

EPA V. EME HOMER CITY GENERATION, L.P.:
 AGENCIES CAN CONSIDER COSTS IN THE
 FACE OF STATUTORY SILENCE

*Ryland Li**

<i>Introduction</i>	293
I. <i>Background</i>	295
A. <i>The Interstate Air Pollution Problem</i>	295
B. <i>The Statutory Framework</i>	296
C. <i>Implementing Regulations</i>	296
D. <i>The D.C. Circuit’s Ruling</i>	298
II. <i>The Supreme Court’s Decision</i>	299
A. <i>The Majority</i>	299
1. <i>FIP Authority</i>	299
2. <i>Transport Rule</i>	300
B. <i>The Dissent</i>	303
III. <i>Analysis</i>	304
A. <i>Chevron Reaffirmed</i>	304
B. <i>Default Rule: Cost Consideration Allowed</i>	305
C. <i>Policy Changes Demand Only a Reasoned Explanation</i>	307
<i>Conclusion</i>	309

*The wind bloweth where it listeth, and thou hearest the sound thereof, but canst not tell whence it cometh, and whither it goeth.*¹

INTRODUCTION

Air knows no political boundaries. Pollution emitted in one state can cross over into many other states and transform into different pollutants along the way. Unlike the air pollution it seeks to control, the federal Clean Air Act (“CAA”) does acknowledge state boundaries through its scheme of “cooperative federalism.” Many of the Act’s provisions, especially those dealing with the implementation of national ambient air quality standards (“NAAQS”), recognize the primacy of states. States decide how to allocate the burden of emissions reduction among in-state sources in formulating State Implementation Plans (“SIPs”). The federal government has a backstop authority to issue its own Federal Implementation Plans (“FIPs”) only when SIPs are inadequate.

Another provision recognizing the role of states is the Good Neighbor Provision (“GNP”), which requires states to eliminate emissions “within the

* J.D. Candidate, Harvard Law School, Class of 2015. The author is grateful to Rebecca Lipman and Sylvanus Polky for their helpful comments on the initial draft; and to Sabrina Baum, Samantha Caravello, and all of the remarkable editors at the *Harvard Environmental Law Review* for shepherding this piece from start to finish.

¹ EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1594 (2014) (quoting The Holy Bible, John 3:8 (King James Version)).

state” “in amounts which will contribute significantly to nonattainment”² of NAAQS in “any other state.”³ In 2011, the U.S. Environmental Protection Agency (“EPA”) implemented the GNP through two actions.⁴ First, the EPA issued the Transport Rule.⁵ The rule applied to twenty-seven upwind states, allocating the burden of emissions reduction among the several states according to a uniform cost threshold.⁶ That is, each state was required to reduce its emissions up to a certain dollar amount per ton of pollution.

Second, and contemporaneous with the Transport Rule, EPA issued FIPs for the regulated states.⁷ EPA had previously determined that these states had failed to submit a compliant SIP.⁸ As a result, states were denied an initial opportunity to submit SIPs to comply with the Transport Rule, being instead immediately subject to FIPs. The EPA chose this path because an earlier D.C. Circuit decision had invalidated the EPA’s prior rulemaking under the GNP and admonished it to quickly implement a new regulatory regime (that is, the Transport Rule).⁹

In *EPA v. EME Homer City Generation, L.P.* (“*EME Homer*”),¹⁰ the Supreme Court upheld the Transport Rule as well as the FIPs by a 6–2 vote, reversing the lower court on both issues.¹¹ The Court specifically held that EPA’s consideration of costs in allocating emissions reductions among the several states was a permissible construction of the GNP, given the statute’s silence on the question of allocation.¹² Further, the plain text of the CAA allows EPA to issue a FIP “any time” within two years of a prior SIP disapproval.¹³

In addition to upholding a major EPA rulemaking with significant public health and environmental benefits, *EME Homer* is significant for reaffirming the Court’s earlier precedent in *Entergy Corp. v. Riverkeeper, Inc.*¹⁴ that an agency may consider costs in setting the level of regulation where the statute is silent with regard to costs, unless the statute implies to the contrary. In doing so, the case substantially narrows the Court’s holding in *Whitman v. American*

² The statute also requires states to eliminate emissions that will “interfere with maintenance” of any other state’s NAAQS. The Court’s analysis and this Comment’s analysis do not, and need not, differentiate between the two prongs (“contribute significantly to nonattainment” and “interfere with maintenance”), and the same analysis applies to both prongs. The dissent’s analysis differentiates between them, however, noting that the word “significantly” only modifies the first prong relating to nonattainment, and not the second. *Id.* at 1613 (Scalia, J., dissenting).

³ 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2012).

⁴ Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (codified in scattered sections of 40 C.F.R.) [hereinafter Transport Rule]. The rule is also known as the Cross-State Air Pollution Rule (“CSAPR”).

⁵ *Id.*

⁶ *EME Homer*, 134 S. Ct. at 1596–97.

⁷ *Id.* at 1597–98.

⁸ *Id.*

⁹ *Id.* at 1602 (citing *North Carolina v. EPA*, 531 F.3d 1176 (D.C. Cir. 2008) (per curiam)).

¹⁰ *Id.* at 1584.

¹¹ *Id.* at 1610.

¹² *Id.*

¹³ *Id.* at 1600 (quoting 42 U.S.C. § 7410(c)(1) (2012)).

¹⁴ 556 U.S. 208 (2009).

Trucking Ass'ns,¹⁵ which had required a textual commitment of authority for an agency to consider costs.

The balance of this Comment begins in Part I by surveying the interstate air pollution problem, the legal framework for addressing it under the CAA, EPA's three attempts to regulate the problem over the last twenty years, and the industry challenges and the D.C. Circuit's response in each case. Part II reports the majority and the dissenting opinions. Part III analyzes the decision's precedential value in regards to cost consideration, and also finds that the decision properly applies longstanding doctrines of deference and abuse of discretion review. A conclusion follows.

I. BACKGROUND

A. *The Interstate Air Pollution Problem*

Along with water, sunlight, and soil, air is one of the critical elements for life on earth. For human beings, air is vital for even a single breath; its deprivation leads to asphyxia and death within moments. Just like water and soil, air can be adulterated by natural and human causes, with subsequent effects on human health, crop yields, and the ecosystem.¹⁶ Air pollution, however, is unique in its mobility: unconfined to a plot of ground or the course of a waterway, air wanders wherever the wind blows, heedless of political and most physical boundaries.

Any effective scheme of air pollution control must account for transboundary effects: pollution created in one jurisdiction can cause harm in another.¹⁷ Otherwise, an emitting (or upwind) state could reap the fruits of industrial activity, while burdening a downwind state with the costs of pollution. This would be inefficient—for the producer not to internalize air pollution costs of production—and inequitable—for downwind states to bear the harms created by upwind states. Moreover, where the bulk of a downwind state's pollution is contributed by other states, that downwind state may find it extremely costly or even impossible to attain clean air solely by its own efforts.¹⁸

¹⁵ 531 U.S. 457 (2001).

¹⁶ UNITED NATIONS ENV'T PROGRAMME, GLOBAL ENVIRONMENT OUTLOOK (GEO-5) 33 (2012), <http://perma.cc/G65D-8ATK>.

¹⁷ See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996); Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV. 23, 29–35 (1996).

¹⁸ Brief for the Federal Petitioners at 2, *EME Homer*, 134 S. Ct. 1584 (No. 12-1182), 2013 WL 4761309, at *2; see also *id.* at *7 (“For the receptors identified in this rule as having ozone problems, the out-of-state share of pollution contributions ranges from a low of 35% to a high of 93%. For those receptors in areas with PM2.5 problems, the range is 47% to 89%, with all but one area above 50%.” (citations omitted)).

B. The Statutory Framework

Federal law addresses interstate pollution in several ways, including through the CAA's GNP.¹⁹ The GNP is one component of the CAA's regulation of stationary source emissions. Under this framework, EPA sets NAAQS for pollutants that endanger public health or welfare, which basically tell states how clean their air must be.²⁰ To implement the NAAQS, each state is required to submit a SIP,²¹ through which the state allocates responsibility for emissions reduction among in-state sources. EPA must review the SIPs and approve them if they satisfy certain conditions.²² If EPA determines that the SIPs are inadequate, however, it has two years to issue a FIP, in which EPA allocates the responsibility for emissions reduction among in-state sources.²³

The GNP fits into this framework as one condition for an adequate SIP: it requires states to mitigate their contributions to air pollution in downwind states. Specifically, the GNP requires that states submit SIPs that

contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the state from emitting 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].²⁴

C. Implementing Regulations

While the text of the GNP is concise, its implementation has been challenging and complex. In the past two decades, EPA has issued three key implementing regulations.²⁵ In 1998, EPA issued the NO_x SIP Call, in which EPA determined that twenty-three jurisdictions²⁶ significantly contributed to nonattainment of ozone NAAQS in other states; set emissions caps for each upwind state based on cost; and encouraged all states to voluntarily participate in a federal cap-and-trade program.²⁷ The D.C. Circuit upheld the rule in *Michigan*

¹⁹ Other ways include the state petition provision, 42 U.S.C. § 7426(b) (2012), the interstate transport commissions provision, *id.* § 7506a, the interstate ozone air pollution provision, *id.* § 7511c, and the Title IV acid deposition control program, *id.* §§ 7651–51o.

²⁰ *See id.* §§ 7408(a)(1), 7409(b)(1)–(2).

²¹ *See id.* § 7410(a).

²² *See id.* § 7410(a)(2); *see also* Train v. Natural Res. Def. Council, Inc., 421 U.S. 60, 79 (1975) (holding that EPA must approve a SIP that satisfies the requirements of § 7410(a)(2)).

²³ *See* 42 U.S.C. § 7410(c).

²⁴ *Id.* § 7410(a)(2)(D)(i)(I).

²⁵ For a more detailed review of these regulations and the associated lower court decisions, see generally Jeremy Feigenbaum, *Becoming Good Neighbors After EME Homer City Generation*, L.P. v. EPA, 38 HARV. ENVTL. L. REV. 259 (2014).

²⁶ These jurisdictions included twenty-two states and Washington, D.C. Throughout the rest of this Comment, the words jurisdiction and state are used interchangeably.

²⁷ Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,356, 57,405, 57,456 (Oct. 27, 1998) (codified in scattered sections of 40 C.F.R.).

v. EPA,²⁸ specifically affirming EPA's use of costs in setting emissions budgets.²⁹

In 2005, the Bush EPA issued the Clean Air Interstate Rule ("CAIR"), regulating both NO_x and SO₂ emissions in order to facilitate attainment of ozone and fine particulate matter ("PM_{2.5}") NAAQS.³⁰ The Agency determined that twenty-nine jurisdictions were subject to CAIR.³¹ As in the prior NO_x SIP Call, the Agency first determined which states were subject to the rule and then allocated emissions budgets.³² In *North Carolina v. EPA*,³³ the D.C. Circuit initially vacated the rule as arbitrary and capricious, and later remanded the rule without vacatur—that is, leaving CAIR in place—while calling on EPA to expeditiously "conduct further proceedings consistent with [its] prior opinion."³⁴

In response to *North Carolina*, the Obama EPA issued the Transport Rule in 2011.³⁵ Like CAIR, the Transport Rule sought to address ozone and PM_{2.5} nonattainment.³⁶ Similar to both the NO_x SIP Call and CAIR, the Transport Rule first determined which states were subject to the rule in a "screening" analysis and subsequently allocated emissions reductions based on cost.³⁷ In the "screening analysis," EPA established a one percent *de minimis* threshold: states that contributed less than one percent of a given NAAQS to any downwind state were excluded from the rule.³⁸ In the second step, called the "control analysis," EPA required cost-effective emissions reductions, requiring states to reduce emissions at a given dollar amount per ton.³⁹

EPA estimated that the rule would prevent 13,000–34,000 premature mortalities per year and 15,000 heart attacks per year, among other benefits.⁴⁰ After two years of implementation, power plant SO₂ and NO_x emissions were ex-

²⁸ 213 F.3d 663 (D.C. Cir. 2000) (per curiam).

²⁹ *Id.* at 679.

³⁰ Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162 (May 12, 2005) (codified in scattered sections of 40 C.F.R.) [hereinafter CAIR].

³¹ See *North Carolina v. EPA*, 531 F.3d 896, 903 (D.C. Cir. 2008) (per curiam).

³² See *id.*

³³ *Id.* at 896.

³⁴ *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) ("[W]e remind EPA that we do not intend to grant an indefinite stay of the effectiveness of this court's decision. Our opinion revealed CAIR's fundamental flaws, which EPA must still remedy."). The Court decided to leave the rule in place for the time being in light of the substantial regulatory uncertainties that would have been caused by the vacatur. See *id.*

³⁵ Transport Rule, *supra* note 4.

³⁶ The Transport Rule involved both the two prior 1997 NAAQS addressed by CAIR (for 8-hour ozone and annual PM_{2.5}) as well as a new 2006 NAAQS for PM_{2.5} measured on a daily basis. See Transport Rule, *supra* note 4, at 48,208–09.

³⁷ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1596 (2014).

³⁸ *Id.*

³⁹ *Id.* at 1596–97. All states were required to reduce NO_x at \$500/ton. See *id.* For SO₂, one group of states was required to reduce at \$500/ton while another group of states was required to reduce at \$2300/ton. *Id.* at 1597 n.7.

⁴⁰ Transport Rule, *supra* note 4, at 48,350. The rule was also expected to prevent 19,000 hospital and emergency department visits, 19,000 cases of acute bronchitis, 420,000 cases of upper and lower respiratory symptoms, 400,000 cases of aggravated asthma, and 1.8 million days of missed work or school. *Cross-State Air Pollution Rule (CSAPR)*, EPA, <http://perma.cc/V5CY-BHCS>.

pected to decrease from 2005 levels by approximately seventy-three percent and fifty-four percent, respectively.⁴¹ EPA estimated annual benefits of \$120–280 billion, far exceeding the annual cost of \$810 million.⁴² In other words, the expected benefits were \$148–346 for every dollar spent in costs.

Contemporaneous with the Transport Rule, EPA promulgated FIPs allocating each state's emissions budget among its in-state sources.⁴³ For each of these states, EPA had previously determined that the state had failed to submit a SIP that complied with the GNP, and those determinations became final after sixty days.⁴⁴ Accordingly, EPA exercised its discretion to promulgate a FIP "any time" within two years after a SIP disapproval.⁴⁵

D. *The D.C. Circuit's Ruling*

State and local governments and industry and labor groups sought review of the Transport Rule and the FIPs in the D.C. Circuit.⁴⁶ In a divided panel, the court of appeals vacated the rule and the FIPs.⁴⁷ Writing for the court, Judge Kavanaugh held that EPA exceeded its authority in two ways.⁴⁸ First, by promulgating FIPs before giving states an opportunity to adopt their own implementation plans, EPA had upset the cooperative federalism embodied in the CAA.⁴⁹ Given the complexity of the interstate pollution problem and the impracticability of states determining their own GNP obligations, states should not be forced to take a "stab in the dark" without EPA guidance.⁵⁰ Accordingly the Agency had an implicit statutory duty to give upwind states a reasonable opportunity to promulgate SIPs after EPA had quantified their GNP obligations.⁵¹

Second, the Transport Rule violated three "red lines that cabin" the Agency's authority.⁵² Whereas the GNP required states to reduce emissions in a manner "proportional" to their physical contribution to downwind pollution,⁵³ the rule improperly required reductions according to the totally different metric of cost-effectiveness, which could force some states to reduce emissions by more than their "fair share."⁵⁴ The rule also failed to prevent "unnecessary over-control" of downwind pollution; that is, the Rule did not guard against requiring states to reduce pollution beyond the statutory mandate.⁵⁵ Finally, the

⁴¹ *Cross-State Air Pollution Rule (CSAPR)*, *supra* note 40.

⁴² Transport Rule, *supra* note 4, at 48,313–14.

⁴³ *EME Homer*, 134 S. Ct. at 1597–98.

⁴⁴ *Id.* All but three of the SIP disapprovals went unchallenged. *See id.* at 1597 n.11.

⁴⁵ *See id.* at 1600.

⁴⁶ *EME Homer City Generation, L.P., v. EPA*, 696 F.3d 7, 11 (D.C. Cir. 2012).

⁴⁷ *Id.* at 37.

⁴⁸ *Id.* at 11.

⁴⁹ *See id.*

⁵⁰ *Id.* at 35.

⁵¹ *Id.* at 37.

⁵² *Id.* at 19.

⁵³ *Id.* at 21.

⁵⁴ *Id.* at 27.

⁵⁵ *Id.* at 22.

Agency had failed to ensure that upwind states were not forced to reduce emissions below the one-percent screening threshold.⁵⁶

In dissent, Judge Rogers argued that respondents' challenge to the Transport Rule was barred because respondents had failed to raise their substantive objections to the rule with reasonable specificity during the notice-and-comment period to preserve them for judicial review,⁵⁷ and that their challenge to the FIPs was an untimely attack on EPA's prior SIP disapprovals.⁵⁸ On the merits, Judge Rogers disagreed with the majority's conclusion that the rule had unreasonably construed the CAA,⁵⁹ and criticized the majority opinion as being inconsistent with *Michigan*, where the court explicitly allowed EPA to consider costs in construing the GNP.⁶⁰ Judge Rogers also disagreed with the majority that EPA was required to quantify a state's good neighbor obligations before promulgating a FIP.⁶¹

II. THE SUPREME COURT'S DECISION

By a vote of 6-2,⁶² the Supreme Court reversed on both issues.⁶³ Writing for the majority, Justice Ginsburg held that EPA properly exercised its statutory discretion to issue a FIP at "any time" within two years of a SIP disapproval, and EPA was not required to quantify states' good neighbor obligations prior to issuing a FIP.⁶⁴ On the Transport Rule issue, the Court held that the rule's use of cost-effective controls was a permissible construction of the GNP.⁶⁵ Justice Scalia, joined by Justice Thomas, dissented, and would have affirmed the lower court's decision on both issues.⁶⁶ On the jurisdictional questions, the unanimous Court found jurisdiction.⁶⁷

A. *The Majority*

1. *FIP Authority*

The Court upheld the FIPs.⁶⁸ Before turning to the merits, the Supreme Court found that the lower court had jurisdiction. EPA had argued that because the Act required challenges to SIP disapprovals to be brought within sixty days,

⁵⁶ *Id.* at 23–24.

⁵⁷ *See id.* at 51–58 (Rogers, J., dissenting).

⁵⁸ *See id.* at 40–46.

⁵⁹ *See id.* at 58–60.

⁶⁰ *Id.* at 59.

⁶¹ *See id.* at 46–51.

⁶² Justice Alito recused himself. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014).

⁶³ *Id.*

⁶⁴ *See id.* at 1600–01.

⁶⁵ *See id.* at 1607.

⁶⁶ *Id.* at 1610 (Scalia, J., dissenting).

⁶⁷ *Id.* at 1599, 1602–03 (majority opinion); *id.* at 1610 n.1 (Scalia, J., dissenting).

⁶⁸ *Id.* at 1600–02 (majority opinion).

and sixty days had already lapsed since the relevant disapprovals, the challenges were thus untimely.⁶⁹ The Court disagreed, noting that the respondents' challenge was not that the SIP disapprovals were erroneous, but rather that EPA was obliged to grant upwind states an opportunity to promulgate adequate SIPs *after* it issued the Transport Rule, but it had failed to do so.⁷⁰ As the Court stated, "[t]his claim [did] not turn on the validity of the prior SIP approvals," and thus was not barred by the CAA.⁷¹

On the merits, the Court held that the text and context of the statute allowed the Agency to issue the FIPs and promulgate the rule simultaneously. The CAA states that "[EPA] shall promulgate a [FIP] *at any time* within 2 years after the [Agency] . . . disapproves a [SIP]."⁷² Nothing in the text requires EPA to quantify good neighbor obligations prior to issuing a SIP.⁷³ Moreover, when Congress intended for EPA's input to be a prerequisite for state action, it so stated expressly, but failed to do so here.⁷⁴

Additionally, the Court found that EPA did not abuse its discretion in issuing the FIPs.⁷⁵ Although EPA had previously—in the NO_x SIP Call and CAIR—given states a grace period to issue SIPs after quantifying the required emissions reductions, EPA was not bound to do so here.⁷⁶ EPA retained discretion to change its policy so long as it provided a reasoned basis for doing so.⁷⁷ The Agency did so here: given the D.C. Circuit's decision in *North Carolina* admonishing EPA to act quickly to replace the illegal CAIR regime, EPA found it inappropriate to delay in issuing FIPs.⁷⁸

2. Transport Rule

The Court held that EPA permissibly interpreted the CAA to require cost-effective emissions reductions.⁷⁹ Nevertheless, the Court agreed with the D.C. Circuit that the CAA forbade EPA from requiring upwind states to reduce pollution beyond the one-percent threshold or the level necessary to bring all downwind states into attainment, and it noted that in the event this over-control occurred, states could bring an as-applied challenge to the rule.⁸⁰

Before turning to the merits, the Court found that the lower court had jurisdiction. EPA had argued that respondents had failed to raise their objec-

⁶⁹ *Id.* at 1599 (citing 42 U.S.C. § 7607(b)(1) (2012)).

⁷⁰ *Id.* at 1599–602.

⁷¹ *Id.* at 1599.

⁷² 42 U.S.C. § 7410(c)(1) (emphasis added).

⁷³ *EME Homer*, 134 S. Ct. at 1601.

⁷⁴ *Id.* (“[S]tates developing vehicle inspection and maintenance programs under the CAA, for example, must await EPA guidance before issuing SIPs. 42 U.S.C. § 7511a(c)(3)(B). A state’s obligation to adopt a SIP, moreover, arises only after EPA has first set the NAAQS the state must meet. § 7410(a)(1).”).

⁷⁵ *See id.* at 1601–02.

⁷⁶ *See id.*

⁷⁷ *Id.* at 1602 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).

⁷⁸ *Id.* (citing Transport Rule, *supra* note 4, at 48,220).

⁷⁹ *Id.* at 1603–10.

⁸⁰ *Id.* at 1608–10.

tions to the rule with “reasonable specificity” during the public comment period to preserve them for judicial review.⁸¹ The Court held that the reasonable specificity requirement was not jurisdictional, but rather spoke to “a party’s procedural obligations.”⁸² The Agency failed to “press the argument unequivocally” in the lower court, so the Court was not obligated to address it.⁸³ “Mindful of the importance of the issues” raised to the “ongoing implementation of the [GNP],” the Court turned to the merits.⁸⁴

The Court held that the text of the CAA did not speak directly to the issue of how emissions reductions were to be allocated among several states, and accorded EPA’s reasonable interpretation *Chevron* deference.⁸⁵ Under *Chevron*,⁸⁶ when “Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute.”⁸⁷ Rather, the agency is charged with filling the “gap” left open by Congress, and the court must defer to the agency’s interpretation so long as it is not “arbitrary, capricious, or manifestly contrary to the statute.”⁸⁸ Here, while the statute requires each upwind state to eliminate “amounts” of pollution that “contribute significantly to nonattainment” of any other states’ NAAQS, it does not specify how emissions reductions are to be allocated among multiple upwind states.⁸⁹

The Court gave the following example: suppose state A’s NAAQS with respect to a pollutant is 100 parts per billion (“ppb”), and that the actual level of the pollutant is 130 ppb.⁹⁰ Suppose also that three upwind states X, Y, and Z each contribute 30 ppb to state A’s pollution problem; that is, the upwind states contribute a total of 90 ppb to state A. EPA cannot, however, require the upwind states to reduce their combined pollution by 90 ppb, for doing so would reduce state A’s pollution to 40 ppb, causing over-control well below the 100 ppb NAAQS. Under the CAA, EPA can only require upwind states to reduce their combined pollution by 30 ppb. The Act, however, does not tell the Agency how to allocate that 30 ppb reduction among the three upwind states.

Moreover, the Court found the proportionality approach advocated by the lower court and the dissent to be mathematically unworkable.⁹¹ Suppose, for example, that states X and Y contribute pollution to state A in a ratio of 1:5. A proportional approach would require state X to reduce its emission by five times that of state Y. Now suppose also that states X and Y contribute pollution to state B in a ratio of 7:1. A proportional approach here would require state Y to reduce its emissions by seven times that of state X. This is mathematically

⁸¹ *Id.* at 1602–03 (quoting 42 U.S.C. § 7607(d)(7)(B) (2012)).

⁸² *Id.* at 1602.

⁸³ *Id.* at 1603.

⁸⁴ *Id.*

⁸⁵ *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

⁸⁶ 467 U.S. 837.

⁸⁷ *Id.* at 843.

⁸⁸ *Id.* at 843–44.

⁸⁹ *EME Homer*, 134 S. Ct. at 1603–07 (citing 42 U.S.C. § 7410(a)(2)(D)(i) (2012)).

⁹⁰ *Id.* at 1604.

⁹¹ *Id.* at 1605.

impossible: state X cannot simultaneously reduce five times the emissions of state Y, while state Y reduces seven times the emissions of state X.

A modified version of this approach, requiring each upwind state to reduce emissions by the amount necessary to eliminate the state's largest downwind contribution, is workable but would likely result in over-control.⁹² EPA would then need to adjust state emission budgets to make allowance for overregulation; as the dissent admits, there are "multiple ways" to do this.⁹³ Proportional reduction, however, cannot be one of those ways, because proportionality was what caused the problem in the first place.⁹⁴ And if EPA can use a nonproportional approach to adjust states' emissions budgets, then surely it can use a nonproportional approach in setting the budgets in the first place.⁹⁵

After finding that the plain text does not address the question, the Court found EPA's reliance on cost-effectiveness a permissible interpretation of the CAA.⁹⁶ EPA's construction is both efficient (because it reduces pollution at lower overall cost) and equitable (because it obligates states that have previously invested less in pollution control to now invest more).

In a footnote, the Court distinguished this case from its decision in *Whitman v. American Trucking Ass'ns*,⁹⁷ where a unanimous Court held that the text of the CAA bars EPA from considering costs in setting the NAAQS.⁹⁸ Unlike in *American Trucking*, where the statute expressly required EPA to set NAAQS at levels "requisite to protect the public health" with "an adequate margin of safety," the GNP was "silent" and "fails to provide any metric" by which emissions reductions should be allocated.⁹⁹

Finally, the Court agreed with the D.C. Circuit that EPA could not require states to reduce pollution by more than is necessary to achieve attainment in every downwind state or below the one-percent screening threshold.¹⁰⁰ However, the Court concluded that this did not justify invalidating the rule on its face for three reasons.¹⁰¹ First, over-control in one place is often necessary to ensure attainment elsewhere.¹⁰² Second, the Agency also has a statutory obligation to avoid under-control. "Required to balance the possibilities of under-control and over-control, EPA must have leeway in fulfilling its statutory mandate."¹⁰³ Finally, amid a voluminous record, respondents could only find a few instances of unnecessary emissions reductions, and even those were con-

⁹² *Id.*

⁹³ *Id.* at 1606.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1606–07.

⁹⁷ *Id.* at 1607 n.21.

⁹⁸ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001).

⁹⁹ *EME Homer*, 134 S. Ct. at 1607 n.21.

¹⁰⁰ *Id.* at 1608.

¹⁰¹ *Id.* at 1608–09.

¹⁰² *Id.* at 1608.

¹⁰³ *Id.* at 1609.

tested.¹⁰⁴ The Court noted that in the event over-control did in fact occur, states could bring as-applied challenges to the rule.¹⁰⁵

B. *The Dissent*

In dissent, Justice Scalia, joined by Justice Thomas, found that the plain text of the CAA prevented EPA from considering cost in the Transport Rule and that EPA abused its discretion in issuing the FIPs.¹⁰⁶ On the Transport Rule issue, Justice Scalia believed that Congress had clearly dictated that each state must reduce its emissions in proportion to the size of its contribution to nonattainment in other states.¹⁰⁷ Accordingly, no *Chevron* deference was warranted.¹⁰⁸ Justice Scalia also resisted the majority's allegation that a proportional approach was unworkable.¹⁰⁹ Moreover, the dissent found that the majority's opinion was in tension with the Court's decision in *American Trucking*, which forbade consideration of costs in setting the NAAQS.¹¹⁰

On the FIPs issue, Justice Scalia argued that the CAA sets forth a "federalism-focused regulatory strategy" where states have "primacy" in implementation.¹¹¹ Accordingly, EPA must first quantify states' GNP obligations and then "afford states a meaningful opportunity to allocate reduction responsibilities."¹¹² Otherwise, states would be left with the impracticable task of "guess[ing]" what their good neighbor obligations were, and would lose their regulatory primacy should they guess wrong.¹¹³ EPA's failure to give states that opportunity when it had the discretion to—especially in light of its longstanding past practice in the NOx SIP Call and CAIR of first quantifying good neighbor obligations and then giving states time to issue compliant SIPs—was an abuse of its discretion.¹¹⁴ Moreover, any "negative implication" based on context¹¹⁵ was "easily overcome by the statute's state-respecting structure—not

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 1611–12, 1619–21 (Scalia, J., dissenting).

¹⁰⁷ *Id.* at 1611. The dissent also resisted the theory that the government put forth, which is that ambiguity in the statutory word "significantly" allowed EPA to consider costs. *Id.* at 1611–12; *see* 42 U.S.C. § 7410(a)(2)(D)(i) (2012) (requiring states to prohibit emissions "which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any . . . [NAAQS]") (emphasis added).

¹⁰⁸ *EME Homer*, 134 S. Ct. at 1611.

¹⁰⁹ *Id.* at 1614–15 & n.2 (asserting that any over-control produced by the proportional approach could be mitigated by EPA in "multiple ways" in accordance with an "amounts-based, proportional focus," such as "by reducing in a percent-based manner the burdens of each upwind State linked to a given downwind area").

¹¹⁰ *Id.* at 1616.

¹¹¹ *Id.* at 1617.

¹¹² *Id.*

¹¹³ *Id.* at 1617–18.

¹¹⁴ *Id.* at 1618–20.

¹¹⁵ In other provisions of the statute, but not here, Congress had expressly stated that EPA action was a prerequisite to state action. *See supra* text accompanying note 74.

to mention the sheer impossibility of submitting a sensible SIP without EPA guidance.”¹¹⁶

III. ANALYSIS

EME Homer sets forth an important precedent and reaffirms three long-standing doctrines. Following on an earlier case called *Entergy v. Riverkeeper*, *EME Homer* bolsters the rule that where a statute is silent on whether an agency may consider costs and does not expressly require the agency to consider other factors, an agency is permitted to consider costs. The case also reaffirms that courts defer to agencies’ statutory construction where the statute is ambiguous, and that courts must hold up agencies’ changed policy judgments so long as they are supported by a reasoned explanation.

A. Chevron Reaffirmed

Under *Chevron*, a court must defer to an agency’s reasonable construction of a statute unless Congress has unambiguously spoken to the issue.¹¹⁷ In the GNP, Congress did not speak unambiguously as to how emissions reductions should be allocated among several upwind states, and so the Court properly held under *Chevron* that EPA’s reasonable construction must prevail.¹¹⁸

The GNP requires states to adopt plans that prohibit in-state sources “from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in . . . any other State with respect to any . . . [NAAQS].”¹¹⁹ The statute is written as though the problem of interstate pollution reduction could be considered on a state-by-state basis, but this is not so because of the complex linkages among the various states.

The *EME Homer* majority’s simplified example of three upwind states each contributing pollution to one downwind state¹²⁰ is on point. The Agency could decide the emissions reductions burden for one upwind state at a time, but requiring each upwind state to eliminate its entire contribution to downwind states’ nonattainment would lead to significant over-control.¹²¹ The statute offers no guidance on how to allocate reduction when there are multiple pollution

¹¹⁶ *Id.* at 1620–21.

¹¹⁷ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

¹¹⁸ Note that unlike the statutory provision here, if a statute were to *require* proportional reduction, then EPA would have to implement that approach and could not rewrite a clear statutory command to allow cost consideration. *See id.* at 842–43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); *see also* *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) (“An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”).

¹¹⁹ 42 U.S.C. § 7410(a)(2)(D)(i)(I) (2012).

¹²⁰ *EME Homer*, 134 S. Ct. at 1604.

¹²¹ That is, were pollution in the downwind state to exceed the relevant NAAQS by 30 ppb and each contributing upwind state to reduce its emissions by 30 ppb, the downwind state would have its emissions reduced by a total of 90 ppb, which over-controls its pollution far below the required NAAQS level. *See supra* text accompanying note 90.

contributors,¹²² and it is easy to imagine numerous reasonable allocation criteria. For example, the Agency could allocate the emissions reductions pro rata among the three upwind states.¹²³ The Agency could also allocate the burden to achieve the lowest cost, to maximize collateral benefits, or based on the ability of in-state sources to pay. Because the statute does not answer this question, it is ambiguous on this point, and so EPA's construction, if permissible, must prevail.

B. Default Rule: Cost Consideration Allowed

EME Homer's most important precedent is to bolster a default rule allowing (but not requiring) agencies to consider costs where the text is silent with regard to costs and otherwise does not imply that cost consideration is barred. The Court convincingly distinguishes this case from *American Trucking*, which allowed cost consideration only if the statute said so explicitly. At the same time, *EME Homer* narrows the effect of *American Trucking* while fortifying the Court's precedent in *Entergy v. Riverkeeper*, a Clean Water Act case where the Court also held that cost consideration was allowed in the face of a silent statute that did not expressly require the Agency to consider other factors.

American Trucking requires "a textual commitment of authority to EPA to consider costs."¹²⁴ There the Court held that the CAA NAAQS provision, 42 U.S.C. § 7409(b)(1), which required EPA to set air quality standards "requisite to protect the public health" with "an adequate margin of safety," did not permit cost consideration.¹²⁵ The Court found the language to be "absolute";¹²⁶ implied from the fact that other sections of the CAA expressly allowed cost consideration that § 7409(b)(1) did not;¹²⁷ and required a clear statement to per-

¹²² *EME Homer*, 134 S. Ct. at 1603–07.

¹²³ Though this proportional approach is a plausible way to allocate the emissions reductions burden, it does not, unlike the dissent suggests, follow logically. *See id.* at 1613 (Scalia, J., dissenting). For one, were Congress to have wanted to speak directly on this question, it could have included statutory language requiring proportional reductions, as it has done in other federal statutes. *See, e.g.*, I.R.C. §§ 25A(d), (i)(4), 221(b)(2)(B) (2012). Moreover, the proportional reduction approach is *not* a general legal principle. Tort law often does not function that way, but allows consideration of equitable principles such as cost. *See* RESTATEMENT (SECOND) OF TORTS § 886A cmt. h (1979) (joint-and-several liability); *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 cmt. c (2000) (comparative fault). Neither does the Superfund statute. *See* 42 U.S.C. § 9613(f)(1) (allowing consideration of "equitable factors as the court determines are appropriate"). Nor do several other pollution control provisions of the CAA, which determine pollution limits based on technology-based controls. *See, e.g., id.* §§ 7475(a)(4), 7479(1) (Prevention of Significant Deterioration program); *see also generally* PEW CTR. ON GLOBAL CLIMATE CHANGE, TECHNOLOGY-BASED STANDARDS UNDER DIFFERENT FEDERAL ENVIRONMENTAL STATUTES (2010), <http://perma.cc/Q74D-NNDF>.

¹²⁴ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

¹²⁵ *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1)) (internal quotation marks omitted).

¹²⁶ *Id.* (quoting DAVID P. CURRIE, AIR POLLUTION 4–15 (1981)).

¹²⁷ *Id.* at 467.

mit cost consideration given that § 7409 was the “engine” that drives Title I of the statute.¹²⁸

The *EME Homer* majority distinguishes this case from *American Trucking*, while narrowing the reach of that case’s holding.¹²⁹ The Court offers two distinctions, of which only the second is convincing. The Court first claims that the provision in *American Trucking* was “absolute” while the provision here is ambiguous.¹³⁰ As the dissent correctly notes, however, this is only “begging the question.”¹³¹ The second distinction is much more compelling: the NAAQS provision expressly provides factors for EPA to consider in setting the NAAQS, whereas the GNP failed to provide any “metric” for EPA to consider.¹³² That is, in *American Trucking*, the statute, by providing a list of other factors for the Agency to consider (namely, public health and “an adequate margin of safety”), implied that the Agency was to consider only those factors, not cost. But in *EME Homer*, the statute, by not giving the Agency any factors to consider, did not imply that cost consideration was barred.

In this respect, *EME Homer* is like *Entergy* (a highly relevant decision which both the majority and dissent neglected to mention).¹³³ *Entergy* allowed cost consideration in a Clean Water Act provision requiring the “best technology available for minimizing adverse environmental impact.”¹³⁴ The Court explained that “[the provision] is silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing [the provision]—an obvious logical impossibility.”¹³⁵

Thus, where the statute is silent and does not dictate other factors for the Agency to consider in setting the level of regulation, cost consideration is permissible. A fair triangulation of these cases is that the default rule allows cost consideration, but this presumption can be overcome if the statute implies to the contrary. Under this characterization, a key remaining question is just what

¹²⁸ *Id.* at 468.

¹²⁹ In addition to the Court’s analysis, it is possible to draw at least three other distinctions. First, the NAAQS provision in *American Trucking* was “the engine that drives nearly all of Title I of the CAA,” *id.*; by contrast, neither the GNP nor the provision at issue in *Entergy* was central to the operation of its respective statute. Second, the decisions are consistent in that the Court has always deferred to EPA’s construction of the statutes. Third, the NAAQS provision at issue in *American Trucking* is concerned with how clean the air should be, whereas the *Entergy* provision is concerned with a technology standard, and the GNP is concerned with allocating emissions reductions among several responsible states.

¹³⁰ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1607 n.21 (2014) (quoting *American Trucking*, 531 U.S. at 465).

¹³¹ *Id.* at 1616 n.3 (Scalia, J., dissenting).

¹³² *Id.* at 1607 n.21 (majority opinion).

¹³³ Although *Entergy* is a Clean Water Act case, it was cited in the parties’ briefs, *see, e.g.*, Brief for the Federal Petitioners, *supra* note 18, at 44, and seems clearly relevant to the issue of whether an agency can consider costs in the face of statutory silence. It is not clear why neither the majority nor the dissent discusses it. *See* Daniel A. Farber, *Unpacking EME Homer: Cost, Proportionality and Emissions Reductions* 31–32 (Univ. of Cal., Berkeley, Sch. of Law, Pub. Law Research Paper No. 2486236, 2014), <http://perma.cc/5CQR-UDD3> (speculating as to why neither opinion mentions *Entergy*).

¹³⁴ 33 U.S.C. § 1326(b) (2012).

¹³⁵ *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009).

is necessary to overcome the default rule; this is not yet well fleshed out. As usual, the ordinary techniques of statutory interpretation and the court's consideration of whether to accord deference¹³⁶ will likely be relevant.

The Court does give us a few specific pointers. First, assuming this aspect of *American Trucking* is still alive (which it should be), express textual provision of other, non-cost factors is sufficient to overcome the presumption. Second, also following *American Trucking*, where the provision is central to the statute's operation and is a predicate upon which numerous other provisions depend, a court will be quicker to find contrary intent to overcome the default rule. Third, under both *Enterger* and *EME Homer*, the mere fact that a given provision fails to mention cost, while nearby provisions do, is not sufficient to bar this consideration.

C. Policy Changes Demand Only a Reasoned Explanation

Under abuse of discretion review (also known as "hard look review"), a court must uphold an agency's policy judgment so long as it gives a "reasoned explanation" for doing so, even if the agency's policy is a departure from prior practice.¹³⁷ Here, EPA gave a reasoned explanation for its departure from its prior policy of giving states additional time to promulgate SIPs after it construed the GNP, and thus its action must be upheld, notwithstanding a court's contrary policy preferences.

Since its landmark 1983 opinion in *State Farm*,¹³⁸ the Court has required agencies to take a "hard look" at the policy questions it confronts. Under hard look review, a court must uphold an agency policy judgment so long as the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action."¹³⁹ An agency's departure from a prior policy similarly demands reasoned explanation, but "it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one."¹⁴⁰ Nevertheless, "when its prior policy has engendered serious reliance interests that must be taken into account," an agency must provide "a more detailed justification than what would suffice for a new policy created on a blank slate."¹⁴¹ The reviewing court's role is limited, and "a court is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."¹⁴²

¹³⁶ See, e.g., *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (in deciding whether to accord *Chevron* deference, the Court considers "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

¹³⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–16 (2009).

¹³⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

¹³⁹ *Id.* at 43.

¹⁴⁰ *Fox*, 556 U.S. at 515.

¹⁴¹ *Id.*

¹⁴² *Id.* at 513–14.

Here, the Agency's new policy—of issuing the FIPs contemporaneously with quantifying GNP obligations in the Transport Rule—was a departure from its prior policies in the NO_x SIP Call and CAIR, where the Agency had given states an opportunity to submit SIPs after it quantified GNP obligations. While past practice may have created reliance interests, and thus subjected the Agency's policy change to heightened scrutiny, the Agency gave an adequate reasoned explanation for its change: the then-existing regime, CAIR, was illegal, and the D.C. Circuit had admonished EPA to replace it quickly.¹⁴³

Because the Agency gave a reasoned explanation for its policy change, the Court properly upheld its action. To have done otherwise, as the dissent suggested, would have been to improperly inject the Court into the business of making policy. Doing so would not only have been wrong doctrinally, and a violation of the Court's constitutional responsibility not to make the law but to "say what the law is,"¹⁴⁴ it would also have involved the Court in balancing complex policy judgments outside of its institutional capacity.

Consider for example the policy considerations of federalism and practicability, which the dissent thought directed EPA to exercise its discretion to give states additional time to submit SIPs.¹⁴⁵ To the contrary, although these policies do provide context for the Agency's exercise of discretion, they provide no clear direction whatsoever, only a quagmire of possibilities.

Practicability offers no clear direction. While some respondent states claimed that it was impossible to submit compliant SIPs without EPA quantification of their GNP obligations, some of the same states had in fact claimed it was possible to do so in an earlier case,¹⁴⁶ a position that a group of amicus states in this case continued to support.¹⁴⁷ Furthermore, it is paradoxical that a court should demand that EPA exercise its discretion to do only practicable things, when the CAA Amendments of 1970 demanded EPA and American industry to achieve what was then thought to be impracticable.¹⁴⁸

¹⁴³ See Transport Rule, *supra* note 4, at 48,220 (citing *North Carolina v. EPA*, 531 F.3d 1176 (D.C. Cir. 2008)).

¹⁴⁴ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

¹⁴⁵ *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1619–20 (Scalia, J., dissenting).

¹⁴⁶ See *id.* at 1600 n.13 (quoting Final Brief of Petitioning States at 37, *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (No. 98–1497)).

¹⁴⁷ Brief for the States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, North Carolina, Rhode Island, Vermont, and the District of Columbia, and the Cities of Baltimore, Bridgeport, Chicago, New York, and Philadelphia as Respondents in Support of Petitioners at 29, *EME Homer*, 134 S. Ct. 1584 (No. 12–1182), 2013 WL 4769417, at *29 [hereinafter *New York's Brief*]; see also *id.* at 14–15 (Delaware and Colorado did in fact submit compliant SIPs based on their own analyses (not the Transport Rule)).

¹⁴⁸ See *Union Elec. Co. v. EPA*, 427 U.S. 246, 258–59 (1976) (In establishing and achieving ambient air quality standards, the Act was intended to be "technology forcing," which "may mean that people and industries will be asked to do what seems to be impossible at the present time.") (quoting 116 CONG. REC. 32,901–02 (1970) (statement of Sen. Muskie)); cf. also 33 U.S.C. § 1251(a)(1)–(2) (2012) (stating the Clean Water Act's purpose of making all navigable waters of the United States fishable and swimmable by 1983 and eliminating discharge of pollutants into navigable waters by 1985; neither goal has been achieved as of 2014).

Neither does federalism offer any clear direction. True, the FIPs deny upwind states a meaningful first opportunity to issue a compliant SIP, but they also affirm the primacy of states in interpreting the GNP, as opposed to “helplessly await[ing] EPA’s interpretation,”¹⁴⁹ and promptly provide many downwind states with needed help to achieve NAAQS attainment.¹⁵⁰ Moreover, Congress in the CAA made careful judgments regarding federalism¹⁵¹ and sharply expanded federal authority in response to the perceived inadequacy of then-existing state regulations.¹⁵² A court’s role is to be faithful to the balance Congress has drawn, not to invoke federalism to subvert that balance.

CONCLUSION

EME Homer, read together with *Entergy*, sets forth a default rule allowing cost consideration in the face of statutory silence. The strength of the presumption is not yet clear, but for now, the presumption can be overcome by textual provision of other factors the Agency must consider, but cannot be overcome by negative implication (that is, where neighboring provisions expressly allow cost consideration, but the given provision does not). The case also is a casebook exemplar of longstanding doctrines of *Chevron* deference and hard look review. Practically, the case indicated to all parties that the Transport Rule and the FIPs were here to stay and upheld a measure that saves 13,000–34,000 human lives a year. *EME Homer* combines good administrative law with a big win for public health and clean air.

¹⁴⁹ New York’s Brief, *supra* note 147, at 30; *see also supra* notes 146–47.

¹⁵⁰ New York’s Brief, *supra* note 147, at 27–30.

¹⁵¹ For an overview of the balance the CAA strikes between federalism and centralized control, see John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995); *see also generally* CHRISTOPHER J. BAILEY, CONGRESS AND AIR POLLUTION: ENVIRONMENTAL POLICIES IN THE USA (1998).

¹⁵² *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 64 (1975); *see also Union Elec. Co.*, 427 U.S. at 249 (noting that the Amendments “reflect congressional dissatisfaction with the progress of existing air pollution programs and a determination to ‘tak(e) a stick to the States’ in order to guarantee the prompt attainment and maintenance of specified air quality standards” (citation omitted)).

