CERTIFICATE AS TO PARTIES, RULINGS, AND OTHER CASES

Intervenor-Respondents adopt the Certificate of Parties provided by respondent United States Environmental Protection Agency except to add that additional amicus curiae, the American Thoracic Society, appears in this Court in support of respondent.

Respectfully submitted on behalf of State and City Intervenor-Respondents,

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GLOSSARY

CAA	Clean Air Act, 42 U.S.C. § 7401 et seq.
CAIR	Clean Air Interstate Rule
CSAPR	Cross-State Air Pollution Rule
	(also referred to by EPA as "Transport Rule")
EPA	United States Environmental Protection Agency
EPA Br.	Brief for EPA
FIP	Federal Implementation Plan
Ind. Pet. Br.	Brief for Industry Petitioners
NAAQS	National Ambient Air Quality Standard
NO_x	Nitrogen Oxides
$PM_{2.5}$	Fine Particulate Matter
SIP	State Implementation Plan
SO_2	Sulfur Dioxide
St. Pet. Br.	Brief for State Petitioners

PRELIMINARY STATEMENT

Since the enactment of the modern Clean Air Act (CAA) in 1970, intervenor-respondent States and Cities (Downwind States/Cities) have struggled to bring all areas within their borders into compliance with national ambient air quality standards (NAAQS) for harmful air pollutants such as ozone and fine particulate matter ($PM_{2.5}$). Downwind States/Cities have imposed stringent and expensive emissions-reduction requirements in an effort to prevent the thousands of premature deaths and billions of dollars in increased health-care costs caused by NAAQS nonattainment.

But as the CAA itself recognizes, Downwind States/Cities cannot reduce or eliminate emissions from upwind States that harm air quality in downwind areas. To address the problem of interstate air pollution, the CAA requires upwind States to reduce emissions that impair downwind NAAQS attainment and maintenance. In 2005, EPA issued the Clean Air Interstate Rule (CAIR) to enforce this statutory mandate, but this Court held the rule unlawful.

The Cross-State Air Pollution Rule (CSAPR) fixes the defects that this Court found in CAIR. CSAPR imposes emissions reductions on

upwind States based on EPA's determination on a state-by-state basis of the cost of pollutant removal and the effect of such removal on downwind air quality. EPA's balanced program will provide the protection to downwind areas that the CAA mandates, is a reasonable and permissible implementation of the statute, and should accordingly be upheld.

ISSUES PRESENTED

The Downwind States/Cities adopt EPA's statement of issues.

STATEMENT OF THE CASE AND FACTS

The Downwind States/Cities adopt EPA's statement of the case and facts, and add the following statement.

Downwind States/Cities have two vital interests in reducing upwind emissions: protecting the health of their residents and avoiding the economic harm of subsidizing upwind emissions. Because failure to meet NAAQS jeopardizes public health, eliminating upwind emissions that impede downwind NAAQS attainment will save thousands of lives, prevent avoidable illnesses, and reduce healthcare costs—harms that cannot be meaningfully eliminated without CSAPR. In New York, North Carolina, and Illinois, for example, CSAPR is expected to prevent as many as 2,000, 1,900, and 1,500 premature deaths each year, respectively, critical protection that would be lost if implementation of CSAPR were blocked or delayed. *See* EPA, Clean Air Act Where You Live, *at* http://www.epa.gov/cleanairactbenefits/whereyoulive/ (figures obtained by clicking on map).

In addition, without the protection of CSAPR, the cost and burden of protecting air quality would be unfairly shifted to Downwind States/Cities, which have already undertaken significant efforts, at

great expense, to improve air quality for their residents,[1] yet have still not been able to achieve full NAAQS compliance because of the impact of upwind pollution. Downwind States/Cities should not be compelled to impose ever more costly and stringent pollution reduction requirements on their own in-state sources while upwind States avoid responsibility for—and do not equitably share the costs of—reducing their own contributing emissions.

[1] *See, e.g.*, Md. Code Ann. Envir. § 2-1001 *et seq.*; Ch. 2002-4, 2002 N.C. Sess. L. 72-81 (codified in part at N.C. Gen. Stat. § 143-215.107D); 6 N.Y.C.R.R. pts. 237-238; Conn. Dep't of Envtl. Prot., Comments (JA 1228-29).

STATUTES AND REGULATIONS

The CAA addresses the problem of interstate air pollution in several provisions. Section 110(a)(2)(D)(i)(I) requires every state implementation plan (SIP) to

> contain adequate provisions—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutants in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State which respect to any . . . national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D)(i)(I).

All other potentially applicable statutes and regulations are reproduced in petitioners' opening briefs.

SUMMARY OF ARGUMENT

EPA has adhered to the CAA and this Court's decisions interpreting the CAA in crafting CSAPR. First, EPA was authorized to implement CSAPR through federal implementation plans (FIPs). The statute permits EPA to issue FIPs when States have not met their pre-existing statutory obligations to address their downwind contributions

to NAAQS compliance, and EPA has properly determined that the regulated States have not met those obligations.

Second, CSAPR also imposes reasonable requirements on covered upwind States. The CAA gives EPA discretion to define "significant contribution" and "interference with maintenance," and this Court should defer to EPA's rational definitions in CSAPR given the great scientific complexity involved in the formation and interstate transport of air pollution.

ARGUMENT

POINT I

THE CLEAN AIR ACT AUTHORIZES EPA TO ISSUE FIPS TO IMPLEMENT CSAPR

Section 110(a)(2)(D)(i) of the CAA is a key component of the statute's remedy for the problems caused by interstate transport of air pollution. The provision mandates that States act as "good neighbors," *see Michigan v. EPA*, 213 F.3d 663, 671 (D.C. Cir. 2000) (referring to section 110(a)(2)(D)(i) as the CAA's "good neighbor provision"), by controlling in-state emissions that harm air quality in other States. Under the "good neighbor provision," SIPs must contain requirements "prohibiting" in-state emissions that worsen air quality in other States and thereby impede those States' compliance with NAAQS. 42 U.S.C. § 7410(a)(2)(D)(i)(I). To effectively enforce this statutory requirement, EPA promulgated CSAPR and, to avoid further delay, implemented CSAPR by issuing FIPs setting emissions budgets for covered States.

State Petitioners argue that EPA lacked authority to issue FIPs and must instead wait for noncomplying States to revise their own SIPs (St. Pet. Br. at 24), a process that would delay effective control of interstate air pollution beyond the NAAQS deadlines. *See* EPA Br. at

89-90 (listing deadlines). But that wait-and-see approach is not compelled by the CAA or by principles of federalism, as State Petitioners assert.

The CAA expressly directs EPA to issue a FIP: (1) if a State has failed to submit an adequate SIP that complies with statutory requirements; or (2) if EPA disapproves a SIP submission. *See* 42 U.S.C. § 7410(c)(1); *North Carolina v. EPA*, 531 F.3d 896, 902 (D.C. Cir. 2008) ("If a state is untimely in submitting a compliant SIP to EPA, EPA must promulgate a [FIP] for the state to follow."). Those prerequisites are met here: "[f]or each FIP" issued to implement CSAPR, EPA either disapproved a SIP or determined that the covered State failed to submit a SIP meeting the statutory requirements prohibiting interstate pollution, 76 Fed. Reg. 48,208, 48,219 (Aug. 8, 2011).

The CAA also gives EPA other options for addressing inadequate or outdated SIPs, such as issuing a SIP call under section 110(k)(5) that would establish a deadline for States to revise their own SIPs. *See* 42 U.S.C. § 7410(k)(5). But nothing in section 110(k)(5) or any other provision of the CAA *compels* EPA to issue a SIP call when States have

not submitted adequate SIPs or when SIPs have been disapproved, especially when further delay would harm public health and prolong the very interstate pollution Congress sought to eliminate.

EPA's exercise of FIP authority in this case does not "radically alter[] the CAA's federal-State balance of power," St. Pet. Br. at 28. The CAA's good-neighbor provision requires States to control emissions that impede NAAQS compliance or maintenance in other States. This statutory obligation exists independently of any implementation by EPA. 42 U.S.C. § 7410(a)(2). Thus, many States, including some State Petitioners, submitted SIPs to address their contributions to downwind States' nonattainment of the 2006 $PM_{2.5}$ NAAQS and did so *before* EPA issued a rule quantifying contribution or interference amounts under that NAAQS. *See* St. Pet. Br. at 29; *see also* 76 Fed. Reg. 53,638 (Aug. 29, 2011) (approving Delaware's SIP submission for significant contribution and interference with maintenance under the 2006 24-hour $PM_{2.5}$ NAAQS).

But because the harm of interstate pollution primarily affects downwind areas, upwind States do not have strong incentives to reduce emissions that impose harms elsewhere. EPA adopted CSAPR (and its

predecessor CAIR) because many States failed to comply with their statutory duty to eliminate and control in-state emissions that damaged air quality in other States. The CAA does not protect the sovereignty of upwind States at the *expense* of downwind States whose sovereign interests are substantially impeded if they are denied protection from out-of-state emissions that impair air quality and public health. The good-neighbor provision recognizes that there are sovereign interests on *both sides* of the line and that the interest in public health and welfare in downwind areas should not be sacrificed to preserve upwind autonomy over emissions restrictions.

In those circumstances, as this Court recognized in *North Carolina*, EPA has a statutory obligation—in its supervisory role—to ensure full compliance with CAA's interstate emissions requirements to protect all relevant state interests. *See* 531 F.3d at 901-02. Moreover, failure to timely implement CSAPR would distort the operation of the CAA, as this Court emphasized in *North Carolina*. There, this Court found that EPA had a statutory obligation to ensure interstate emissions reductions on a schedule "consistent with" the statutory schedule States face for NAAQS attainment. *Id.* at 912. Failure to

align these statutory deadlines would result in significant and irreparable harms. If "downwind nonattainment areas must attain NAAQS . . . without the elimination of upwind states' significant contribution to downwind nonattainment," downwind States would be forced to make greater emissions reductions than the CAA contemplates, *id.*, in effect subsidizing emissions from upwind States in order to protect their own air quality and the health and safety of their citizens.

As *North Carolina* warned, delayed enforcement of the CAA's good-neighbor provision is not acceptable because NAAQS compliance is subject to strict deadlines. A SIP call would have consumed so much time—up to eighteen months for States to make a SIP submission, plus additional time for EPA review, *see* 42 U.S.C. § 7410(k)(5)—that it would not have resulted in upwind emissions reductions in time for downwind States to meet their imminent NAAQS compliance deadlines. Thus, had EPA not issued FIPs here, it would have delayed statutory compliance in violation of this Court's instruction in *North Carolina*, and would have improperly increased the burden on the downwind States and cities in direct contravention of statutory requirements.

Under Petitioners' perverse reading of the statute, the CAA would *reward* nonconforming States—and force downwind States to continue suffering the harms caused by upwind air pollution—because nonconforming States would be given additional time to revise their SIPs to correct their statutory noncompliance. Nothing in the CAA compels that illogical result.

Although there may be instances where EPA lacks a reasonable basis to use a FIP rather than a SIP call, the record here amply supports EPA's promulgation of FIPs. The NAAQS at issue were already five and fourteen years old when CSAPR was finalized, *see* 76 Fed. Reg. at 48,209—well past the deadline for submitting compliant SIPs. Moreover, the CAA explicitly directs that NAAQS attainment be achieved "as expeditiously as practicable," 42 U.S.C. § 7502(a)(2)(A), and that upwind States share the responsibility to achieve that goal *on that schedule*, *North Carolina*, 531 F.3d at 911-12. Nothing in the CAA prohibits EPA from issuing FIPs to enforce the good-neighbor provision, to ensure expeditious NAAQS compliance, and to remedy the continued harm to downwind States if interstate emissions are not immediately reduced. And CSAPR does not "radically alter" the CAA's cooperative

federalism because it empowers States to replace FIPs with adequate SIPs. 76 Fed. Reg. at 48,327-28.

POINT II

CSAPR IMPOSES PERMISSIBLE AND RATIONAL REDUCTIONS ON INTERSTATE EMISSIONS

Petitioners' substantive challenges to CSAPR also fail. The Downwind States/Cities address three of petitioners' arguments: (1) that CSAPR impermissibly requires upwind States to reduce emissions below the "significant contribution" threshold; (2) that CSAPR impermissibly requires upwind States to reduce emissions below NAAQS levels for some downwind areas; and (3) that CSAPR fails to independently address "interference with maintenance" as the CAA mandates. In each instance, petitioners fail to give deference to EPA's evaluation of complex "scientific data within its technical expertise," deference which is especially appropriate when the agency is administering complicated provisions of the CAA, as in this case. *See ATK Launch Sys., Inc. v. EPA*, 2012 WL 593097, at *3 (D.C. Cir. Feb. 24, 2012) (quotation marks omitted).

A. CSAPR Does Not Unlawfully Eliminate More Than Significant Contributions.

In designing CSAPR, EPA adopted a one-percent threshold below which States' contributions to nonattainment in other States are considered *de minimis*. As a result of this threshold, upwind States that contribute no more than one percent of the relevant NAAQS to *each covered* downwind area are exempt from CSAPR requirements. *See* 76 Fed. Reg. at 48,236. For example, EPA excluded South Dakota from CSAPR regulation for $PM_{2.5}$ NAAQS because South Dakota contributed no more than two-tenths of one percent to ambient $PM_{2.5}$ levels in all relevant downwind areas. *Id.* at 48,240 (Table V.D-1).

Because the CAA does not provide a criterion for determining whether emissions "contribute significantly" to downwind nonattainment, this Court has upheld EPA's discretion to define significant contribution under the Act. *See Michigan*, 213 F.3d at 674. For States that exceed that one-percent threshold, EPA has determined emissions budgets by reference to both air-quality impacts and cost: it has defined significant contributions as emissions (a) that generators can remove at a specified cost per ton, and (b) that, once removed, eliminate downwind nonattainment and maintenance problems in

almost all areas. 75 Fed. Reg. 45,201, 45,271 (Aug. 2, 2010); 76 Fed. Reg. at 48,248. EPA did *not* purport to use the one-percent test as its definition of significant contribution, and therefore reducing some States' contribution beneath the one-percent level does not violate the statute as reasonably interpreted by EPA's regulation.

Petitioners appear to argue that for CSAPR to be valid, a covered State's obligations must cease once its impact falls to one percent. *See* Ind. Pet. Br. at 19-24; St. Pet. Br. at 35-37. If that is their claim, then they improperly confuse the test for *coverage* under CSAPR—the one-percent test—with the *remedy* for significant contribution as determined by EPA's cost- and air-quality-based standard. *See*, *e.g.*, 75 Fed. Reg. at 45,233 (threshold determines which States are "linked" to downwind areas); *id.* at 45,284 (referring to "1 percent contribution thresholds" used to identify linkages); *see also North Carolina*, 531 F.3d at 916-17 (comparable initial thresholds in CAIR were permissibly "unrelated" to the resulting state budgets reflecting the elimination of significant contributions).

Moreover, allowing EPA to reduce emissions beneath the one-percent threshold is necessary to achieve the statutory goal of

eliminating significant contributions. Because the magnitude of the contribution by an upwind State to air pollution in different downwind areas varies greatly due to the complex ways in which winds distribute pollutants and chemicals react in the atmosphere,[2] allowing EPA flexibility to reduce emissions to different levels in different places is necessary to achieve the CAA's goal of eliminating significant contributions to NAAQS nonattainment in *all areas* of downwind States.

Petitioners' interpretation of the statute and regulation would severely impair EPA's ability to regulate interstate emissions because of the differing effect of the upwind emissions on nonattainment in specific downwind areas. Missouri, for example, contributes about eight percent of the annual $PM_{2.5}$ NAAQS level in Madison County, Illinois—immediately across the Mississippi River from Missouri—but only one

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[2] *See, e.g.*, EPA, "Contributions of 8-hour ozone, annual $PM_{2.5}$, and 24-hour $PM_{2.5}$ from each state to each monitoring site" (Tab "CSAPR Annual PM Contributions") (identifying magnitude of annual $PM_{2.5}$ contributions from 37 states to 723 receptor sites) (JA 2728-39).

percent to the same NAAQS level in Cuyahoga County, Ohio.[3] If, as Petitioners contend, EPA could not reduce Missouri's emissions to any material extent—because any such reductions would necessarily reduce Missouri's contribution to Cuyahoga County nonattainment beneath the one-percent threshold level—then EPA would have no power to address Missouri's contribution to air pollution in Madison County, Illinois, or indeed any other downwind area, even those that suffer much more acute harms from Missouri's emissions.

Because of the diverse and disparate impacts of interstate air pollution and dispersal of that pollution, particular emissions will likely contribute less than one percent to NAAQS nonattainment *somewhere* in the nation. But EPA properly rejected Petitioners' "somewhere test" as an appropriate standard for remediating significant contribution. The agency's approach is reasonable and equitable. All States are treated equally: if any State contributes less than one percent to NAAQS nonattainment at *all downwind sites*, that State is exempt from

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[3] EPA, "Contributions of 8-hour ozone, annual $PM_{2.5}$, and 24-hour $PM_{2.5}$ from each state to each monitoring site" (Tab "CSAPR Annual PM Contributions," rows 165, 510 (relevant cells highlighted) (JA 2730, 2736).

CSAPR. If a State exceeds the one-percent contribution threshold, however, it is subject to CSAPR and may be required to reduce its contributions to pollution levels in *all downwind areas* with which it is linked—even if that would push the State's contribution to pollution in *some* downwind areas beneath the one-percent threshold.

That requirement is not unfair, as Industry Petitioners claim (*see* Br. at 24-26), and does not improperly shift the burden of statutory compliance from downwind to upwind States. The CAA imposes a duty on upwind States to reduce their contributions to interstate air pollution. This is a task that can be performed only by upwind States; downwind States cannot block upwind pollution emissions.

Since the enactment of the CAA, downwind States have worked hard to eliminate nonattainment areas within their own borders through SIPs and other state statutes and regulations. *See* Statement of Facts, *supra*, at 3-4. States like Connecticut, Maryland, and New York, for example, have imposed emissions reductions on their own in-state sources that are far more strict—and far more expensive—than the reductions EPA has imposed under CSAPR. *See* Conn. Dept. of Envtl. Prot., Comments (JA 1227-29); Md. Dep't of the Envt., Comments

(JA 586); N.Y.S. Dep't of Envtl. Cons., Comments (JA 928). Yet even these efforts have not resulted in full NAAQS compliance due to the unabated effects of interstate air pollution.

The record here does not reflect an unlawful shifting of burdens, but instead an attempt to correct an imbalance that has existed for over forty years—the disparity between downwind States' extensive efforts to control their own in-state emissions and the far fewer and often weaker efforts by upwind States to reduce their contributions to interstate air pollution. In light of the record, and EPA's extensive technical analysis, Petitioners have not shown that CSAPR's definition of "significant contribution" is arbitrary or in conflict with the CAA.

B. CSAPR Does Not Unlawfully Reduce Air Pollutant Levels Beneath NAAQS.

Industry Petitioners also argue that CSAPR exceeds EPA's authority because in some cases CSAPR may require significantly contributing States to reduce emissions levels below what is necessary to achieve NAAQS in some downwind areas. Ind. Pet. Br. at 26-30. But that argument fails for the same reasons noted above. CSAPR does what the CAA commands: it "prohibit[s]" emissions from upwind states

that will "contribute significantly to nonattainment . . . or interfere with maintenance" in other States. 42 U.S.C. § 7410(a)(2)(D)(i).

Nothing in the statute bars EPA from reducing specific emissions to the level necessary to achieve that goal in all covered downwind areas even if the practical result is improvement of air quality beyond minimal NAAQS requirements in *some* downwind areas.[4] As explained above, reductions in upwind emissions levels will not have equal and uniform effects in all downwind areas given the complexity involved in how $PM_{2.5}$ and ozone form and how resulting air pollution moves between upwind States and downwind nonattainment areas. Nor must the results be precisely the same everywhere to lawfully implement the CAA's good neighbor provision.

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[4] Contrary to Industry Petitioners' claim (Br. at 27), EPA did not set state emission budgets based solely on what the agency considered reasonable and cost effective. Instead, EPA's principal focus was on eliminating upwind emissions that impeded downwind states' ability to achieve and maintain NAAQS compliance. The agency's judgments about reasonable and cost-effective emission reductions were thus not unmoored, but instead were made with reference to that mandatory statutory goal. *See*, *e.g.*, 76 Fed. Reg. at 48,247 (EPA applied its methodology "to quantify emissions reductions that [downwind] states must achieve to eliminate . . . significant contribution to nonattainment and interference with maintenance").

For example, the upwind reductions needed to achieve the $PM_{2.5}$ NAAQS in one downwind area might well drive the annual $PM_{2.5}$ level in another area significantly beneath that NAAQS. See *supra* at 16-17. The interdependencies between attainment of the three NAAQS covered by CSAPR (annual and 24-hour $PM_{2.5}$ and 8-hour ozone) are even more complex. The reductions in SO_2 from various upwind States needed to achieve the *24-hour* $PM_{2.5}$ NAAQS in one downwind county might additionally reduce the *annual* $PM_{2.5}$ level in that county or another downwind area below the NAAQS. *See*, *e.g.* Southern Co., Comments (JA 1370). Likewise, the reductions in NO_x necessary to achieve the 8-hour ozone NAAQS in one downwind county might similarly reduce the annual or 24-hour level of $PM_{2.5}$ below the required NAAQS level, due to the role that NO_x plays in both ozone and $PM_{2.5}$ formation.

Even considering just a single downwind area, meeting *all* covered NAAQS in that area—as the CAA directs—may require the EPA to reduce certain upwind emissions below the level necessary to achieve a *particular* NAAQS at the downwind site because pollutant levels are interdependent. For example, there may be situations in which annual and 24-hour $PM_{2.5}$ nonattainment and 8-hour ozone nonattainment in a

downwind area result from NO_x emissions from only one upwind State. A NO_x reduction of 50,000 tons from the upwind State might be sufficient to eliminate both *24-hour* $PM_{2.5}$ and ozone nonattainment in that downwind area. But a greater reduction of, say, 100,000 tons might be necessary to ensure the downwind area's compliance with the *annual* $PM_{2.5}$ NAAQS. In that case, EPA could permissibly require the upwind State to make the greater reduction necessary to bring the affected downwind area into compliance with the annual $PM_{2.5}$ NAAQS.

Under Petitioners' implausible interpretation of the statute, EPA could not impose an emissions limitation that would bring any downwind area beneath a covered NAAQS, and therefore EPA would be unable to address the vast majority of upwind contributions to downwind nonattainment. But this runs directly counter to the protective purpose and goal of the CAA's good-neighbor provision. Petitioners do not dispute that, because of scientific and practical realities, it is largely *impossible* to eliminate significant contributions from upwind States and attain NAAQS for the pollutants covered by CSAPR—in all or even most downwind nonattainment areas—without

also reducing pollutant levels beneath NAAQS in other downwind areas.

EPA's response to these complex scientific issues is not arbitrary or unreasonable. CSAPR represents a rational solution to the problem of interstate emissions and interstate air pollution. Given the complexities in this highly technical area, this Court should defer to EPA's reasoned approach.[5] *See, e.g.*, *ATK Launch Sys.*, 2012 WL 593097, at *3; *Appalachian Power Co. v. EPA,* 135 F.3d 791, 802 (D.C. Cir. 1998) (noting the "deference traditionally given to an agency when reviewing a scientific analysis within its area of expertise," and applying that deference to EPA computer modeling). The beneficial side effects of CSAPR are not a reason to invalidate the rule as a whole.

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[5] Contrary to Industry Petitioners' argument (Br. at 34-35), EPA also treated states consistently in setting emissions budgets under CSAPR. Petitioners concede that EPA applied the same cost thresholds to 2012 and 2014 emissions budgets. *Id.* at 35. Petitioners' complain that EPA incorporated the effect of state-mandated emissions reductions in 2013, so that some states' 2014 budgets were lower than their 2012 budgets. But EPA treated states consistently: the budgets for Maryland, New York, and North Carolina in both 2012 and 2014 also reflect independent state-mandated reductions, but those reductions happened to take place before 2012, while the ones about which Petitioners complain will take place in 2013.

C. CSAPR Properly Addresses "Interference with Maintenance."

Finally, EPA considered and properly addressed "interference with maintenance" in promulgating CSAPR. The CAA prohibits emissions that *either* significantly contribute to NAAQS nonattainment, or "interfere with maintenance" of NAAQS, by other States. 42 U.S.C. § 7410(a)(2)(D)(i)(I). CSAPR addresses the statutory "interference with maintenance" requirement by defining areas in which such interference occurs and subjecting States that interfere with maintenance in those areas to emissions reduction requirements. *See*, *e.g.*, 76 Fed. Reg. at 48,211. Specifically, CSAPR defines maintenance areas as those where EPA's estimate of average future air quality is below a NAAQS, but where the agency's high-end estimate of future air quality exceeds permitted NAAQS levels. *See, e.g.*, *id.*

State Petitioners argue (Br. at 38) that EPA violated the CAA and this Court's decision in *North Carolina* because the agency used the same emissions reductions standard for States that interfere with NAAQS maintenance as for States that significantly contribute to NAAQS nonattainment. But that argument is wrong. The CAA does not define either "contribute significantly" or "interfere with

maintenance," thus giving EPA discretion in how to address these phrases to craft a workable rule. *See, e.g.*, *North Carolina*, 531 F.3d at 914 (where plain text of the CAA does not demand one interpretation, EPA's interpretation will be upheld if it is "reasonable").

Nor does *North Carolina* require EPA to use a different emissions reduction standard for interference-with-maintenance States. In *North Carolina*, this Court vacated CAIR in part because EPA did not "give independent significance to the 'interfere with maintenance' language" in the CAA, thus "unlawfully nullif[ying] that aspect of the statute." *Id.* at 910-11. This Court did not hold that EPA must implement the CAA by imposing independent and *different* rules on interference States. It merely held that EPA could not read the statute to avoid identifying those States at all, so that "a state [could] *never* 'interfere with maintenance' unless EPA determines" the State also "'contribut[ed] significantly to nonattainment.'" *Id.* at 910 (emphasis added).

Here, EPA has solved the problem of underinclusiveness this Court identified in *North Carolina*, which improperly resulted in "no protection for downwind areas that, despite EPA's predictions, [would] still find themselves struggling to meet NAAQS due to upwind

interference." *Id.* at 910-11. That requirement of *independent coverage* for upwind interference does not compel EPA to adopt a different methodology for calculating emissions reductions to remedy that interference once the agency has properly identified the larger category of interference-with-maintenance States.

EPA's decision to impose the same emissions reduction requirements on significant-contribution and interference-with-maintenance States under CSAPR is reasonable given the complexity of the interstate air-pollution problem, the statutory requirement that EPA remedy both types of upwind-downwind problems, and the significant overlap between both categories of States. *See*, *e.g.*, 76 Fed. Reg. at 48,241-46 (all twelve of the interference-with-maintenance States for annual $PM_{2.5}$ are also significant-contribution States; twenty of the twenty-one interference-with-maintenance States for 24-hour $PM_{2.5}$ are also significant-contribution States, and eleven of the twenty-six interference-with-maintenance States for ozone are significant-contribution States).

Fundamentally, State Petitioners' argument about "interference with maintenance" is an attack on the statutory requirement that

upwind States avoid interfering with downwind States' efforts to maintain air quality at NAAQS levels. St. Pet Br. at 39 ("affirmative emissions-reduction obligations for areas in nonattainment are *not required* for areas historically in attainment" (emphasis added)). When downwind areas come into attainment, they are subject to a ten-year plan for continued maintenance under section 175A, 42 U.S.C. § 7505a(a), but the CAA's good-neighbor provision was designed to ensure that downwind areas would not bear the burden of maintenance for pollution caused by other States.

An EPA rule that eliminated or diminished emissions reduction requirements for States that interfere with maintenance would unlawfully shift the burden to downwind States—which would have to impose more stringent emissions controls on in-state emissions to compensate for out-of-state pollution, effectively subsidizing out-of-state emissions—to maintain downwind air quality. That result would nullify the "interference with maintenance" language in the CAA and deny the very statutory protection this Court found necessary in *North Carolina*.

CONCLUSION

For all the foregoing reasons, the petitions for review should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Andrew Frank, an Assistant Attorney General in the Office of the Attorney General of the State of New York, hereby certifies:

(1) according to the word-count feature of the word processing program used to prepare this brief, the brief contains 4,655 words and complies with the type-volume limitations of Rule 32(a)(7)(B), and,

(2) upon information and belief based upon representations made to me by the industry intervenor-respondents and the nongovernmental organization intervenor-respondents, collectively the briefs of intervenor-respondents do not exceed 14,000 words, as mandated in the Court's January 18, 2012 order, Doc. No. 1353334.

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/s/ Andrew G. Frank
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit on March 16, 2012, using the Court's CM/ECF system, and that service will therefore be accomplished through notice sent by the CM/ECF system to all counsel of record for petitioners, respondents, intervenors and *amici* registered in the CM/ECF system for docket number 11-1302(L) and all consolidated cases.

Dated: March 16, 2012

/s/ Simon Heller