No.

In the Supreme Court of the United States

STATE OF OKLAHOMA, OKLAHOMA DEP'T OF ENVIRONMENTAL QUALITY, AND STATE OF UTAH, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Clean Air Act, each state must adopt an implementation plan to meet national standards, which EPA then reviews for compliance with the Act. *See* 42 U.S.C. § 7410. In 2023, EPA published disapprovals of 21 states' plans implementing national ozone standards. It did so in a single *Federal Register* notice. The Act specifies that "[a] petition for review of the [EPA's] action in approving or promulgating any implementation plan … or any other final action of the [EPA] under this Act … which is locally or regionally applicable may be filed only in" the appropriate regional circuit, while "nationally applicable regulations … may be filed only in" the D.C. Circuit. 42 U.S.C. § 7607(b)(1). Parties from a dozen states sought judicial review of their respective state plan disapprovals in their appropriate regional circuits.

The Fourth, Fifth, Sixth, and Eighth Circuits held that the implementation plan disapprovals of states within those circuits are appropriately challenged in their respective regional courts of appeals. In the decision below, the Tenth Circuit held that challenges to the disapprovals of Oklahoma's and Utah's plans can only be brought in the D.C. Circuit, explicitly disagreeing with the decisions of its sister circuits.

The question presented is:

Whether a final action by EPA taken pursuant to its Clean Air Act authority with respect to a single state or region may be challenged only in the D.C. Circuit because EPA published the action in the same *Federal Register* notice as actions affecting other states or regions and claimed to use a consistent analysis for all states.

PARTIES TO THE PROCEEDING

Petitioners filed separate petitions for review of separate agency action in the court of appeals. Petitioners the State of Oklahoma, by and through its Attorney General, and the Oklahoma Department of Environmental Quality challenged EPA's disapproval of Oklahoma's state implementation plan. Petitioner the State of Utah, by and through its Governor, Spencer J. Cox, and its Attorney General, Sean D. Reyes, challenged EPA's disapproval of Utah's state implementation plan.

The Tenth Circuit procedurally consolidated Oklahoma's challenge with petitions challenging the same agency action filed by Oklahoma Gas & Electric Company, Tulsa Cement LLC, d/b/a/ Central Plains Cement Company LLC, Republic Paperboard Company, and Western Farmers Electric Cooperative.

The Tenth Circuit also procedurally consolidated Utah's challenge with petitions challenging the same agency action filed by PacifiCorp and Utah Associated Municipal Power Systems.

Respondent the Environmental Protection Agency was the respondent in each challenge in the Tenth Circuit.

RELATED PROCEEDINGS

1. This Petition arises out of separate petitions for review of agency action that Oklahoma and Utah filed in the court of appeals seeking review of EPA's disapproval of their respective state implementation plans. *See Oklahoma v. EPA*, No. 23-9514 (10th Cir.); *Utah v. EPA*, No. 23-9509 (10th Cir.).

2. On May 30, 2023, the Tenth Circuit procedurally consolidated Oklahoma's and Utah's petitions with related challenges to the same agency action. Oklahoma's petition was consolidated with petitions filed by Okla. Gas & Elec. Company, Tulsa Cement LLC, d/b/a/ Central Plains Cement Company LLC, Republic Paperboard Company, and Western Farmers Electric Cooperative. *See Okla. Gas & Elec. v. EPA*, No. 23-9521 (10th Cir.); *Tulsa Cement LLC v. EPA*, No. 23-9533 (10th Cir.); *W. Famers Elec. Coop. v. EPA*, No. 23-9534 (10th Cir.). Utah's petition was consolidated with petitions filed by PacifiCorp and Utah Associated Municipal Power Systems. *See PacifiCorp v. EPA*, No. 23-9512 (10th Cir.); *Utah Assoc. Mun. Power Sys.*, No. 23-9520 (10th Cir.).

3. Because EPA sought to dismiss or transfer the above-referenced petitions filed in the Tenth Circuit, the Tenth Circuit petitioners also filed protective petitions in the D.C. Circuit. *Utah v. EPA*, No. 23-1102 (D.C. Cir.); *Oklahoma v. EPA*, No. 23-1103 (D.C. Cir.); *Okla. Gas & Elec. Co. v. EPA*, No. 23-1105 (D.C. Cir.); *Tulsa Cement LLC v. EPA*, No. 23-1106 (D.C. Cir.); *W. Farmers Elec. Coop. v. EPA*, No. 23-1107 (D.C. Cir.); *PacifiCorp v. EPA*, No. 23-1112 (D.C. Cir.).

4. On February 27, 2024, the Tenth Circuit transferred the challenges to the D.C. Circuit.

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INTRODUCTION

Five courts of appeals are in direct and acknowledged conflict over an important and recurring federal question about how to interpret the Clean Air Act's venue provision, 42 U.S.C. § 7607(b)(1). States and industry from twelve states filed separate challenges to EPA's disapproval of their respective state's ozone plan for implementing the Clean Air Act's "Good Neighbor Provision." 42 U.S.C. § 7410(a)(2)(D)(i)(I). The Fourth, Fifth, Sixth, and Eighth Circuits held that venue for those challenges is appropriate in the regional federal courts of appeal. But, below, the Tenth Circuit explicitly departed from its sister circuits and held that exclusive venue for this type of challenge lies in the D.C. Circuit. Pet. App. 8a-19a. This Court's review is needed to resolve the split.

The conflict centers on how to characterize the agency action being challenged. The Clean Air Act provides that challenges to "nationally applicable regulations" may "be filed only" in the D.C. Circuit. 42 U.S.C. § 7607(b)(1). But challenges to "locally or regionally applicable" actions "may be filed only in the United States Court of Appeals for the appropriate circuit." *Id.* Under the statute, "EPA's 'action in approving or promulgating any implementation plan' is the prototypical 'locally or regionally applicable' action that may be challenged only in the appropriate regional court of appeals." *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013) (Kavanaugh, J.) (quoting 42 U.S.C. § 7607(b)(1)).

The Tenth Circuit held that challenges to EPA's disapprovals of Oklahoma's and Utah's Good Neighbor plans

are challenges to a "nationally applicable action" because EPA combined those disapprovals with the disapprovals of 19 other states into a single *Federal Register* notice. Pet. App. 13a. The Fourth, Fifth, Sixth, and Eighth Circuits reached the opposite conclusion in addressing other states' plans—from Arkansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Texas, and West Virginia—that were disapproved by EPA in the same 21-state *Federal Register* notice. As the Fourth Circuit explained, the Clean Air Act does not elevate form over substance: "the fact that the EPA consolidated its disapprovals in a single final rule does not, by that fact alone, make its 21 separate decisions … a single nationally applicable action." *West Virginia v. EPA*, 90 F.4th 323, 330 (4th Cir. 2024).

The confusion over the proper venue for challenges brought under the Clean Air Act imposes significant burdens on courts and litigants. This Court has repeatedly recognized the importance of clear jurisdictional and venue rules. *E.g., Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Confusion over where to file produces unnecessary "appeals and reversals" and "encourage[s] gamesmanship." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

This case demonstrates those concerns. Petitioners are being forced to litigate in the D.C. Circuit, while challengers from ten other states continue to litigate in the regional circuits. If this Court waits until final judgment to resolve this question, party and judicial resources will necessarily be wasted: either Petitioners will be required to re-litigate (and courts will have to re-adjudicate) in the Tenth Circuit, or parties in ten other states will be

compelled to do the same in the D.C. Circuit. Review now, before judgment, is therefore justified, as this Court has previously recognized. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 119 (2018) (granting certiorari before judgment to resolve dispute about which court should review challenges under the Clean Water Act).

Moreover, absent this Court's guidance, venue disputes under the Clean Air Act will continue to recur frequently. States must submit new implementation plans every time EPA establishes new national standards for any given air pollutant—standards EPA reviews every five years. 42 U.S.C. § 7409(d)(1), 7410(a)(1). Challenges of the kind brought here are therefore common. Meanwhile, venue questions arise in other Clean Air Act contexts, too, which has led to other circuit splits. And given the immense role of this cooperative federalism statute, these Clean Air Act cases often involve issues of tremendous importance to states, the economy, critical national industries, and the public. Repeated and protracted disputes about venue only delay their resolution.

This Court should grant review to end the division among courts of appeals and the uncertainty over how to interpret the Clean Air Act's venue provision.

OPINION BELOW

The decision of the court of appeals (Pet. App.1a-19a) is was selected for publication and is available at *Oklahoma v. EPA*, 93 F.4th 1262 (10th Cir. 2024).

JURISDICTION

This petition is filed under Rule 11 of this Court. The order transferring venue sought to be reviewed was

entered by the Tenth Circuit on February 27, 2024. This Court has jurisdiction to review on a writ of certiorari the order below under 28 U.S.C. §§ 1254(1) and 2101(e).

STATUTORY PROVISIONS INVOLVED

The text of 42 U.S.C. §§ 7410 and 7607(b)(1) is reproduced in the appendix to this petition.

STATEMENT OF THE CASE

A. Statutory Background

1. The Clean Air Act centers around the "'core principle' of cooperative federalism." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511 n.14 (2014). It does so by delegating some regulatory responsibilities to EPA and others to individual states.

The Act delegates to EPA authority to establish standards that apply nationwide, such as the National Ambient Air Quality Standards ("NAAQS"). 42 U.S.C. § 7409(a)-(b). Meanwhile, the Act gives each state the authority to "implement[], maint[ain], and enforce[]" these standards through state implementation plans based on state-specific considerations. *Id.* § 7410(a); *see also Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."). States thereby assume "primary responsibility for assuring air quality within … such State by submitting an implementation plan for such State

which will specify the manner in which [the NAAQS] will be achieved and maintained." 42 U.S.C. § 7407(a).

The state implementation plan process involves a back-and-forth between EPA and the individual State. "Each State shall … adopt and submit" to EPA a state implementation plan for "such State." *Id.* § 7410(a)(1). EPA then "shall approve" the plan "if it meets all of the applicable requirements of" the Act. *Id.* § 7410(k)(3). "The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified." *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976). This means that EPA has "no authority to question the wisdom of a State's choices" in developing a state plan. *Train*, 421 U.S. at 79; *see also Union Elec. Co.*, 427 U.S. at 269 (Congress delegated to states, not EPA, the power to make "legislative choices in regulating air pollution."). But if EPA validly "finds that a State has failed to … satisfy the minimum criteria" of the Act, it may promulgate a federal implementation plan for that state. 42 U.S.C. § 7410(c)(1).

2. The Clean Air Act provides for judicial review of EPA's actions under the Act, vesting original jurisdiction in the court of appeals. *See id.* § 7607(b)(1). It then divides venue, depending on the EPA action challenged, between the regional courts of appeals and the U.S. Court of Appeals for the District of Columbia Circuit. *Id.*

The Act provides for review in the regional circuits of actions under "several specifically enumerated provisions of the Act," *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 584 (1980), including any EPA action "in approving or promulgating any implementation plan under section

7410 of this title," 42 U.S.C. § 7607(b)(1). In 1977, Congress added to that list a catch-all: also reviewable in the regional federal appellate courts are "any other final action of the Administrator under [the] Act which is locally or regionally applicable." *Harrison*, 446 U.S. at 584-85 (quoting 42 U.S.C. § 7607(b)(1)).

Meanwhile, the Act states that challenges to certain other EPA actions "may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7407(b)(1). This list includes EPA actions such as "promulgating any national primary or secondary ambient air quality standard," "any emission standard," "any standard of performance," or "any other nationally applicable regulations." *Id.* Finally, even for actions that must otherwise be filed in a regional circuit, challenges to those actions "may be filed only in the [D.C. Circuit] if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." *Id.*

B. Procedural History

1. In 2015, EPA revised the NAAQS for ozone, lowering the national air quality standard from 75 to 70 parts per billion. 80 Fed. Reg. 65,292, 65,293-94 (Oct. 26, 2015). This triggered the responsibility for each state to develop an implementation plan for the revised NAAQS. *See* 42 U.S.C. § 7410(a)(1). One aspect of a state plan is demonstrating compliance with the Act's "Good Neighbor Provision," which delegates to each state the task of ensuring no "emissions activity within the State" will emit "in

amounts which will … contribute significantly to nonattainment," or "interfere with maintenance," of the NAAQS by "any other State." *Id.* § 7410(a)(2)(D)(i)(I). States accordingly developed and submitted to EPA their respective implementation plans to demonstrate compliance with the revised ozone NAAQS, including the Good Neighbor Provision. In developing these plans, states worked in close coordination with EPA's Regional Offices. *See, e.g.*, No. 23-9514, J.A.424-26 (correspondence between EPA's Region 6 Office and Oklahoma regarding Oklahoma's draft Good Neighbor plan); No. 23-9509, J.A.0069-73 (correspondence between EPA's Region 8 Office and Utah regarding Utah's plan).[1]

Throughout 2022, EPA proposed to disapprove the state Good Neighbor plans for 23 states. EPA published the proposed disapprovals in separate *Federal Register* notices, each covering a state or group of states within a single EPA Region. *See, e.g.*, 87 Fed. Reg. 9,798 (Feb. 22, 2022) (proposed state plan disapproval for Arkansas, Louisiana, Oklahoma, Texas); 87 Fed. Reg. 31,470 (May 24, 2022) (proposed state plan disapproval for Utah). In the proposed rulemakings, EPA purported to detail why each state's plan should be disapproved, individually examining each state's specific submission, emissions sources and trends, and downwind air quality contributions. *See*

[1] These citations are to the joint appendices filed in the court of appeals. The joint appendix (Dkt. No. 11041131) on the Oklahoma docket (No. 23-9514) was filed on November 1, 2023. The joint appendix (Dkt. No. 11037455) on the Utah docket (No. 23-9509) was filed on October 17, 2023.

generally id. In response, each state, and often regulated industries within each state, submitted comments to the proposed disapprovals demonstrating why the state's particular circumstances showed the state's plan was factually, analytically, and legally justified. *See, e.g.*, No. 23-9514, J.A.389-404 (Oklahoma comment letter on EPA's proposed Oklahoma state plan disapproval); No. 23-9509, J.A.0145-48 (Utah comment letter on EPA's proposed Utah state plan disapproval); and J.A.0149-357 (Utah industry comment letters).

EPA nonetheless finalized the disapproval of 21 state Good Neighbor plans, but it did so in a single *Federal Register* notice. 88 Fed. Reg. 9,336 (Feb. 13, 2023). EPA's state-by-state justification for disapproving each of these plans relied almost entirely on its assessment of the individual state plans in its proposed disapprovals. *See, e.g.*, *id.* at 9,354-61.[2]

2. A mix of states and industry parties in 12 states challenged their respective state-plan disapprovals in their regional circuits.[3] In each of those regional courts of

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[2] EPA has recently proposed to disapprove the state plans of five additional states. 89 Fed. Reg. 12,666 (Feb. 16, 2024) (proposed disapproval of state plans of Arizona, Iowa, Kansas, New Mexico, and Tennessee).

[3] *See West Virginia v. EPA*, No. 23-1418 (4th Cir.); *Texas v. EPA*, No. 23-60069 (5th Cir.) (Texas, Louisiana, and Mississippi); *Kentucky v. EPA*, No. 23-3216 (6th Cir.); *Arkansas v. EPA*, No. 23-1320 (8th Cir.); *Missouri v. EPA*, No. 23-1719 (8th Cir.); *Allete, Inc. v. EPA*, No. 23-1776 (8th Cir.) (Minnesota); *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir.) (Nevada); *Oklahoma v. EPA*, No. 23-

appeals, EPA filed motions to dismiss or transfer venue, arguing that its state plan disapprovals were either "nationally applicable regulations" or "based on a determination of nationwide scope or effect," such that review is only appropriate in the D.C. Circuit under the Act's judicial review provision (42 U.S.C. § 7607(b)(1)). *E.g.* Mot. to Transfer, No. 23-9514, Dkt. No. 10983947 (10th Cir. Mar. 16, 2023); Mot. to Transfer, No. 23-9509, Dkt. No. 10983793 (10th Cir. Mar. 16, 2023). Until the decision below was issued, each of the regional circuits declined to grant EPA's motion to transfer venue.

The Fourth Circuit, in a published decision, denied EPA's motion to transfer, holding that review of West Virginia's challenge to its state plan disapproval was appropriate in that regional court of appeals instead of the D.C. Circuit. *West Virginia*, 90 F.4th 323. In an opinion by Judge Niemeyer, the court ruled that EPA's disapproval of West Virginia's plan was not "nationally applicable," noting that the "focus [is] on the geographical reach of the EPA's action"—which, in that case, was EPA's disapproval of a plan for West Virginia. *Id.* at 328. It rejected EPA's argument that "because [EPA] disapproved of the [state plans] of 21 States in a consolidated, single agency action, its determination that the West Virginia [plan] was inadequate somehow became national," reasoning that EPA's consolidated notice merely "throws a blanket labeled 'national' over 21 individual decisions rejecting 21

9514 (10th Cir.); *Utah v. EPA*, No. 23-9509 (10th Cir.); *Alabama v. EPA*, No. 23-11173 (11th Cir.).

separate States' [plans] in an effort to convert each unique state decision into a national one." *Id.* at 330.

"The Clean Air Act," the Fourth Circuit explained, "instructs that '[e]ach State' shall submit a [state plan] implementing the air quality standards" and "following each State's submission, the EPA approves or disapproves of each State's 'plan'—using the word 'plan' in the singular to indicate that the agency acts on each plan." *Id.* (quoting 42 U.S.C. § 7410(a)(1), (k)(1)-(3)). "Thus, the relevant agency action for our review here is the EPA's disapproval of West Virginia's [state plan]." *Id.* EPA's action on West Virginia's plan was also not "based on a determination of nationwide scope or effect" because in "rejecting West Virginia's [plan], it is clear that the EPA focused on factual data localized to West Virginia and two downwind States 'linked' to West Virginia" and "rejected West Virginia's analysis of those factual circumstances." *Id.* at 328. That EPA applied a "nationally consistent approach" to all state plans does not transform its action into a national regulation, otherwise "there never could be a local or regional action … because every action of the EPA purportedly applies a national standard created by the national statute and its national regulations." *Id.* at 329-30. Judge Quattlebaum joined Judge Niemeyer's opinion, but Judge Thacker dissented, stating that, in her view, "the Final Rule is clearly nationally applicable." *Id.* at 332.

The Fifth Circuit, like the Fourth, held that it was the proper venue for the challenges filed by Texas, Louisiana, and Mississippi to their respective plan disapprovals. *Texas v. EPA*, No. 23-60069, 2023 WL 7204840, at *3-6 (5th Cir. May 1, 2023). Here again, the court of appeals

focused on the text of the Clean Air Act: the Act "makes clear that the EPA's relevant actions for purposes of the present litigation are its various [state plan] denials." *Id.* at *4. So while "the EPA packaged these disapprovals together with the disapprovals of eighteen other States … , the EPA's chosen method of publishing an action isn't controlling." *Id.* "What controls is the [Act]" and the Act "is very clear: The relevant unit of administrative action here is the EPA's individual SIP denials" and, in fact, "the EPA separately considered and disapproved Texas's [plan], Louisiana's [plan], and Mississippi's [plan]." *Id.*

Having determined the relevant EPA action at issue, the Fifth Circuit had no trouble concluding venue was appropriate in that regional circuit, not the D.C. Circuit. "[T]he 'legal impact' of the three [state plan] disapprovals is plainly local or regional" given that they "involve only the regulation of Texas, Louisiana, and Mississippi emission sources and have legal consequences only for Texas, Louisiana, and Mississippi facilities." *Id.* at *5. They are therefore not nationally applicable actions where review is only appropriate in the D.C. Circuit. *Id.* Nor are the actions challenged in that case, the Fifth Circuit held, "based on a determination of nationwide scope or effect" because EPA's decisions "were plainly based on a number of intensely factual determinations unique to each State." *Id.* (citation and internal marks omitted). Judge Douglas dissented from the per curiam opinion because she believed EPA's action was "nationally applicable on its face" and "was based on a determination of 'nationwide scope or effect.'" *Id.* at *11.

The Sixth Circuit ruled in accord with the Fourth and Fifth, holding that transfer of Kentucky's challenge to its state plan disapproval to the D.C. Circuit was not warranted. *Kentucky v. EPA*, No. 23-3216, slip op. at 2-6 (6th Cir. July 25, 2023). Relying on the Fifth Circuit's analysis of the text of the Act, the Sixth Circuit started by concluding that the relevant "final action" is "EPA's denial of *Kentucky's*" plan. *Id.* at 4. The Sixth Circuit next explained that "State Implementation Plans, by their very nature, concern each State's plan" and "[b]ecause the denial and legal impact of Kentucky's [plan] affects only Kentucky—that is, it does not concern the nation, let alone any other state—the final action is 'locally or regionally applicable.'" *Id.* at 5. And the court rejected EPA's claim that its determination was one based on nationwide scope or effect because "EPA's disapproval here was based on a number of intensely factual determinations unique to Kentucky." *Id.* at 5-6 (citation and internal marks omitted). Judge Cole dissented from the decision of Judges McKeague and Nalbandian because he believed EPA's act was "based on a determination of nationwide scope or effect," without opining on whether it was also "nationally applicable." *Id.* at 10-21.

The Eighth Circuit, in separate orders unaccompanied by an opinion and without dissent, also denied EPA's motion to transfer challenges to Arkansas's, Missouri's, and Minnesota's state plan disapprovals. Order, *Arkansas v. EPA*, No. 23-1320, Dkt. No. 5269098 (8th Cir. April 25, 2023); Order, *Missouri v. EPA*, No. 23-1719, Dkt. No. 5281126 (8th Cir. May 26, 2023); Order, *Allete, Inc. v. EPA*, No. 23-1776, Dkt. No. 5281229 (8th Cir. May 26,

2023). Meanwhile, motions panels in the Ninth, Tenth, and Eleventh Circuits deferred decision on EPA's motions to transfer to a later merits panel in challenges to the state plan disapprovals of Nevada, Oklahoma, Utah, and Alabama. Order, *Nevada Cement Co. v. EPA*, No. 23-682, Dkt. No. 27 (9th Cir. July 3, 2023); Order, *Utah v. EPA*, No. 23-9509, Dkt. No. 10994985 (10th Cir. April 27, 2023); Order, *Alabama v. EPA*, No. 23-11173, Dkt. No. 24 (11th Cir. July 12, 2023).

C. Decision Below

Splitting with its sister circuits, the Tenth Circuit merits panel published an opinion ruling that EPA's disapprovals of the Utah and Oklahoma state plans were "nationally applicable" and ordered the cases transferred to the D.C. Circuit. Pet. App. 12a-19a. The court below justified this conclusion by stating "Petitioners seek review of a final rule disapproving [state plans] from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits—because those states all failed to comply with the good-neighbor provision." Pet. App. 12a. "And," the Tenth Circuit continued, "in promulgating that rule, the EPA applied a uniform statutory interpretation and common analytical methods, which required the agency to examine the overlapping and interwoven linkages between upwind and downwind states in a consistent manner." Pet. App. 12a-13a.

In so ruling, the Tenth Circuit "recognize[d] that the Fourth, Fifth, and Sixth Circuits recently reached the contrary conclusion: each denied the EPA's motions to transfer petitions challenging the same final rule at issue

here"— also acknowledging in a footnote that the Eighth Circuit also reached the contrary conclusion. Pet. App. 17a. The court below believed that "all three courts strayed" from the statute's text and, "because the Fourth, Fifth, and Sixth Circuit decisions denying the EPA's transfer motions all depart from [the Act's] plain text and our binding precedent, we decline to follow them." Pet. App. 19a.

REASONS FOR GRANTING THE PETITION

This Court should grant review of the decision below because it directly conflicts with the rulings of the Fourth, Fifth, Sixth, and Eighth Circuits on an important and recurring federal question about the appropriate venue for challenges to EPA actions under the Clean Air Act. The disagreement among the courts of appeals presented by this case is exceptionally clear; it was explicitly acknowledged by the court below. Moreover, the issue of venue for Clean Air Act challenges is of immense importance to states, the federal government, industry, and the public, and will continue to arise frequently in cases that extend well beyond the Good Neighbor Provision. The Court should decide this question now, before seven courts of appeals are required to reach merits decisions in this and related cases concerning the plans of a dozen (or more) states without knowing the Court's judgment on the appropriate venue for these cases.

I. The Tenth Circuit's decision below explicitly conflicts with the decisions of several other courts of appeal.

Certiorari is warranted because, in the ruling below, the Tenth Circuit entered a decision in conflict with four other federal courts of appeals on an important issue. The Tenth Circuit's ruling squarely splits with both the result and reasoning of decisions by the Fourth, Fifth, Sixth, and Eighth Circuits.

Start with the result of the Tenth Circuit's decision. The court below ruled that EPA's disapprovals of Oklahoma's and Utah's plans, which were published in the same *Federal Register* notice as 19 other states' disapprovals, could be reviewed only in the D.C. Circuit. Pet. App. 19a. Meanwhile, the Fourth, Fifth, Sixth, and Eighth Circuits—which are reviewing the disapprovals of other states' plans contained in the same *Federal Register* notice—have denied EPA's motion to transfer those cases to the D.C. Circuit. Neither the court below nor EPA have suggested that, for purposes of venue, anything distinguishes the disapprovals of Oklahoma's and Utah's plans from the disapprovals of the other states' ozone Good Neighbor plans being reviewed in the regional circuits. The conflict among courts of appeals is as clean as can be.

The reasoning of the court below also openly splits with reasoning embraced by the other circuits. The courts of appeals are divided in their rationales in at least two respects.

First, the Tenth Circuit believed "the nature of the agency's final action" being challenged was "a final rule

disapproving [state plans] from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits." Pet. App. 12a-13a. In contrast, the Fourth Circuit held "the relevant agency action for our review here is the EPA's disapproval of West Virginia's [implementation plan]." *West Virginia*, 90 F.4th at 330. The Fourth Circuit rejected EPA's attempt, adopted by the Tenth Circuit, to "throw[] a blanket labeled 'national' over 21 individual decisions rejecting 21 separate States' [plans] in an effort to convert each unique state decision into a national one." *Id.* So, "the fact that the EPA consolidated its disapprovals in a single final rule does not, by that fact alone, make its 21 separate decisions included within its final rule … a single nationally applicable action." *Id.*

The Fifth Circuit similarly considered the issue of what "the relevant 'action' is for purposes of § 7607(b)(1)" and ruled "the [Clean Air Act] makes clear that the EPA's relevant actions for purposes of the present litigation are its various [state plan] denials." *Texas*, 2023 WL 7204840, at *3. The Fifth Circuit acknowledged that, "[y]es, the EPA packaged these disapprovals together with the disapprovals of eighteen other States," but the court held that "the EPA's chosen method of publishing an action isn't controlling." *Id.* at *4. "What controls is the [Act]" and "the [Act] is very clear: The relevant unit of administrative action here is the EPA's individual [state plan] denials." *Id.* The Sixth Circuit adopted the reasoning of the Fifth Circuit in reaching the same conclusion. *Kentucky*, *supra*, slip op. at 3-4.

This dispute arises because the Tenth Circuit interprets the text of the Clean Air Act differently than the

other courts of appeals. The Tenth Circuit believed that the *Federal Register* notice containing the disapprovals of 21 state plans was the relevant unit of analysis because the Act's judicial review provision speaks of a "final action." Pet. App. 13a (quoting 42 U.S.C. § 7607(b)(1)). The court then chided the Fourth, Fifth, and Sixth's Circuits from having "strayed" and "depart[ed] from § 7607(b)(1)'s plain text." Pet. App. 17a, 19a.

But for those other courts, the Tenth Circuit's invocation of the words "final action" merely begs the question; "[t]he relevant unit of administrative action" still must be determined. *Texas*, 2023 WL 7204840, at *4. That determination is governed by statute, namely, the provisions providing "the legal source of the agency's (here the EPA's) authority to take the challenged actions (here the [state plan] denials)." *Id.*; *contra* Pet. App. 16a n.6 ("Whether an EPA action is nationally applicable does not turn on the 'type' of statutory authority delegated to the agency."). With respect to state implementation plans, the Fifth Circuit wrote, the statute speaks in terms of state and EPA action for "each State" and "the State." *Texas*, 2023 WL 7204840, at *4 (quoting 42 U.S.C. § 7410(a), (k)(3)). And because EPA's action on a single state's plan is indisputably local or regional, not national, venue is appropriate in the regional circuit. *Id.* The Fourth and Sixth Circuits concurred in a similar textual analysis as the Fifth. *West Virginia*, 90 F.4th at 330 ("[T]he relevant agency action for our review here is the EPA's disapproval of West Virginia's [state plan]."); *Kentucky*, *supra*, slip op. at 3-4 (explaining that the important question is "determining *what* 'final action' we are dealing with" and

concluding that the answer is "EPA's disapproval of each state's [implementation plan]").

Second, the Tenth Circuit held that EPA's disapprovals were "nationally applicable" because "EPA applied a uniform statutory interpretation and common analytical methods, which required the agency to examine the overlapping and interwoven linkages between upwind and downwind states in a consistent manner." Pet. App. 12a-13a. The Fourth Circuit rejected precisely that reasoning: "While national standards — imposed by the statute, regulations, and practices — were indeed applied to reject West Virginia's [state plan], the venue provision of the Clean Air Act does not focus on whether national standards were applied." *West Virginia*, 90 F.4th at 329. "If application of a national standard to disapprove a plan were the controlling factor," the Fourth Circuit explained, "there never could be a local or regional action as recognized by the Clean Air Act because every action of the EPA purportedly applies a national standard created by the national statute and its national regulations." *Id.* at 329-30; *see also id.* at 328 (explaining that "the venue issue [does not] turn[] on whether a national rule or standard was applied to make the determination" because that would mean "there could be no local or regional action"). Instead, the Fourth Circuit pointed to EPA's state-specific disapproval, where "EPA focused on factual data localized to West Virginia" and EPA's rejection of "West Virginia's analysis of those factual circumstances." *Id.* at 328. The Fifth and Sixth Circuits are in accord with the Fourth's approach here, too. *Texas*, 2023 WL 7204840, at *5 & n.5; *Kentucky*, *supra*, slip op. at 5-6.

In short, the Tenth Circuit has squarely split with the Fourth, Fifth, Sixth, and Eighth Circuits on both *what* the appropriate venue is for these state plan disapproval challenges and *how* that analysis should be conducted. The decision below openly acknowledges the conflict, "recogniz[ing] that the Fourth, Fifth, and Sixth Circuits recently reached the contrary conclusion." This irreconcilable conflict among the courts of appeals requires this Court's resolution.[4]

II. The question of the appropriate venue for challenges under the Clean Air Act is ripe for review, important, and frequently recurring.

A. Certiorari before judgment is warranted to resolve the split on venue "because of the importance of determining the locus of judicial review of the actions of EPA [under the Clean Air Act]." *Harrison*, 446 U.S. at 586 (granting certiorari review before final judgment); *see also* Sup. Ct. R. 11. Waiting until the D.C. Circuit decides the merits of this case will not impact the venue question, while delay will only result in needless expenditure of state, federal, industry, and court resources to litigate one or more cases in the incorrect venue.

This Court has previously granted certiorari before judgment when "[u]ncertainty surrounding the scope of

[4] While the Tenth Circuit mentioned the Eighth Circuit's decision only in passing, Pet. App. 17a n.7, the Eighth Circuit, by denying EPA's motion to change venue, also necessarily disagreed with the Tenth Circuit's decision that venue is appropriate only in the D.C. Circuit because the challenged agency action is "nationally applicable."

[an] Act's judicial-review provision" has divided courts and led to duplicative litigation. *Nat'l Ass'n of Mfrs.*, 583 U.S. at 119. In that case, the Sixth Circuit held it had jurisdiction to review suits brought under the Clean Water Act, but a single district court with a suit before it challenging the same rulemaking disagreed. *Id.* This Court resolved the confusion without waiting for the parallel litigation that had been proceeding across the country to reach final judgments.

Here, the split is not only more pronounced, but the need for immediate review is even greater given the posture of this case and the numerous courts of appeals with state Good Neighbor plan challenges before them. Petitioners here have already fully briefed the merits of their claims before the Tenth Circuit. If this Court declines review, the parties may engage in further briefing in the D.C. Circuit, expending the public funds of both state and federal governments. Oral argument and the decisionmaking process will also consume valuable litigant and court resources. If this Court were to ultimately determine that the Tenth Circuit should have retained venue, the delay and duplicated effort from merits adjudication in the D.C. Circuit would be unnecessary.

And, of course, if this Court determines that exclusive venue lies in the D.C. Circuit, then the ten challenges currently being litigated in the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits would likewise be for naught. Review now would serve public policy and conserve judicial and party resources, instead of subjecting the states and EPA "to long and complex litigation which may all be for naught if consideration of the preliminary

question of venue is postponed until the conclusion of the proceedings." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

Nor would further delay "help[] to explain and formulate the underlying principles this Court … must consider." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2597 (2015). "[Venue] is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the [states' petitions for review]." *Mercantile Nat'l Bank*, 371 U.S. at 558. It is unlikely that the D.C. Circuit would reconsider the venue question after transfer. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) ("[T]he policies supporting the [law of the case] doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation."). And five circuits have already considered the question presented. This petition therefore presents a clean, well-developed, and fulsome split, ready for review.

In short, additional delay would produce no benefits, but it would result in unnecessary delays and tremendous wasted effort. This Court should grant review now rather than subject litigants, courts, and the public to those costs.

B. The Court should also grant review because venue questions arise frequently in the context of important Clean Air Act disputes. Such disputes include the current voluminous litigation over state Good Neighbor plans, other disputes about state plan approvals and

disapprovals, and still other disputes under the Clean Air Act.

First, a determination from this Court on the appropriate venue will provide definitive resolution to venue questions being litigated in multiple circuits. Answering the question presented will not merely resolve the dispute over the proper venue for separate challenges brought by Oklahoma and Utah to EPA's plan disapproval for each state, it will also resolve disputed questions of venue still ongoing in the related Ninth and Eleventh Circuit cases. *Nevada Cement Co. v. EPA*, No. 23-682, Dkt. No. 27 (9th Cir. July 3, 2023) (referring venue dispute to merits panel); Order, *Alabama v. EPA*, No. 23-11173, Dkt. No. 24 (11th Cir. July 12, 2023) (same). And it will confirm (or reject) the decisions to retain venue in the Fourth, Fifth, Sixth, and Eighth Circuits.

Absent this Court's intervention, an irreconcilable legal incongruity will persist: Oklahoma and Utah will be forced to litigate issues relating to their state-specific emissions and ozone contributions in the D.C. Circuit, while other states are litigating their local ozone issues in their regional circuits. Given the massive effect of EPA cross-state ozone regulation on local economies, these disputes are too important to be litigated amidst such a legal haze. *See Texas*, 2023 WL 7204840, at *10 (explaining the "billions of dollars in compliance costs" and harms to electric grid reliability imposed by EPA's proposed ozone Good Neighbor rulemakings); *West Virginia*, 90 F.4th at 331 (explaining burden on state regulators and consumers of EPA's Good Neighbor rulemakings).

Granting certiorari would also resolve ongoing disputes about the venue provision's savings clause, which directs to the D.C. Circuit review of EPA actions, including those locally and regionally applicable, that are "based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1). The Tenth Circuit did not "address EPA's alternative argument that the petitions belong in the D.C. Circuit even if the final action is 'locally or regionally applicable' because it 'is based on a determination of nationwide scope or effect' made and published by the EPA." Pet. App. 19a n.8 (quoting § 7607(b)(1)). But the Fourth, Fifth, and Sixth Circuits all directly rejected that argument. *See Texas*, 2023 WL 7204840, at *5 (holding that because the state plan disapprovals were based on "intensely factual determinations," they were not based on a determination of nationwide scope or effect); *accord West Virginia*, 90 F.4th at 330; *Kentucky*, No. 23-3216, slip op. at 5-6. Meanwhile, dissenting judges in the Fifth and Sixth Circuits disagreed and would have transferred the cases to the D.C. Circuit, arguing that EPA's actions were based on a determination of nationwide scope and effect. *Texas*, 2023 WL 7204840, at *12-13 (Douglas, J., dissenting); *Kentucky*, No. 23-3216, slip op. at 12-19 (Cole, J., dissenting). Review of the question presented will address this ongoing division, too.

Second, a decision from this Court will provide clarity in innumerable future challenges to state plan approvals or disapprovals under the Clean Air Act, which occur whenever EPA revises ambient air quality standards and issues other regulations requiring state plan

revisions. The Clean Air Act requires EPA to promulgate new national ambient air quality standards every five years for a host of different pollutants. 42 U.S.C. § 7409(d)(1). Then, every time a new national standard for any given pollutant rolls out, States have no more than three years to revise their state implementation plans. 42 U.S.C. §§ 7410(a)(1), (a)(2)(D). And each state has plans for different provisions of the Clean Air Act—the Good Neighbor Provision is just one of them—each of which may generate their own litigation and concomitant venue disputes. *E.g.*, *Texas v. EPA*, 829 F.3d 405, 417-24 (5th Cir. 2016) (retaining venue in regional circuit in challenge to disapprovals of states' plans to meet Act's "regional haze" requirements); *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455-56 (adjudicating venue in challenge to approval of state plan for nonroad engines and vehicles); *New York v. EPA*, 133 F.3d 987, 989-90 (7th Cir. 1998) (retaining venue in regional circuit over dispute concerning exemption from cross-state ozone standards spanning states in three different circuits). Litigation over approvals and disapprovals of portions of state plans is therefore almost constant. And they further multiply every time EPA jumpstarts the process, even absent setting a new national standard, by issuing calls for state plan revisions. *See* 42 U.S.C. § 7410(k)(5); *e.g., W. Virginia Chamber of Com. v. Browner*, 166 F.3d 336 (4th Cir. 1998) (adjudicating venue dispute over call for cross-state ozone plan revisions).

Litigation over state plans addressing the Good Neighbor Provision is a prime example of how implementation plan disputes are only increasing in scope and

frequency. EPA's first Good Neighbor rule—the 1998 NOx SIP Call—was limited to Eastern states. 63 Fed. Reg. 57,356, 57,386 (Oct. 27, 1998); *see also* 80 Fed. Reg. 75,706, 75,715 (Dec. 3, 2015). EPA extended the program to additional states in the 2011 Transport Rule. *See EME Homer*, 572 U.S. at 499-500. Currently under the 2015 ozone NAAQS, the Good Neighbor Provision now has potential implications as far west as Utah, Nevada, and California. 88 Fed. Reg. at 9,355, 9,358, 9,360. As EPA's regulatory approach has become more aggressive, vigorous litigation of EPA's individual state plan actions has increased. Without clear rules from this Court, venue disputes in challenges to EPA actions related to the Good Neighbor Provision will continue to recur, creating ongoing uncertainty for litigants.

Third, a decision by this Court will help resolve recurring venue disputes under a variety of other Clean Air Act provisions. For example, in cases involving attainment designations under Section 107 of the Act, courts often disregard the substance of the EPA action at issue and simply rely on the number of states receiving designations, with those attainment designations involving more states being sent to the D.C. Circuit and those with fewer states remaining in the local circuits. *See*, *e.g.*, *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 668 (7th Cir. 2017) (24 states transferred to D.C.); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 806-07 (9th Cir. 1980) (one state retained in the local circuit); *Texas v. EPA*, 983 F.3d 826, 832-35 (5th Cir. 2020) (same); *Texas v. EPA*, 706 F. App'x 159 (5th Cir. 2017) (same).

Courts have also addressed venue issues over such disparate topics as special provisions granting California a Clean Air Act preemption waiver that may be adopted by states nationwide, to permitting decisions under Title V of the Act that advanced a novel interpretation of the Act, to allocation of pollution entitlements in the Act's acid rain program. *See, e.g.*, *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 877-78 (D.C. Cir. 2015); *Sierra Club v. EPA*, 926 F.3d 844, 846 (D.C. Cir. 2019); *Chevron U.S.A. Inc. v. EPA*, 45 F.4th 380, 381-82 (D.C. Cir. 2022); *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 865-67 (D.C. Cir. 1996). Similarly, in recent decisions related to refinery-specific waiver determinations under the Renewable Fuel Standards program, a split has developed as to whether such decisions should be heard in the local circuits or in the D.C. Circuit. *See Calumet Shreveport Ref., L.L.C. v. EPA,* 86 F.4th 1121, 1130-31 (5th Cir. 2023) (holding that the Fifth Circuit was the appropriate venue because each waiver decision was based on the unique facts and circumstances presented by each individual small refinery); *Hunt Ref. Co. v. EPA*, 90 F.4th 1107, 1110-12 (11th Cir. 2024) (holding the D.C. Circuit was the appropriate venue because EPA issued a single notice for all affected small refineries and applied a common decision-making method).

Finally, ensuring that the appropriate disputes remain in the regional circuits, consistent with the will of Congress expressed in the statutory text, is particularly important to the states. While the Act requires "[n]ationally applicable actions go to the D.C. Circuit" to "promote[] national uniformity," it also mandated "locally or

regionally applicable actions … go to the regional circuits, which promotes responsiveness and attention to local and regional diversity." *Texas*, 983 F.3d at 835. Oklahoma and Utah should, consistent with the Act, be afforded the opportunity to litigate the specific issues relating to their emissions, and the downwind effects on their bordering neighbors, in courts intimately familiar with their regional issues, economies, and geographies. The regional circuit, moreover, will likely be able to resolve issues regarding a few states more expeditiously than the D.C. Circuit would if all states were lumped into a consolidation of numerous cases before that distant forum. Such consolidation also often prejudices the ability of states to bring their unique issues to the fore. Those unfortunate results will only metastasize across many aspects of Clean Air Act litigation if EPA is able to repeat its procedural ploy, now endorsed by the Tenth Circuit, of packaging together many disparate local actions into a single *Federal Register* notice. Particularly given the frequency of Clean Air Act disputes in a variety of contexts, this Court's definitive interpretation of the Act's venue provision will advance important jurisprudential interests.

C. This Court's review is also warranted because the confusion over the proper application of 42 U.S.C. § 7607(b)(1) unnecessarily wastes judicial and party resources in the present cases and in future ones among the panoply of Clean Air Act disputes.

"[L]itigation over whether the case is in the right court is essentially a waste of time and resources." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980)

(internal quotation marks and citation omitted). Uncertainty on that question produces "appeals and reversals, encourage[s] gamesmanship, and, again, diminish[es] the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz Corp.*, 559 U.S. at 94.

The persistent conflict over the circuit in which a Clean Air Act challenge belongs produces all those harms. Courts of appeals often defer disputed venue questions to the merits panel, as the Tenth Circuit did here and the Ninth and Eleventh Circuits did in challenges brought by other states over their Good Neighbor plans. *Supra* 12. Litigants therefore sometimes invest significant time and resources into briefing a case, only for the court to transfer the case to another circuit. Indeed, here, the transfer decision came after the parties completely briefed the merits and a month before oral argument. A decision by this Court will promote judicial efficiency and streamline litigation over EPA final actions.

The uncertainty surrounding § 7607(b)(1)'s proper application has also incentivized petitioners to file protective petitions for review in multiple circuits. *See Nat'l Ass'n of Mfrs.*, 583 U.S. at 119 ("Uncertainty surrounding the scope of the Act's judicial-review provision … prompted many parties … to file 'protective' petitions for review in various Courts of Appeals to preserve their challenges"). Petitioners challenging EPA actions related to state plans regularly file duplicative judicial review petitions in both the regional circuit and the D.C. Circuit to preserve appeal rights in case they chose venue incorrectly and their

"primary" petition gets dismissed rather than transferred.[5]

In some cases, "primary" petitions for review of the same EPA action are filed by different parties in multiple circuits. *See Texas,* 983 F.3d at 823 (Texas filed petition in Fifth Circuit while the Sierra Club filed a petition in the D.C. Circuit). These repetitive petitions require party resources to prepare and impose unnecessary administrative burdens on courts.

Indeed, in this case, EPA has made this duplication of efforts even worse. Oklahoma and Utah filed protective petitions in the D.C. Circuit after EPA moved to transfer or dismiss their Tenth Circuit petitions. EPA then attempted to exploit the uncertainty by asking the D.C. Circuit to adjudicate the venue issue already before the Tenth Circuit so as to preempt the regional circuit's adjudication. *Utah v. EPA*, Nos. 23-1102 *et al.*, EPA Mot. to Confirm Venue and to Expedite, Dkt. No. 1999261 (D.C. Cir. May 15, 2023). Thankfully, the D.C. Circuit rejected that gambit, but not after yet more expenditure of party and court resources briefing the issue. *Id.*, Petitioners' Reply in Support of Abeyance, Dkt. No. 2001718 (D.C.

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[5] *See*, *e.g.*, *Sierra Club*, 926 F.3d at 846 (dismissing case for improper venue rather than transferring to already open Tenth Circuit docket); *see also id.* at 847 (protective petition filed in the Tenth Circuit); *Dalton Trucking, Inc.*, 808 F.3d at 877 (protective petition filed in D.C. Circuit); *Am. Rd. & Transp. Builders*, 705 F.3d at 455 (protective petition filed in the Ninth Circuit); *Texas*, 829 F.3d at 416 n.12 (protective petitions filed in both the Tenth and D.C. Circuits); *Texas*, 706 Fed. App'x at 159 (protective petition filed in D.C. Circuit).

Cir. June 1, 2023); *id.*, Order, Dkt. No. 2005201 (D.C. Cir. June 27, 2023).

"[A]dministrative simplicity is a major virtue" in applying a venue statute. *Hertz Corp.*, 559 U.S. at 94. This Court should grant review to provide it.

III. The Tenth Circuit's decision is wrong.

Review should also be granted to correct the errant decision below. At bottom, the Tenth Circuit's decision grants EPA the power to "transform" the "proper forum for judicial review" by packaging multiple "regionally applicable" actions into a single *Federal Register* notice, and therefore making it a "nationally applicable action." Pet. App. 13a. That holding badly misinterprets the Clean Air Act, and it adopts a view of venue that improperly elevates the form of an EPA action over its substance.

A. To start, the Clean Air Act's venue provision "specifically enumerate[s]" a list of EPA actions that are per se reviewable in the appropriate regional circuit. *Harrison*, 446 U.S. at 584. In that list are challenges to EPA "action in approving or promulgating any implementation plan under section 7410," such as plans implementing the Good Neighbor Provision of the Clean Air Act. 42 U.S.C. § 7607(b)(1). Thus, "the statutory text places review of [state implementation plan] approvals or disapprovals in the regional circuits." *Texas v. EPA*, 829 F.3d 405, 419 n.16 (5th Cir. 2016). Not surprisingly, lower courts have repeatedly described action on whether to approve a state implementation plan as the "prototypical 'locally or regionally applicable' action that may be challenged only in the appropriate regional court of appeals." *Am. Rd. &*

Transp. Builders Ass'n, 705 F.3d at 455; *Nat'l Parks Conservation Ass'n v. McCarthy*, 816 F.3d 989, 993 (8th Cir. 2016) (same); *see also Chevron U.S.A. Inc. v. EPA*, 45 F.4th 380, 386 (D.C. Cir. 2022) (describing state implementation plan rulemaking as at the far "end of the spectrum" of locally or regionally applicable actions); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011) (characterizing a state implementation plan as a "purely local action" and "an undisputably regional action").

The Tenth Circuit dismissed this text by emphasizing the catch-all at the end of the list of actions reviewable in the regional circuit: "[T]he statute merely provides," the Tenth Circuit said, "that '[a] petition for review of the [EPA]'s action in approving or promulgating any implementation plan … or any other final action … (including any denial or disapproval …) *which is locally or regionally applicable* may be filed only in the … appropriate [regional] circuit.'" Pet. App. 11a n.5 (quoting 42 U.S.C. § 7607(b)(1)) (emphasis in original). According to the court below, this "does not … say that any such approval, promulgation, denial, or disapproval *is* locally or regionally applicable." *Id.* But the Tenth Circuit ignores "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Thus, the inclusion of state implementation plan approvals in the enumerated actions means they are categorically reviewable in the regional circuit regardless of whether they are locally or regionally applicable. At the

very least, this is a strong textual indication that the challenges here are presumptively appropriate in the regional circuit.

Indeed, EPA concedes that challenges to its state implementation plan *approvals* belong in the regional circuits. When EPA approved the interstate transport plans for the 2015 ozone standard for several other states, it did so in a series of *Federal Register* notices covering individual states or small groups of states and instructed that "petitions for judicial review … must be filed in the United States Court of Appeals for the appropriate circuit."[6]

EPA nonetheless argues, and the Tenth Circuit agreed, that exclusive venue for challenges to the state Good Neighbor plan *disapprovals* lies in the D.C. Circuit because of EPA's calculated decision to announce 21 state plan disapprovals in a single *Federal Register* notice, claiming the consolidated notice is therefore a "nationally applicable" action. The only distinction between EPA's approval of state plans and disapproval of state plans was the form of the notice—specifically, the number of states that EPA included in a single *Federal Register* notice—and to EPA, that makes all the difference.

But the statute does not hinge the entire question of venue on such manipulable formalities. A *Federal Register* notice does not, by itself, constitute a "final action." It

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[6] *See e.g.* 86 Fed. Reg. 73,129 (Dec. 27, 2021) (Hawaii); 85 Fed. Reg. 20,165 (Oct. 11, 2020) (Colorado and North Dakota); 86 Fed. Reg. 68,413 (Dec. 2, 2021) (Florida, Georgia, North Carolina, and South Carolina); *see also, e.g.*, *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1174 (9th Cir. 2015) (reviewing challenge to approval of California's implementation plan).

is no more than a vehicle to communicate agency action. *See Nat. Res. Def. Council v. EPA*, 706 F.3d 428, 432 (D.C. Cir. 2013). Rather, as the Fourth, Fifth, and Sixth Circuits explained, how EPA packaged its state plan decisions does not determine the relevant "action"—disapproval of a single state's plan or 21 states' plans—being challenged. *Supra* 15-16. That determination instead stems from the source of EPA's authority to take the action, which here is EPA's authority to approve or disapprove the plan of a single state under 42 U.S.C. § 7410. *Supra* 16-17. Such single-state actions are categorically not "nationally applicable."

B. The Fourth, Fifth, and Sixth Circuits also demonstrated the Tenth Circuit's error in concluding that Oklahoma and Utah's plan disapprovals were nationally applicable because EPA applied the same analytic framework in evaluating all state plans. That cannot be correct, the Fourth Circuit explained, because it would make virtually *every* EPA action national since EPA is always purporting to apply some consistent standard to administer its portion of a national statute. *Supra* 17-18. After all, if EPA applied different standards to different states, that "[u]nexplained inconsistency'" would be "arbitrary and capricious." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (citation and internal quotation marks omitted). Indeed, here, EPA applied the same legal principles and methodology to *both* the state plan approvals *and* the disapprovals. It contended challenges to the former belong in the regional circuits. *Supra* 32 n.6. But that cannot be squared with its present argument that

application of a national framework for the latter mandates review only in the D.C. Circuit.

Other aspects of EPA's state plan disapprovals only corroborate that each disapproval is a separate final action for purposes of the Act's venue provision. In its *Federal Register* notice, EPA offered only "a brief, high level overview of the [state plan] submissions and the EPA's evaluation and key bases for disapproval," while stating that the "full basis for the EPA's disapprovals" was to be found in the sundry proposed rulemakings that were grouped and signed by EPA's *regional* offices. 88 Fed. Reg. at 9,354; *see supra* 6-8. Thus, even EPA believed at one point the true nature of its state plan disapprovals is local or regional.

And even in its final *Federal Register* notice, EPA codified Oklahoma's, Utah's, and every other state's plan disapproval in separate sections of the Code of Federal Regulations. 88 Fed. Reg. at 9,381-84. Normally, "[a]gency statements 'having general applicability and legal effect' are to be published in the Code of Federal Regulations," while "preamble statements" are not by default considered the final agency action that is subject to judicial review. *Nat. Res. Def. Council v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009) (citing 44 U.S.C. § 1510(a)-(b); 1 C.F.R. § 8.1); *see also AT&T Corp. v. FCC*, 970 F.3d 344, 350 (D.C. Cir. 2020). Oklahoma challenges the regulation disapproving its state plan that EPA seeks to codify at 40 C.F.R. § 52.1922(c), while Utah challenges 40 C.F.R. § 52.2354, and neither are challenging regulations applying to any other state. Those state-specific regulations are, on their face, not "nationally applicable,"

confirming that the Tenth Circuit erred in concluding that venue lies exclusively in the D.C. Circuit.

* * *

The Tenth Circuit wrongly indulged EPA's decision to consciously elevate form over substance. Congress directed that state plan approvals and disapprovals—each of which reflect "intensely factual determinations" unique to each state—belong in regional circuits. *Texas*, 829 F.3d at 421. Allowing EPA to gerrymander venue by packaging together a multitude of state plan disapprovals would undermine Congress's careful allocation. Whatever EPA's reasons are to attempt so nakedly to manipulate the forum for these cases, "venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." *Travis v. United States*, 364 U.S. 631, 634 (1961) (citation omitted).

CONCLUSION

This Court should grant the petition.

March 2024 Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

February 27, 2024, Filed

No. 23-9514

STATE OF OKLAHOMA, BY AND THROUGH ITS ATTORNEY GENERAL; GENTNER F DRUMMOND; OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT;

Appendix A

SOUTHERN UTAH WILDERNESS ALLIANCE;
CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9521

OKLAHOMA GAS & ELECTRIC COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; MICHAEL S.
REGAN, ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT
ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL
DIVERSITY; DOWNWINDERS AT RISK; UTAH
PHYSICIANS FOR A HEALTHY ENVIRONMENT;
SOUTHERN UTAH WILDERNESS ALLIANCE;
CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix A

No. 23-9533

TULSA CEMENT LLC, D/B/A CENTRAL PLAINS CEMENT COMPANY LLC; REPUBLIC PAPERBOARD COMPANY LLC,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix A

No. 23-9534

WESTERN FARMERS ELECTRIC COOPERATIVE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9509

STATE OF UTAH, BY AND THROUGH ITS GOVERNOR, SPENCER J. COX, AND ITS ATTORNEY GENERAL, SEAN D. REYES,

Appendix A

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9512

PACIFICORP; DESERET GENERATION & TRANSMISSION CO-OPERATIVE; UTAH MUNICIPAL POWER AGENCY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9520

UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S.

Appendix A

REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Petitions for Review of Orders From the Environmental Protection Agency. (EPA Nos. EPA-R08-OAR-2022-315 & EPA-R06-OAR-2021-0801 & EPA-HQ-OAR-2021-0663).

Submitted without oral argument:*

Before **MORITZ, EBEL**, and **ROSSMAN**, Circuit Judges.

MORITZ, Circuit Judge.

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* After examining the motions, responses, replies, and supplemental authority, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Appendix A

In a February 2023 final rule, the U.S. Environmental Protection Agency (EPA) disapproved state implementation plans (SIPs) from 21 states across the country because those states all failed to adequately address their contributions to air-quality problems in downwind states. These seven petitions seek review of that final rule: Oklahoma and various industry groups challenge the EPA's decision to disapprove Oklahoma's SIP; Utah and other industry groups challenge the disapproval of Utah's SIP. But the EPA has moved to dismiss or transfer the petitions to the D.C. Circuit under the Clean Air Act's judicial-review provision, 42 U.S.C. § 7607(b)(1), which assigns to the D.C. Circuit any petition seeking review of a "nationally applicable" agency action. And because we agree with the EPA that the challenged rule is nationally applicable, we grant the EPA's motions in part, to transfer the petitions to the D.C. Circuit, and thus do not reach the merits.

Background

The Clean Air Act establishes "a cooperative-federalism approach to regulate air quality." *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012). The Act directs the EPA to establish and periodically revise National Ambient Air Quality Standards (NAAQS), which represent "the maximum airborne concentration[s] of [certain air] pollutant[s] that the public health can tolerate." *West Virginia v. EPA*, 597 U.S. 697, 707, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)). After the EPA revises or sets a new air-

quality standard, the agency must designate geographic regions around the country as areas of "attainment" or "nonattainment" (or label them "unclassifiable"). 42 U.S.C. § 7407(d)(1); *see also EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014). The burden then shifts to the states to each adopt and submit for the EPA's approval a SIP that will implement, maintain, and enforce the NAAQS within its boundaries. *See* 42 U.S.C. § 7410(a)(1); *EME Homer City*, 572 U.S. at 498. But because air pollutants travel with the wind, "heedless of state boundaries," emissions in upwind states can threaten a downwind state's ability to attain and maintain the NAAQS. *EME Homer City*, 572 U.S. at 496. To tackle this complex interstate pollution problem, the Act includes a good-neighbor provision requiring each SIP to prohibit emissions that will "contribute significantly to nonattainment" or "interfere with maintenance" in any other state. § 7410(a)(2)(D)(i).

In 2015, the EPA tightened the NAAQS for ozone. *See* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015). This revision triggered each state's duty to submit a SIP to implement the 2015 ozone NAAQS. *See* § 7410(a)(1). In February 2023, the EPA issued a final rule disapproving SIPs submitted by 21 states because those states all failed to meet their good-neighbor obligations. *See* Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336 (Feb. 13, 2023) [hereinafter Air Plan

Disapprovals].[2] In evaluating these SIPs, the EPA applied a four-step framework it developed to implement the good-neighbor provision. *See id.* at 9338. Under this framework, the EPA (1) identifies downwind areas expected to have problems attaining or maintaining the relevant NAAQS; (2) determines which upwind states contribute to these identified problems in amounts sufficient to link them to the downwind air-quality problems; (3) identifies the emissions reductions necessary to eliminate each linked upwind state's significant contribution to downwind nonattainment through a multifactor analysis; and (4) adopts enforceable control measures to achieve those reductions. *Id.* In applying the framework, the EPA also considered any alternative approach states proposed in their SIPs "with an eye to ensuring national consistency." *Id.* at 9338, 9381.

Here, two such states—Oklahoma and Utah, joined by various industry groups—have petitioned for review of the final rule, challenging the EPA's decision to disapprove their SIPs. The EPA responded by moving to dismiss or transfer the petitions to the D.C. Circuit under § 7607(b)(1).[3] We stayed the Oklahoma and Utah SIP

2. We note that as to two of these 21 states, Minnesota and Wisconsin, the EPA partially approved and partially disapproved the proposed SIPs. *See* Air Plan Disapprovals, 88 Fed. Reg. at 9336, 9354.

3. Utah and its industry groups suggest in a footnote that the EPA's motion to dismiss their petitions is untimely. In support, they note that under Tenth Circuit Rule 27.3(A)(3)(a), a motion to dismiss "should be filed within 14 days after the notice of appeal is filed, unless good cause is shown." But we agree with the EPA that it has shown good cause for filing its March 16, 2023 motion slightly

disapprovals pending our review and referred the EPA's motions to the panel assigned to hear these cases on their merits.

Analysis

The EPA argues that we must dismiss or transfer the petitions to the D.C. Circuit under the Clean Air Act's judicial-review provision, which divides reviewable EPA actions into three categories and designates the proper forum for each.[4] *See* § 7607(b)(1). It provides that a petition for review of a "nationally applicable" final action "may be filed only in [the D.C. Circuit]." *Id.* By contrast, a petition for review of a "locally or regionally applicable" final action "may be filed only in the . . . appropriate [regional] circuit."[5] *Id.* But if that "locally or

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more than 14 days after Utah and its industry groups petitioned for review on February 13 and 23, 2023: various petitioners have sought review of the same final rule in regional circuit courts across the country, and the "EPA has acted as expeditiously as practicable in moving to [dismiss or] transfer these cases [to the D.C. Circuit] in a coordinated fashion." EPA Utah Mot. 2 n.1.

4. We need not decide whether § 7607(b)(1) is a jurisdictional or venue provision. *See ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1196 n.1 (10th Cir. 2011). For our purposes, it is enough that the provision is mandatory and that the EPA invokes it here. *See Eberhart v. United States*, 546 U.S. 12, 19, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005) (explaining that nonjurisdictional claim-processing rules "assure relief to a party properly raising them").

5. We reject petitioners' cursory suggestion that § 7607(b)(1), by its text, assigns all petitions challenging a SIP disapproval to the regional circuits. The statute merely provides that "[a] petition

regionally applicable" action "is based on a determination of nationwide scope or effect" and if the EPA, in taking that action, "finds and publishes that such action is based on such a determination," then the petition "may be filed only in the [D.C. Circuit]." *Id.*

Under the statute's plain text, then, whether a petition for review belongs in the D.C. Circuit turns exclusively on the nature of the challenged agency action. *See ATK Launch Sys.*, 651 F.3d at 1197. We must therefore ask whether the action itself is "nationally applicable" or "locally or regionally applicable." *Id.* (quoting § 7607(b)(1)). And in answering that question, we look only to the face of the action, not its practical effects or the scope of the petitioner's challenge. *Id.*

On its face, the final EPA action being challenged here is nationally applicable. Petitioners seek review of a final rule disapproving SIPs from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits—because those states all failed to comply with the good-neighbor provision. *See* Air Plan Disapprovals, 88 Fed. Reg. at 9380. And in promulgating that rule, the EPA applied a uniform statutory interpretation and common analytical methods, which required the agency to examine

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for review of the [EPA]'s action in approving or promulgating any implementation plan . . . or any other final action . . . (including any denial or disapproval . . .) *which is locally or regionally applicable* may be filed only in the . . . appropriate [regional] circuit." § 7607(b)(1) (emphasis added). It does not, as petitioners assert, say that any such approval, promulgation, denial, or disapproval *is* locally or regionally applicable.

the overlapping and interwoven linkages between upwind and downwind states in a consistent manner. *Id.* Because a final action with these features is "nationally applicable" under § 7607(b)(1), judicial review is proper only in the D.C. Circuit. *See ATK Launch Sys.*, 651 F.3d at 1197.

Seeking to avoid this conclusion, petitioners urge us to view the 21 SIP disapprovals in the final rule as separate, locally or regionally applicable agency actions. They maintain that each of their seven petitions challenges just one such action: either the Oklahoma SIP disapproval or Utah SIP disapproval. Those final SIP disapprovals, petitioners say, turned on state-specific facts and grew out of several proposed rules signed by regional administrators. And in petitioners' view, the EPA cannot transform a locally or regionally applicable SIP disapproval into a nationally applicable action by deciding to "packag[e] it together with 20 other SIP disapprovals" in a single final rule. Utah Resp. 13.

But petitioners' arguments collide with § 7607(b)(1)'s plain text, which directs courts to consider only the face of the "final action," establishing an action-focused method for determining the proper forum for judicial review. It is simply not material to the analysis that the EPA issued several *proposed* rules or that it could have chosen to issue standalone final SIP disapprovals. What matters is the nature of the agency's final action. *See ATK Launch Sys.*, 651 F.3d at 1197. And here, that action is a nationally applicable final rule, signed by the EPA administrator, disapproving SIPs from 21 states across the country—not just one—because those states failed to meet their good-neighbor obligations.

Nor is it material that petitioners each purport to challenge only one such SIP disapproval. By its terms, § 7607(b)(1) "assigns to the D.C. Circuit all challenges to 'nationally applicable [final actions],' not, for instance, all national challenges or all challenges that will have a national effect." *Id.* (quoting § 7607(b)(1)). Thus, we have made clear that "the manner in which a petitioner frames [their] challenge" does not "alter the court in which the [petition] belongs"; "[t]he nature of the [agency action], not the challenge, controls." *Id.* And we are not alone in making this unremarkable observation. *See, e.g., Hunt Refin. Co. v. EPA*, 90 F.4th 1107, 1110 (11th Cir. 2024) ("When deciding whether a final action is 'nationally applicable,' we begin by 'analyzing the nature of the EPA's action, not the specifics of the petitioner's grievance." (quoting *RMS of Ga., LLC v. EPA*, 64 F.4th 1368, 1372 (11th Cir. 2023))); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017) ("Under the straightforward (if wordy) statutory text [of § 7607(b)(1)], venue depends entirely on—and is fixed by—the nature of the agency's action; the scope of the petitioner's challenge has no role to play in determining venue."); *Sierra Club v. EPA*, 926 F.3d 844, 849, 441 U.S. App. D.C. 376 (D.C. Cir. 2019) ("The court need look only to the face of the agency action, not its practical effects, to determine whether an action is nationally applicable.").

We applied this action-focused approach in *ATK Launch Systems*. There, the petitioners sought review of a final EPA rule listing attainment and nonattainment designations for the NAAQS for fine particulate matter. 651 F.3d at 1195. Although the petitions challenged the

nonattainment designations of only two counties in Utah, the rule "enumerate[d] designations for areas across the country." *Id.* at 1195-96. The EPA moved to dismiss or transfer the petitions under § 7607(b)(1), arguing that they belonged in the D.C. Circuit because the rule was nationally applicable. *Id.* at 1196-97. We agreed, explaining the statute "makes clear that this court must analyze whether the [final action] itself is nationally applicable, not whether the effects complained of or the petitioner's challenge to that [action] is nationally applicable." *Id.* at 1197. Because the rule there applied "a uniform process and standard across the country" and "reache[d] geographic areas from coast to coast," we held that it was nationally applicable and therefore transferred the petitions to the D.C. Circuit. *Id.* at 1197-98, 1200; *see also Hunt*, 90 F.4th at 1110-11 (holding that two EPA final actions were "nationally applicable" because they denied 105 small-refinery exemptions to refineries across the nation and because EPA applied "new statutory interpretation and analytical framework that is applicable to all small refineries no matter their location or market"); *S. Ill. Power Coop.*, 863 F.3d at 671 (holding that similar air-quality designation rule was "nationally applicable" because it was "a final rule of broad geographic scope" and "promulgated pursuant to a common, nationwide analytical method," even though petitioners challenged only EPA's designation of one Illinois county as nonattainment area). Here, too, the final rule is nationally applicable: it applies a consistent statutory interpretation and uniform analytical methods

to disapprove SIPs from 21 states around the country.[6] *See* Air Plan Disapprovals, 88 Fed. Reg. at 9380. So any challenge to that rule belongs in the D.C. Circuit. *See* § 7607(b)(1).

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6. Petitioners attempt to distinguish *ATK Launch Systems* and *Southern Illinois Power Cooperative* by focusing on the nature of the statutory authority under which the EPA took the challenged actions. They highlight that the Clean Air Act assigns to the EPA the responsibility to make air-quality designations, and the states merely offer recommendations on how to designate areas within their boundaries. *See* § 7407(d)(1)(A)-(B). By contrast, petitioners note, the statute delegates to the states the responsibility to craft SIPs, and the EPA must approve such a plan if the agency determines that it is complete and meets all applicable requirements. *See* § 7410(a), (k). So according to petitioners, the EPA's authority "differ[s] significantly" when the agency makes air-quality designations than when it approves or disapproves SIPs, with the EPA taking a more back-seat role when reviewing SIPs. Utah Resp. 19. But we discern no material distinction here. Whether an EPA action is nationally applicable does not turn on the "type" of statutory authority delegated to the agency, *id.* at 22; again, it depends entirely on the nature of the agency's action, *ATK Launch Sys.*, 651 F.3d at 1197. Thus, as the EPA points out, it is appropriate to challenge in a regional circuit court even a final action that sets air-quality designations if that action applies only locally or regionally. *See, e.g., Texas v. EPA*, 983 F.3d 826, 832 (5th Cir. 2020) (holding that final rule establishing attainment and nonattainment designations for counties in Texas was "'locally or regionally applicable' because it [wa]s directed only at . . . contiguous Texas counties" (quoting § 7607(b)(1))). But when a final action concerns states around the country and applies a common analytical method—as in *ATK Launch Systems, Southern Illinois Power Cooperative*, and this case—then the action is nationally applicable.

We recognize that the Fourth, Fifth, and Sixth Circuits recently reached the contrary conclusion: each denied the EPA's motions to transfer petitions challenging the same final rule at issue here.[7] *See Texas v. United States EPA*, No. 23-60069, 2023 U.S. App. LEXIS 13898, 2023 WL 7204840, at *1 (5th Cir. May 1, 2023) (unpublished); *Kentucky v. United States EPA*, No. 23-3216, 2023 U.S. App. LEXIS 18981 (6th Cir. July 25, 2023); *West Virginia v. EPA*, 90 F.4th 323, 331 (4th Cir. 2024). But in our view, all three courts strayed from § 7607(b)(1)'s text and instead applied a petition-focused approach that we and other circuits have rejected. Indeed, the Fifth Circuit conceded that its own precedent recognizes "§ 7607(b)(1)'s use of 'action' means 'the rule or other final action taken by the agency that the petitioner seeks to prevent or overturn.'" *Texas*, 2023 U.S. App. LEXIS 13898, 2023 WL 7204840, at *3-4 (quoting *Texas v. EPA*, 829 F.3d 405, 419 (5th Cir. 2016)). Nevertheless, rather than focusing its analysis on the face of the rule as is required, the Fifth Circuit focused on the nature of the petitions before it—which each challenged a single SIP disapproval contained in the final rule—to conclude that "the relevant unit of administrative action" was each individual SIP disapproval and that such disapprovals were "locally or regionally applicable." 2023 U.S. App. LEXIS 13898, [WL] at *4. The Fourth and Sixth Circuits followed suit. *See Kentucky*, 2023 U.S. App. LEXIS 18981 (following *Texas* and wrongly characterizing "EPA's [disapproval] of *Kentucky's* SIP," not the final rule itself, as the relevant

7. The Eighth Circuit also denied the EPA's transfer motions, but it simply issued summary orders containing no analysis. *See, e.g., Arkansas v. EPA*, No. 23-1320 (8th Cir. Apr. 25, 2023).

"final action"); *West Virginia*, 90 F.4th at 330-31 (joining *Texas* and *West Virginia* and improperly framing "the relevant agency action" as "EPA's disapproval of West Virginia's SIP").

All three decisions generated strong dissents highlighting critical flaws in the majority opinions. In *West Virginia*, for example, the dissent sharply criticized the majority opinion for "jettison[ing the well-established] analysis altogether and instead look[ing] to the nature of West Virginia's challenge to hold that the [f]inal [r]ule is locally applicable." 90 F.4th at 334 (Thacker, J., dissenting). The dissent further pointed out that the decisions from the Fifth and Sixth Circuits likewise "depart[ed] from all relevant precedent," including our decision in *ATK Launch Systems*, "without adequate justification or explanation." *Id.* at 333-35 ; *see also Kentucky*, 2023 U.S. App. LEXIS 18981 (Cole, J., dissenting) (relying on *ATK Launch Systems* and other cases to explain that majority's "limiting [of] the 'action' to Kentucky's state-specific challenge is inappropriate" when "the 'scope of the [final rule]' is much broader" (quoting *Nat. Res. Def. Council v. Thomas*, 838 F.2d 1224, 1249, 267 U.S. App. D.C. 274 (D.C. Cir. 1988))); *Texas*, 2023 U.S. App. LEXIS 13898, 2023 WL 7204840, at *11-12 (Douglas, J., dissenting) (same). Moreover, this misdirected approach may well result in ten regional circuit courts ruling on issues arising from the same nationwide EPA rule, thereby defeating the statute's purpose to centralize judicial review of nationally applicable actions in the D.C. Circuit. *See Texas*, 2023 U.S. App. LEXIS 13898, 2023 WL 7204840, at *13 (Douglas, J., dissenting); *Kentucky*, 2023 U.S. App. LEXIS 18981 (Cole, J., dissenting).

In short, because the Fourth, Fifth, and Sixth Circuit decisions denying the EPA's transfer motions all depart from § 7607(b)(1)'s plain text and our binding precedent, we decline to follow them. *See Hunt*, 90 F.4th at 1111-13 (distinguishing *Texas* and *Kentucky* and further disagreeing with *Calumet Shreveport Refining, LLC v. EPA*, 86 F.4th 1121 (5th Cir. 2023), in which the Fifth Circuit held that two EPA final actions denying 105 small-refinery exemptions were locally or regionally applicable). And applying § 7607(b)(1) as written, we readily conclude that these petitions belong in the D.C. Circuit because they seek review of a nationally applicable final rule.[8]

Conclusion

Because petitioners seek review of a nationally applicable final rule, we grant the EPA's motions to dismiss or transfer in part and transfer the petitions to the D.C. Circuit.

8. Given this conclusion, we need not address the EPA's alternative argument that the petitions belong in the D.C. Circuit even if the final action is "locally or regionally applicable" because it "is based on a determination of nationwide scope or effect" made and published by the EPA. § 7607(b)(1).

APPENDIX B — STATUTORY EXCERPTS

42 U.S.C. § 7607(B)(1)

Administrative proceedings and judicial review

(b) Judicial Review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)1 of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance

certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

Appendix B

42 U.S.C. § 7410

State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D;

(D) 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 pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that,

where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a

condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)

(A) Repealed. Pub. L. 101–549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of

any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c), shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) [1] of this title, suspensions under subsection (f) or (g) (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) [1] of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101–549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)

(A)

(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) respecting indirect source review programs which apply only to federally assisted

highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii)), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)[1] of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A), or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)

(A) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public

hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101–549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)

(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards, and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D.

(d), (e) Repealed. Pub. L. 101–549, title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and

opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of

unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under

section 1857c–10[1] of this title, as in effect before August 7, 1977, or section 7413(d)[1] of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect

for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c–10[1] of this title as in effect before August 7, 1977, or under section 7413(d)[1] of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d)[1] of this title (relating to compliance orders), a plan promulgation under subsection (c), or a plan revision under subsection (a)(3); no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

Appendix B

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The

plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the

Administrator deems appropriate, subject the State to the requirements of this chapter to which

the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this

title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the

Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) (as in effect immediately before November 15, 1990), shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) (as in effect immediately before

November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of

the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development [2] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.