SUPREME COURT OF THE UNITED STATES

Nos. 12–1182 and 12–1183

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
PETITIONERS
12–1182 *v.*
EME HOMER CITY GENERATION, L. P., ET AL.; AND

AMERICAN LUNG ASSOCIATION ET AL.,
PETITIONERS
12–1183 *v.*
EME HOMER CITY GENERATION, L. P., ET AL.

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

[April 29, 2014]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

Too many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress. With the statute involved in the present cases, however, Congress did it right. It specified quite precisely the responsibility of an upwind State under the Good Neighbor Provision: to eliminate those *amounts of pollutants* that it contributes to downwind problem areas. But the Environmental Protection Agency was unsatisfied with this system. Agency personnel, perhaps correctly, thought it more efficient to require reductions not in proportion to the *amounts of pollutants* for which each upwind State is responsible, but on the basis of how *cost-effectively* each can decrease emissions.

Today, the majority approves that undemocratic revision of the Clean Air Act. The Agency came forward with a textual justification for its action, relying on a farfetched meaning of the word "significantly" in the statutory text. That justification is so feeble that today's majority does not even recite it, much less defend it. The majority reaches its result ("Look Ma, no hands!") without benefit of text, claiming to have identified a remarkable "gap" in the statute, which it proceeds to fill (contrary to the plain logic of the statute) with cost-benefit analysis—and then, with no pretended textual justification at all, simply extends cost-benefit analysis beyond the scope of the alleged gap.

Additionally, the majority relieves EPA of any obligation to announce novel interpretations of the Good Neighbor Provision before the States must submit plans that are required to comply with those interpretations. By according the States primacy in deciding how to attain the governing air-quality standards, the Clean Air Act is pregnant with an obligation for the Agency to set those standards before the States can be expected to achieve them. The majority nonetheless approves EPA's promulgation of federal plans implementing good-neighbor benchmarks before the States could conceivably have met those benchmarks on their own.

I would affirm the judgment of the D. C. Circuit that EPA violated the law both in crafting the Transport Rule and in implementing it.[1]

I. The Transport Rule

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ.*

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[1] I agree with the majority's analysis turning aside EPA's threshold objections to judicial review. See *ante*, at 13–14, 18–19.

Hospital, 488 U. S. 204, 208 (1988). Yet today the majority treats the text of the Clean Air Act not as the source and ceiling of EPA's authority to regulate interstate air pollution, but rather as a difficulty to be overcome in pursuit of the Agency's responsibility to "craf[t] a solution to the problem of interstate air pollution." *Ante*, at 3. In reality, Congress itself has crafted the solution. The Good Neighbor Provision requires each State to eliminate whatever "amounts" of "air pollutant[s]" "contribute significantly to nonattainment" or "interfere with maintenance" of national ambient air-quality standards (NAAQS) in other States. 42 U. S. C. §7410(a)(2)(D)(i)(I). The statute addresses solely the environmental consequences of emissions, *not* the facility of reducing them; and it requires States to shoulder burdens in proportion to the size of their contributions, *not* in proportion to the ease of bearing them. EPA's utterly fanciful "from each according to its ability" construction sacrifices democratically adopted text to bureaucratically favored policy. It deserves no deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

A. Alleged Textual Support: "Significantly"

In the Government's argument here, the asserted textual support for the efficient-reduction approach adopted by EPA in the Transport Rule is the ambiguity of the word "significantly" in the statutory requirement that each State eliminate those "amounts" of pollutants that "contribute *significantly* to nonattainment" in downwind States. §7410(a)(2)(D)(i)(I) (emphasis added). As described in the Government's briefing:

> "[T]he term 'significantly' . . . is ambiguous, and . . . EPA may permissibly determine the amount of a State's 'significant' contribution by reference to the amount of emissions reductions achievable through application of highly cost-effective controls." Reply

> Brief for Federal Petitioners 15–16 (emphasis added; some internal quotation marks omitted).

And as the Government stated at oral argument:

> "[I]n terms of the language, 'contribute significantly,' . . . EPA reasonably construed that term to include a component of difficulty of achievement [*i.e.*, cost]; that is, in common parlance, we might say that dunking a basketball is a more *significant* achievement for somebody who is 5 feet 10 than for somebody who is 6 feet 10." Tr. of Oral Arg. 9 (emphasis added).

But of course the statute does not focus on whether the upwind State has "achieved significantly"; it asks whether the State has "contributed significantly" to downwind pollution. The provision addresses the physical effects of physical causes, and it is only the magnitude of the relationship sufficient to trigger regulation that admits of some vagueness. Stated differently, the statute is ambiguous as to *how much* of a contribution to downwind pollution is "significant," but it is not at all ambiguous as to whether factors unrelated to the *amounts of pollutants* that make up a contribution affect the analysis. Just as "[i]t does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple,'" *United States* v. *Home Concrete & Supply, LLC*, 566 U. S. ___, ___, n. 1 (2012) (SCALIA, J., concurring in part and concurring in judgment) (slip op., at 2, n. 1), it does not matter whether the phrase "amounts which . . . contribute significantly [to downwind NAAQS nonattainment]" is ambiguous when EPA has interpreted it to mean "amounts which are inexpensive to eliminate."

It would be extraordinary for Congress, by use of the single word "significantly," to transmogrify a statute that assigns responsibility on the basis of amounts of pollutants emitted into a statute authorizing EPA to reduce interstate pollution in the manner that it believes most

efficient. We have repeatedly said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (citing *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160 (2000)).

The statute's history demonstrates that "significantly" is not code for "feel free to consider compliance costs." The previous version of the Good Neighbor Provision required each State to prohibit emissions that would "*prevent* attainment or maintenance by any other State of any [NAAQS]." 91 Stat. 693 (emphasis added). It is evident that the current reformulation (targeting "any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]") was meant simply to eliminate any implication that the polluting State had to be a but-for rather than merely a contributing cause of the downwind nonattainment or maintenance problem—not to allow cost concerns to creep in through the back door.

In another respect also EPA's reliance upon the word "significantly" is plainly mistaken. The Good Neighbor Provision targets for elimination not only those emissions that "contribute significantly to nonattainment [of NAAQS] in . . . any other State," but also those that "interfere with maintenance [of NAAQS] by . . . any other State." §7410(a)(2)(D)(i)(I). The wiggle-word "significantly" is absent from the latter phrase. EPA does not—cannot—provide any textual justification for the conclusion that, when the same amounts of a pollutant travel downwind from States X and Y to a single area in State A, the emissions from X but not Y can be said to "interfere

with maintenance" of the NAAQS in A just because they are cheaper to eliminate. Yet EPA proposes to use the "from each according to its ability" approach for nonattainment areas *and* maintenance areas.

To its credit, the majority does not allude to, much less try to defend, the Government's "significantly" argument. But there is a serious downside to this. The sky-hook of "significantly" was called into service to counter the criterion of upwind-state responsibility plainly provided in the statute's text: *amounts of pollutants* contributed to downwind problem areas. See Brief for Federal Petitioners 42–45. Having forsworn reliance on "significantly" to convert responsibility for amounts of pollutants into responsibility for easy reduction of pollutants, the majority is impaled upon the statutory text.

B. The Alleged "Gap"

To fill the void created by its abandonment of EPA's "significantly" argument, the majority identifies a supposed gap in the text, which EPA must fill: While the text says that each upwind State must be responsible for its own contribution to downwind pollution, it does not say how responsibility is to be divided among multiple States when the total of their combined contribution to downwind pollution in a particular area exceeds the reduction that the relevant NAAQS requires. In the example given by the majority, *ante*, at 21–22, when each of three upwind States contributes 30 units of a pollutant to a downwind State but the reduction required for that State to comply with the NAAQS is only 30 units, how will responsibility for that 30 units be apportioned? Wow, that's a hard one—almost the equivalent of asking who is buried in Grant's Tomb. If the criterion of responsibility is *amounts of pollutants*, then surely shared responsibility must be based upon *relative amounts of pollutants*—in the majority's example, 10 units for each State. The statute makes

no sense otherwise. The Good Neighbor Provision contains a gap only for those who blind themselves to the obvious in order to pursue a preferred policy.

But not only does the majority bring in cost-benefit analysis to fill a gap that does not really exist. Having filled that "gap," it then extends the efficiency-based principle to situations *beyond the imaginary gap*—that is, situations *where no apportionment is required*. Even where an upwind State contributes pollutants to only a *single* downwind State, its annual emissions "budget" will be based not upon the amounts of pollutants it contributes, but upon what "pollution controls [are] available at the chosen cost thresholds." *Ante*, at 9. EPA's justification was its implausible (and only half-applicable) notion that "significantly" imports cost concerns into the provision. The majority, having abandoned that absurdity, is left to deal with the no-apportionment situation with no defense—not even an imaginary gap—against a crystal-clear statutory text.

C. The Majority's Criticisms of Proportional Reduction

1. Impossibility

The majority contends that a proportional-reduction approach "could scarcely be satisfied in practice" and "appears to work neither mathematically nor in practical application, *ante*, at 23—in essence, that the approach is impossible of application. If that were true, I know of no legal authority and no democratic principle that would derive from it the consequence that EPA could rewrite the statute, rather than the consequence that the statute would be inoperative. "There are sometimes statutes which no rule or canon of interpretation can make effective or applicable to the situations of fact which they purport to govern. In such cases the statute must simply fail." 3 R. Pound, Jurisprudence 493 (1959) (footnote omitted). In other words, the impossibility argument has

no independent force: It is relevant only if the majority's textual interpretation is permissible. But in any event, the argument is wrong.

The impossibility theorem rests upon the following scenario: "Imagine that States X and Y . . . contribute air pollution to State A in a ratio of one to five . . . ." *Ante*, at 23. And suppose that "States X and Y also contribute pollutants to a second downwind State (State B), this time in a ratio of seven to one." *Ibid.* The majority concludes that "[t]he Court of Appeals' proportionality edict with respect to *both* State A and State B appears to work neither mathematically nor in practical application." *Ibid.* But why not? The majority's model relies on two faulty premises—one an oversimplification and the other a misapprehension.

First, the majority's formulation suggests that EPA measures the comparative downwind drift of pollutants in free-floating proportions between States. In reality, however, EPA assesses quantities (in physical units), not proportions. So, the majority's illustration of a 1-to-5 ratio describing the relative contributions of States X and Y to State A's pollution might mean (for example) that X is responsible for 0.2 unit of some pollutant above the NAAQS in A and that Y is responsible for 1 unit. And the second example, assuming a 7-to-1 ratio underlying State X's and Y's contributions to State B's pollution, might mean that State X supplies 0.7 unit of the same pollutant above the NAAQS and State Y, 0.1 unit. Under a proportional-reduction approach, State X would be required to eliminate emissions of that pollutant by whatever minimum amount reduces both State A's level by 0.2 unit and State B's by 0.7 unit. State Y, in turn, would be required to curtail its emissions by whatever minimum amount decreases both State A's measure by 1 unit and State B's by 0.1 unit.

But, the majority objects, the reductions that State X

must make to help bring State B into compliance may be more than those necessary for it to help bring State A into compliance, resulting in "over-control" of X with respect to A. See *ante*, at 23–25, and n. 19. This objection discloses the second flaw in the impossibility theorem. Echoing EPA, see Brief for Federal Petitioners 47–48, the majority believes that the D. C. Circuit's interpretation of the Good Neighbor Provision forbids over-control with respect to even a single downwind receptor. That is the only way in which the proportional-reduction approach could be deemed "to work neither mathematically nor in practical application" on its face. *Ante*, at 23. But the premise is incorrect. Although some of the D. C. Circuit's simplified examples might support that conclusion, its opinion explicitly acknowledged that the complexity of real-world conditions demands the contrary: "To be sure, . . . there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States' emissions enough to meet the NAAQS in other downwind States." 696 F. 3d 7, 22 (2012). Moreover, the majority itself recognizes that the Good Neighbor Provision does not categorically prohibit over-control. "As the Good Neighbor Provision seeks attainment in *every* downwind State, . . . exceeding attainment in one State cannot rank as 'over-control' unless unnecessary to achieving attainment in *any* downwind State." *Ante*, at 29–30. The majority apparently fails to appreciate that, having cleared up that potential point of confusion, nothing stands in the way of the proportional-reduction approach.

The majority relies on an EPA document preceding the Transport Rule to establish the Agency's supposed belief that the proportional-reduction approach "could scarcely be satisfied in practice." *Ante*, at 23. But the document says no such thing. Rather, it shows that the Agency rejected a proportion-based, "air[-]quality-only" methodology not because it was impossible of application, but be-

cause it failed to account for costs. See App. in No. 11–1302 etc. (CADC), pp. 2311–2312. The document labels as a "technical difficulty" (not an impossibility) the fact that "most upwind states contribute to multiple downwind [receptors] (in multiple states) and would have a different reduction percentage for each one." *Id.*, at 2312. The Clean Air Act is full of technical difficulties, and this one is overcome by requiring each State to make the greatest reduction necessary with respect to any downwind area.

2. Over-Control

Apparently conceding that the proportional-reduction approach may not be impossible of application after all, the majority alternatively asserts that it would cause "costly overregulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment." *Ante*, at 24. This assertion of massive overregulation assumes that a vast number of downwind States will be the accidental beneficiaries of collateral pollution reductions—that is, nontargeted reductions that occur as a consequence of required reductions targeted at neighboring downwind States. (Collateral pollution reduction is the opposite of collateral damage, so to speak.) The majority contends that the collateral pollution reductions enjoyed by a downwind State will cause the required upwind reductions actually targeting that State to exceed the level necessary to assure attainment or maintenance, thus producing unnecessary over-control. I have no reason to believe that the problem of over-control is as extensive and thus "costly" as the majority alleges, and the majority provides none.

But never mind that. It suffices to say that over-control is no more likely to occur when the required reductions are apportioned among upwind States on the basis of *amounts of pollutants* contributed than when they are apportioned on the basis of *cost*. There is no conceivable reason why

the efficient-reduction States that bear the brunt of the majority's (and EPA's) approach are less likely to be over-controlled than the major-pollution-causing States that would bear the brunt of my (and the statute's) approach. Indeed, EPA never attempted to establish that the Transport Rule did not produce gross over-control. See 696 F. 3d, at 27. What causes the problem of over-control is not the *manner of apportioning* the required reductions, but the *composite volume* of the required reductions in each downwind State. If the majority's approach reduces over-control (it admittedly does not entirely eliminate it), that is only because EPA applies its cost-effectiveness principle not just to determining the proportions of required reductions that each upwind State must bear, but to determining the volume of those required reductions. See *supra*, at 7.

In any case, the solution to over-control under a proportional-reduction system is not difficult to discern. In calculating good-neighbor responsibilities, EPA would simply be required to make allowance for what I have called collateral pollution reductions. The Agency would set upwind States' obligations at levels that, after taking into account those reductions, suffice to produce attainment in all downwind States. Doubtless, there are multiple ways for the Agency to accomplish that task in accordance with the statute's amounts-based, proportional focus.[2] The majority itself invokes an unexplained device to prevent over-control "in uncommon particular applications" of its scheme. *Ante*, at 31. Whatever that device is, it can serve just as well to prevent over-control under the approach I have outlined.

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[2]The majority insists that "proportionality cannot be one of those ways." *Ante*, at 25. But it is easy to imagine precluding unnecessary over-control by reducing in a percent-based manner the burdens of each upwind State linked to a given downwind area, which would retain the proportionality produced by my approach.

I fully acknowledge that the proportional-reduction approach will demand some complicated computations where one upwind State is linked to multiple downwind States and vice versa. I am confident, however, that EPA's skilled number-crunchers can adhere to the statute's *quantitative* (rather than efficiency) mandate by crafting *quantitative* solutions. Indeed, those calculations can be performed at the desk, whereas the "from each according to its ability" approach requires the unwieldy field examination of many pollution-producing sources with many sorts of equipment.

D. Plus Ça Change: EPA's Continuing Quest for Cost-Benefit Authority

The majority agrees with EPA's assessment that "[u]sing costs in the Transport Rule calculus . . . makes good sense." *Ante*, at 26. Its opinion declares that "[e]liminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address." *Ibid.* Efficient, probably. Equitable? Perhaps so, but perhaps not. See Brief for Industry Respondents 35–36. But the point is that whether efficiency should have a dominant or subordinate role is not for EPA or this Court to determine.

This is not the first time EPA has sought to convert the Clean Air Act into a mandate for cost-effective regulation. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457 (2001), confronted EPA's contention that it could consider costs in setting NAAQS. The provision at issue there, like this one, did not expressly bar cost-based decisionmaking—and unlike this one, it even contained words that were arguably ambiguous in the relevant respect. Specifically, §7409(b)(1) instructed EPA to set primary NAAQS "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin

of safety." One could hardly overstate the capaciousness of the word "adequate," and the phrase "public health" was at least equally susceptible (indeed, much more susceptible) of permitting cost-benefit analysis as the word "significantly" is here. As the respondents in *American Trucking* argued, setting NAAQS without considering costs may bring about failing industries and fewer jobs, which in turn may produce poorer and less healthy citizens. See *id.*, at 466. But we concluded that "in the context of" the entire provision, that interpretation "ma[de] no sense." *Ibid.* As quoted earlier, we said that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not . . . hide elephants in mouseholes." *Id.*, at 468.

In *American Trucking*, the Court "refused to find implicit in ambiguous sections of the [Clear Air Act] an authorization to consider costs that has elsewhere, and so often, been expressly granted," *id.*, at 467, citing a tradition dating back to *Union Elec. Co.* v. *EPA*, 427 U. S. 246, 257, and n. 5 (1976). There are, indeed, numerous Clean Air Act provisions explicitly permitting costs to be taken into account. See, *e.g.*, §7404(a)(1); §7521(a)(2); §7545(c)(2); §7547(a)(3); §7554(b)(2); §7571(b); §7651c(f)(1)(A). *American Trucking* thus demanded "a textual commitment of authority to the EPA to consider costs," 531 U. S., at 468—a hurdle that the Good Neighbor Provision comes nowhere close to clearing. Today's opinion turns its back upon that case and is incompatible with that opinion.[3]

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[3]The majority shrugs off *American Trucking* in a footnote, reasoning that because it characterized the provision there in question as "absolute," it has nothing to say about the Good Neighbor Provision, which is not absolute. See *ante*, at 28, n. 21. This is a textbook example of begging the question: Since the Good Neighbor Provision is not absolute (the very point at issue here), *American Trucking*, which dealt with a provision that is absolute, is irrelevant. To the contrary, *American Trucking* is right on point. As described in text, the provision at issue

II. Imposition of Federal Implementation Plans

The D. C. Circuit vacated the Transport Rule for the additional reason that EPA took the reins in allocating emissions budgets among pollution-producing sources through Federal Implementation Plans (FIPs) without first providing the States a meaningful opportunity to perform that task through State Implementation Plans (SIPs). The majority rejects that ruling on the ground that "the Act does not require EPA to furnish upwind States with information of any kind about their good neighbor obligations before a FIP issues." *Ante*, at 16. "[N]othing in the statute," the majority says, "places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligations." *Ante*, at 17. This remarkably expansive reasoning makes a hash of the Clean Air Act, transforming it from a program based on cooperative federalism to one of centralized federal control. Nothing in the Good Neighbor Provision suggests such a stark departure from the Act's fundamental structure.

A. Implications of State Regulatory Primacy

Down to its very core, the Clean Air Act sets forth a federalism-focused regulatory strategy. The Act begins by declaring that "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is *the primary responsibility of States and local governments*." §7401(a)(3) (emphasis added). State primacy permeates Title I, which addresses the promulgation and implementation of NAAQS, in particular. Under §7409(a), EPA must promulgate NAAQS for each pollutant for which air-quality criteria have been

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here is even more categorical ("absolute") than the provision at issue in *American Trucking*.

issued pursuant to §7408. Section 7410(a)(1), in turn, requires each State, usually within three years of each new or revised NAAQS, to submit a SIP providing for its "implementation, maintenance, and enforcement." EPA may step in to take over that responsibility if, and only if, a State discharges it inadequately. Specifically, if the Agency finds that a State has failed to make a required or complete submission or disapproves a SIP, it "shall promulgate a [FIP] at any time within 2 years . . . , unless the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision." §7410(c)(1).

To describe the effect of this statutory scheme in simple terms: After EPA sets numerical air-quality benchmarks, "Congress plainly left with the States . . . the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co.*, 427 U. S., at 269. The States are to present their chosen means of achieving EPA's benchmarks in SIPs, and only if a SIP fails to meet those goals may the Agency commandeer a State's authority by promulgating a FIP. "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the [NAAQS], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 79 (1975). EPA, we have emphasized, "is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the [NAAQS] are to be met." *Ibid.*

The Good Neighbor Provision is one of the requirements with which SIPs must comply. §7410(a)(2)(D)(i)(I). The statutory structure described above plainly demands that EPA afford States a meaningful opportunity to allocate reduction responsibilities among the sources within their borders. But the majority holds that EPA may in effect force the States to guess at what those responsibilities

might be by requiring them to submit SIPs before learning what the Agency regards as a "significan[t]" contribution—with the consequence of losing their regulatory primacy if they guess wrong. EPA asserts that the D. C. Circuit "was wrong as a factual matter" in reasoning that States cannot feasibly implement the Good Neighbor Provision without knowing what the Agency considers their obligations to be. Brief for Federal Petitioners 29. That is literally unbelievable. The only support that EPA can muster are the assertions that "States routinely undertake technically complex air quality determinations" and that "emissions information from all States is publicly available." *Ibid.* As respondents rightly state: "All the scientific knowledge in the world is useless if the States are left to guess the way in which EPA might ultimately quantify 'significan[ce].'" Brief for State Respondents 50.

Call it "punish[ing] the States for failing to meet a standard that EPA had not yet announced and [they] did not yet know," 696 F. 3d, at 28; asking them "to hit the target . . . *before* EPA defines [it]," *id.*, at 32; requiring them "to take [a] stab in the dark," *id.*, at 35; or "set[ting] the States up to fail," *id.*, at 37. Call it "hid[ing] the ball," Brief for State Respondents 20; or a "shell game," *id.*, at 54. Call it "pin the tail on the donkey." Tr. of Oral Arg. 24. As we have recently explained:

> "It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time . . . and demands deference." *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. ___, ___ (2012) (slip op., at 14).

That principle applies *a fortiori* to a regulatory regime

that rests on principles of cooperative federalism.

B. Past EPA Practice

EPA itself has long acknowledged the proposition that it is nonsensical to expect States to comply with the Good Neighbor Provision absent direction about what constitutes a "significan[t]" contribution to interstate pollution.

The Agency consistently adopted that position prior to the Transport Rule. In 1998, when it issued the NO_X SIP Call under §7410(k)(5), EPA acknowledged that "[w]ithout determining an acceptable level of NO_X reductions, the upwind State would not have guidance as to what is an acceptable submission." 63 Fed. Reg. 57370. EPA deemed it "most efficient—indeed necessary—for the Federal government to establish the overall emissions levels for the various States." *Ibid.* Accordingly, the Agency quantified good-neighbor responsibilities and then allowed States a year to submit SIPs to implement them. *Id.*, at 57450–57451.

Similarly, when EPA issued the Clean Air Interstate Rule (CAIR) in 2005 under §7410(c), it explicitly "recognize[d] that States would face great difficulties in developing transport SIPs to meet the requirements of today's action without th[e] data and policies" provided by the Rule, including "judgments from EPA concerning the appropriate criteria for determining whether upwind sources contribute significantly to downwind nonattainment under [§74]10(a)(2)(D)." 70 *id.*, at 25268–25269. The Agency thus gave the States 18 months to submit SIPs implementing their new good-neighbor responsibilities. See *id.*, at 25166–25167, 25176. Although EPA published FIPs before that window closed, it specified that they were meant to serve only as a "Federal backstop" and would not become effective unless necessary "a year after the CAIR SIP submission deadline." 71 *id.*, at 25330–25331 (2006).

Even since promulgating the Transport Rule, EPA has repeatedly reaffirmed that States cannot be expected to read the Agency's mind. In other proceedings, EPA has time and again stated that although "[s]ome of the elements of the [SIP-submission process] are relatively straightforward, . . . others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS." 76 *id.*, at 58751 (2011). As an example of the latter, the Agency has remarked that the Good Neighbor Provision "contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution," citing CAIR. *Ibid.*, n. 6. In fact, EPA repeated those precise statements not once, not twice, but *30 times* following promulgation of the Transport Rule.[4]

Notwithstanding what parties may have argued in other litigation many years ago, it is beyond responsible debate that the States cannot possibly design FIP-proof SIPs without knowing the EPA-prescribed targets at which they must aim. EPA insists that it enjoys significant discretion—indeed, that it can consider essentially whatever factors it wishes—to determine what constitutes a "significan[t]" contribution to interstate pollution; and it simultaneously asserts that the States ought to know what quantities it will choose. The Agency—and the

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[4] In addition to the citations in text, see 77 Fed. Reg. 50654, and n. 7 (2012); *id.*, at 47577, and n. 7; *id.*, at 46363, and n. 7; *id.*, at 46356, and n. 9; *id.*, at 45323, and n. 7; *id.*, at 43199, and n. 7; *id.*, at 38241, and n. 6; *id.*, at 35912, and n. 7; *id.*, at 34909, and n. 7; *id.*, at 34901, and n. 8; *id.*, at 34310, and n. 7; *id.*, at 34291, and n. 8; *id.*, at 33384, and n. 7; *id.*, at 33375, and n. 7; *id.*, at 23184, and n. 7; *id.*, at 22543, and n. 4; *id.*, at 22536, and n. 7; *id.*, at 22253, and n. 8; *id.*, at 21915, and n. 7; *id.*, at 21706, and n. 6; *id.*, at 16788, and n. 4; *id.*, at 13241, and n. 5; *id.*, at 6715, and n. 7; *id.*, at 6047, and n. 4; *id.*, at 3216, and n. 7; 76 *id.*, at 77955, and n. 7 (2011); *id.,* at 75852, and n. 7; *id.*, at 70943, and n. 6; *id.*, at 62636, and n. 3.

majority—cannot have it both ways.

C. Abuse of Discretion

The majority attempts to place the blame for hollowing out the core of the Clean Air Act on "the Act's plain text." *Ante*, at 16. The first textual element to which it refers is §7410(c)'s requirement that after EPA has disapproved a SIP, it "shall promulgate a [FIP] at any time within 2 years." That is to say, the Agency has discretion whether to act at once or to defer action until some later point during the 2-year period. But it also has discretion to work within the prescribed timetable to respect the rightful role of States in the statutory scheme by delaying the issuance or enforcement of FIPs pending the resubmission and approval of SIPs—as EPA's conduct surrounding CAIR clearly demonstrates. And all of this assumes that the Agency insists on disapproving SIPs before promulgating the applicable good-neighbor standards—though in fact EPA has discretion to publicize those metrics before the window to submit SIPs closes in the first place.

The majority states that the Agency "retained discretion to alter its course" from the one pursued in the NOx SIP Call and CAIR, *ante*, at 17, but that misses the point. The point is that EPA has discretion to arrange things so as to preserve the Clean Air Act's core principle of state primacy—and that it is an *abuse of discretion* to refuse to do so. See §7607(d)(9)(A); see also 5 U. S. C. §706(2)(A) (identical text in the Administrative Procedure Act). Indeed, the proviso in §7410(c)(1) that the Agency's authority to promulgate a FIP within the 2-year period terminates if "the State corrects the deficiency, and [EPA] approves the [SIP] or [SIP] revision" explicitly contemplates just such an arrangement.[5]

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[5] I am unimpressed, by the way, with the explanation that the majority accepts for EPA's about-face: that the D. C. Circuit admonished it to "act with dispatch in amending or replacing CAIR." *Ante,* at 18 (citing

The majority's conception of administrative discretion is so sprawling that it would allow EPA to subvert state primacy not only with respect to the interstate-pollution concerns of the Good Neighbor Provision, but with respect to the much broader concerns of the NAAQS program more generally. States must submit SIPs "within 3 years" of each new or revised NAAQS "*or such shorter period as [EPA] may prescribe*." §7410(a)(1) (emphasis added). Because there is no principled reason to read that scheduling provision in a less malleable manner than the one at issue here, under the majority's view EPA could demand that States submit SIPs within a matter of days—or even hours—after a NAAQS publication or else face the immediate imposition of FIPs.

The second element of "plain text" on which the majority relies is small beer indeed. The Good Neighbor Provision does not expressly state that EPA must publish target quantities before the States are required to submit SIPs—even though the Clean Air Act does so for NAAQS more generally and for vehicle inspection and maintenance programs, see §7511a(c)(3)(B). From that premise, the majority reasons that "[h]ad Congress intended similarly to defer States' discharge of their obligations under the Good Neighbor Provision, Congress . . . would have included a similar direction in that section." *Ante*, at 17. Perhaps so. But EPA itself read the statute differently when it declared in the NO_X SIP Call that "[d]etermining the overall level of air pollutants allowed to be emitted in a State *is comparable to determining [NAAQS]*, which the courts have recognized as EPA's responsibility, and is

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North Carolina v. *EPA*, 550 F. 3d 1176, 1178 (2008) (*per curiam*)). Courts of Appeals' raised eyebrows and wagging fingers are not law, least so when they urge an agency to take ultra vires action. Nor can the encouragement to act illegally qualify as a "good reaso[n]" for an agency's alteration of course under *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009).

distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility." 63 Fed. Reg. 57369 (emphasis added).

The negative implication suggested by a statute's failure to use consistent terminology can be a helpful guide to determining meaning, especially when all the provisions in question were enacted at the same time (which is not the case here). But because that interpretive canon, like others, is just one clue to aid construction, it can be overcome by more powerful indications of meaning elsewhere in the statute. It is, we have said, "no more than a rule of thumb that can tip the scales when a statute could be read in multiple ways." *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. ___, ___ (2013) (slip op., at 9) (internal quotation marks and brackets omitted). The Clean Air Act simply cannot be read to make EPA the primary regulator in this context. The negative-implication canon is easily overcome by the statute's state-respecting structure—not to mention the sheer impossibility of submitting a sensible SIP without EPA guidance. Negative implication is the tiniest mousehole in which the majority discovers the elephant of federal control.

* * *

Addressing the problem of interstate pollution in the manner Congress has prescribed—or in any other manner, for that matter—is a complex and difficult enterprise. But "[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *Brown & Williamson*, 529 U. S., at 125 (quoting *ETSI Pipeline Project* v. *Missouri*, 484 U. S. 495, 517 (1988)). The majority's approval of EPA's approach to the Clean Air Act violates this foundational principle of popular government.

I dissent.