ., Deputy Solicitor General,

25     Department of Justice, Washington, D.C.; on behalf of
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1 Petitioners.

2 JONATHAN F. MITCHELL, ESQ., Solicitor General, Austin,

3   Texas; on behalf of State and Local Respondents.

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

5   Industry and Labor Respondents.

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1   C O N T E N T S

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

2   (10:09 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4 argument first this morning in Case 12-1182,

5 Environmental Protection Agency v. EME Homer City

6 Generation and the consolidated case American Lung

7 Association v. EME Homer City Generation.

8   Mr. Stewart.

9   ORAL ARGUMENT OF MALCOLM L. STEWART

10   ON BEHALF OF THE PETITIONERS

11   MR. STEWART: Mr. Chief Justice, and may it

12 please the Court:

13   In promulgating the Transport Rule, EPA

14 sought to protect the public health and to strike a fair

15 balance between the competing interests of upwind and

16 downwind States. EPA's analysis proceeded in three

17 basic steps.

18   First, EPA performed a screening analysis to

19 determine which upwind States would be covered by the

20 Transport Rule. And in order to do that, EPA first

21 identified the downwind receptors that were in a State

22 of nonattainment or had maintenance difficulties, and

23 then it determined which upwind States were linked to

24 those receptors.

25   And in order to be linked to a downwind

1   receptor, the upwind State had -- had to contribute one

2   percent or more of the relevant National Air Quality --

3   Ambient Air Quality standard, or -- or NAAQS, to that

4   downwind receptor. And any State that didn't contribute

5   at least one percent to any of the downwind -- any of

6   the relevant downwind receptors was determined not to

7   contribute significantly to nonattainment at that area.

8   Second, once the States that were to be

9   covered by the Transport Rule had been identified, EPA

10   set a State emissions budget for each State. And to do

11   that, it performed computer modeling to determine, in

12   addition to whatever emission control efforts were

13   already going on, what additional emission reductions

14   could be achieved by implementation of control measures

15   available at various cost thresholds.

16   And the thresholds ultimately selected were,

17   for NAAQS, $500 per ton. For SO2, the group 1 States

18   were at a level of $2,300 per ton. The group 2 States

19   were 5 -- $500 per ton. And the idea was let's see what

20   emissions savings we can achieve, if additional control

21   measures are implemented up to those cost thresholds.

22   And --

23   JUSTICE SCALIA: Of course, those -- those

24   savings would -- would not be evenly distributed among

25   the upwind States, right? So some upwind States that

1   are able to make those efficient changes will be

2   carrying more than their burden of reducing the

3   emissions that affect downwind States, right?

4   MR. STEWART: Well, there -- there were two

5   bases for distinguishing among the States. The first --

6   in terms of the $500 per ton threshold for the group 2

7   States versus the $2,300 per ton threshold; the way in

8   which States were divided into those categories is that

9   the States that were linked to the downwind receptors

10   that had the most severe pollution problems were treated

11   as group 1 States, and they were required to make

12   greater pollution control efforts because they had some

13   responsibility for the most serious problems.

14   Now, I guess the point of your question

15   would go to -- to the fact that, even among States that

16   were operating under constant cost control thresholds, a

17   State that had already implemented cost measures up to

18   that limit might have to do less in a sense because it

19   would have already taken the -- the steps that were

20   required, at least as compared to an air-quality-only

21   threshold.

22   JUSTICE SCALIA: Well, I don't mind a State

23   doing less. I think North Carolina said -- said that

24   you can use those cost figures to do less, and that's

25   not challenged here. But what the application of the

1   cost factor means is that some States that can more

2   efficiently make the changes will be required to do more

3   than merely account for their proportion of the downwind

4   harm. Isn't that true?

5   MR. STEWART: Well --

6   JUSTICE SCALIA: Yes or no? I mean, I think

7   it's an easy yes or no answer.

8   MR. STEWART: I think it is -- no, I think

9   it is the case that, if you adopted an air-quality-only

10   threshold, then it would be more likely to be the case

11   that States that had already done a lot to control air

12   pollution would have to take additional steps, even if

13   it was done at a non-cost -- in a non-cost-effective

14   way.

15   JUSTICE SCALIA: Have you answered my

16   question? Does -- does the fact that you begin with --

17   what the statute says is that each upwind State has to

18   account for its -- its effect on the downwind States,

19   but once having identified that effect, you -- you then

20   say those upwind States that can make the reductions

21   more efficiently have to make more reductions than

22   they -- than their mere proportion of the harm requires.

23   Isn't that so?

24   MR. STEWART: I think it would be the case

25   that at least as -- yes, as compared to at least some

1   air-quality-only measures, the use of cost would have

2   the effect of distributing the burden in a somewhat

3   different way than it would have if you considered air

4   quality factors only.

5   JUSTICE KAGAN: Is the idea, Mr. Stewart,

6   that the States that are required to do more are the

7   States that haven't done much already?

8   MR. STEWART: That's correct. And that was

9   what I was trying -- trying to get out earlier, that

10   if -- if States have to do less in order to meet the

11   $500 -- in order to be in a position where they've

12   implemented all the cost -- all the emission control

13   measures that are available at $500 per ton, if a

14   particular State has to do less in order to achieve

15   that, it's probably because that State has already

16   implemented most of those measures on its own.

17   JUSTICE SCALIA: And what provision of the

18   statute allows you to take that into account?

19   MR. STEWART: Well, the -- the term that

20   we're --

21   JUSTICE SCALIA: I mean, as opposed to each

22   State, whether it's inefficient or efficient, has to

23   merely reduce its contribution to the downwind State

24   pollution, right? That's what the statute says.

25   MR. STEWART: Well, the statute says that

1   each State will adopt measures that prevent sources

2   within its borders from contributing significantly to

3   downwind nonattainment. And the purpose of the

4   provision is not to allocate blame for an existing state

5   of nonattainment or for prior pollution.

6   It's a -- it's to devise a scheme that going

7   forward will prevent nonattainment from occurring. And

8   the idea is, if each State lives up to its obligation

9   and if the downwind States make commensurate

10   commitments, then the problem will be solved.

11   And in terms of the language, "contribute

12   significantly," I think there are -- there are various

13   reasons to think that EPA reasonably construed that term

14   to include a component of difficulty of achievement;

15   that is, in common parlance, we might say that dunking a

16   basketball is a more significant achievement for

17   somebody who is 5 feet 10 than for somebody who is 6

18   feet 10.

19   We might say that a $100 charitable

20   contribution is more significant if it's made by a

21   person who makes $10,000 a year than a 1,000

22   contribution by somebody who makes $1 million a year.

23   CHIEF JUSTICE ROBERTS: That's -- I was just

24   going to say, that just is because of, in the latter

25   case, because contribution happens to be used in both an

1   affirmative and a negative sense. The question is, for

2   example, whether somebody who fatally stabs somebody and

3   someone who fatally shoots them have each significantly

4   contributed to the bad result.

5   MR. STEWART: I think --

6   CHIEF JUSTICE ROBERTS: Or -- or not

7   significantly contributed in -- in -- contributed in

8   varying degrees.

9   MR. STEWART: I would say if -- if you cause

10   death by alternative means, then both people would have

11   contributed as significantly. But to include -- to set

12   out a hypothetical that involves contribution to a bad

13   result, if you had a basketball team that lost a game by

14   one point, and the coach was asked to pinpoint the plays

15   that contributed significantly to the defeat, the coach

16   would be much more likely to identify a missed layup or

17   a turnover than the missed half-court shot at the

18   buzzer.

19   It's true that the missed half-court shot at

20   the buzzer would, in one sense, contribute

21   significantly, in that it was a but-for cause. If the

22   shot had been made, the outcome was -- would have been

23   different.

24   But if you're talking about significant

25   contributions to a bad result, you'd more likely to

1   focus on errors that could or -- and should have been

2   avoided, not simply the failure to accomplish something

3   that's extraordinarily difficult.

4   JUSTICE KAGAN: Can I ask a question?

5   JUSTICE KENNEDY: Is part your -- your

6   answer to Justice Kagan's question and Justice Scalia's

7   question that it depends on the time point, at the time

8   at which you measure? That is to say, if you take a

9   look at a State which, for 5 years, has been trying to

10   ameliorate pollution, you can measure it from the point

11   5 years ago; and if you do that, then they're not having

12   to contribute more.

13   MR. STEWART: I --

14   JUSTICE KENNEDY: Or don't you like that

15   answer?

16   MR. STEWART: I don't -- I don't quite want

17   to go there. I think there's a kernel of truth in

18   there -- in that, but that the point at which the

19   State's significant -- the point at which the State's

20   good neighbor obligation is triggered is by the

21   promulgation of a new National Air -- Ambient Air

22   Quality standard.

23   And the State is required, within 3 years of

24   the promulgation of the NAAQS, to promulgate a State

25   plan that includes good neighbor provisions for -- for

 1   the particular --

 2   JUSTICE KENNEDY: How far back -- how far

 3   back do you go for the relevant NAAQ? 2006 or --

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

 5   NAAQS that were implemented -- that were promulgated in

 6   1997.

 7   JUSTICE BREYER: Oh, '97.

 8   MR. STEWART: One of them for annual

 9   particulate matter and one of them for ozone; and then

10   the 2006 NAAQS was for 24-hour particular matter --

11   particulate matter, which is harder to achieve.

12   And -- and so when -- when we are asking

13   what are the States supposed to do, as of the time that

14   the new NAAQS is promulgated, the States don't exactly

15   get credit for what they have done in the past; that is,

16   they can't do less than they are supposed to do in the

17   future, simply because they have done a lot in prior

18   years to prevent pollution.

19   But the fact that sources within the State

20   have, in the past, installed various pollution control

21   devices or are using cleaner fuels, that may make it

22   easier for them to prevent significant contributions to

23   downwind nonattainment, going forward.

24   JUSTICE KAGAN: Can I ask a question?

25   Following up on Justice Scalia about the statutory

1   language and how you read it, I think -- you know, most

2   people, everybody, thinks that it's better to regulate

3   with attention to costs than to regulate without

4   attention to costs.

5   We have this -- our Trucking Association

6   decision, where we said, well, notwithstanding that

7   everybody agrees that regulating with attention to costs

8   is better, when Congress says the opposite, we have to

9   go with the opposite. And, there, we said Congress had

10   said the opposite because it had talked about protecting

11   the public health with an adequate margin of safety.

12   Now, I'm wondering, what does it take in a

13   statute to make us say, look, Congress has demanded that

14   the regulation here occur without any attention to

15   costs? In other words, essentially, Congress has

16   demanded that the regulation has occurred in a

17   fundamentally silly way.

18   MR. STEWART: Well, I mean in the case of the

19   NAAQS, I think it was -- it was not the case that

20   requiring EPA to establish the NAAQS without reference

21   to cause -- to cost, would cause a silly result; that is,

22   the Ambient Air Quality Standards were supposed to be

23   set based on public health criteria.

24   And the Court in -- in the same case, in

25   American Trucking, said that, of course, you can

1 consider costs in deciding what is the most efficient

2 and appropriate way to implement those NAAQS. And,

3 here, I take your point that, in order to conclude that

4 Congress barred consideration of costs at the

5 implementation stage, we would have to have very clear

6 language, and "significant contribution" doesn't do it.

7   And the other thing I would say, in addition

8 to the examples I've given of -- in common parlance, we

9 use "significance" to refer to ease or difficulty of

10 achievement. It's worth emphasizing that this is a

11 provision of law, and it's designed to help allocate the

12 responsibility among different actors for alleviating a

13 shared problem.

14   And, for example, suppose --

15 JUSTICE SCALIA: The problem is that that

16 allocation among different actors is done State by

17 State, and simply taking costs into account as

18 determining who will do what simply eliminates the --

19 the requirement that each State not be -- not be

20 required to do more than its share of the pollution

21 it's -- it's causing downstream.

22   It's the State-by-State requirement that

23 makes it very difficult to think that all Congress

24 wanted was the most efficient reduction of pollution, no

25 matter where that pollution came from. That's simply

1   not what the statute envisions.

2   MR. STEWART: I guess --

3   JUSTICE SCALIA: And maybe that'd be a

4   better statute. Maybe it shouldn't be State by State.

5   MR. STEWART: I mean, the first thing I

6   would say is we -- we can accept the premise that each

7   State should alleviate no more than its share, and there

8   still may be -- that each State should do no more than

9   its share, and yet, there still may be different ways of

10   determining what a State's fair share is; that is, one

11   way would be to determine which States had been the

12   greatest polluters in the past and say that, the more

13   pollution that had previously flowed from your borders,

14   the greater your reduction obligation in the future.

15   But another way would be to say, in order to

16   ensure that each of the States that have shared

17   responsibility for the problem in the past bears its

18   fair share, we will ask each State to undertake

19   commensurate efforts, as measured by the cost threshold.

20   For example, if it could be shown, somehow,

21   that the generation of electric power inherently

22   required the emission of some level of SO_2 and NO_x, that

23   there was simply no way to -- to generate electricity

24   through any technology known today, without

25   generating -- without emitting that minimum amount, I

1   think we would certainly say, well, Congress didn't

2   intend to bury in the good neighbor provision some

3   prohibition against particular States generating

4   electricity.

5   And EPA could -- EPA or the States could

6   reasonably determine that the unavoidable component of

7   the emissions, the part that couldn't be avoided, even

8   with the best possible pollution control technology,

9   that would be regarded as legally insignificant; that

10   the only legally significant contribution would be

11   contribution that could have been avoided.

12   Now, clearly, EPA has gone one step farther

13   because it hasn't just focused on emissions that

14   couldn't be avoided at all, at least with -- without

15   foregoing the generation of electric power. It has

16   said, we will treat as legally significant only the

17   extra increment of emissions that comes after we've

18   taken what we regard to be equitable and cost-effective

19   pollution control --

20   JUSTICE KENNEDY: Just one more question on

21   cost. In -- in your answer to Justice Kagan's question,

22   there is at least a possible argument that you, the

23   regulator, the government, the EPA, can take cost into

24   account, unless it's expressly prohibited from doing so.

25   You don't go that far.

1   But you -- you even stop short of that.   You

2   say that it might be difficult to apply the cost

3   rationale at the implementation stage? I -- I think

4   that's what you said, and if so, I didn't quite

5   understand.

6   MR. STEWART: I misspoke. What the Court

7   said in American Trucking is that in -- in setting the

8   NAAQS, EPA was forbidden to consider cost, not because

9   the statute said, in so many words, cost can't be

10   considered, but because the criteria that were set out

11   in the statute for what the NAAQS had to achieve simply

12   couldn't be reconciled with consideration of costs.

13   JUSTICE KENNEDY: I understand.

14   MR. STEWART: But the Court in the same decision said,

15   although you can't consider costs in determining what

16   the NAAQS will be -- what air quality standards have to

17   be achieved, of course, you can and should consider

18   costs in deciding what implementation measures should be

19   used to determine which emissions will be reduced.

20   JUSTICE SCALIA: If Congress wanted that,

21   why couldn't Congress simply have said, the EPA shall

22   prescribe minimum pollution reduction measures that have

23   to be taken by the States? That's a quite different

24   statute from what we have before us. But what you're

25   saying is -- you know, you -- you reduce it this -- this

26   much, as much as efficiency will allow, or else, you're

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

2   And that's a very different statute from

3   what Congress wrote. Maybe it's a good idea. Maybe EPA

4   ought to control all -- all efficiency measures for

5   reducing pollution, but it's certainly not the statute

6   that Congress wrote.

7   MR. STEWART: Let me say three things in

8   response to that. The first is that, as I mentioned

9   before, the good neighbor provision is addressed in the

10   first instance to the States; that is, it's the State's

11   initial obligation to submit an implementation plan that

12   contains good neighbor provisions.

13   And so if the Court says costs can't be

14   considered in defining significant contribution, the

15   effect is not simply that EPA can't consider that factor

16   when it steps into the State's shoes. The effect is

17   that a State can't consider cost of achievement

18   in attempting, in good faith, to implement its own good

19   neighbor provision.

20   The second thing I would say --

21   JUSTICE SCALIA: Excuse me. I don't

22   understand that. Please say that again.

23   MR. STEWART: The good neighbor provision --

24   we're dealing here with a situation where EPA was the

25   one that promulgated Federal implementation plans, but

1   that's only because the States didn't -- the relevant

2   upwind States did not discharge their obligation to

3   implement State -- promulgate State implementation plans

4   that contain good neighbor provisions.

5   But the language "contribute significantly"

6   is in the portion of the statute that deals with what a

7   State plan is supposed to contain. It's not dealing

8   with -- it's not in a provision that, by its terms, is

9   addressed directly to EPA.

10   And so if the Court said, in defining

11   "contribute significantly," we can't take into account

12   the cost of emission control measures, that would mean

13   not simply that EPA can't consider that factor when it

14   steps into the State's shoes; it would also mean that

15   the State can't consider that factor.

16   JUSTICE SOTOMAYOR: Mr. Stewart --

17   CHIEF JUSTICE ROBERTS: Well, when you

18   mention the fact that the States didn't address the good

19   neighbor requirement -- of course, you hadn't come up

20   with their budgets that they had to meet at the time

21   that they had to promulgate their SIPs.

22   Now, at a different point in your brief, you

23   emphasize how incredibly complicated it is for States to

24   determine how much they must reduce their emissions to

25   take care of the fact that they significantly

1   contributed to downwind pollution.

2   And yet, you would impose on those States

3   the burden to issue the good neighbor program without

4   knowing how much you expect them to -- to meet.

5   MR. STEWART: Well, it's the statute that

6   imposes the obligation on the States. And it may help

7   to draw the Court's attention to the relevant

8   provisions. On page 1a of the appendix to the

9   government's opening brief, the relevant provision is 42

10   USC 7410.

11   And 7410(a)(1) begins by saying, "Each State

12   shall, after reasonable notice and public hearings,

13   adopt and submit to the administrator of EPA within 3

14   years or such shorter period as the administrator may

15   prescribe after the promulgation of a national primary

16   ambient air quality standard, the NAAQS." And then it

17   goes on to say, "A plan which provides for

18   implementation," and so forth.

19   And then, if you look to the bottom of -- or

20   to the top of page 2a -- I'm sorry -- subsection (2)

21   begins, "Each implementation plan submitted by a State

22   under this chapter shall be adopted by the State after

23   reasonable notice and public hearing. Each such plan

24   shall," and then if you look at the bottom of the page,

25   it says, "contain adequate provisions prohibiting,

1   consistent with the provisions of this subchapter, any

2   source or other type of emissions activity within the

3   State from emitting any air pollution in amounts which

4   will contribute significantly to nonattainment" --

5   CHIEF JUSTICE ROBERTS: So -- so if you were

6   working for one of the upwind States and you were facing

7   this 3-year deadline and EPA had not told anyone how it

8   intended to interpret the State's obligations under the

9   good neighbor policy, what would you have told the State

10   to do?

11   MR. STEWART: Well, certainly, EPA's basic

12   methodology of using -- using cost thresholds had been

13   embodied in the -- the NAAQS SIP call in 1998, and in

14   CAIR, which I believe was promulgated in 2006.

15   CHIEF JUSTICE ROBERTS: Right. So -- but

16   the head of the State EPA comes to you and says, how

17   much do we have to reduce our emissions to satisfy our

18   requirements? And you would tell them what?

19   MR. STEWART: We would tell them, in all

20   honesty, we don't know yet. But that -- that's not a

21   fatal flaw in the argument; that is, it is inherent in

22   any legal context in which one person acts and then a

23   second person reviews, that the first person has to act

24   before the second person has -- has made up his or her

25   mind.

1   And so a district court --

2   CHIEF JUSTICE ROBERTS: Well, but that kind

3   of glosses over the fact that, as you say elsewhere in

4   your brief, this is a -- is your analogy, right -- a

5   spaghetti matrix or something? And so there's no

6   possible way for the State to know how much of a burden

7   you expect them to address, and yet, you're saying,

8   well, you've got to do it, and you've got to do it

9   within 3 years, or we're going to take over the

10   responsibility.

11   MR. STEWART: Well, certainly, what EPA was

12   called upon to do was far more complicated than what any

13   particular State was going to be called upon to do

14   because, as a result of widespread noncompliance, EPA

15   was promulgating Federal implementation plans for close

16   to 30 States and plans for -- for different NAAQS.

17   The second thing I would say is that --

18   CHIEF JUSTICE ROBERTS: But could I address

19   the first thing first? I'm not sure that's right. I

20   think EPA has an easier job dealing with it as a group.

21   They say, look, here are these States, here's what you

22   have to do. But any individual State has no idea what

23   its particular role is going to be in your group

24   resolution.

25   MR. STEWART: Well, it certainly has the

1   data available to it that -- that EPA had available

2   about how much did each State contribute to the overage

3   at various nonattainer -- nonattainment receptors in the

4   past.

5   It's certainly true that the States wouldn't

6   necessarily know exactly what policy judgment EPA would

7   ultimately make as to what the right cost threshold was.

8   But --

9   JUSTICE SCALIA: Oh, but that's crucial. I

10   mean, it would have no idea whether EPA would use any or

11   would pick $500 or would pick whatever. I mean, I don't

12   know how it could sensibly design a -- a program without

13   knowing that.

14   MR. STEWART: I guess the second -- the

15   other two points I would make are, first, the State's

16   role is to devise something, in this area, as in others,

17   that it believes will carry out its own legal

18   obligations, not necessarily to predict just how EPA

19   would do it if the task fell to EPA.

20   And so, for example, when the States are

21   undertaking a more -- the more prosaic task of devising

22   plans that will produce attainment of the NAAQS within

23   their own borders, they have to make a variety of policy

24   judgments about the right mix of emission controls, what

25   sources should be allowed to emit, in -- in what

1 amounts.

2   If a particular State just didn't do it,

3 that task would fall to EPA. And it's very unlikely

4 that anything the particular State would come up with

5 would exactly match what EPA would ultimately devise.

6   JUSTICE SCALIA: Can you give us an example

7 of when EPA has done this in the past, where a -- a

8 crucial element of a -- of a NAAQS has not been defined

9 by the agency, and yet, the agency, nonetheless,

10 requires the States to -- to put together their SIPs

11 without knowing what their target is?

12   And that's the problem here.   What's your

13 best example of another case in which the agency said,

14 you -- you put together a SIP, and we're not going to

15 tell you what the target is.

16   MR. STEWART: Well, the examples I would

17 point to are in the brief filed by the -- the Respondent

18 States that are on our side of the case, who identify

19 examples of instances where States did successfully

20 comply with their good neighbor obligations and -- and

21 persuaded EPA that what they had done was enough.

22   JUSTICE SCALIA: Well, that just means it's

23 pin the tail on the donkey. Some States got the tail.

24 I mean -- you know, they pinned it in the right place.

25 That doesn't prove anything.

1   I want an example of another instance in

2 which EPA has -- has hidden the ball, has said, we're

3 not going to tell you what the target is, it's up to you

4 to come up -- up with a SIP, and we'll tell you after

5 the fact whether that SIP happened to meet the target

6 that we've invented.

7   MR. STEWART: I don't -- I wouldn't

8 characterize what EPA is doing as hiding the ball; that

9 is, it didn't kind of fail to divulge information that

10 it had its -- at its disposal.

11   JUSTICE SCALIA: All right. All right.

12   MR. STEWART: It released a great deal of

13 information at the time that the proposed rule was

14 announced in the -- the summer of 2010.

15   JUSTICE SCALIA: Okay.

16   MR. STEWART: But -- but I take your point

17 that -- the two additional things I would say, though,

18 are that, for better or worse, Congress did place this

19 obligation of the States. It evidently thought that, at

20 least in the mine run of -- of cases, States were

21 capable of carrying out this task.

22   And at least to the extent that adopting a

23 good -- a good neighbor provision requires consideration

24 of circumstances in other States, in a sense, this is

25 just the flip side of what the downwind States have to

1   do all the time; that is, if New York officials are

2   trying to determine, when a new NAAQS comes out, how can

3   we bring our own air quality into compliance? What

4   controls do we have to place on our own sources, in

5   order to get air quality to the desired level?

6   The New York officials have to take account

7   of the degree of pollution that is likely to travel to

8   their borders from other States. They can't analyze

9   emissions within their own borders in a vacuum. They

10   have to consider what the likely contributions of their

11   neighbors --

12   JUSTICE SCALIA: Yes. That just means

13   there's some facts that they don't know. Of course,

14   there are always going to be uncertainty about certain

15   facts. But here, there is uncertainty about the target,

16   not just about the facts. We don't know what target

17   we're expected to hit.

18   MR. STEWART: I guess the final thing I

19   would say on -- on this part of the -- this particular

20   sub-issue of the case is that, even if you reach that

21   conclusion, even if you determine that it was just

22   practically infeasible for any State to adopt a

23   compliant State implementation plan with good neighbor

24   provisions for these NAAQS until EPA acted, then the

25   proposition of the opposing States still wouldn't

1   follow; that is, the statute in the provisions that I've

2   pointed to says it's up to the States in the first

3   instance to devise the State implementation plans,

4   including good neighbor provisions.

5   And then, on page 10a of the same

6   provision -- of the same appendix, I'm sorry -- the

7   statute describes what happens if a State fails to

8   satisfy that obligation.

9   And this is at the beginning of subsection

10   (c)(1) on page 10A, it says, "The Administrator shall

11   promulgate a Federal implementation plan at any time

12   within 2 years after the Administrator finds that a

13   State has failed to make a required submission or finds

14   that the plan or plan revision submitted by the State

15   does not satisfy the minimum criteria."

16   And --

17   JUSTICE SOTOMAYOR: Mr. Stewart, below, the

18   government conceded that there was a theoretical

19   possibility that some States could be overcontrolled,

20   that they would be implementing measures that would

21   reduce their contributions to pollution below the one

22   percent. Assume that -- I think there's a theoretical

23   possibility of that -- but that your approach was

24   basically fine.

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

1   are there measures States can take to get out of the

2   FIP, if it's inappropriate to them, because of

3   overcontrol? And if not -- and how do they do it? I

4   mean, what's the process?

5   If we think there's a flaw, do we vacate the

6   rule? Do we leave it in place? What do we do? And

7   what -- and what's our power to do it?

8   MR. STEWART: I mean, I think, in the

9   circumstance you describe, if you reach the conclusion

10   that there was a theoretical possibility that this could

11   happen and that it would be a problem if it did, but

12   that the methodology used by EPA was, on the whole,

13   rational, I think the task for the Court at this stage

14   of the case is to rule on the more big picture

15   objections that are properly before it and -- and that

16   the court of appeals ruled on.

17   Now, even if we win everything that's at

18   issue in this Court, the case is not over. There are a

19   variety of more specific challenges to the details of

20   the rule that the D.C. Circuit found it unnecessary to

21   address. And so, if we won on the issues that are

22   before the Court, the case would be remanded, and there

23   would be an opportunity for the court below to consider

24   those.

25   And to the extent --

1   CHIEF JUSTICE ROBERTS: Including --

2   including the overcontrol argument? Or would that have

3   been done?

4   MR. STEWART: Well, to -- to the extent that

5   any State had -- and I don't know the -- the pending

6   as-applied challenges at this level of detail. But to

7   the extent that any State has a properly preserved

8   challenge to the effect that it is actually likely to be

9   subject to overcontrol, then that could be heard by the

10   court of appeals.

11   The court of appeals could determine both

12   whether that is, in fact, likely to happen and whether,

13   if it does happen, that would render the rule arbitrary

14   and capricious as to that State.

15   But the -- the real problem with the court

16   of appeals methodology was that it said the fact that

17   EPA can't absolutely rule out the possibility that it

18   might happen renders the rule invalid on its face, and

19   in other portions of the opinion, the court faulted EPA

20   for failing to ensure that its regime would not lead to

21   overcontrol.

22   And I think that's an extraordinary standard

23   for an administrative agency to deal with; that is --

24   you know, it happens all the time that Federal agencies

25   are given authority to regulate -- to address one

1   problem, and the regulation necessarily has spillover

2   effects on other conduct.

3   And so, for instance, if a Federal agency

4   was tasked with preventing the sale in interstate

5   commerce of contaminated food, it might require

6   inspections, it might require the recall of food after

7   one item in a shipment had been shown to be

8   contaminated. These measures might have spillover

9   effects on food that was not, in fact, contaminated.

10   But that wouldn't be a flaw in the rule.   Of

11   course, an agency could go overboard and impose a regime

12   that was so onerous in comparison to the health benefits

13   that it was arbitrary and capricious.

14   But nobody would ever say that it's the duty

15   of the agency to ensure that there is no other means of

16   achieving the same health benefits at lower cost to the

17   public.

18   The other thing that the States could do --

19   I mentioned that one way in which a State that believed

20   itself to be unfairly or inappropriately treated by the

21   rule was to pursue any adequately preserved legal

22   challenge it may have in the judicial proceedings.

23   And as your question indicated, there is

24   also a mechanism by which a State can ask to have the

25   Federal implementation plan replaced by a plan of its

 1   own devising.

 2   And so the consequence of the State's

 3   failure to achieve their good neighbor obligations in

 4   time and EPA's stepping into their shoes, that -- the

 5   consequence was not that they're forever barred from

 6   devising their own plans. The consequence was simply

 7   that the Federal implementation plan would remain in

 8   effect for a fairly limited period of time, subject to

 9   replacement by a State plan.

10   JUSTICE SOTOMAYOR: If we were to rule

11   against you and affirm the decision below, how long do

12   you think it would take to get a new rule in place?

13   MR. STEWART: I don't have an estimate on

14   the time, but if the Court affirms on the ground that

15   EPA may not consider costs -- part of the problem -- I

16   think it would be an extraordinary undertaking for EPA

17   to try to achieve; that is, part of the difficulty here

18   is that nobody has identified a concrete alternative;

19   that is, a plan that would not consider costs and

20   that -- yet that would disperse the burdens of

21   compliance among the States in proportion to their prior

22   contributions and also would address the nonattainment

23   problem at all of the downwind receptors.

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

25   JUSTICE KAGAN: Could you explain that to

1   me, Mr. Stewart? Because are you saying that the

2   straight proportionality approach that was applied in

3   the D.C. Circuit, are you saying that that's impossible?

4   Or are you saying it's complicated and dumb?

5   MR. STEWART: What -- at least what we

6   understand to be the straight proportionality approach

7   is impossible; that is, it might be possible with

8   respect to any particular downwind receptor because you

9   could say that, if one upwind State is contributing two

10   units and another four and another seven, the

11   proportional solution might be to require that any

12   necessary reduction would be in those proportions.

13   One State would do 2/13ths of the reduction,

14   another would do 4/13ths of the reduction, and another

15   would do 7/13ths of the reduction. That would be

16   theoretically possible, with respect to any receptor.

17   But with respect to another receptor, the same States

18   might be contributing in entirely different proportions,

19   and so there would be no way of devising a solution that

20   would be proportionate as to both.

21   JUSTICE SCALIA: I suppose you could average

22   them out, couldn't you?

23   MR. STEWART: You might be able to average

24   them out.

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

1   more irrational then picking a number like 500 bucks

2   as -- as to -- you know, what the -- who can do it more

3   efficiently. That's sort of arbitrary.

4   MR. STEWART: Well, I mean, the purpose of

5   the cost threshold was not to increase or decrease the

6   total amount of reductions that would be necessary. It

7   would be to ensure that the reductions that had to take

8   place were done in the most cost-effective manner

9   possible. And part of the irony --

10   JUSTICE SCALIA: I understand that, but my

11   point is that is certainly a pretty -- pretty arbitrary

12   number, and -- and I think averaging for all the

13   receptors is certainly no more arbitrary.

14   MR. STEWART: Well, I think the cost

15   methodology is one that EPA had used often in the past.

16   Indeed, even before the term "contribute significantly"

17   was added to the statute in 1990, EPA had interpreted

18   the prior reading of the statute to allow relief for a

19   downwind State, if an upwind State was contributing

20   significantly to downwind pollution, and it had

21   interpreted that standard as allowing consideration of

22   cost and compliance burdens.

23   I mean, one of the ironic things about this

24   case is that the only ill consequence of overcontrol is

25   cost; that is, this is not a situation in which there is

 1   some distinct public health benefit -- distinct public

 2   health problem -- I'm sorry -- that is caused if power

 3   plants are emitting too little NOx or SO2. The only

 4   reason that people worry about overcontrol, about

 5   reducing emissions more than they need to be, is that it

 6   costs money.

 7   And if that's the problem to be avoided, it

 8   seems strange that EPA can't take account of costs in

 9   devising a solution.

10   JUSTICE BREYER: Sir, I don't want you to --

11   finish your argument, if you had something to say on

12   what you started out with in describing the plan. You

13   said there are three aspects. The first aspect was you

14   cut out anyone -- any State that's contributing less

15   than one percent.

16   You said the second aspect was that you used

17   a metric of $500 per ton of NOx reduced, and you applied

18   that to the States still in, and then you said there

19   were three, and you never got to three, and I want to be

20   sure you do, if you had that.

21   MR. STEWART: The third part of the process

22   is that, once each State's emissions budget has been

23   quantified, with respect to each State, the EPA

24   essentially divides up the emissions that are allowed

25   among the different power plants within the State's

1   borders. And the way that it does that is it gives

2   allowances to the various power plants that add up to

3   the total number of tons of pollutants that are allowed

4   to be emitted.

5   And it's important to emphasize that the

6   States have not joined the industry's argument here that

7   cost -- even the States on the other side of the case

8   have not joined the industry's argument here that

9   states -- that costs can't be considered.

10   Those States are not quarreling with the

11   methodology by which EPA quantified their State emission

12   budgets. Those States are simply saying that, once

13   those had been quantified, they should have been given

14   an opportunity to determine, on their own, how the

15   allowances should be allocated without EPA doing it

16   first.

17   In some situations, that might have been a

18   rational way for EPA to proceed; that is, the statute

19   says that once the -- once EPA finds that a particular

20   State has either failed to submit a good neighbor SIP or

21   has -- or EPA has disapproved the good neighbor SIP,

22   once that happens, the statute says that EPA, at any

23   time within 2 years, can promulgate its own Federal

24   implementation plan.

25   And in some circumstances, it might be

1 rational for EPA to wait the full 2 years and give

2 additional guidance to States, in order to give them

3 every opportunity to devise compliant plans. There

4 were basically two reasons that EPA didn't do that here.

5 The first is that it was subject to the D.C. Circuit's

6 mandate in North Carolina, which said get something in

7 place that works as soon as possible, and EPA felt

8 constrained by that to act as quickly as it could.

9   And the second point worth emphasizing is

10 that there are State sovereign interests on both sides

11 of the case. It's true that, by devising a Federal

12 plan, in the first instance, EPA has intruded to a

13 degree on the ability of the upwind States to decide how

14 emissions allowances should be allocated among their own

15 sources.

16   But the downwind States are subject to their

17 own obligations to comply with the NAAQS within their

18 own borders, and to the extent that they can't get

19 relief from the upwind States, their task is made more

20 difficult.

21   JUSTICE KAGAN: I'm sure I should know this

22 after reading all these briefs, but if we -- if we

23 reverse the D.C. Circuit, what would happen, going

24 forward? In other words, the States have had this time

25 to -- to go first and do their SIPs, then they were

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

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

3   I mean, isn't the EPA under a continuing obligation to

4   look at, review its NAAQS, to give the States further

5   opportunities to come back?

6   MR. STEWART: Yes. I mean, with respect to

7   the particular NAAQS that are at issue here, the

8   States -- it's unclear to what extent they've been

9   working on this in the interim, but the States certainly

10   could, even under the terms of the transport rule,

11   propose State implementation plans to replace the FIPs.

12   Now, it's to be contemplated that there will

13   be additional NAAQS implemented, and this Court's

14   decision would affect the way in which both the States

15   and EPA went about the business of determining how good

16   neighbor obligations should be carried out with respect

17   to those future NAAQS.

18   CHIEF JUSTICE ROBERTS: Thank you, counsel.

19   Mr. Mitchell, why don't you give us 30

20   seconds or so?

21   Mr. Mitchell.

22   ORAL ARGUMENT OF JONATHAN F. MITCHELL

23   ON BEHALF OF THE STATE AND LOCAL RESPONDENTS

24   MR. MITCHELL: Mr. Chief Justice, and may it

25   please the Court:

1   EPA's actions in this case have written the

2 States out of the Clean Air Act. EPA cannot impose a

3 good neighbor FIP on the States when EPA has left the

4 States completely in the dark about the meaning of the

5 phrase "contribute significantly."

6   EPA's approach requires the States to submit

7 SIPs that can only guess at how EPA will quantify their

8 good neighbor obligations under Section 7410(a)(2)(D).

9   CHIEF JUSTICE ROBERTS: Well, it's -- it's

10 certainly -- it's certainly hard, but it is what the

11 statute says; and it seems to me that, if EPA had taken

12 a different view, it would have been contrary to the

13 statute.

14   MR. MITCHELL: EPA's actions are unlawful

15 for several independent reasons. The first is EPA's

16 actions in this case represent an arbitrary and

17 capricious change in the way that the Agency has

18 interpreted the statute.

19   For 15 years, starting with the NAAQS SIP

20 call in 1998, EPA told the States not to submit good

21 neighbor State -- good neighbor SIPs before EPA had

22 quantified the State's obligations under (a)(2)(D). And

23 EPA repeated that stance numerous times, including in

24 the disapproval of Nevada's SIP that we cite on Pages 9

25 and 59 of our brief, and also in the sources that the D.C.

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

2 Appendix.

3   EPA has now done a 180-degree shift, and

4 they have told the States that they are required to

5 submit good neighbor State -- SIPs before EPA has

6 quantified their obligations under Subsection (a)(2)(D).

7   JUSTICE BREYER: Well, they don't know

8 exactly how to do it. I mean, this is a tough problem.

9 So it sounds as if what you're making is a procedural

10 objection here, to which the government's point was,

11 you're right, we'd all been talking about this. We

12 wanted to see what the States would come up with, so we

13 look.

14   The States haven't come up with enough, in

15 our opinion; and so, now, we go to the Federal process,

16 and we put out our thing, and you comment on that. And

17 then, if you feel that their thing is no good, propose

18 your own solutions again. That's what he's saying.

19   But it's supposed to advance the ball.   So

20 there is a procedure for the States to come in, if they

21 can come up with a better plan, that's what you've just

22 heard, and so do it. So what's -- what's arbitrary or

23 capricious about such a system?

24   MR. MITCHELL: Because that's the approach

25 EPA rejected in the NAAQS SIP call.

1   JUSTICE BREYER: Well, they objected it

2   once. Now, they think it works here. I mean, all the

3   time it happens, that people change their minds about

4   how problems are best solved, or they cite this

5   problem's better solved one way and better another way.

6   So if your only point is, once they did it a different

7   way, they'll say, well, what's unreasonable about

8   changing our way? We're trying to get the job done.

9   MR. MITCHELL: EPA is allowed to change

10 their interpretation of the statute, but if they're

11 going to do that, they have to acknowledge, in the

12 transport rule, that they're abandoning the prior

13 construction of the statute --

14   JUSTICE BREYER: Well, years and years, the

15 neighbor board -- the labor board decided things in

16 adjudications, rules. One day, they say, no, we think

17 we should preside rulemaking processes, like other

18 agencies. Does anything in the law prevent that?

19   MR. MITCHELL: No, they're not prevented

20 from making the change, but the arbitrary and capricious

21 standard --

22   JUSTICE SOTOMAYOR: But you're not prevented

23 from giving a counter SIP, is what they were being told.

24 You can -- you can counter, is what the government is

25 saying, and so it's not clear, to me, that they've

1   estopped you from doing your own SIP.

2   MR. MITCHELL: But we can propose and submit

3   the SIP only after the FIP has already been imposed on

4   States.

5   JUSTICE SOTOMAYOR: So what's the

6   difference? If you think they're wrong, you give a

7   counter SIP, and you duke it out with them in terms of

8   what you think -- where you think they are wrong as

9   applied to you.

10   But let me ask you something fundamental

11   about this. Are you challenging the transport rule

12   using cost? Or are you just challenging the process in

13   which that was achieved? Because, if I understand all

14   the amici briefs and the theory of this, not even you

15   would want a command-and-control regulation; is that

16   correct?

17   MR. MITCHELL: We do not have a position on

18   the question of whether EPA can consider costs.

19   JUSTICE SOTOMAYOR: It'd be crazy if they

20   didn't, right?

21   MR. MITCHELL: We represent a coalition of

22   States --

23   JUSTICE SOTOMAYOR: Right. And for some of

24   them, it would really be a bad idea, wouldn't it?

25   MR. MITCHELL: There's simply no consensus

1   among the States on that question.

2   (Laughter.)

3   MR. MITCHELL: So we are remaining agnostic

4   on that point.

5   (Laughter.)

6   JUSTICE SCALIA: Can I ask, until you

7   propose your SIP to replace the FIP, right, the FIP

8   remains in effect?

9   MR. MITCHELL: Yes.

10   JUSTICE SCALIA: And you're bound by that

11   until they approve your new SIP. How long does such a

12   transaction normally take?

13   MR. MITCHELL: It depends. It really does.

14   We don't know exactly what our obligations are.

15   JUSTICE SCALIA: You think that's a quick

16   process? I mean, as soon as --

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

18   JUSTICE SCALIA: If you'll have to develop a

19   new SIP, that'll take you some time?

20   MR. MITCHELL: Yes.

21   JUSTICE SCALIA: And then that SIP is -- is

22   submitted to EPA, and -- and they chew on it for as long

23   as they want, right?

24   MR. MITCHELL: Yes.

25   JUSTICE SCALIA: And then maybe they will

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

2   MR. MITCHELL: Right. We're still waiting

3   for EPA to decide on the SIP that we submitted to

4   implement the good neighbor obligations for the 2006

5   particulate matter standard.

6   JUSTICE KENNEDY: But at least if you've

7   adopted a SIP or proposed a SIP, you've given reasons,

8   you have a -- you have a rational plan, and the EPA then

9   must give a reasoned response to it; whereas, if the EPA

10   is the first one, they're writing on a blank slate; and

11   it seems to me that, in some respects, the EPA is more

12   constrained under this process to which you object.

13   MR. MITCHELL: Well, it's still an unlawful

14   use of the FIP authority for several reasons -- and this

15   gets back to Justice Breyer's question, why is this

16   unlawful? And there are several reasons.

17   The first is that EPA has changed its

18   interpretation of the statute, and the key language from

19   the NAAQS SIP call appears on Pages 57,368 through 370,

20   where EPA tells the States, we don't want you to submit

21   good neighbor SIPs that simply take a guess at what you

22   think the good neighbor obligations are, we will

23   quantify your obligations in a rule first and then --

24   JUSTICE SCALIA: And that means the statute

25   doesn't require you to do that, I assume.

1   MR. MITCHELL: The statute --

2   JUSTICE SCALIA: I mean, when they say that,

3 that -- that's an affirmation by them that the statute

4 does not require you to do it, I assume. Is that your

5 point?

6   MR. MITCHELL: Not only that, they said, in

7 the NAAQS SIP calls, that they are adopting an

8 interpretation of the statute that prohibits us from

9 doing that, that the interpretation of the statute that

10 EPA adopted is that EPA, and only EPA, is the

11 institution that is charged with the responsibility of

12 quantifying a State's good neighbor obligations.

13   The States had argued for a different

14 approach back in 1998. We wanted to have the

15 prerogative to decide what the good neighbor obligations

16 mean; and EPA said, no, we are the sole entity with that

17 prerogative, and you need to wait until we issue a rule

18 that quantifies your obligations.

19   EPA has now changed that approach without

20 explaining or acknowledging in the transport rule that

21 they were abandoning their earlier interpretation of the

22 statute.

23   JUSTICE SOTOMAYOR: But they were doing that

24 with respect to the NAAQS. I thought that was them

25 saying they had to quantify the NAAQS.

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

2   call was they have to quantify the good neighbor

3   obligations. They have to tell the States what it means

4   to contribute significantly to another State's air

5   pollution.

6   And that leads to a second statutory problem

7   with this regime in the transport rule. The States have

8   the prerogative, under the Clean Air Act, to do what the

9   Federal minimum requirements are for clean air and to go

10   no further.

11   EPA's approach here requires the States,

12   when they submit or propose SIPs, and they have to take

13   a wild guess as to what their good neighbor obligations

14   are, it effectively compels the States to overcontrol

15   and overregulate because, if they want EPA to approve

16   the SIP and they don't know what their good neighbor

17   obligations will be, they have to overshoot and

18   overcontrol and overregulate or risk that EPA will deny

19   their SIP and impose a FIP on the State.

20   And what EPA is essentially doing is telling

21   the States that, if you want to do only what the Federal

22   floor requires and to go no further, the price of that

23   is that you have to accept an EPA-imposed FIP that

24   defines those obligations, rather than giving the State

25   the opportunity to distribute regulatory burdens in a

1   SIP as it sees fits.

2   JUSTICE KAGAN: Mr. Mitchell, I might just

3   not be understanding you, but this goes back to the

4   Chief Justice's question. The statute says, look, after

5   these standards are originally promulgated, the State

6   gets 3 years to make its best pitch, and then the

7   administrator shall promulgate a FIP at any time within

8   two years after that.

9   Now, presumably, there are lots of

10   conversations that can happen between the EPA and the

11   States during those 5 years, and maybe, sometimes, more

12   of those conversations happen and, sometimes, less of

13   those conversations happen. But I don't see that as

14   different constructions of the statute.

15   It seems to me, as the statute sets up its

16   framework, you go first, do it within 3 years; then the

17   EPA goes, it has to do it within 2 years. The EPA just

18   has very substantial discretion under this statute as to

19   what kinds of conversations it wants to have when,

20   within that broad structure.

21   Why am I not reading it right?

22   MR. MITCHELL: I agree that the EPA has that

23   discretion. The problem is that, in the NAAQS SIP Call

24   in 1998, they asserted exclusive interpretative

25   authority over subsection (a)(2)(D), which is the good

1   neighbor provision of the Clean Air Act. And they said

2   that EPA is the institution might quantify the States'

3   good neighbor obligations. Until EPA fills in the

4   blanks and tells the States what this "contribute

5   significantly" phrase means, it's an empty requirement.

6   EPA could have taken a different approach in

7   the NAAQS SIP Call. They could have told the States,

8   you can take the first crack at defining what

9   "contribute significantly" means, and we'll review your

10   submission and approve or disapprove it. But what they

11   said, 15 years ago, was that the States need to wait for

12   EPA to quantify the obligations in a rule.

13   Once EPA asserts that exclusive interpretive

14   authority over the provision, the States have no

15   obligation to guess at what EPA might do in the future,

16   when they submit the SIP. And that leads to a second

17   independent problem with EPA's transport rule because

18   EPA had no authority to impose Federal implementation

19   plans for the 1997 standards on the 22 States that

20   already had EPA-approved SIPs in place for those

21   standards.

22   EPA --

23   JUSTICE SOTOMAYOR: Haven't some States

24   already challenged that? Isn't that pending below? Why

25   should we be looking at that issue here, when States

1   have challenged that?

2   MR. MITCHELL: Three of the States have

3   challenged their --

4   JUSTICE SOTOMAYOR: I don't know why the

5   rest didn't, but three of them have. So why should we

6   enter the fray anticipatorily? Isn't that an issue we

7   should wait and see what EPA says below?

8   MR. MITCHELL: The United States is

9   suggesting that we're somehow launching an improper

10   collateral attack because the States could have

11   challenged the earlier SIP disapprovals or earlier

12   findings of failure to submit --

13   JUSTICE SOTOMAYOR: No, no, no. This is a

14   very discrete question, that they've already approved

15   some -- some SIPs. Three States have already challenged

16   the fact that they shouldn't be required to meet a new

17   standard because they've already had an old standard

18   approved.

19   That seems, to me, a very discrete

20   challenge, and three States have undertaken it.

21   MR. MITCHELL: But those judicial

22   proceedings have been stayed, pending the outcome of

23   this proceeding.

24   JUSTICE SOTOMAYOR: Well, I don't know why,

25   but that's a different issue. Even though it has,

1   wouldn't it be more prudent for us to wait for that

2   administrative process to finish before we venture into

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

4   MR. MITCHELL: I don't think the Court

5   should wait because the issues that we're raising are

6   discrete from what's being challenged by those three

7   States in their separate proceedings. The arguments

8   we're making are that, first, EPA has no authority to

9   impose a FIP on the States before quantifying the good

10   neighbor obligations under (a)(2)(D); and, second, EPA

11   improperly invoked the corrections --

12   JUSTICE GINSBURG: And that's because --

13   because EPA did it that way -- you don't get that from

14   the statute. You get it from what EPA did in the first

15   round; is that right?

16   MR. MITCHELL: We're not relying solely on

17   the statute, Justice Ginsburg, that's correct. Our

18   argument is that EPA has changed its interpretation of

19   the statute from the NAAQS SIP Call to the transport

20   rule, without adequately acknowledging or explaining how

21   its new interpretation is consistent with the statute.

22   But we're also relying on the statute as

23   well because, as I mentioned earlier, (a)(2)(D) requires

24   the States to eliminate pollution that contributes

25   significantly to another State's nonattainment.

1   JUSTICE BREYER: But they may not know --

2   you know. They may not know. There's six States that

3   contribute to the seventh State's pollution, and how

4   much each State can cut back depends. It depends on

5   what it costs. It depends on how much they contribute.

6   It depends upon what the other States will do. It

7   depends upon where the wind blows, and that changes all

8   the time.

9   MR. MITCHELL: Right.

10   JUSTICE BREYER: So they have a tough

11   problem. They can't tell you exactly how much you

12   should cut back until they know what they have in mind

13   or what others have in mind for solving the problem. So

14   it sounds to me as if you're asking them to do the

15   impossible, and they'd had a very good reason for not

16   doing what they did before; namely, it would be

17   impossible here to have a -- or not actually impossible,

18   but very tough and very expensive.

19   So that's why, I gather, they went the way

20   they did. Now, I don't know anything in the law that

21   tells them that this statute was meant to force them to

22   proceed in a way that would either be hugely more

23   expensive and perhaps impossible.

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

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

1   mean, with the CAIR FIPs when they first quantified the

2   States' good neighbor obligations, they gave the States

3   an opportunity to submit SIPs before the CAIR Federal

4   implementation plans would take effect.

5   And EPA agrees that the States have no

6   ability to guess accurately at how EPA will quantify

7   their good neighbor obligation. They can't --

8   JUSTICE SCALIA: Well, they have done the

9   impossible here, haven't they? I mean, they have the

10   transport rule. The only question is whether it should

11   have come out sooner or later, right? The only question

12   is whether it should have come out before the States

13   were obliged to submit their SIPs.

14   MR. MITCHELL: It's not impossible for EPA

15   to decide what "contribute significantly" means. That's

16   their job. They've asserted that prerogative. They can

17   choose any reasonable interpretation of that phrase.

18   JUSTICE SCALIA: You started to give us a

19   second statutory reason. I was really eager to see what

20   that was.

21   MR. MITCHELL: Yes, that's the Section

22   7410(k)(6) issue that we mentioned in the brief. EPA

23   had previously approved good neighbor SIPs for 22 States

24   that implemented the 1997 standards for ozone in

25   particulate matter. Once EPA approves a State's SIP, its

1   ability to impose a FIP on the SIP -- on that State

2   expires under the statute.

3   So EPA had a problem for those 22 States:

4   How would they be able to impose FIPs when they had

5   previously approved SIPs? EPA says, in the transport

6   rule, that they are going to invoke the corrections

7   power of (k)(6), and (k)(6) says that, if EPA determines

8   that a prior decision approving a SIP was in error, then

9   EPA --

10   JUSTICE SOTOMAYOR: Isn't that the issue

11   that the three States are challenging below, just that

12   discrete issue, about whether the EPA can call this a

13   corrective action or not? Isn't that entire issue being

14   determined in -- in those proceedings?

15   MR. MITCHELL: Well, it's not being

16   determined because the proceedings have been stayed.

17   But, yes, three States, Kansas, Georgia and Ohio, have

18   challenged --

19   JUSTICE SOTOMAYOR: But that issue is what's

20   at issue there, part of the --

21   JUSTICE SCALIA: Would you finish describing

22   the issue? I really didn't hear it.

23   MR. MITCHELL: EPA invoked its corrections

24   power under (k)(6), but (k)(6) says that a correction

25   must be made, quote, "in the same manner as," end quote,

1 the decision being corrected. EPA's approvals of the

2 earlier SIPs went through notice and comment.

3   Because of that, (k)(6) requires that the

4 corrections, likewise, go through notice and comment,

5 and the corrections here did not go through notice and

6 comment. There's no disagreement between the

7 Petitioners and the Respondents on that point.

8   And the United States tries to get out of

9 this problem by saying that they can use the good cause

10 exception to notice and comment rulemaking that's found

11 in the Administrative Procedure Act. That doesn't help

12 EPA at all because the requirement comes not from the

13 Administrative Procedure Act; the requirement to use

14 notice and comment comes from (k)(6).

15   It doesn't help EPA to rely on an exception

16 to a statute when the statute providing that exception

17 is not the statute that imposes the requirement.

18   JUSTICE KAGAN: Well, why can't -- this is,

19 of course, a statute on which EPA gets substantial

20 Chevron deference. Why couldn't we read that language

21 to essentially mean subject to the same procedural

22 requirements as the original?

23   MR. MITCHELL: Because that caveat does not

24 appear in (k)(6).

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

1   It's just a different understanding of what that

2   language means. I mean, you say it has to be in the

3   exact same -- in the exact same way they previously

4   acted, and I guess I'm saying it could mean subject to

5   the exact same procedural requirements.

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

7   MR. MITCHELL: I think your argument or

8   suggestion is that EPA could rely on the normal rule set

9   forth in the Administrative Procedure Act --

10   JUSTICE KAGAN: Whatever procedural

11   requirements constrained EPA when it approved the SIP,

12   those were the same procedural requirements that

13   constrained EPA when it's disapproved the SIP. But

14   we're just asking, are they -- you know, both are --

15   have to be subject to the same procedural requirements.

16   EPA can act differently, as long as they are acting

17   within that same set of rules.

18   MR. MITCHELL: We don't think that's a

19   tenable construction of (k)(6). I mean, (k)(6)

20   authorizes EPA to make corrections, but it says,

21   specifically, the corrections must be made in the same

22   manner as the decision being corrected. If the decision

23   being corrected went through notice and comment, the

24   corrections have to go through notice and comment as

25   well. If the decision being corrected went through

1   formal adjudication, then the correction must also go

2   through formal adjudication.

3   And EPA doesn't try to make that argument in

4   their brief about what (k)(6) means. They are just

5   trying to say that the good cause exception in the APA

6   to notice and comment rulemaking should carry over here,

7   and there's --

8   JUSTICE KAGAN: Well, I think that they are

9   trying to make that argument. They are saying, in the

10   initial version, we could have done it by notice and

11   comment rulemaking, or we could have done it if we had

12   good cause, so, too, when we reverse that initial

13   determination.

14   MR. MITCHELL: If that's what the statute

15   means, then (k)(6) doesn't constrain the agency much at

16   all because --

17   JUSTICE SCALIA: Well, I think -- I think

18   it would follow that if you did it for good cause to --

19   to apply the rule, you can do it for good cause to

20   abolish it, not that you can do it by rulemaking when

21   you adopt it and then used good cause when you -- when

22   you abolish it. It would seem, to me, to square with

23   the text.

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

25   manner as."

1   JUSTICE SCALIA: "In the same manner"?

2   MR. MITCHELL: "In the same manner." So

3   it's looking back to the original decision and how it

4   was made. And it's the second reason we've provided

5   for why the D.C. Circuit decision should be affirmed.

6   Now, if the Court were to reach the (k)(6)

7   issue, there's also the question of whether the FIPs can

8   be severed because the (k)(6) argument doesn't -- I see

9   my time's expired.

10   CHIEF JUSTICE ROBERTS: You can finish your

11   sentence.

12   MR. MITCHELL: The (k)(6) argument doesn't

13   knock out all of the steps on -- standing alone. It

14   would require -- announces the severability question.

15   Thank you.

16   CHIEF JUSTICE ROBERTS: Thank you,

17   Mr. Mitchell.

18   Mr. Keisler.

19   ORAL ARGUMENT OF PETER KEISLER

20   ON BEHALF OF THE INDUSTRY AND LABOR RESPONDENTS

21   MR. KEISLER: Mr. Chief Justice, and may it

22   please the Court:

23   The private party Respondents are focused on

24   the statutory limitations to the EPA's authority under

25   the good neighbor provision. And I'd like to begin by

1   addressing the issue that my friend from the government

2   focused on a lot, which is the use of cost, and to

3   explain not only what we think the statute requires in

4   this regard, but why, Justice Kagan, it would be neither

5   silly nor dumb; or, Justice Sotomayor, crazy to read the

6   statute the way we suggest.

7   And we begin with the text of the statute,

8   which authorizes the prohibition only of amounts that

9   contribute significantly to nonattainment or interfere

10   with maintenance in downwind locations. The focus of

11   that language, we think, is quite clearly on the effects

12   of a State's emissions on other States and not on the

13   cost of reducing them.

14   What EPA has done here is assert that it has

15   the power to increase a State's reduction obligations

16   beyond what a focus on the effects of its emissions

17   would require, simply because EPA has decided that it

18   would be reasonably affordable for that State to bear a

19   higher burden.

20   And what that means is that States here

21   which are making only a very slight contribution to air

22   quality problems in downwind States are nonetheless

23   required to make very substantial reductions, in many

24   cases, far more than States that are making far greater

25   contributions to poor air quality in the same downwind

1 locations.

2   There is no relationship at all, under the

3 EPA's methodology, between the amount a State

4 contributes and the amount it has to reduce because the

5 entire driver is cost. Mr. Stewart said that cost was

6 one component. It's not one component. It is the

7 entire driver --

8   JUSTICE BREYER: Why is it wrong? That is,

9 I focused on your argument here in the briefs, which is

10 very clear and very good. And -- and the example that

11 comes to my mind is we have an overgrazing problem in

12 State A. All right?

13   It's caused because cows come in from State

14 B and sheep come in from State C. The cow men and the

15 sheep men are in different States. They're not friends.

16   (Laughter.)

17   JUSTICE BREYER: Now, it turns out -- it

18 turns out that EPA, which is in charge of preventing the

19 overgrazing, discovers that, if the sheep men build a

20 fence, that will cure the problem, even though they only

21 contribute half or maybe less.

22   Well, if we bury it -- you know, we divide

23 it equally, you each have to pay -- you each have to

24 cause half the problem because that seems fair, it's

25 going to end up that the people in State A with the

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

2   So our choice is between taking two people,

3   two States, each of whom cause half the problem and

4   getting an overall plan where you solve the problem at

5   minimal cost or just dividing it 50/50, which seems fair

6   in mathematics, but leads to starvation, cost and death,

7   et cetera. Do you see what I'm driving at?

8   And that's what they've done here, the

9   second method. They -- rather the -- they're not

10   treating each State alike, you are right. And the

11   reason that they're not treating each State alike is

12   they know, one, all the States are partly responsible in

13   more than one percent, and with this plan, we get the

14   job done at much lower cost.

15   Now, where in the statute does it say they

16   can't do that?

17   MR. KEISLER: I'll try to respond to that --

18   that fully, Justice Breyer. Certainly, it is the case

19   and we would acknowledge that there are always going to

20   be legitimate policy arguments in favor of the least

21   cost, most efficient solution to any problem.

22   But we would also say that there are

23   countervailing policy arguments at issue here, and we do

24   believe the statute sides with those countervailing

25   policy arguments. And the countervailing policy

1   arguments here are focused on the fact that, in Your

2   Honor's hypothetical, where there's one State that it

3   would cost more to reduce and another State it would

4   cost less.

5   The only scenario in which you get a

6   different result under the EPA's approach and our

7   approach is where the State that would cost more to

8   reduce is, in fact, contributing a lot more to the

9   downwind State's air problem than the other State.

10   And for several reasons, we think when the

11   statute looks at that issue and asks the question of

12   whether EPA should have the authority to force the State

13   which is, in fact, contributing less to nonetheless

14   reduce more simply because it's costly, we think there

15   are at least three reasons why the statute embodies the

16   policy choice that says, no, the State that contributes

17   more, reduces more; the State that contributes less,

18   reduce less.

19   The first is the one that I mentioned at the

20   outset, which is the statutory text, which we think

21   quite clearly is focused on the effects. "Significantly

22   contribute to nonattainment or interfere with

23   maintenance in downwind locations."

24   But the second is the whole structure of --

25   JUSTICE SCALIA: Amounts significantly

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

2   MR. KEISLER: Amounts -- correct -- that

3 significantly contribute.

4   JUSTICE SCALIA: Yes, yes. Not conducts

5 significantly.

6   MR. KEISLER: No, that's right. And I don't

7 think the word "significantly" can bear the weight that

8 Mr. Stewart places on it. It modifies the words

9 "contribute to nonattainment." So it's about the degree

10 of causal contribution. And it doesn't modify, at all,

11 the phrase "interference with maintenance," and they've

12 used the same cost methodology to implement that as

13 well.

14   But the second, beyond the text, the whole

15 structure of the Clean Air Act is focused on treating

16 the States as separate entities, which are responsible

17 for the emissions that happen within their borders and

18 the effect that those emissions have on other States.

19 That's why this is in a SIP, rather than some general

20 EPA regulation, and that's why the language of the

21 statute is what it is, amounts of emissions within a

22 State.

23   And in this regard, I think it's --it's

24 telling that, in the reply brief, what the government

25 said was that it believes it has the kind of authority

1   here to consider cost that would be considered by a

2   chancellor at equity in a nuisance case. A chancellor

3   at equity in a nuisance case had private party

4   defendants before him or her. And so, of course, they

5   were allocating burdens on the basis of equity and

6   efficiency and all the kinds of things a common law

7   chancellor can take into account.

8   The EPA has before it separate States, with

9   separate responsibilities, who have a long, historic

10   role and responsibility of enforcing emissions control

11   procedures within their border, and Congress could

12   rightly or reasonably at least have concluded that it

13   didn't want EPA to have the same authority to shift

14   costs and efficiency and equity around among different

15   States to require --

16   JUSTICE BREYER: On that point -- now, you

17   remember, please, that -- that my cow/sheep example was

18   meant to pick up precisely the disproportion that you're

19   talking about. And -- and keep that in mind because I

20   found it a helpful example.

21   Now, my point is, did you find in

22   Congress -- and I'm interested in legislative history --

23   did you find anything in the legislative history that

24   suggests that, where the EPA faces this kind of regional

25   problem, and it's a regional, not just a statewide

1   problem, that people in Congress thought they had an

2   answer or a glimmer of an answer, as opposed to taking

3   this language, which is pretty open, and saying, we're

4   going to leave it to -- we don't know, we don't have a

5   clue. The EPA is there to figure this thing out, and

6   we're giving them a broad authority here.

7   Is there anything that cuts on your side

8   that you see, as opposed to the other side of reading

9   this language?

10   MR. KEISLER: I think there's one thing I

11   can cite, Your Honor, and that is that the statutory

12   history in this case is that the predecessor version to

13   what we currently have before us simply said that States

14   were required to prohibit the amounts which prevent

15   attainment or maintenance, no word "significantly," just

16   prevent attainment or maintenance. I think, certainly, I

17   looking at that language, there's nothing in there that

18   would suggest that costs can be taken into account.

19   What Congress said in the committee report

20   in 1990, when it added the words "significantly

21   contribute to nonattainment and interfere with

22   maintenance," was that it was doing that precisely

23   because it recognized that this was a provision that

24   addressed causation of bad air quality effects because

25   what it was doing was not introducing some new element

1   of cost, but relaxing the causation standard, saying it

2   shouldn't be something like but-for causation, where the

3   question is just does it prevent attainment or maintenance.

4   It's enough if it contributes significantly to

5   nonattainment or interfere.

6   JUSTICE KAGAN: So, Mr. Keisler, I mean, you

7   have a statute here that clearly does not have any

8   language about no costs allowed, that also does not have

9   what the American Trucking Association statute had,

10   which was like public health only, sufficient margin of

11   safety; right? So none of that. What you have is

12   exactly what you said. You have a statute that focuses

13   on causal contribution, right?

14   So this is a hard problem, right?

15   Because -- I mean, let me just sort of give you a

16   numerical example, which I'm sure is as simplistic as

17   the other numerical examples floating around this case.

18   But -- you know, let's say that the standard is a

19   hundred. And there's a State that has 120, and there

20   are two States, X and Y, that have each contributed 20.

21   Right.

22   So we -- you know, we only need 20 of those.

23   We have 40. And the question is how do you get from

24   those 40 to those 20? The D.C. Circuit would just say,

25   well, we take 10 from each. But if this -- if the

    1   question is only about causal contribution and that's

    2   all that the statute talks about, there have to be other

    3   ways we can make that determination of what contribution

    4   each should be legally responsible for, right?

    5   And what the EPA said here was, we're going

    6   to distinguish between -- we're going to distinguish

    7   between States that have -- have put a lot of technology

    8   and a lot of money into this already and, on the other

    9   hand, States that have lots of cheap and dirty

   10   emissions. And why isn't that a perfectly rational

   11   thing to do under this very statute?

   12   MR. KEISLER: Well, first of all, I think,

   13   in the example that Your Honor gave, where you had the

   14   two States and should they be each reduced to ten, the

   15   reason in favor of doing it that way, from a statutory

   16   perspective, is that that then gives a consistent

   17   application to the same causal language in the statute,

   18   which means that the same causal effect from one upwind

   19   State on a downwind State isn't significant if it comes

   20   from Indiana to Delaware, but insignificant if it comes

   21   from Tennessee; and that, when the statute says that

   22   States must prohibit the amounts they significantly

   23   contribute, then the more they contribute, the more they

   24   reduce.

   25   So we see that as fitting much more securely

 1 within the statutory language than the kind of shifting

 2 that Your Honor mentioned. Certainly, one could

 3 imagine, since the policy rationales that are behind

 4 Your Honor's question are certainly legitimate and more

 5 than plausible, certainly, one could imagine a statute

 6 that Congress could have written, which would have said,

 7 treat it at as national playing field, ignore the fact

 8 that there are State boundaries, think about what the

 9 most efficient way to force reductions to achieve

10 attainment in downwind locations, locate those

11 reductions in the least cost areas, and impose those on

12 the States.

13   Surely, if that was what Congress had

14 intended, it wouldn't have written the statute which

15 directs each State to include in its SIP provisions

16 that --

17   JUSTICE SOTOMAYOR: Do you battle

18 Mr. Stewart's point that Congress surely didn't intend

19 to shut down these plants if they didn't or couldn't

20 feasibly reduce their contributions?

21   MR. KEISLER: Yes, Your Honor, but we think

22 the statute --

23   JUSTICE SOTOMAYOR: So if they couldn't

24 feasibly do it, doesn't the words "significantly

25 contribute" have to take into account, in some way, the

1   cost of reducing the amount?

2   MR. KEISLER: Your Honor, I'm here on behalf

3   of industry and labor, so certainly, we believe that

4   there have to be mechanisms to deal with the kinds of

5   problems that Your Honor just identified, but we don't

6   think they come out of defining the amounts that

7   significantly contribute to nonattainment. We think

8   that those kinds of considerations come into play

9   elsewhere in the process.

10   In the American Trucking case that's been

11   referred to, the Court said that, when States are

12   implementing the requirements of the EPA, for example,

13   by deciding to allocate among different sources what

14   the -- how the reduction would be distributed, they can

15   take costs into account. And there are other mechanisms

16   in the SIP process when that definition of what amount

17   significantly contributes is then translated into an

18   emission reduction obligation.

19   We do think there are occasions, and we've

20   noted them in Note 17 of our brief, where the State in

21   then formulating its SIP can say, okay, this is the

22   amount we have to reduce, but we're going to do it in

23   this way because costs have to be taken into account.

24   But that is a very different matter from

25   saying that EPA, in defining what amounts significantly

1   contribute, can do the same thing. And the reason it's

2   different -- the reason it's not just, oh, you know, we're

3   locating it in some different box what EPA wants to do

4   in its box, is that the box that we're locating it in

5   makes clear that it functions as the kind of break Your

6   Honor described.

7   If something is unfeasible or economic,

8   there are ways to soften it out at the --

9   JUSTICE SOTOMAYOR: Well, they found a way

10   to do that with the cost tradeoff with the cap and trade

11   system --

12   MR. KEISLER: Well --

13   JUSTICE SOTOMAYOR: -- because the industry

14   itself can make that choice, with the State, presumably.

15   They're not stopping a SIP that stops a State from

16   participating.

17   MR. KEISLER: Well, the trading presents

18   unique issues under this statute. We support trading

19   anywhere it's appropriate, but this is a statute which

20   is focused on providing relief to downwind States. And

21   if -- to take my other example, if Indiana is

22   contributing emissions into Delaware that hurt its air

23   quality, it does no good for Delaware if Indiana

24   purchases allowances from Tennessee, which isn't

25   contributing into Delaware.

1   JUSTICE BREYER: Yes, but you're -- I mean,

2   you want me to write -- look what I would have to write,

3   if I made it very specific. Two units floats over the

4   air from the cow State. Two units floats over the air

5   from the sheep State -- or three.

6   It happens that, if we treat them alike,

7   we're going to tell the cow State, your unit is the same

8   as the sheep State's unit, both make the same

9   significant contribution, and we have to say that, even

10   if for you to remit your unit causes death and

11   destruction, destroys your economy, see, and I have to

12   write those words to accept your argument, don't I?

13   Because --

14   MR. KEISLER: I'd like to resist the role

15   Your Honor --

16   JUSTICE BREYER: Of course.

17   MR. KEISLER: -- has assigning me of bringing

18   death and destruction and starvation.

19   (Laughter.)

20   JUSTICE BREYER: Well, I'm trying to use the

21   most -- I'm trying to use the most extreme words I can,

22   so that, then, you will either have to draw a

23   distinction or something. That's why I'm --

24   MR. KEISLER: But in some ways, the

25   distinction is the one I was drawing in response to

1 Justice Sotomayor's question, which is that, when you

2 get down to the level of implementing these things, you

3 can take into account whether death, destruction,

4 starvation will be taken care of, when the State is

5 doing that as part of a SIP process.

6   But that doesn't bear on how the amount of

7 significant contribution is defined because, when EPA

8 takes costs into account it's not simply preventing the

9 death and destruction and starvation. It's working the

10 other way, too.

11   It's saying that, even though a causation

12 standard only would require you to reduce this much, we,

13 the EPA, can shift to you an additional burden because

14 we think another State has already done enough.

15 JUSTICE SOTOMAYOR: They say that's not a

16 theoretical possibility, under the numbers they've

17 worked out. So why isn't this taken care of in the

18 process that permits individual States to challenge this

19 as applied?

20 MR. KEISLER: Let me make a distinction in

21 that regard, Your Honor, which is what the government

22 says is a theoretical possibility is simply whether a

23 State would be driven below the one percent threshold.

24 But what I'm saying really goes back to Justice Scalia's

25 very first question, which is, even apart from the one

1   percent threshold, every time they are allocating on the

2   basis of cost and displacing what you would allocate on

3   the basis of what each State actually contributes, then

4   you are shifting burdens around, even apart from the one

5   percent.

6   JUSTICE KENNEDY: But you're -- you're

7   saying that "significant" must mean only measurable

8   amounts. It can't mean -- pick your word --

9   culpability, feasibility, responsibility, feasibility.

10   One State finds it quite feasible, from a cost

11   standpoint, to reduce emissions by a factor of 10. The

12   other State is the -- Justice Breyer's example, finds

13   that it can't do it, except if it's a factor of a

14   hundred.

15   Can't you say that the contribution in one

16   case is more significant than the other, based on

17   feasibility? Maybe you can't.

18   MR. KEISLER: I don't think so, Your Honor.

19   I don't think that is a proper definition of

20   "significant," when it's modifying "contribution to

21   nonattainment."

22   Mr. Stewart --

23   JUSTICE SCALIA: It isn't contributions to

24   nonattainment. It's the word "amounts." The statute

25   prohibits activity within the State from emitting any

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1 air pollutant in amounts which will contribute

2 significantly.

3   MR. KEISLER: We agree, Your Honor, and we

4 would emphasize that language as well.

5   JUSTICE SCALIA: Okay. Amounts are amounts.

6 I mean, it doesn't --

7   JUSTICE KENNEDY: But the word -- the word

8 "significantly" does import a judgmental component. I

9 think that's what the government is going to say. I

10 just wanted to ask you what --

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

12 limitless --

13   JUSTICE KENNEDY: Maybe they'll have a

14 better answer.

15   MR. KEISLER: I don't think that

16 "significantly" means that any factor that might be

17 deemed relevant in a broad policy sense can be imported

18 in. I think when you have a statute here which talks

19 about amounts that contribute significantly to

20 nonattainment or interfere with maintenance --

21   JUSTICE BREYER: All right. So there's an

22 ambiguity here because, I mean, when you use the word

23 "amounts," I think it does help you. Add the word

24 "amounts" to "significantly," and I think that Justice

25 Scalia's point might be -- he knows it better that I --

1 an amount is an amount. An amount is an amount. That's

2 what you want to say.

3   JUSTICE SCALIA: That's my point exactly.

4   (Laughter.)

5   JUSTICE BREYER: Yes. Yes. It is. And

6 then the -- the response is, well, not always because

7 you say, an amount, you're talking about a specific

8 amount coming out of a State, and is the one -- the cow

9 one, as significant as the sheep one. All right?

10   And that's, I think, where -- I think you

11 hit the nail as to what the issue is.

12   MR. KEISLER: Yes, and I guess our position

13 is that significant may have a range of meanings, but

14 it's not a limitless range of meanings. I think one

15 member of the Court once said the fact that yellow is

16 ambiguous doesn't mean it can mean purple.

17   And here -- you know, we don't think the range

18 of meanings in the context of this provision accommodate

19 the government's definition.

20   JUSTICE KAGAN: But, Mr. Keisler, the nature

21 of this problem is that there's an allocation issue.

22 It's not just everybody gets down to a certain threshold

23 level. It's there's a level, and we have to allocate.

24 And the question is, what are we going to allocate on

25 the basis of?

1   And the word "amounts" doesn't tell you what

2   you're going to allocate on the basis of. So there are

3   lots of different choices for what we can allocate on

4   the basis of.

5   We can just divide -- you know, and do it

6   all proportionally. We can take into account per

7   capita. We can take into account a State's population,

8   if we wanted to. Or we can take into account, as the

9   EPA did here, costs on the understanding that costs

10   reflect how much of an investment a State has already

11   made in pollution technology.

12   So the statute -- neither the word "amount"

13   nor anything else says anything about those different

14   methods of allocation, does it?

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

16   Your Honor. I think -- and -- you know, I don't focus

17   exclusively on the word "amount" or the word

18   "significantly." It's the entire phrase, "amounts that

19   contribute significantly to nonattainment or interfere

20   with maintenance," which I do think ten out of ten

21   people who weren't in this courtroom and hadn't read the

22   Clean Air Act, if you sat down and asked them, what does

23   it mean? They're talking about what the effect the

24   emissions in one state have on the other.

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

1   referring to air quality effects as a standard than the

2   NAAQS statute at issue in American Trucking was in

3   talking about safety and health as a standard. It does

4   supply a content to what the EPA has to do, and that

5   content isn't cost. It's this air quality effect

6   standard.

7   CHIEF JUSTICE ROBERTS: What is -- what is

8   your answer -- do you have an answer to Mr. Stewart's

9   basketball hypothetical? I mean, I thought that was

10   pretty good. If you ask the coach what significantly

11   contributed to the loss, he's going to talk about the

12   missed layup, rather than the missed desperation throw,

13   even though, as far as amount, each was going to count

14   for two points.

15   Assuming one was within the --

16   (Laughter.)

17   MR. KEISLER: Well, it's very hard -- it's

18   very hard for me to translate the -- the amount concept

19   into performance on the basketball court, but

20   Mr. Stewart's other example was a contribution to a

21   charity.

22   And I certainly would accept the notion that

23   if Bill Gates and I each contribute a hundred dollars to

24   a charity, I've made the more significant contribution,

25   but that's because we're using "contribution" in that

1   context to mean something else. We're using it to mean

2   "donate" or "give."

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

4   JUSTICE SCALIA: But the basketball thing

5   is -- to make it parallel to what's at issue here, the

6   question you should ask the coach, which -- which of

7   the -- you lost 101 to 100. Which of the 101 points

8   contributed most to your loss?

9   (Laughter.)

10   JUSTICE BREYER: As in the answer is that

11   some one point --

12   JUSTICE SCALIA: It's -- it's the one that

13   was the layup. I mean, he would not answer the one that

14   was the layup. He'd say what do you mean? All -- all

15   of the 101.

16   MR. KEISLER: But if there were different

17   teams playing in the league and you had an overall

18   result, you could actually determine -- you know, which

19   team had contributed what to the overall result. And

20   when we're dealing with States, we are dealing with

21   groups that the statute conceptualizes as separate teams

22   which are entitled to be treated separately.

23   But I would like to make just one other

24   point because I see my white light is on. We have

25   raised a completely separate argument. It's the first

 1 argument in our brief, which is independent of how the

 2 Court decides EPA may define the amount that contributes

 3 significantly, whether cost or air quality effects or

 4 anything else, and that is that, however it's defined,

 5 EPA cannot regulate beyond the point necessary to

 6 achieve attainment or maintenance in downwind locations.

 7   And here, although in the prior two good

 8 neighbor rulemakings, it specifically said it examined

 9 the issue and avoided overkill, here, it didn't say that

10 because it didn't do that.

11   Apart from the cost versus air quality

12 issue, we had commenters that submitted evidence that

13 showed that EPA could achieve attainment and maintenance

14 at virtually all the same downwind locations at lower

15 levels of regulation.

16   And EPA's response to that, on Pet App

17 354(a), was they weren't going to look at lower levels

18 of regulation because, at lower levels of regulation,

19 some sources in some States might cease operating

20 existing controls, and that's all they said.

21   But if sources in some States could cease

22 operating existing controls and as the commenter said,

23 you would still achieve attainment and maintenance in

24 all the downwind locations that they are linked to, then

25 EPA has no authority under the good neighbor provision

1   to require those sources to continue operating their

2   existing controls.

3   There may be authority under other

4   provisions, but not this one. And the EPA, in this

5   particular proceeding, said nothing else, gave no other

6   reason for refusing to act on the evidence that

7   commenters submitted, that lower levels of regulation at

8   most upwind States would still achieve attainment and

9   maintenance at downwind locations, and they had no

10   authority to regulate beyond the point necessary to

11   achieve attainment and maintenance.

12   If the Court has no further questions, I thank

13   the Court.

14   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15   Mr. Stewart, you have 4 minutes remaining.

16   REBUTTAL ARGUMENT OF MALCOLM L. STEWART

17   ON BEHALF OF THE PETITIONERS

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

19   As Mr. Keisler indicated, in our reply

20   brief, we cited the -- the history of the restatement as

21   it bears on the common law of nuisance. And as this

22   Court indicated in American Electric Power, if the Clean

23   Air Act had not been enacted, the remedy that downwind

24   States would have in a situation like this one would be

25   a Federal common law nuisance suit against upwind States

1   or polluters in upwind States.

2   And I think there are three lessons to draw

3   from that fact. The first is that, as the briefs and

4   argument in this case indicate, judicial resolution of

5   such a suit would have been a Herculean task. And the

6   prospect of doing that through judicial processes should

7   reinforce the wisdom of Congress' choice to replace that

8   mechanism with the Clean Air Act, and it counsels in

9   favor of deference to the expert agency that has been

10   placed in the position that a common law court would

11   previously have been placed in.

12   The second is that, as the reply brief

13   citation to the law of nuisance indicates, the common

14   law court in that scenario would have been able to

15   consider the costs necessary to achieve reduction in

16   pollution upwind in deciding whether a particular remedy

17   would be appropriate or how much of a reduction an

18   upwind polluter should have to make. And there's no

19   reason, absent extraordinarily clear statutory language,

20   to deny EPA the same authority.

21   The third thing is, as the analogy to the

22   common law suit indicates, there are sovereign State

23   interests on both sides of this case. This is not a

24   matter of EPA versus the States. It's a matter of EPA

25   trying to act as an honest broker between the upwind and

1   downwind States.

2   The next thing I would say about the Clean

3   Air Act is that the statute, as a whole, is replete with

4   references to economic activity and harnessing the

5   profit motive; that is, both the States and EPA are

6   specifically authorized to provide for the trading of

7   allowances, the whole purpose of which is to achieve

8   emission reductions in the most cost-effective manner

9   possible.

10   And I think it's worth noting in this regard

11   that, although we talk about the transport rule as

12   regulating the emission of -- emissions of States, what

13   we're really regulating is emissions of power plants

14   within the States, and the good neighbor provision,

15   itself, talks about preventing significant contribution

16   from emissions sources or emissions activity within the

17   States.

18   And one of the things that the EPA said in

19   the proposed rulemaking was that, in some circumstances,

20   the cumulative downwind impact of a particular upwind

21   State might be great, not because any particular power

22   plant was poorly regulated or emitting at a high level,

23   but because there were so many power plants in the same

24   State.

25   And one consequence of forbidding the EPA to

1   consider costs is that a particular power plant in an

2   upwind State might be required to install more expensive

3   pollution control measures and make greater reductions,

4   simply because it happened to be located in a State with

5   a lot of other power plants.

6   And the last thing I would say is this is --

7   the statute, as I've said before, has prospective focus.

8   It's intended to be implemented by State officials, and

9   if you ask how would a State official assure herself or

10   feel confident that her own State implementation plan

11   was satisfying good neighbor obligations, when she

12   wasn't really sure what other States might be doing, and

13   one way is if a State official said, if everybody else

14   did what I'm doing, I can feel confident that the

15   problem would be solved.

16   And that's really the approach that EPA

17   used. It examined certain cost thresholds, and it said,

18   at particular cost thresholds, we feel confident that if

19   everyone, upwind and downwind State alike -- alike

20   makes pollution control efforts at these levels, the

21   problem will be solved or at least almost solved because

22   there would still be slight residual nonattainment.

23   And it seems perfectly rational to say that

24   the significant contribution is the amount over and

25   above what would occur, if everyone adhered to an

1   approach which, if applied across the board, would solve

2   the problem.

3   Thank you.

4   CHIEF JUSTICE ROBERTS: Thank you, counsel.

5   Counsel.

6   The case is submitted.

7   (Whereupon, at 11:39 a.m., the case in the

8   above-entitled matter was submitted.)

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