NOTES

EPA v. EME Homer City Generation, L.P.: Supreme Court Upholds Transport Rule—Third Time's a Charm for Good Neighbor Provision Enforcement

I. OVERVIEW

Interstate pollution is a complex issue both for air quality and economic reasons.[1] Air pollution emitted from upwind states travels and impacts air quality in downwind states. To deal with this challenge, the United States Congress included a Good Neighbor Provision in the Clean Air Act (CAA) prohibiting states from emitting air pollutants that will "contribute significantly to downwind States'" ability to meet national air quality standards.[2] The EPA interpreted the Good Neighbor Provision and adopted the Cross-State Air Pollution Rule (Transport Rule).[3] The Transport Rule is a two-part test that requires "consideration of costs," along with other factors to determine emission reduction requirements of upwind states to improve downwind air quality.[4] A group of state and local governments along with industry and labor groups (respondents) petitioned for review of the Transport Rule.[5]

1. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1593 (2014).
2. *Id.* (quoting Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i) (internal quotation mark omitted)).
3. *Id.*
4. *Id.*
5. *Id.* at 1598.

The United States Court of Appeals for the District of Columbia Circuit vacated the rule in its entirety.[6] The D.C. Circuit, in a 2-1 decision, held that the Transport Rule exceeded the Agency's authority under the CAA on two accounts.[7] First, the court found that the Transport Rule may require upwind states to reduce emissions by more than their significant contribution to downwind air quality leading to "over-control" in violation of the statute.[8] Second, the court found that the EPA departed from its traditional approach to the CAA because it failed to provide the states with Good Neighbor standards so that states could create compliant State Implementation Plans (SIP).[9] Instead the EPA issued Federal Implementations Plans (FIP) to implement at the state level.[10] The EPA appealed and the United States Supreme Court granted certiorari to determine whether the D.C. Circuit correctly interpreted the EPA's authority under the CAA.[11]

On review, the Supreme Court *held* that the EPA reasonably interpreted the Good Neighbor Provision and that the EPA (1) was not required to provide states a second opportunity to improve its SIP after it developed standards for the Transport Rule and (2) was not restricted from considering costs when determining upwind states' responsibility for downwind air quality. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1599, 1609-10 (2014).

II. BACKGROUND

Congress revised the CAA over forty years ago to include the Good Neighbor Provision to mitigate out-of-state pollutants that effect air quality standards.[12] Over the years, the act evolved to address the progress and problems associated with advancement of science and technology.[13] In order to combat the complex problem of interstate air pollution, the CAA includes a provision, known as the Good Neighbor Provision, that requires SIPs to include procedures that prohibit air pollution "in amounts which will contribute significantly to nonattainment . . . by, any other State . . . [of] air quality standard[s]."[14]

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6. EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 12 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584.
7. *Id.* at 11.
8. *Id.* at 22.
9. *Id.* at 28.
10. *Id.*
11. *EME Homer City Generation*, 134 S. Ct. at 1599.
12. *Id.* at 1595.
13. *See id.* at 1594-95.
14. 42 U.S.C. § 7410(a)(2)(D) (2012).

The EPA made several attempts to enforce the Good Neighbor Provision and mitigate interstate pollution. In 1998, the EPA issued the NO_x SIP Call.[15] The NO_x SIP Call ordered twenty-two states and the District of Columbia to submit SIPs with provisions to reduce emissions.[16] The NO_x SIP Call allowed states to use cost analysis when determining "amounts that . . . contribute significantly to nonattainment."[17] In 2005, the Agency attempted to regulate under the Good Neighbor Provision with the Clean Air Interstate Rule (CAIR).[18] The CAIR enforced regulations of nitrogen oxides (NO_x) and sulfur dioxide (SO_2) emissions from upwind states that contributed to nonattainment in downwind states.[19] There, the EPA created a voluntary cap and trade program within the downwind states.[20] The D.C. Circuit initially vacated the rule in *North Carolina v. EPA*.[21] However, on rehearing the court allowed it to be left in place, but urged the EPA to revise the rule.[22] The EPA did just that with its most recent attempt to enforce the Good Neighbor Provision, the Transport Rule.[23] The Transport Rule is an "air-quality and cost-based multi-factor approach" to mitigating interstate pollution.[24] The EPA assured that it addressed all of the D.C. Circuit's issues with CAIR in the revised rule.[25]

Agencies are only restricted from using cost considerations when it is expressly precluded by the intent of Congress.[26] For example, in *Michigan v. EPA*, the D.C. Circuit upheld the EPA's use of cost considerations when regulating under the Good Neighbor Provision.[27] There, the court found that since there was no statutory bar restricting the EPA from considering cost, the Agency's use of cost was reasonable.[28] Furthermore, the court found that the EPA's consideration of cost was legitimate in light of the ambiguity in the word "significant."[29]

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15. NO_x SIP Call, 40 C.F.R. § 51.121 (1999).
16. *Id.*
17. *Id.*
18. 40 C.F.R. §§ 51.123-.124 (2013).
19. *Id.* NO_x and SO_2 are the same emissions regulated in the Transport Rule. *See* Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (to be codified at 40 C.F.R. pt. 51).
20. *See* 40 C.F.R §§ 51.123-.124.
21. 531 F.3d 896, 930 (D.C. Cir. 2008), *reh'g granted*, 550 F.3d 1176 (D.C. Cir. 2008).
22. North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008).
23. Cross-State Air Pollution Rule, 76 Fed. Reg. at 48,208.
24. *Id.* at 48,247.
25. *Id.* at 48,211.
26. *See* Michigan v. EPA, 213 F.3d 663, 679 (D.C. Cir. 2000).
27. *Id.* at 678.
28. *Id.*
29. *See id.* at 677-78.

The Supreme Court addressed the issue of cost consideration when setting initial national ambient air quality standards (NAAQS).[30] In *Whitman v. American Trucking Ass'ns*, the Supreme Court held that the EPA could not consider cost when setting initial NAAQS.[31] The CAA instructs the EPA to determine NAAQS at a level that will "'protect the public health.'"[32] The Court determined that the EPA must read "public health" in its ordinary meaning.[33] Therefore, the Court held that there was no ambiguity and that consideration of cost when setting NAAQS was barred.[34]

When determining whether to give deference to an agency's interpretation of a statute, a court must first determine whether Congress directly addressed the precise issue.[35] If Congress's intent is clear, the agency and the court must "give effect to the unambiguously expressed intent of Congress."[36] If the statute contains ambiguities or Congress did not directly address the issue in question, the court must determine whether the agency's interpretation is "based on a permissible construction of the statute."[37] In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that the EPA could define the term "stationary source" to mean all pollution-emitting devices within the same industrial cluster.[38] There, the Court determined that the statute in question did not explicitly define "stationary source."[39] The Court reasoned that when "Congress has explicitly left a gap [in a statute] for the agency to fill, there is an express delegation of authority to the agency."[40] After careful review, the Court concluded that the EPA's construction of "stationary source" was permissible.[41]

When reviewing legislation, a reviewing court's duty is to read and "apply" the plain language of the statute, not to "improve" it.[42] In *Pavelic & LeFlore v. Marvel Entertainment Group*, the Supreme Court held that the lower court erred when it reviewed Rule 11 sanctions based on an

30. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).
31. *Id.* at 486.
32. *Id.* at 465 (quoting Clean Air Act, 42 U.S.C. § 7409(b)(1)).
33. *Id.* at 465-66.
34. *Id.* at 467.
35. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
36. *Id.*
37. *Id.* at 843.
38. *Id.* at 851, 859.
39. *Id.* at 848.
40. *Id.* at 843-44.
41. *Id.* at 866.
42. Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989).

interpretation that would serve the underlying policies of the Rule.[43] There, the Court found that the lower court's interpretation of the Rule, which should be treated like a statute, went beyond the unambiguous language of the statute and was, therefore, improper.[44]

In *EME Homer City Generation, L.P. v. EPA*, the D.C. Circuit vacated the EPA's Transport Rule and held that the FIPs promulgated by the EPA in accordance with the Transport Rule violated the CAA.[45] There, the court found that the concern for "over-control" was too high.[46] Additionally, the court found that the EPA was required to provide the states with guidelines and allow states the opportunity to draft SIPs.[47] Further, the court found that the EPA could not publish the Transport Rule while simultaneously introducing FIPs.[48]

Circuit Judge Rogers, dissenting in *EME Homer City*, objected to the contentions made by the majority.[49] First, she stated that the EPA clearly required the states to submit SIPs with or without first providing the states with guidance.[50] Second, she argued that just because the EPA provided guidance in the past does not mean that the EPA is bound to its previous behavior.[51] Third, the dissent highlighted that the EPA submitted FIPs just "as it warned" and that the states had an opportunity to conduct interstate pollution analysis.[52] Fourth, Judge Rogers emphasized that courts do not have authority to rewrite statutes; they may only review the plain text.[53] Finally, Judge Rogers contended that the Transport Rule took into consideration the possibility of "over-control."[54]

III. COURT'S DECISION

In the noted case, the Supreme Court reversed the D.C. Circuit's decision, finding that the EPA's construction of the Transport Rule was a permissible enforcement scheme for the Good Neighbor Provision of the CAA.[55] The Court began with a review of the complex issues that arise

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43. *Id.* at 126-27.
44. *Id.* at 123-27.
45. 696 F.3d 7, 37 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584 (2014).
46. *Id.* at 22.
47. *Id.* at 28.
48. *Id.* at 33-34.
49. *Id.* at 38-61 (Rogers, J., dissenting).
50. *Id.* at 39.
51. *Id.* at 50.
52. *Id.* at 42.
53. *Id.* at 46 (quoting Kay v. FCC, 525 F.3d 1277, 1279 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1049 (2008)).
54. *Id.* at 59-60.
55. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1610 (2014).

when trying to regulate air pollution that travels from state to state.[56] First, the Court reviewed the complex challenge of interstate pollution, and Congress's and the EPA's history in attempting to tackle the issue.[57] Next, the Court discussed the EPA's timeline for Federal Implementation Plans (FIP) and whether the EPA was required to release quantified air quality standards prior to the SIP deadline.[58] Finally, the Court determined whether the Transport Rule's two-step interpretation of the Good Neighbor Provision was a permissible method for allocating upwind responsibility for downwind air pollution.[59]

A. State Implementation Plan or Federal Implementation Plan

In the noted case, the Court discussed the EPA's timeline and triggers for FIP issuance.[60] First, the Court addressed whether the EPA's disapproval of SIPs was sufficient to "trigger the agency's statutory authority to issue a FIP."[61] Next, the Court addressed the D.C. Circuit's finding that the EPA should have provided states with guidance and an opportunity to create SIPs consistent with the Transport Rule.[62]

First, the Court found in favor of the EPA's position that disapproval of a SIP triggered the Agency's authority to issue an FIP.[63] The Court reviewed the plain text of the statute to determine when the EPA is permitted to issue an FIP.[64] The statute dictates that once the EPA revises the air quality standards, each state must draft a SIP that includes compliance with the CAA's new requirements within three years.[65] Additionally, the CAA requires that SIPs satisfy compliance with the Good Neighbor Provision.[66] Further, the Court pointed out that the CAA dictates that if the EPA finds an SIP inadequate, the Agency must issue an FIP within two years.[67]

Next, the Court determined that the CAA did not obligate the EPA to provide states with specific guidelines before issuing FIPs.[68] The Court rejected the lower court's argument that it would be impossible for

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56. *Id.* at 1594-95.
57. *Id.* at 1593-99.
58. *Id.* at 1599-1602.
59. *Id.* at 1602-11.
60. *Id.* at 1599-1602.
61. *Id.* at 1599-1601.
62. *Id.* at 1600.
63. *Id.*
64. *Id.* (citing Clean Air Act, 42 U.S.C. § 7410).
65. *Id.* (citing Clean Air Act, 42 U.S.C. § 7410(a)(1)).
66. *Id.* (citing 42 U.S.C. § 7410(a)(2)).
67. *Id.* (citing 42 U.S.C. § 7410(c)(1)).
68. *Id.* at 1601.

a "[s]tate to develop a 'comprehensive solution' to the 'collective problem'" without specific parameters from the EPA.[69] The Court found that even if the D.C. Circuit's position was sensible, "a reviewing court's 'task is to apply the text [of the statute], not to improve upon it.'"[70] The Court further rejected the respondents' argument that because the EPA previously provided states with guidance and a "grace period," the Agency was somehow required to use this strategy again.[71] Finally, the Court held that the EPA's decision to issue FIPs instead of providing guidelines and an opportunity for states to improve their SIPs was within the statutory limitations of the CAA and was not "arbitrary or capricious."[72]

B The Transport Rule

Finally, the Court discussed the Transport Rule as an interpretation of the Good Neighbor Provision.[73] First, the Court determined whether the Good Neighbor Provision requires the strict proportionality the D.C. Circuit suggested.[74] Second, the Court considered whether the EPA's "allocation method [was] a 'permissible construction of the statute'" in consideration of the D.C. Circuit's objections.[75] Lastly, the Court addressed the lower court's additional objections.[76]

First, the Court determined that the Good Neighbor Provision did not require strict proportionality.[77] The Court found that under the "*Chevron* deference test," Congress granted the EPA authority to create the Transport Rule to enforce the Good Neighbor Provision of the CAA.[78] The Court determined that the ambiguous language of the Good Neighbor Provision to eliminate pollution that "contributes significantly to nonattainment" left the EPA with the task of determining a method to allocate responsibility among multiple upwind states.[79] The Court went on to reject the D.C. Circuit's assertion that the plain text of the CAA required the EPA to allocate reduction responsibility proportional to each

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69. *Id.* at 1600 (quoting EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 36 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584).
70. *Id.* (quoting Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989)).
71. *Id.* at 1601-02.
72. *Id.* at 1602.
73. *Id.* at 1602-11.
74. *Id.* at 1603-07.
75. *Id.* at 1606 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
76. *Id.* at 1608-10.
77. *Id.* at 1606.
78. *Id.* at 1607.
79. *Id.* at 1603-04 (quoting Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i)).

state's contribution to nonattainment.[80] The Court asserted that not only does the statute not require the D.C. Circuit's strict proportionality interpretation, but the Court in the noted case doubted that this would be a practical solution.[81]

Second, the Court determined that "the allocation method chosen by EPA [was] a 'permissible construction of the statute.'"[82] The Court found that the EPA's consideration of the degree of upwind contributions as well as the cost of reducing those emissions was a reasonable construction of the statute.[83] Nothing in the statute prevented the EPA from considering cost in deciding which "'amounts' to eliminate."[84] Additionally, the Court determined that consideration of cost is an "efficient and equitable" solution because the EPA can reach the required levels of attainment at a lower cost overall.[85] Furthermore, under *Chevron*, in the event of statutory silence, an agency may select a "reasonable" method for filling statutory blanks.[86]

Finally, the Court addressed two additional objections made by the D.C. Circuit: (1) a fear of "over-control" and (2) a concern that upwind states may be required to reduce emission beyond the amount required by the Good Neighbor Provision.[87] The Court found that neither of these concerns was sufficient to invalidate the statute.[88]

The Court emphasized that any instance of "over-control" in one location may be necessary for attainment elsewhere.[89] The Court highlighted that excessive control would only exist if the emission reduction was unnecessary for achieving air quality standards in any state.[90] Next, the Court pointed out that while the EPA must worry about "over-control" it also has a mandate to prevent "under-control."[91] Lastly, the Court further stressed that the respondents were able to "point to only a few instances of 'unnecessary' emission reductions."[92]

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80. *Id.* at 1606, 1617.
81. *Id.* at 1604-05.
82. *Id.* at 1606 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).
83. *See id.* at 1606-07.
84. *Id.*
85. *Id.* at 1607.
86. *Id.* (quoting *Chevron*, 467 U.S. at 843).
87. *Id.* at 1608-10.
88. *Id.* at 1609.
89. *Id.* at 1608.
90. *Id.* at 1609.
91. *Id.*
92. *Id.*

C. Justice Scalia's Dissent

Justice Scalia dissented as to the majority's application of the Transport Rule and to the EPA's authority to use FIPs in enforcing the Good Neighbor Provision.[93] He was weary of the increased power of unelected federal officials in creating laws as opposed to the "representatives in Congress."[94] First, Justice Scalia refuted the majority's finding of a gap in the Good Neighbor Provision.[95] Lastly, he highlighted the importance of the EPA providing the states with guidelines prior to issuing FIPs.[96]

First, Justice Scalia did not see the "alleged gap" in the Good Neighbor Provision that the majority found in order to provide the EPA deference.[97] He submitted that while "significant" can be ambiguous, it is only ambiguous as to the "magnitude," not as to how outside factors related to contributions.[98] Justice Scalia stated that since the statute called for "amounts of pollutants" responsibility for emission reduction should be divided based on "relative amounts of pollutants."[99]

Justice Scalia went on to address the majority's criticism of this proposed "proportional-reduction" by criticizing its impossibility argument.[100] He argued that even "if th[is] were true," it would not provide the EPA authority to "rewrite the statute."[101] Justice Scalia contended that proportionality would be a "technical difficulty," not an impossibility.[102] Additionally, Justice Scalia stated that the majority's concerns of "over-control" in a proportional reduction plan could be easily managed.[103] He also pointed to precedent, stating that parties previously tried to "convert the Clean Air Act into a mandate for cost-effective regulation" and that the Court refused to allow this interpretation.[104]

Finally, Justice Scalia took on the EPA's issuance of FIPs prior to providing the states with guidance and an opportunity to submit SIPs.[105]

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93. *Id.* at 1610 (Scalia, J., dissenting).
94. *Id.*
95. *Id.* at 1610-14.
96. *Id.* at 1616-21.
97. *Id.* at 1612-13.
98. *Id.* at 1611.
99. *Id.* at 1613.
100. *Id.*
101. *Id.*
102. *Id.* at 1614.
103. *Id.* at 1615.
104. *Id.* at 1616 (citing Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001)).
105. *Id.* at 1616-21.

He noted the importance of federalism in implementing the CAA.[106] Additionally, he agreed with the respondents that the EPA's past practices of providing standards set an expectation.[107] Justice Scalia found that there was no way the states could have created appropriate SIPs without the EPA's guidance on what would "constitute[] a 'significant' contribution."[108] Finally, Justice Scalia found that the EPA abused its discretion by failing "to preserve the Clean Air Act's core principle of state primacy."[109] It was his contention that issuing an FIP without allowing the states a chance to meet the EPA's new guidelines violated state primacy and, therefore, the EPA's discretion.[110]

IV. ANALYSIS

The Supreme Court's decision in the noted case will have a significant impact on interstate pollution. The EPA made two previous attempts since 1990 to enforce the Good Neighbor Provision of the CAA without success.[111] Following this decision, the EPA can now enforce the Good Neighbor Provision using the Transport Rule and the FIPs set in place.

On the other hand, it cannot yet be determined whether the Supreme Court's decision in the noted case will have a negative impact on the use of cooperative federalism in CAA enforcement. Cooperative federalism was key in past enforcement strategies. Justice Scalia, in his dissent, referred to it as "a core principle" of CAA enforcement.[112] That being said, should the EPA be required to issue standards prior to requiring states to submit SIPs? As the Court in the noted case pointed out, whether it makes good sense or not is not the question. If the statute did not require it, then the EPA was under no obligation to do so.[113]

While there may be some questions as to whether the EPA *should* provide states with standards, there is well-established precedent of providing agencies with deference when Congress leaves a gap in the statute.[114] Therefore, if there was a gap in the Good Neighbor Provision, then the EPA was permitted to choose the gap-filling method. The

106. *Id.* at 1617.
107. *Id.* at 1618.
108. *Id.* at 1619 (quoting Clean Air Interstate Rule, 40 C.F.R. §§ 51.123-.124).
109. *Id.* at 1619-20.
110. *Id.* at 1619-21.
111. *Id.* at 1595 (majority opinion).
112. *Id.* at 1619-20 (Scalia, J., dissenting).
113. *See id.* at 1600 (majority opinion).
114. *See, e.g.*, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

selected method may not be the same as the one a court would choose, but as long it was "a permissible construction" of the CAA, then the EPA was permitted to select it.[115]

Further, the D.C. Circuit and Justice Scalia in the dissent focused on the idea of a proportional enforcement technique.[116] The Supreme Court correctly rejected this notion in the majority opinion. Both the D.C. Circuit and Justice Scalia appear to argue that the statute is clear and that there is no gap to fill; however, they both clearly want to add the word "proportional" when the statute treats all upwind states the same.[117] If there is no gap, then the word "proportional" should not be added; however, if there is a gap, then the EPA is permitted to select the method in which to fill it. Here, the EPA could have selected a proportional mechanism, but instead went with the two-prong cost-effective mechanism in the Transportation Rule.

Additionally, Justice Scalia's dissent hinged on the Supreme Court's decision in *Whitman* as precedent that the EPA cannot consider cost when implementing the CAA.[118] However, that decision is easily distinguished from the noted case. In *Whitman*, the EPA was setting initial NAAQS, and section 109(b) explicitly states that the EPA must consider "public health"; this clearly leaves no gap that could be filled with cost considerations.[119] Additionally, the holding in *Whitman* was very narrow: "[T]he CAA as a whole, unambiguously bars cost consideration from the NAAQS-setting process."[120] This does nothing to prevent the EPA from considering cost when enforcing air quality standards after they are determined.

Finally, Justice Scalia, in the dissent, was concerned with the increased power of unelected bureaucrats.[121] However, federal judges are also unelected. By this notion, allowing the D.C. Circuit to restrict the EPA from considering cost, something the D.C. Circuit has upheld in previous decisions, and forcing the EPA to allocate responsibility under the Good Neighbor Provision proportionally is not an improvement. In fact, elected members of Congress drafted the CAA and the Good Neighbor Provision and left its enforcement in the hands of the EPA.

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115. *Id.* at 843.

116. *EME Homer City Generation*, 134 S. Ct. at 1613-14 (Scalia, J., dissenting); EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 27 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584.

117. 134 S. Ct. at 1613-14 (Scalia, J., dissenting); 696 F.3d at 27.

118. 134 S. Ct. at 1616 (Scalia, J., dissenting).

119. The majority addressed this very point in a footnote. *Id.* at 1607 n.21 (majority opinion).

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

121. *EME Homer City Generation*, 134 S. Ct. at 1610.

V. CONCLUSION

The holding in the noted case is a home run for anyone concerned with the effects of interstate pollution. After over twenty years of effort, the EPA can finally enforce the Good Neighbor Provision. Further, maybe courts will think twice before rewriting statutes and agency rules. Provided the EPA works within the confines of the CAA, it has the duty and authority to mitigate interstate air pollution. The EPA will soon be able to get to work enforcing the Good Neighbor Provision using the Transport Rule.

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