No. 23-1068

In the Supreme Court of the United States

PACIFICORP, *et al.*,
v.
ENVIRONMENTAL PROTECTION AGENCY, *et al.*

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Environmental Protection Agency's ("EPA") disapproval of a State Implementation Plan ("SIP") may be challenged only in the D.C. Circuit under 42 U.S.C. § 7607(b)(1) when EPA packages that disapproval with its disapprovals of other SIPs and purports to use a consistent method in evaluating the state-specific determinations in those SIPs.

PARTIES TO THE PROCEEDINGS

The Utah Industry Petitioners are PacifiCorp; Deseret Generation & Transmission Co-Operative; Utah Municipal Power Agency; and Utah Associated Municipal Power Systems. PacifiCorp, Deseret Generation & Transmission Co-Operative, and Utah Municipal Power Agency were the Petitioners in the Tenth Circuit below in No.23-9512 and are Petitioners here. Utah Associated Municipal Power Systems was the Petitioner in the Tenth Circuit below in No.23-9520 and is a Petitioner here.

The Oklahoma Industry Petitioners are Oklahoma Gas & Electric Company; Tulsa Cement LLC, d/b/a Central Plains Cement Company LLC; Republic Paperboard Company LLC; and Western Farmers Electric Cooperative. Oklahoma Gas & Electric Company was the Petitioner in the Tenth Circuit below in No.23-9521 and is a Petitioner here. Tulsa Cement LLC, d/b/a Central Plains Cement Company LLC, and Republic Paperboard Company LLC were the Petitioners in the Tenth Circuit below in No.23-9533 and are Petitioners here. Western Farmers Electric Cooperative was the Petitioner in the Tenth Circuit below in No.23-9534 and is a Petitioner here.

The U.S. EPA and Michael Regan, in his official capacity as the Administrator of the U.S. EPA, were

the Respondents in each of the Tenth Circuit cases below and are the Respondents here.

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INTRODUCTION

Under Section 307(b)(1) of the Clean Air Act ("CAA"), challenges to "nationally applicable" EPA actions—as well as challenges to actions that EPA validly determines have a "nationwide scope or effect"—must be filed in the D.C. Circuit, while challenges to EPA actions that are "locally or regionally applicable" must go to the regional Circuits. 42 U.S.C. § 7607(b)(1). This regime embodies Congress' judgment that while the D.C. Circuit is best positioned to resolve challenges to EPA actions that operate nationwide or otherwise impact the entire Nation, the regional Circuits are better suited for adjudicating the legality of all other EPA actions under the CAA.

Determining the appropriate venue for challenges to EPA's approval or disapproval of a State Implementation Plan ("SIP") under Section 307(b)(1) is easy. "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, 455–56 (D.C. Cir. 2013) (Kavanaugh, J.) (citations omitted). And the CAA's venue provision's plain text treats EPA's disapproval of a SIP in the same way as an approval, with both types of actions challengeable in the appropriate regional Circuit by default. After all, a SIP regulates emission sources

only within one State. Such an action is by its nature and statutory definition only locally applicable.

Application of these Section 307(b)(1) principles to the case here is thus straightforward. After EPA disapproved Utah's SIP and Oklahoma's SIP for nitrogen oxides (NO_x) emissions, several parties (including Petitioners here) challenged those disapprovals in the Tenth Circuit. That is the proper venue for those two separate challenges to two separate EPA actions. Neither of these SIP disapprovals is "nationally applicable," as EPA only acted on each State's submission based on that submission, thus each disapproval comprised EPA's action as to only one State.

While Section 307(b)(1) allows EPA to "determine that [ ] otherwise locally or regionally applicable regulations have a nationwide scope or effect," *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455—and thereby establish the D.C. Circuit as the appropriate venue—EPA did not validly make that determination here with regard to the two relevant actions: EPA's disapproval of both Utah's SIP submission and Oklahoma's SIP submission, respectively. Rather, EPA asserted that its disapprovals of 21 States' submissions together had a "nationwide scope or effect." But the statutory focus of Section 307(b)(1) is the relevant EPA action, which here is EPA's individually disapproving Utah's SIP and Oklahoma's SIP. It would, of course, be impossible for EPA to have issued its disapproval for either of those two

individual SIPs "based on a determination" of "nationwide scope or effect." 42 U.S.C. § 7607(b)(1). After all, each SIP governs NO_x emissions only within one State. Although EPA (erroneously) claims that Utah's and Oklahoma's emissions unlawfully affect areas outside the borders of each State, even that effect is regional, not national, because the alleged impacts are limited to one portion of one downwind State (for Utah) and portions of two downwind States (for Oklahoma).

The Tenth Circuit nevertheless transferred these cases challenging EPA's disapprovals of Utah's SIP and Oklahoma's SIP to the D.C. Circuit, after concluding that EPA's actions were "nationally applicable" under Section 307(b)(1). The Tenth Circuit rested its holding on two features of EPA's disapprovals. First, the Tenth Circuit pointed to EPA's administrative decision to package its disapprovals of Utah's SIP and Oklahoma's SIP into a single Federal Register notice along with notices disapproving 19 other individual SIPs. Second, the Tenth Circuit pointed to EPA's claim to apply common analytical methods to all 21 of its SIP disapprovals in that notice.

The Tenth Circuit's approach violates Section 307(b)(1). The statutory text and structure do not empower EPA to transform a "locally or regionally applicable" action on a single SIP submission into a "nationally applicable" one by aggregating that SIP disapproval with other States' disapprovals in a

single Federal Register notice, whether out of EPA's desire for administrative convenience, to wrest control of interstate emissions from individual States, or to forum-shop to the D.C. Circuit. Section 307(b)(1) sets "the locus of judicial review of the actions of EPA," *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980), based upon Congress' judgment about which Circuits are best equipped to consider the actions at issue, not based upon EPA's preference of where to defend those actions.

Similarly, EPA's claimed reliance on the use of common analytical methods for all 21 of its SIP disapprovals does not make disapproving Utah's SIP or Oklahoma's SIP nationally applicable. Section 307(b)(1) does not focus on whether EPA applied a consistent methodology when taking the disputed action. Rather, it looks to whether that *action* itself is nationally applicable. Any other conclusion would gut Section 307(b)(1)'s preference that the regional Circuits evaluate locally and regionally applicable actions. After all, the Administrative Procedure Act ("APA") and the CAA require EPA to act in a consistent manner.

This Court should reverse the judgment of the Tenth Circuit and remand with instructions to proceed to the merits of the petitions.

DECISION BELOW

The Tenth Circuit's February 27, 2024, decision granting in part EPA's motions to dismiss or transfer and directing transfer is reported at 93 F.4th 1262 and reproduced at Pet.App.1a–17a.

JURISDICTION

The Tenth Circuit entered its order granting in part EPA's motions to dismiss or transfer and directing transfer on February 27, 2024. Pet.App.1a–17a. This Court has jurisdiction to review that order under 28 U.S.C. § 1254(1). This Court granted the Petition For A Writ Of Certiorari on October 21, 2024.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of Sections 110 and 307 of the CAA, 42 U.S.C. §§ 7410, 7607, are set forth at Pet.App.26a–35a. EPA published its final disapprovals of Utah's SIP and Oklahoma's SIP in the Federal Register at 88 Fed. Reg. 9,336 (Feb. 13, 2023).

STATEMENT OF THE CASE

A. Legal Background

1. By adopting the Clean Air Act, Congress enacted an air-pollution-control regime that "envisions States and the federal government

working together to improve air quality." *Ohio v. EPA*, 603 U.S. 279, 283 (2024); *see* 42 U.S.C. § 7401. In this cooperative-federalism framework, Congress created "three main regulatory programs to control air pollution from stationary sources such as power plants," including the National Ambient Air Quality Standards ("NAAQS") program—the program at issue here. *West Virginia v. EPA*, 597 U.S. 697, 707 (2022) (identifying the other two programs as the "New Source Performance Standards program" and the "Hazardous Air Pollutants (HAP) program").

The NAAQS program is the centerpiece of the CAA's federal-state collaboration. This program regulates air pollutants like ozone, which "'may reasonably be anticipated to endanger public health or welfare,' and 'the presence of which in the ambient air results from numerous or diverse mobile or stationary sources.'" *Id.* (quoting 42 U.S.C. § 7408(a)(1)). Congress assigned distinct roles to EPA and the States under the NAAQS program. Congress tasked EPA with "identifying" the pollutants regulated and then periodically "establish[ing] a NAAQS for each." *Id.*; *Ohio*, 603 U.S. at 283; *see* 42 U.S.C. §§ 7408–09. The NAAQS for a given pollutant "represents 'the maximum airborne concentration of the pollutant that the public health can tolerate.'" *West Virginia*, 597 U.S. at 707 (quoting *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 465 (2001) (brackets omitted)). Congress did not authorize EPA to "choose which sources [within any State] must reduce their pollution and by how much to meet the

ambient pollution target." *Id.* Instead, Section 110 gives each State the primary responsibility to regulate air pollution from sources within its borders to meet the NAAQS. *Ohio*, 603 U.S. at 283.

A State meets its air-pollution-regulation obligations under the CAA's NAAQS program by designing a SIP that provides for the "implementation, maintenance, and enforcement" of a given NAAQS in its jurisdiction. 42 U.S.C. § 7410(a)(1). States have "wide discretion in formulating" their respective SIPs. *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). A "State is at liberty to adopt [in its SIP] whatever mix of emission limitations it deems best suited to its particular situation," "so long as the ultimate effect of [the] State's choice of emission limitations is compliance with the national standards for ambient air." *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

Relevant here, a State's SIP must comply with certain interstate-transport obligations. 42 U.S.C. § 7410(a)(2)(D)(i)(I); *Ohio*, 603 U.S. at 283–84. The CAA recognizes that "air currents can carry pollution across state borders," meaning that "emissions in upwind States sometimes affect air quality in downwind States." *Ohio*, 603 U.S. at 283–84. So, to resolve that "externality problem," *id.*, Section 110 requires a State to develop a SIP to address interstate-transport of pollutants from within that State, requiring the SIP to "contain adequate provisions . . . prohibiting . . . any source or other type

of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]," 42 U.S.C. § 7410(a)(2)(D).

Congress requires EPA to review every State's plan to ensure that each individual SIP complies with the CAA. *Id.* § 7410(k)(1)–(3); *Union Elec.*, 427 U.S. at 250. EPA "has no authority to question the wisdom of a State's choices of emission limitations" in a SIP when EPA conducts its compliance review. *Ohio*, 603 U.S. at 284 (quoting *Train*, 421 U.S. at 79). "So long as a SIP satisfies the 'applicable requirements' of the Act . . . , EPA 'shall approve' it within 18 months of its submission." *Id.* (quoting 42 U.S.C. § 7410(k)(3), and citing 42 U.S.C. § 7410(k)(1)(B), (k)(2)). Only if EPA first finds that a State has failed to submit a CAA-compliant SIP does EPA gain the authority to promulgate a "Federal Implementation Plan" ("FIP") "for the noncompliant State." *Id.* (quoting 42 U.S.C. § 7410(c)(1)).

2. Section 307(b)(1) establishes the appropriate venue for challenges to EPA action under the CAA, including challenges to EPA approving or disapproving a SIP under Section 110. 42 U.S.C. § 7607(b)(1); *see Harrison*, 446 U.S. at 584–85. Section 307(b)(1) sets out a default rule for venue and an exception to that rule in its first three sentences.

In Section 307(b)(1)'s first two sentences, Congress provides the default rule to determine the appropriate venue for challenges to EPA's actions. The first sentence describes what challenges must be heard in the D.C. Circuit by listing actions authorized by the CAA where EPA sets national policy, such as any "national primary or secondary ambient air quality standard" and "any emission standard or requirement" in Section 112, among others, and then by including a catchall provision for challenges to "any other nationally applicable" EPA actions "under this chapter." 42 U.S.C. § 7607(b)(1). The second sentence has the same structure, describing what challenges must be heard in the appropriate regional Circuit by listing actions authorized by the CAA where EPA implements the CAA on a case-by-case basis, such as by "approving or promulgating any implementation plan" under Section 110. *Id.* This sentence then provides a catchall for "any other final action . . . under this chapter (including any denial or disapproval by the Administrator under subchapter I)"—which includes Section 110 of the CAA—that "is locally or regionally applicable." *Id.* Thus, the text clearly enumerates that, when EPA disapproves a SIP, that final action is "a[ ] denial or disapproval by the Administrator under subchapter I" and thus a "locally or regionally applicable" action. *Id.*

Section 307(b)(1)'s third sentence creates a limited exception to the default rule in the first two sentences. A petition for review of a "locally or

regionally applicable" action may be filed in the D.C. Circuit "if such action is based on a determination of nationwide scope or effect" and EPA "finds and publishes that such action is based on such a determination." *Id.* Put another way, this exception provides that challenges to certain actions that ordinarily must be heard in the regional Circuits will be heard in the D.C. Circuit when those "otherwise locally or regionally applicable regulations have a nationwide scope or effect." *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455.

Congress' changes to Section 307 show concern with the venue for challenges to SIP-related actions. As originally enacted, Section 307 provided that SIP approvals could be challenged "only" in the "appropriate circuit." Clean Air Act Amendments of 1970, Pub. L. No.91-604, § 12(a), 84 Stat. 1676, 1708 (1970). This prompted concern that the failure to specify the "appropriate circuit" would create "threshold litigation over the question of which is the appropriate circuit," with the Administrative Conference of the United States recommending that Congress "clarify[ ] that the appropriate circuit is the one containing the state whose plan is challenged." Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,767, 56,767 (Dec. 30, 1976).

EPA's then-General Counsel, G. William Frick, advocated for a narrow exception to the Administrative Conference's recommendation that all

"SIP issues" be reviewed "in the local circuit." *Id.* at 56,768–69. Frick noted that while "approval and promulgation of [SIPs] under the Clean Air Act usually involve issues peculiar to the affected States," EPA sometimes takes actions such as granting "two-year extensions of the date for attainment of national ambient air quality standards in a number of metropolitan areas and its promulgation of generic regulations (applicable to all States) that require prevention of significant deterioration of air quality." *Id.*; *see Dayton Power & Light Co. v. EPA*, 520 F.2d 703 (6th Cir. 1975) (addressing regulations that "amend[ed] every state's [SIP] in precisely the same way"); *NRDC v. EPA*, 465 F.2d 492 (1st Cir. 1972) (addressing two-year extension and similar issues). For this subset of SIP-related actions—which do not involve EPA granting or denying a particular State's SIP—EPA's conduct is "virtually identical to promulgation of 'national standards.'" 41 Fed. Reg. at 56,769. Frick explained that "the validity" of such a "nationally applicable regulation will not turn on the particulars of its impacts within a given Circuit," including because "such actions typically involve establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to particular geographical areas." *Id.* at 56,769 & n.2.

Soon after, in 1977, Congress amended Section 307 to its current form. *See* Clean Air Act Amendments of 1977, Pub. L. No.95-95, § 305(c), 91 Stat. 685, 776 (1977); Safe Drinking Water Act

Amendments of 1977, Pub. L. No.95-190, § 14(a)(80), 91 Stat. 1393, 1404 (1977) (technical amendment). Congress first amended the first two sentences to include the catchall provisions. Pub. L. No.95-95, § 305(c)(1)–(2), 91 Stat. at 776. This expanded the jurisdiction of the courts of appeals from just the enumerated actions in each sentence to "any other nationally applicable regulations promulgated, or final action taken" or "any other action." *Harrison*, 446 U.S. at 590. Congress then passed technical amendments noting "any denial or disapproval by the Administrator under title I" was locally or regionally applicable within that catchall, Pub. L. No.95-190, § 14(a)(80), 91 Stat. at 1404, to "clarify some questions relating to venue for review of rules or orders," *Harrison*, 446 U.S. at 590 (citing H.R. Rep. No.95–294, at 323–24 (1977)). The House Report accompanying the 1977 Clean Air Act Amendments explained that the amendments "provide[ ] for essentially locally, stateside, or regionally applicable rules or orders," such as actions on SIPs, "to be reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located." H.R. Rep. No.95-294, at 323. It noted that "the committee's view . . . concurs . . . with the comments, concerns, and recommendation contained" in Frick's separate statement regarding the CAA's venue provisions. *Id.* at 324 (citing 41 Fed. Reg. at 56,768).

B. Factual And Procedural Background

1. In 2015, EPA lowered the NAAQS for ground-level ozone to 70 parts per billion ("ppb"). 80 Fed. Reg. 65,292 (Oct. 26, 2015). Once EPA lowered the NAAQS for ground-level ozone, States had the duty to submit new SIPs within three years, or by 2018. *See* 42 U.S.C. § 7410(a)(1). Utah and Oklahoma created their state-specific implementation plans, which are the subject of the petitions here.

Utah promptly began designing its SIP for submission to EPA following the issuance of the 2015 ozone NAAQS. *See* JA33a, 60a. Utah "engaged early and often" with EPA to ensure that it crafted an interstate-transport SIP that satisfied its CAA obligations. JA60a. EPA provided comments on drafts of Utah's SIP, JA60a–61a, encouraging Utah to apply EPA guidance regarding the setting of a 1-part-per-billion emissions-contribution threshold for determining whether NO_x emissions contributions (as measured by localized air quality receptors) to downwind States were significant, JA61a; *see* 42 U.S.C. § 7410(a)(2)(D)(i)(I). EPA also recommended that Utah elaborate in its SIP on the contributions of NO_x to downwind States from biogenic and international emissions. *See* JA49a, 60a–61a.

After incorporating EPA's feedback, Utah concluded in its SIP that its contributions to the air quality in downwind States were not significant and, therefore, additional emissions reductions by Utah

sources were not necessary under Section 110. *See* JA57a. Utah rested that conclusion upon state- and region-specific facts and analyses relating to Utah's unique topographical, geographical, and meteorological characteristics, as well as EPA guidance. JA57a, 65a–66a. Utah began by identifying five receptors in Colorado's Denver Metro/North Front Range Nonattainment Area where Utah's emissions contributed to those receptors exceeding 1 percent of the 2015 ozone NAAQS—three nonattainment receptors and two maintenance receptors. JA43a–44a. Following EPA's earlier guidance, Utah screened those receptor sites using the 1-part-per-billion threshold to determine that Utah's emissions were "linked" only to four of these receptors. JA43a–45a, 50a. Utah applied a "weight-of-the-evidence" approach, consistent with past EPA practice, to determine whether its contributions contributed "significantly" to the nonattainment, or "interfere[d] with" the maintenance of the 2015 ozone NAAQS in Colorado. JA42a–43a, 57a. In particular, Utah considered that Colorado's own in-state contributions were much greater, a phenomenon far more often observed in western States than eastern States. JA47a–49a. Utah further considered that international emissions, emissions from wildfires, and biogenic emissions also contributed much more significantly than Utah's own contributions. JA49a–51a. And Utah noted that it had seen substantial emissions reductions in its State from 2011 to 2017, and that it expected this downward trend to continue.

JA51a–57a. Utah submitted its revised, proposed SIP to EPA on January 24, 2020. *See* JA33a–34a.[1]

Oklahoma similarly began the arduous process of constructing its interstate-ozone SIP shortly after the 2015 NAAQS issued. It began by identifying the appropriate air quality model, which turned out to be Texas's regional model based on year 2012. JA13a–18a. Oklahoma found that the Texas model appropriately accounted for regional effects and its updated data did not use meteorological conditions in 2011 (a meteorological extreme year for the region) in contrast to EPA's model. JA13a–18a. Oklahoma also relied on EPA's 2018 guidance documents which advised that States had flexibility in choosing between a 1 part-per-billion NO_x threshold and a one percent threshold that produced insignificant differences. JA16a–18a. And Oklahoma relied on EPA's guidance that approved a "weight of the evidence" analysis. *See* 82 Fed. Reg. 1,733, 1,740 (Jan. 6, 2017); JA23a–26a.

Relying on EPA's contemporaneous guidance, Oklahoma timely filed its SIP, which ultimately concluded that its contributions to the air quality in downwind States were not significant and that it did not need any more stringent emissions reductions

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[1] EPA initially made an incompleteness determination on Utah's SIP relating to adequate public notice, 84 Fed. Reg. 66,612, 66,614 (Dec. 5, 2019), which Utah corrected, JA33a–34a.

(than already in place) under its Section 110-approved SIP for other emissions. JA1a–3a, 26a. Oklahoma's SIP analyzed whether areas in downwind States, initially Michigan[2] and Texas, would fail to attain or maintain the 2015 ozone NAAQS under the 1 part-per-billion threshold. JA21a–25a. In its complex analysis of localities in those States, Oklahoma determined that the localities would reach attainment under Texas's 2012 regional model and confirmed this analysis by further reviewing local trends for the identified sites. JA20a–25a. Oklahoma then reviewed its own emissions trends and found that its projected contribution to the Michigan locale comprised only three percent of all upwind contributions there. JA25a–26a. The State further considered that its current emissions controls would continue to reduce its emissions to half its 2011 levels. JA25a–26a; *see* JA16a–17a.

2. After EPA unlawfully delayed its actions on Utah's SIP and Oklahoma's SIP for years beyond its statutory review period, 42 U.S.C. § 7410(k)(2), EPA separately proposed to disapprove Utah's SIP, *see* 87 Fed. Reg. 31,470 (May 24, 2022); and Oklahoma's SIP, *see* 87 Fed. Reg. 9,798 (Feb. 22, 2022).

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[2] EPA ultimately agreed that Oklahoma's emissions would not impact Allegan County, Michigan. 87 Fed. Reg. 9,798, 9,820 (Feb. 22, 2022).

In its proposed disapproval of Utah's SIP, EPA disagreed with Utah's determination that sources within Utah did not significantly contribute to nonattainment of the 2015 NAAQS for ozone for certain areas in Colorado. 87 Fed. Reg. at 31,483. EPA began by rejecting Utah's conclusion "that a 1 ppb threshold is appropriate for the Denver area receptors to which it is linked" because Utah "did not adequately explain how a 1 ppb threshold would be justified with respect to all the [Colorado] receptors to which Utah is linked." *Id.* at 31,478; *see also id.* at 31,478–82. EPA then rejected Utah's analysis that the evidence, which included "the relatively large impact" of "international emissions," "non-anthropogenic emissions," and "home state emissions at the Colorado receptors," as well as "emissions reductions already achieved as a result of other regulatory programs," weighed against finding a significant cross-state impact. *Id.* at 31,482; *see also id.* at 31,482–83.

As for Oklahoma's SIP, EPA proposed to disapprove it, along with submissions from Texas, Arkansas, and Louisiana, in February 2022. 87 Fed. Reg. 9,798. EPA's decision to disapprove Oklahoma's SIP relied heavily on rejecting the Texas 2012 modeling based on alleged technical flaws related to identification of maintenance-only receptors. *Id.* at 9,820–21. Instead, EPA applied new modeling (unavailable to Oklahoma when it formulated its SIP) that identified linkages between Oklahoma's emissions and Denton County, Texas and Cook

County, Illinois. *Id.* at 9,822.[3] It then found that Oklahoma had failed to analyze what emissions should be prohibited to prevent emissions from interfering with the maintenance of the 2015 ozone NAAQS in those two areas. *Id.* EPA rejected Oklahoma's choice of screening threshold and analysis of existing emissions reductions to electric generating units that had caused a downward trend in emissions. *Id.* at 9,823. EPA similarly denied Oklahoma's weight of the evidence analysis that took into account local emissions data and collective contributions to support its finding that Oklahoma's emissions did not significantly contribute to downwind air quality issues. *Id.*

After separately proposing to disapprove Utah's SIP and Oklahoma's SIP, EPA packaged its final disapprovals of these submissions in one Federal Register notice, along with the disapprovals for 19 other SIPs and deferrals on two other SIPs. 88 Fed. Reg. 9,336, 9,337–38 (Feb. 13, 2023). In that combined Federal Register notice, EPA explained that it had acted on each State's SIP "in light of the facts and circumstances of each particular state's submission," *id.* at 9,340, meaning that "the contents of each individual state's submission were evaluated

[3] EPA further revised its modeling prior to issuing its final disapproval. *See* 88 Fed. Reg. 9,336, 9,339 (Feb. 13, 2023). That new modeling added a new linkage to Galveston County, Texas. *See* JA255a.

on their own merits," *id.* at 9,354. The combined Federal Register notice contained only "a brief, high level overview of the SIP submissions and the EPA's evaluation and key bases for disapproval," while explaining that "[t]he full basis for the EPA's disapprovals is available in the relevant Federal Register notification of proposed disapproval for each state," as well as in certain technical supporting documents and in EPA's responses to comments. *Id.* So, when EPA disapproved Utah's SIP and Oklahoma's SIP, EPA provided only one-paragraph, "high level overview[s]" of the bases for its actions, *id.* that largely reiterated and incorporated EPA's prior reasoning from its separately proposed disapprovals of Utah's SIP and Oklahoma's SIP, *id.* at 9,360 (Utah); *id.* at 9,359 (Oklahoma).

Finally, EPA addressed in the combined Federal Register notice what it claimed was the proper venue for any challenges to its actions on the 21 SIPs in the combined Federal Register notice. *Id.* at 9,380–81.

EPA claimed that "[t]his rulemaking is 'nationally applicable,'" meaning that challengers must file their petitions in the D.C. Circuit. *Id.* at 9,380. According to EPA, it took a single "final action" "applying a uniform legal interpretation and common, nationwide analytical methods" "to disapprove SIP submissions that fail to satisfy the[ ] requirements for the 2015 ozone NAAQS." *Id.* EPA claimed the "action" was nationally applicable because it "addresses implementation of the good neighbor provision" in 21

States across the country and due to "the interdependent nature of interstate pollution transport and the common core of knowledge and analysis involved in evaluating the submitted SIPs." *Id.*

"In the alternative," EPA claimed that for the same "final action," it "exercis[ed] the complete discretion afforded to [the agency] under the CAA to make and publish a finding that this action is based on a determination of 'nationwide scope or effect.'" *Id.* EPA asserted that the "final action" had a nationwide scope or effect because it applied a uniform statutory interpretation to a "common core of nationwide policy judgments and technical analysis concerning the interstate transport of pollutants throughout the continental U.S." *Id.* But EPA also explained that it "evaluated each state's arguments for the use of alternative approaches or alternative sets of data" to avoid inequitable results between the States. *Id.* at 9,381. Notably, EPA only refers to taking one action in the combined Federal Register notice. *See id.* at 9,380–81.

3. Petitioners—who are industry members with significant interests in Utah and Oklahoma—each challenged EPA's disapproval of Utah's SIP or its disapproval of Oklahoma's SIP in the Tenth Circuit. *See generally* Pet.App.9a. The States of Utah and Oklahoma also filed their own separate petitions for review challenging EPA's disapproval of their own SIPs in the Tenth Circuit. *See* Pet.App.9a.

Petitioners, Utah, and Oklahoma all specified in their petitions for review that they were challenging only EPA's action disapproving Utah's SIP or Oklahoma's SIP, as appropriate. *See generally* Pet.App.12a. Thus, Petitioners, Utah, and Oklahoma asserted that venue for their respective challenges was appropriate in the Tenth Circuit, under Section 307(b)(1).

The parties engaged in extensive venue and stay proceedings. After EPA moved the Tenth Circuit to transfer venue for the petitions to the D.C. Circuit, Pet.App.9a, a Tenth Circuit panel—Judges Tymkovich, Bacharach, and Rossman—entered an order referring EPA's motions to transfer venue to the merits panel. Order, *Utah v. EPA,* Nos.23-9509, *et al.,* Doc.10994985 (10th Cir. Apr. 27, 2023). Then, on July 27, 2023, the Tenth Circuit—Judges Tymkovich and Carson—granted motions to stay the disapprovals of Utah's SIP and Oklahoma's SIP, finding that "petitioners have satisfied their burden as to each" of the stay factors. Order at 4, *Utah,* Nos.23-9509, *et al.,* Doc.11016742 (10th Cir. July 27, 2023). The parties then completed full merits briefing, *see* Order at 3–4, *Utah*, Nos.23-9509, *et al.*, Doc.11002290 (10th Cir. May 30, 2023); Minute Order, *Utah*, Nos.23-9509, *et al.*, Doc.11038946 (10th Cir. Oct. 25, 2023), and the Tenth Circuit set the case for oral argument on March 21, 2024, Notice, *Utah*, Nos.23-9509, et al., Doc.11058134 (10th Cir. Jan. 10, 2024).

Shortly before oral argument, the Tenth Circuit changed course and granted EPA's motion to transfer

to the D.C. Circuit. Pet.App.18a–25a; Pet.App.1a–17a. The Tenth Circuit—Judges Moritz, Ebel, and Rossman—held that the D.C. Circuit was the appropriate venue based on Section 307(b)(1)'s first sentence, Pet.App.6a–7a, concluding that the "final rule" is "nationally applicable" for two reasons, Pet.App.11a. First, the court found that EPA's actions here are "nationally applicable" because EPA "disapprov[ed] SIPs from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits." Pet.App.11a. Second, the Tenth Circuit concluded that these actions are "nationally applicable" because EPA applied "consistent statutory interpretation and uniform analytical methods." Pet.App.14a. The Tenth Circuit did not "address the EPA's alternative argument that the petitions belong in the D.C. Circuit" "because [the final rule] 'is based on a determination of nationwide scope or effect' made and published by the EPA." Pet.App.17a n.8.

Other States and industry groups challenged EPA disapproving their respective States' SIPs in that Federal Register notice in the appropriate regional Circuits, with the Tenth Circuit being the only court to have transferred the challenges to the D.C. Circuit. The Fourth, Fifth, and Eighth Circuits all rejected EPA's attempt to transfer those challenges to the D.C. Circuit, with the Fourth and Fifth Circuits providing detailed opinions. *West Virginia v. EPA*, 90 F.4th 323 (4th Cir. 2024); *Texas v. EPA*, No.23-60069, 2023 WL 7204840 (5th Cir. May 1, 2023); Order, *Arkansas v.*

EPA, No.23-1320, Doc. 5280996 (8th Cir. May 25, 2023). The Sixth, Ninth, and Eleventh Circuits deferred venue determinations to merits panels. *E.g.*, Order, *Alabama v. EPA*, No.23-11173, Dkt.24 (11th Cir. July 12, 2023). Thereafter, and most recently, the Sixth Circuit denied EPA's motion to transfer venue, in a detailed opinion that also vacated EPA's disapproval of Kentucky's SIP. *Kentucky v. EPA*, No.23-3216, 2024 WL 5001991 (6th Cir. Dec. 6, 2024).

This Court granted the Petition For A Writ Of Certiorari and consolidated this case for briefing and oral argument with No.23-1067.

SUMMARY OF THE ARGUMENT

I. The CAA's default venue provision places challenges to EPA decisions on SIPs—like EPA's disapproval of Utah's SIP and Oklahoma's SIP—in the appropriate regional Circuit, which here is the Tenth Circuit.

A. Congress decided that the nature of EPA's statutory action should determine which Circuit hears the case. Section 307(b)(1)'s text enumerates EPA actions that are "nationally applicable" or "locally or regionally applicable." In its first sentence, Section 307(b)(1) explains that the D.C. Circuit must hear challenges to EPA "promulgating any national primary or secondary ambient air quality standard." 42 U.S.C. § 7607(b)(1). And in Section 307(b)(1)'s second sentence, the regional Circuit hears disputes

over EPA "approving or promulgating any implementation plan under Section 110," including any "denial or disapproval" of an implementation plan. *Id.* The CAA includes catchall provisions for any other non-enumerated final action "under this chapter," that either sets national policy and is "nationally applicable" or involves implementing national policy on a case-by case basis and is therefore "locally or regionally applicable." *Id.* The latter catchall also expressly "includ[es] any denial or disapproval by the Administrator under subchapter I." *Id.*

B. Challenges to EPA disapproving Utah's SIP and Oklahoma's SIP belong in the Tenth Circuit under the default venue provision. Section 307(b)(1) mandates that these state-specific SIP disapprovals are not nationally applicable. And due to the "purely local" nature of a SIP, *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011) (Murphy, J., joined by Gorsuch & Hartz, JJ.), EPA action on a State's SIP submittal is "the prototypical locally or regionally applicable action" that belongs in the regional Circuit. *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455–56. This "includ[es] any denial or disapproval" of a SIP, as Section 307(b)(1)'s text expressly notes. 42 U.S.C. § 7607(b)(1). And EPA's notices disapproving Utah's SIP and Oklahoma's SIP confirm this conclusion, as EPA evaluated each State's respective submission and rejected the state-specific findings about each State's domestic emissions sources and trends and the emissions'

impacts on attaining or maintaining 2015 ozone NAAQS in different localities (one in Colorado for Utah, and two in Texas for Oklahoma).

C. The Tenth Circuit erroneously held that EPA disapproving Utah's SIP and Oklahoma's SIP were part of a single "nationally applicable" action. The court determined that consolidating multiple disapprovals of 21 different SIPs by States into a single Federal Register notice transformed the prototypically local action into a nationally applicable action. But the relevant statutory "action" under the CAA's default venue provision is the disapproval of each individual SIP, no matter how EPA packages that disapproval. The Tenth Circuit also believed that merely applying a uniform statutory interpretation and common analytical methods, as required by the APA, creates a "nationally applicable" action, but this has no basis in the statutory text. And this approach would lead to absurd results because, under the APA and the CAA, EPA must always apply uniform methodologies in its actions.

II.A. Under Section 307(b)(1)'s exception to the default venue rule, a petition for review of a "locally or regionally applicable" action may only be filed in the D.C. Circuit "if such action is based on a determination of nationwide scope or effect" and EPA "finds and publishes that such action is based on such a determination." 42 U.S.C. § 7607(b)(1). To avail itself of this exception, EPA must correctly identify the statutory "action" and validly determine that it

took the challenged action "based on a determination" of the "nationwide scope or effect" of the action. *Id.* When "otherwise locally or regionally applicable regulations have a nationwide scope or effect," and EPA publishes the required finding, the D.C. Circuit hears the challenge. *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455.

B.1. Here, EPA based its "determination of nationwide scope or effect" on the issuance of a single notice covering actions that apply to many States, but that is not a statutorily relevant action for venue purposes. Rather, the relevant actions are those that EPA took with regard to Utah's and Oklahoma's SIP submission. EPA's "finding" thus has no legal effect because EPA improperly defined the "action" at issue.

2. Analyzing the correct action (EPA individually disapproving Utah's and Oklahoma's SIPs), EPA's decisions have no nationwide scope or effect. These SIPs regulate only sources within each State and analyze in-state sources of ozone-causing emissions on a state-specific basis. For example, Utah determined that modeling for the eastern United States insufficiently described ozone transport in the western United States, and Utah's local analysis showed fewer receptors in Denver linked to Utah's emissions. Oklahoma, by contrast, relied in part on Texas's 2012 air modeling because that model more accurately described conditions in the southern United States than EPA's model, including in Texas where Oklahoma's emissions could potentially impact

attainment. EPA's disapprovals of these two different decisions could not have nationwide scope because the decisions did not even apply to both Oklahoma and Utah as each State had made modeling and attainment findings unique to its geographic circumstances. Nor could EPA have based its disapproval on a determination of nationwide "effect" because—even under EPA's reasoning—emissions from Utah impacted a handful of receptors in neighboring Colorado and emissions from Oklahoma affected a limited number of receptors in Texas.

3. EPA's assertions that its Utah SIP and Oklahoma SIP disapprovals are based on a determination of nationwide scope or effect lack merit. Under EPA's reading, every EPA action applying a national standard has nationwide scope or effect, which would render Section 307(b)(1)'s second sentence pure surplusage. Similarly, EPA's claim that its technical analysis had nationwide scope or effect fails because EPA admitted that it made individual determinations as to what was equitable for each individual State. And Congress did not grant EPA unfettered discretion to determine the venue for any challenge. Congress set up a careful statutory scheme so that courts would examine the "geographical aspects of the factual and analytical circumstances of the agency's determination" to determine whether a final action has nationwide scope. *West Virginia*, 90 F.4th at 328. That independent judicial inquiry reveals EPA's actions to be quintessentially local, requiring reversal.

ARGUMENT

I. EPA's Actions Disapproving Utah's SIP And Oklahoma's SIP Are "Locally Or Regionally Applicable" Actions Under Section 7607(b)(1)'s Default Venue Provision

A. Section 307(b)(1)'s first two sentences create a default rule for determining the appropriate venue for challenges to EPA's actions under the CAA, while Section 307(b)(1)'s third sentence creates a limited exception to that default rule. *See infra* Part II (addressing Section 307(b)(1)'s third sentence).

Section 307(b)(1)'s first sentence sets the D.C. Circuit as the default venue for challenges to EPA actions that are "nationally applicable." 42 U.S.C. § 7607(b)(1). As a textual matter, "nationally applicable" applies to the terms "regulations promulgated, or final action taken" by EPA. *Id.* "[T]he regulations or action must 'have reference to' ('applicable') the 'nation as a whole' ('nationally')." *Kentucky*, 2024 WL 5001991, at *7 (citing definitions from 1 Oxford English Dictionary 575 (2d ed. 1989); 10 Oxford English Dictionary, *supra,* at 235; Webster's Third New Int'l Dictionary 105, 1505 (1976)). The word "'[n]ational' contemplates an activity with a nationwide scope." *Id.* (citing Black's Law Dictionary 923 (5th ed. 1979)).

The structure of the first sentence confirms this reading. It begins by enumerating EPA actions under

the CAA that are always "nationally applicable"—actions challengeable in the D.C. Circuit by default. *Id.* at *6. This list includes, for example, "[an] action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section [112]," as well as "any standard of performance or requirement under section [202]." *Id.* (citation omitted). These actions all share the common feature of EPA setting national policy or standards for subsequent implementation across the Nation. *See id.* at *7. Section 307(b)(1)'s first sentence then ends with a catchall provision, which identifies the D.C. Circuit as the venue for challenges to "any other nationally applicable" EPA actions "under this chapter." 42 U.S.C. § 7607(b)(1); *Kentucky*, 2024 WL 5001991, at *7.

Section 307(b)(1)'s second sentence follows the same structure but sets the appropriate regional Circuits as the default venue for challenges to EPA actions that are "locally or regionally applicable." 42 U.S.C. § 7607(b)(1). The second sentence begins by listing certain EPA actions that are categorically "locally or regionally applicable," challengeable in the appropriate regional Circuit by default. *Id.* For example, and most relevant here, this list includes "the Administrator's action in approving or promulgating any implementation plan under section [110]"—the section governing SIPs—as well as "any order under section [111(j)]," "under section [112]," among other provisions. *Id.*; *Kentucky*, 2024 WL

5001991, at *6 (citation omitted). The enumerated EPA actions in Section 307(b)(1)'s second sentence all share the quality of EPA implementing national policy on a case-by-case basis, such as by acting on States' individual implementation or enforcement plans under the CAA. The second sentence then concludes with its own catchall, setting the regional Circuits as the default venue for challenges to "any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I [42 U.S.C. §§ 7401 *et seq.*]) which is locally or regionally applicable." 42 U.S.C. § 7607(b)(1). The phrase "including any denial or disapproval by the Administrator under subchapter I [42 U.S.C. §§ 7401 *et seq.*]," *id.*, "makes clear" that this catchall provision also covers EPA disapproving a SIP under Section 110, *see Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 347–48, 350, (2021), as Section 110 falls within subchapter I of the CAA.

Determining whether an EPA "action" falls within the catchall provisions of Section 307(b)(1)'s first or second sentences is a straightforward inquiry that compares the challenged "action" at issue to the enumerated list of actions in these two sentences. 42 U.S.C. § 7607(b)(1).

To begin, this inquiry requires identifying what the challenged EPA "action" is within Section 307(b)(1), according to the CAA provisions authorizing EPA to take that "action." *Id.*

"Administrative agencies are creatures of statute," *NFIB v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022) (per curiam), as "[a]gencies have only those powers given to them by Congress," *West Virginia*, 597 U.S. at 723. Thus, Section 307(b)(1)'s references to EPA taking some "action" refers to those actions that Congress has authorized EPA to take. 42 U.S.C. § 7607(b)(1). The first and second sentences of Section 307(b)(1) reaffirm this point. Their enumerated lists of "action[s]" specifically cite the CAA provisions authorizing each of the specified "action[s]"—such as "section [110]," "section [111]," "section [112]," and the like. *Id.* And the catchall provisions of Section 307(b)(1)'s first and second sentences both expressly state that they apply to other "action[s]" taken by EPA "*under this chapter*," further showing that "action" under Section 307(b)(1) refers to actions specifically authorized by the CAA. *Id.* (emphasis added).

With the "action" at issue properly identified, the inquiry under Section 307(b)(1)'s catchall provisions turns to whether that "action" shares the common characteristics of the specifically enumerated CAA actions in Section 307(b)(1)'s first or second sentences, so as to make it either "nationally applicable" or "locally or regionally applicable," respectively. *Id.*; *see generally Fischer v. United States*, 603 U.S. 480, 487 (2024) (citations omitted) (*ejusdem generis* canon). This analysis looks to the "face" of the challenged action, rather than the action's "practical effects."

Am. Rd. & Trans. Builders Ass'n, 705 F.3d at 456. Thus, an action will be "nationally applicable" if it is enumerated or, under the first sentence's catchall provision if, like the first sentence's enumerated actions, the face or nature of the action sets national policy or standards under the CAA for subsequent implementation across the Nation. *See* 42 U.S.C. § 7607(b)(1). An action will be "locally or regionally applicable" if it is enumerated or, under the second sentence's catchall provision if, like the second sentence's enumerated actions, it involves EPA implementing national policy on a case-by-case basis, such as by acting on States' individual implementation or enforcement plans under the CAA. *See id.*; *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455–56.

B. Here, EPA's actions disapproving Utah's SIP and Oklahoma's SIP are "locally or regionally applicable" actions under the catchall provision of Section 307(b)(1)'s second sentence, meaning that the challenges to those disapprovals belong in the Tenth Circuit by default.

First, the "action[s]" at issue here, 42 U.S.C. § 7607(b)(1), are EPA's *individual disapprovals* of Utah's SIP and Oklahoma's SIP under Section 110(k) of the CAA, respectively, *see* 88 Fed. Reg. at 9,337; *see also id.* at 9,360 (Utah); *id.* at 9,359 (Oklahoma). Section 110(k), entitled "Environmental Protection Agency *action* on plan submissions," 42 U.S.C. § 7410(k) (emphasis added), authorizes EPA "to act"

on a State's submission by approving it in full, approving it in part and disapproving it in part, or disapproving it in full, *id.* § 7410(k)(3); *accord id.* § 7410(k)(6). Section 110(k) also requires EPA's actions on a State's SIP submission, including disapprovals, to proceed on a state-by-state basis. *Id.* § 7410(k)(3); *Union Elec.,* 427 U.S. at 250. Thus, among other things, Section 110(k)(2) speaks of each State "submitt[ing] *a* plan" to EPA, in the singular, while also obligating EPA to "act on *the* submission," again in the singular. 42 U.S.C. § 7410(k)(2) (emphases added); *see also, e.g.*, *id.* § 7410(k)(3) ("such submittal").

Second, for purposes of the catchall provision in Section 307(b)(1)'s second sentence, EPA's actions in disapproving Utah's SIP and Oklahoma's SIP under the CAA are materially indistinguishable from EPA's "action in approving or promulgating any implementation plan under section [110]." *Id.* § 7607(b)(1). That is, looking to the face or nature of EPA disapproving Utah's SIP and Oklahoma's SIP alone, *Am. Rd. & Trans. Builders Ass'n*, 705 F.3d at 456; *ATK Launch Sys.*, 651 F.3d at 1199, confirms that these actions are "locally or regionally applicable" under Section 307(b)(1)'s second sentence for the same reasons that EPA's approval of a SIP is "locally or regionally applicable" under that sentence, 42 U.S.C. § 7607(b)(1): they involve EPA implementing the CAA by acting upon a particular State's SIP submission. And to the extent that any doubt exists that a disapproval constitutes a "locally

or regionally applicable" action, Congress' technical amendments to Section 307(b)(1) to "clarify some questions relating to venue for review of rules or orders," *Harrison*, 446 U.S. at 590 (citation omitted), resolve it by including "any denial or disapproval by [EPA] under subchapter I" (which includes Section 110 implementation plans) in Section 307(b)(1)'s second sentence, making the conclusion unmistakable, 42 U.S.C. § 7607(b)(1).

Under the CAA, a State's SIP regulates only emission sources "within such State," meaning that a SIP is—by definition—only locally (or, at most, regionally) applicable. *See id.* § 7410(a)(1); *accord Am. Rd. & Transp. Builders Ass'n,* 705 F.3d at 455–56 (SIP applies "only to certain development projects within the geographic jurisdiction covered" (citation omitted)). Whether EPA approves or disapproves of a State's SIP, the reach of that action is the same, applying only to sources within the State at issue. *See* 42 U.S.C. § 7410(a)(1); *Am. Rd. & Transp. Builders Ass'n,* 705 F.3d at 455–56. Thus, if EPA *approves* a State's SIP, then that SIP will "provide[ ] for implementation, maintenance, and enforcement of [a NAAQS] . . . *within such State*." 42 U.S.C. § 7410(a)(1) (emphasis added). If, however, EPA *disapproves* a State's SIP, then that SIP will not "provide[ ] for implementation, maintenance, and enforcement of [a NAAQS] . . . *within such [same] State*." *Id.* (emphasis added). This state-specific applicability of both an approval or a disapproval of a SIP is also why, as explained above, the CAA requires EPA to act on each

SIP individually. *See supra* p.8 (citing 42 U.S.C. § 7410(k)).

The CAA-defined, state-specific focus of a SIP explains why courts have long held that "a SIP" is "a purely local action" or an "undisputably regional action," *ATK Launch Sys.*, 651 F.3d at 1199, such that challenges to SIP approvals and disapprovals alike belong in the appropriate regional Circuit. These actions are "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 (citations omitted), which is why Section 307(b)(1)'s second sentence lists EPA's "action in approving or promulgating any implementation plan under section 110" as categorically "locally or regionally applicable," while also explicitly stating that "any denial or disapproval by the Administrator under subchapter I" would likewise be "locally or regionally applicable," 42 U.S.C. § 7607(b)(1).

Treating EPA's approval of a SIP under Section 110 as "locally or regionally applicable" under Section 307(b)(1), but a disapproval of a SIP as "nationally applicable," would make no sense. *See id.* The statutory source of EPA's authority to take such actions is the same: Section 110(k)(3) of the CAA. *Id.* § 7410(k)(3). Further, EPA's "approval and promulgation of [SIPs] under the Clean Air Act usually involve issues peculiar to the affected States," 41 Fed. Reg. at 56,768, and SIP disapprovals too are

"usually highly fact-bound and particular to the individual State," *Texas*, 2023 WL 7204840, at *5 (citation omitted); *see Kentucky*, 2024 WL 5001991, at *9. To take just a few examples, EPA's disapproval of a State's SIP can cause plant closures in that State, can reduce electric-generation capacity in that State, and can make residents in that State "face power shortages and grid failures." *Texas v. EPA*, 829 F.3d 405, 416–17 (5th Cir. 2016). And while a SIP disapproval may open the door to EPA promulgating a FIP for the affected State, *see* 42 U.S.C. § 7410(c)(1)(B), that could not possibly make a SIP disapproval "nationally applicable." After all, Section 307(b)(1)'s second sentence lists EPA promulgating a FIP as an action that is "locally or regionally applicable." *Compare id.* § 7607(b)(1) ("approving or promulgating any implementation plan under section [110]"), *with id.* § 7410(c)(1) ("The Administrator shall promulgate a Federal implementation plan . . . after the Administrator . . . disapproves a State implementation plan submission in whole or in part[.]"). There is no rational reason for Congress to have concluded in Section 307(b)(1) that the promulgation of a FIP for a State was "locally or regionally applicable," while the disapproval of that State's SIP that led to that FIP promulgation was itself somehow "nationally applicable."

This is not to say that *all* EPA actions *related in any way* to SIPs are "locally or regionally applicable" actions. As the statutory history of Section 307(b)(1) illustrates, some EPA actions impacting SIPs could

potentially be "nationally applicable," such as "granting [ ] two-year extensions of the date for attainment of [a NAAQS] in a number of metropolitan areas" or promulgating "generic regulations (applicable to all States) that require prevention of significant deterioration of air quality." 41 Fed. Reg. at 56,768–69. Unlike a SIP approval or disapproval for a particular State, those kind of actions involve the "establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to any particular geographical areas." *Id.* at 56,769 & n.2.

Finally, to the extent that it is relevant to the Section 307(b)(1) default venue analysis, nothing in EPA's notices disapproving Utah's SIP or Oklahoma's SIP "distinguishes th[ese] action[s] from most other [actions on] SIPs . . . which, again, unequivocally fall in the 'locally or regionally applicable' category." *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 456.

Utah and Oklahoma developed their own SIPs independently and to govern emissions only from their respective State, JA33a, 37a (Utah); JA1a, 26a (Oklahoma), consistent with the CAA's requirements for SIPs, 42 U.S.C. § 7410(a)(1); *accord Am. Rd. & Transp. Builders Ass'n,* 705 F.3d at 455–56. Further, Utah's SIP and Oklahoma's SIP concluded that each State's emissions were linked only to a limited number of receptors in a limited number of different, downwind regional States. Utah's SIP recognized

that its emissions were linked to "nonattainment and maintenance receptors for the 2015 ozone NAAQS" only "in the Denver area." 87 Fed. Reg. at 31,478. And Oklahoma's SIP determined that in-state emissions were potentially linked to three downwind receptors, one in Denton County, Texas, one in Tarrant County, Texas, and one in Allegan County, Michigan. 87 Fed. Reg. at 9,820.

EPA disapproved Utah's SIP and Oklahoma's SIP by focusing on Utah's and Oklahoma's (alleged) noncompliance with the CAA. *See* 88 Fed. Reg. at 9,354. Thus, EPA explained that it evaluated contents of "each individual state's submission" "on their own merits" and after "consider[ing] the facts and information, including information from the Agency, available to the state at the time of its submission." *Id.*; *see also id.* at 9,340 (explaining that EPA judged each SIP "in light of the facts and circumstances of each particular state's submission"). And EPA specifically incorporated by reference in the final disapprovals of Utah's SIP and Oklahoma's SIP its separately issued, state-specific proposed disapprovals of those States' submissions—which proposed disapprovals were signed by the regional EPA offices. *Id.* at 9,354, 9,359–60.

EPA disapproving Utah's SIP and Oklahoma's SIP illustrates the typically local or regional applicability of EPA's actions on SIPs more generally.

EPA concluded that Utah's submission failed to meet its CAA obligations for several local- or region-specific reasons, not for nationally applicable reasons. EPA disapproved Utah's SIP based on an analysis of Utah's emissions and how those emissions impact ozone concentrations nearby, rejecting Utah's analysis that interstate transport of ozone "is fundamentally different in the western U.S. than in the eastern U.S.," *id.* at 9,360, although EPA had previously agreed that ozone transport in the West differs from transport in the East, JA83a; *see* JA86a–105a. EPA also rejected Utah's findings "related to relative contribution, international and non-anthropogenic emissions, and the relationship of upwind versus downwind-state responsibilities." 88 Fed. Reg. at 9,360. This included examining Utah's submission of emissions contributions from wildfires that EPA decided lacked relevance in comparison to what it deemed was Utah's "own significant contribution to nonattainment or interference with maintenance at downwind areas." 87 Fed. Reg. at 31,477, 31,482 (incorporated at 88 Fed. Reg. at 9,360). And EPA claimed that Utah failed to engage in an adequate analysis of sufficient emissions controls. 88 Fed. Reg. at 9,360.

Likewise, EPA's reasons for rejecting Oklahoma's SIP were Oklahoma-specific and not nationally applicable. EPA disapproved Oklahoma's SIP based, in part, on Oklahoma's use of the Texas 2012 modeling to analyze potential downwind attainment problem areas. 87 Fed. Reg. at 9,820–21

(incorporated at 88 Fed. Reg. at 9,359). EPA also rejected Oklahoma's analysis of its in-state emission trends (due in part to other regulatory actions reducing emissions at certain electric generating units), *id.* at 9,823, and Oklahoma's finding (based on analysis of emissions trends and other contributions relevant to each identified locality) that the State's emissions did not significantly contribute to Michigan and Texas receptors' maintenance goals, *id.* EPA also disapproved Oklahoma's SIP, in part, due to the conclusion that the State failed to provide the necessary analysis of its downwind impacts in Illinois and Galveston, Texas. *Id.* at 9,822–23; JA255a.[4]

C. The Tenth Circuit concluded that the EPA's disapproving Utah's SIP and Oklahoma's SIP—along with disapproving SIPs from 19 other States—comprised a single "nationally applicable" action under Section 307(b)(1)'s first sentence, transferring the petitions here to the D.C. Circuit. Pet.App.11a. The Tenth Circuit concluded that two "features" support its holding. Pet.App.11a. First, according to

[4] Indeed, EPA used revised air modeling that it did not provide to Oklahoma before EPA proposed to disapprove Oklahoma's SIP because the air modeling identified receptors in Illinois rather than Michigan as problematic. *See* 88 Fed. Reg. at 9,360. And in its final disapproval, EPA further revised its air modeling, which changed the alleged linkages even further. *Id.* It is unclear how Oklahoma could provide the "required" analysis for data it did not have. Regardless, the key here is that the analysis is locally focused.

the Tenth Circuit, EPA consolidating into a single Federal Register notice the SIP disapprovals of 21 States made that notice a "nationally applicable" action under Section 307(b)(1)'s first sentence. Pet.App.11a. Second, the Tenth Circuit reasoned that EPA's claim to have "applied a uniform statutory interpretation and common analytical methods" made the Federal Register notice "nationally applicable" under Section 307(b)(1)'s first sentence. Pet.App.11a. No other Circuit has followed this reasoning for the SIP disapprovals in the Federal Register notice.

The Tenth Circuit's conclusion is incorrect on both counts.

EPA's administrative packaging of 21 SIP disapprovals into a single Federal Register notice does not make EPA's "action" "nationally applicable." Pet.App.11a. The Tenth Circuit's rationale misunderstands what the relevant "action" is under Section 307(b)(1). As explained above, "action" in Section 307(b)(1) refers to the action that Congress has statutorily authorized EPA to take in the CAA itself. *Supra* pp.30–32. Here, the "action" is EPA's *individually* disapproving Utah's SIP or Oklahoma's SIP, respectively, under Section 110(k) of the CAA. *Supra* pp.32–33. And reinforcing the individualized nature of these actions, Section 110(k) directs EPA to act on each State's SIP separately, 42 U.S.C. § 7410(k)(2)–(3), while Section 307(b)(1)'s second sentence provides that "*any* . . . disapproval . . . under subchapter I [of the CAA]" qualifies as an "action" for

Section 307(b)(1)'s venue analysis, *id.* § 7607(b)(1) (emphasis added). How EPA chooses to publish those actions in the Federal Register—whether separately or packaged with other disapprovals or other EPA actions—has no bearing on the Section 307(b)(1) inquiry. *See* Fed. R. App. P. 15(a)(2)(C) (providing that parties may challenge only "part" of an agency's "order"). Publishing is not the relevant "action"; Section 307(b)(1) designates that the individual disapprovals are the "action."

Moreover, EPA's own course of conduct illustrates that it always understood relevant "action" here is each *individual* SIP disapproval. When EPA proposed to disapprove Utah's SIP, it did so via an individually issued, state-specific proposal published in the Federal Register; for Oklahoma, EPA issued a combined notice that also included Arkansas, Louisiana, and Texas. *See* 87 Fed. Reg. 31,470 (Utah); 87 Fed. Reg. 9,798 (Oklahoma). Each notice detailed EPA's individual bases for each proposed disapproval. *See generally* 87 Fed. Reg. 31,470; 87 Fed. Reg. 9,798. When EPA then issued its final disapprovals for Utah's SIP and Oklahoma's SIP—packaged with 19 other SIP disapprovals in the single Federal Register notice—EPA continued to address individually Utah's SIP and Oklahoma's SIP in separate sections of the published notice. 88 Fed. Reg. at 9,359–60. Thus, EPA explained in the final rule that it "evaluat[ed] each state's SIP submission" "on their own merits," *id.* at 9,354, and expressly incorporated the individualized proposed disapprovals into the final

rule as the "full basis for the EPA's disapprovals," *id.* at 9,354, 9,359–60. And, to further prove that EPA's packaging of actions in the Federal Register was a mere administrative choice, EPA took different kinds of actions with respect to different States' SIP submissions: it disapproved some submissions, like Utah's SIP and Oklahoma's SIP; partially approved and partially disapproved Minnesota's SIP and Wisconsin's SIP; and deferred action on Tennessee's SIP and Wyoming's SIP. *Id.* at 9,336, 9,354, 9,359–60, 9,367. The single Federal Register notice could not have been a single "action" when EPA reached different conclusions for different States.

The Tenth Circuit's packaging rationale subverts Congress' design. It transforms Section 307(b)(1) from a neutral provision that funnels challenges to the Circuits best equipped to adjudicate them into an arbitrary device that permits EPA to choose the forum in which it will defend its actions. EPA does not dispute "that it could have chosen to issue standalone final SIP disapprovals" and thereby set the Tenth Circuit as the default forum to challenge the Utah and Oklahoma disapprovals under Section 307(b)(1). Pet.App.12a. Thus, under the Tenth Circuit's packaging rationale, whether the challenges to EPA's actions disapproving Utah's SIP or Oklahoma's SIP belong in the Tenth Circuit or the D.C. Circuit depends only on the structure of EPA's Federal Register notice. *See* Pet.App.12a. If Congress had intended EPA to determine the proper venue for litigating its actions, Section 307(b) would say so.

Yet, the Tenth Circuit's decision enables EPA to determine venue by how it elects to publish and format its notice in the Federal Register—a power found nowhere in Section 307(b)(1).

The Tenth Circuit's consistent-method rationale fares no better. EPA disapproving Utah's SIP and Oklahoma's SIP was not "nationally applicable" due to EPA's claim to have used a "consistent statutory interpretation and uniform analytical methods" when denying these two SIPs, along with the SIPs of 19 other States. Pet.App.14a; *see also* Pet.App.11a. EPA did not defend this reasoning in its brief in opposition, *see* Br. For Fed. Resp'ts at 16–17, *Oklahoma v. EPA*, Nos.23-1067, -1068 (U.S. May 21, 2024), and rightly so.

Venue under Section 307(b)(1) does not turn on whether EPA "applied a uniform statutory interpretation and common analytical methods" when taking an action. *Contra* Pet.App.11a. Instead, venue turns on the geographic scope of the action. Enumerated actions must go to either D.C. or the regional Circuits, and the catchall provisions of Section 307(b)(1)'s first and second sentences ask whether *the "action" itself* is "nationally applicable" or "locally or regionally applicable." 42 U.S.C. § 7607(b)(1) (emphasis added); *supra* pp.8–10. So, for example, while EPA may, in approving a particular SIP, "appl[y] a broad regulation to a specific context" or "set a precedent for future SIP proceedings," that does not "distinguish[ ]" that SIP "from most other

approvals of SIPs or SIP revisions," which are "unequivocally . . . 'locally or regionally' applicable." *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 456. In other words, an action to disapprove one State's SIP has "applica[tion]" only in that "local[ity]." 42 U.S.C. § 7607(b)(1). A disapproval of Oklahoma's SIP does not disapprove the SIP of any other State. It is therefore locally—not nationally—applicable, regardless of whether the rationale for the disapproval is rooted in a national or uniform policy.

The Tenth Circuit's reliance on EPA's supposed "consistent statutory interpretation and uniform analytical methods," Pet.App.14a, renders the catchall clause in Section 307(b)(1)'s second sentence functionally meaningless, including that clause's parenthetical references to SIP disapprovals. 42 U.S.C. § 7607(b)(1); *see Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted) (canon against surplusage). Both the APA and the CAA require EPA to apply a uniform statutory interpretation and analytical method whenever it takes actions involving similarly situated States, as "[u]nexplained inconsistency" makes agency action unlawfully arbitrary. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983)). If EPA's use of a consistent interpretation or method alone rendered its actions "nationally applicable" under Section 307(b)(1)'s first sentence, EPA could never take "locally or regionally applicable" action

under the second sentence's catch-all provision. *Contra Corley*, 556 U.S. at 314.

II. Neither EPA's Disapproval Of Utah's SIP Nor Its Disapproval of Oklahoma's SIP Was An "Action . . . Based On A Determination Of Nationwide Scope Or Effect"

The Tenth Circuit remains the appropriate venue for Petitioners' challenges to EPA disapproving Utah's SIP or Oklahoma's SIP notwithstanding EPA's alleged "finding" that its "action is based on a determination of 'nationwide scope or effect'" under Section 307(b)(1)'s third sentence. 88 Fed. Reg. at 9,380. Section 307(b)(1)'s third sentence applies only where EPA takes the action "based on a determination" of the "nationwide scope or effect" of the action. 42 U.S.C. § 7607(b)(1). Here, EPA's "finding" has no legal effect because EPA improperly defined the "action" at issue as "disapproving SIP submittals for the 2015 ozone NAAQS for 21 states," 88 Fed. Reg. at 9,380, when the relevant actions are those that EPA took with regard to Utah's and Oklahoma's SIP submissions. As to those properly defined actions—EPA's disapproving Utah's SIP and Oklahoma's SIP—EPA could not have lawfully taken those actions "based a determination" of either a "nationwide scope" or a "nationwide . . . effect." 42 U.S.C. § 7607(b)(1).

A. Section 307(b)(1)'s third sentence operates as a narrow exception to the default rule that the

appropriate regional Circuit is the venue for challenges to EPA's approval or disapproval of a SIP or some other "locally or regionally applicable" action. *Id.*; *supra* Part I. Section 307(b)(1)'s third sentence provides that, "[n]otwithstanding" the default rule, "a petition for review" challenging a locally or regionally applicable action "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." 42 U.S.C. § 7607(b)(1).

Based on the text, context, and structure of Section 307(b)(1)'s third sentence—and reading this exception "narrowly" so as "to preserve the primary operation of" Section 307(b)(1)'s default rule, *Garland v. Aleman Gonzalez*, 596 U.S. 543, 555 n.6 (2022) (citation omitted); *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 530 (2009)—this third sentence applies where EPA takes the challenged action "based on a determination" of the "nationwide scope or effect" of the action. 42 U.S.C. § 7607(b)(1).

In the context of administrative actions, a determination in an agency order refers to an agency's "final disposition," *see* 5 U.S.C. § 551(6), thus "determination" in Section 307(b)(1)'s third sentence refers to EPA's "'authoritative decision' of the 'matter at issue,'" *Kentucky*, 2024 WL 5001991, at *11 (citations omitted). If EPA decides to issue a locally or regionally applicable "action" "based on" that

action's "nationwide scope or effect" (and then publishes that finding), the D.C. Circuit is the proper venue for challenges to that action. 42 U.S.C. § 7607(b)(1). Or, as then-Judge Kavanaugh put it, the third sentence applies if "otherwise locally or regionally applicable regulations have a nationwide scope or effect." *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455. That is, if "the *ultimate decision* underlying the EPA's 'final action' has a 'nationwide scope or effect,'" the third sentence applies to challenges to that action. *Kentucky*, 2024 WL 5001991, at *11 (citations omitted).

This reading follows from the terms in Section 307(b)(1)'s third sentence. The phrase "nationwide scope or effect" refers to actions "that apply to the entire country" either "as a legal matter"—*i.e.*, "nationwide scope"—or "as a practical one"—*i.e.*, "nationwide . . . effect." *Id.* at *12. "Nationwide" means "extending throughout an entire nation." *Nationwide*, Merriam-Webster Dictionary 466 (1974). "Scope," in turn, is the "extent covered" or "range" of action, inquiry, etc. *Scope*, Merriam-Webster Dictionary 621 (1974). And "effect" means a "result" or "consequence"; "the quality or state of being operative." *Effect*, The Merriam-Webster Dictionary 232 (1974).

Under this statutory text, the analysis proceeds as follows. EPA must first identify the statutory "action" to invoke the exception. 42 U.S.C. § 7607(b)(1). Then, EPA must determine whether it

is taking the action "based on a determination" of the "nationwide scope or effect" of that action. That is, correctly identifying the relevant "action" is a prerequisite to EPA properly finding that the "action" is "based on a determination of nationwide scope or effect." *Id.* Next, EPA must "find[ ] and publish[ ] that such action is based on such a determination." *Id.* Finally, the courts must evaluate whether EPA took the "action" "based on a determination of [the] nationwide scope or effect" of the action and whether EPA found and published that "determination." *Id.*

B. Here, EPA did not take its actions denying Utah's SIP and Oklahoma's SIP, respectively, based on a valid "determination" that either action has a "nationwide scope or effect." *Id.* To begin, EPA's purported finding that the action at issue was based on a "determination of nationwide scope or effect" stemmed from its identification of the wrong "action." But even if EPA had identified the correct "action"—here, its actions disapproving Utah's SIP and Oklahoma's SIP, respectively—EPA could not have lawfully concluded that it issued those actions based upon a determination of nationwide scope or effect.

1. In the "Judicial Review" section of the Federal Register notice, EPA (mis)identified the action as a single "rulemaking" rather than acknowledging 21 separate SIP actions that the notice lumps together. 88 Fed. Reg. at 9,380. EPA asserted that this single "rulemaking" is a nationally applicable "final action" "disapproving SIP submittals for the 2015 ozone

NAAQS for 21 states located across a wide geographic area." *Id.* EPA relied on the same "final action" in the next paragraph when it published its finding that "[i]n the alternative," EPA's action "is based on a determination of 'nationwide scope or effect' within the meaning of CAA section 307(b)(1)." *Id.* EPA's focus on its "final action" in the singular confirms that EPA's determination under the third sentence did not rest on the separate disapprovals for Utah's and Oklahoma's submissions, but rather upon the agency's mistaken belief that the Federal Register notice combining 21 States' SIP disapprovals together was the relevant "action" at issue.

EPA's "finding" that the Federal Register notice has nationwide scope or effect because it combined notices applied to States spread "throughout the continental U.S.," *id.*, holds no relevance to the venue inquiry because the notice is not the relevant action under the CAA. Section 307(b)(1) requires that the relevant action be one "under this chapter," and identifies EPA approving, promulgating, disapproving, or denying any implementation plan under Section 110 as a relevant action. 42 U.S.C. § 7607(b)(1). The Act delineates what qualifies as an action by EPA on State plan submissions, *id.* § 7410(k), and as noted above, the CAA requires that EPA act on each plan submission either in whole or in part, *id.* § 7410(k)(3). *Supra* pp.8, 32–33. EPA's "find[ing]" does not involve any statutorily authorized action, and thus is not an "action" "under this

chapter" relevant to the venue inquiry. 42 U.S.C. § 7607(b)(1).

In all, because EPA's claimed finding under Section 307(b)(1)'s third sentence did not focus on the relevant "action," that finding is invalid for that reason alone.

2. Had EPA focused its analysis on the relevant actions—here, its actions disapproving Utah's SIP and Oklahoma's SIP, respectively—it could not have lawfully concluded that it took *those* two actions based upon a determination of nationwide scope or effect, as Section 307(b)(1)'s third sentence would require.

EPA could not have issued its separate disapprovals for Utah's SIP and Oklahoma's SIP "based on" a "determination" of the "*nationwide scope*" of those two distinct actions. Utah's SIP and Oklahoma's SIP each only governs NO_x (and other ozone causing) emissions from their respective State. JA37a (Utah's SIP governs "emissions from the State of Utah"); *see* JA26a (Oklahoma's SIP governs emissions from "the State of Oklahoma"). Each State developed fact-intensive determinations forecasting their own emissions and whether those emissions linked to specific areas of nonattainment. Utah considered only whether "emissions from Utah" potentially caused "air quality problems" in any applicable downwind States—here, solely Colorado—that necessitated Utah reducing any in-state emissions to avoid "contributing to nonattainment or

interfering with maintenance in" downwind Colorado. JA39a–42a. Then, applying its "weight-of-the-evidence" approach, Utah concluded that its contributions to Colorado were not significant, after considering state- or region-specific factors like Colorado's own in-state contributions (a unique factor for western States, like Utah and Colorado); international emissions, emissions from wildfires, and biogenic emissions in Colorado; and Utah's own downward trend in NO_x emissions. *Supra* pp.13–15. Oklahoma's analysis of whether in-state emissions would "contribut[e] significantly to nonattainment in . . . any other state" was similarly state-specific, JA26a, examining effects in Michigan[5] and Texas, JA21a–23a, 25a. Oklahoma's "weight of the evidence" analysis reviewed local trends for the identified problem sites (including by relying on Texas's regional modeling for Denton and Tarrant counties) to determine that each site would reach attainment. JA21a–25a. Oklahoma then reviewed its own emissions trends and found that existing emission reduction measures would continue to decrease emissions to half their 2011 levels, which further supported Oklahoma's finding that its emissions would not significantly affect another area's nonattainment. JA25a–26a.

[5] EPA ultimately agreed that Oklahoma's emissions would not impact Allegan County, Michigan. 87 Fed. Reg. at 9,820.

EPA's actions disapproving the States' individual submissions involved findings specific to each State and thus do not have a nationwide scope. In disapproving Utah's SIP, EPA rejected each of Utah's state- or region-specific findings and analyses, including Utah's findings that its current reductions in emissions to meet other regulatory requirements meant that Utah's emissions would not significantly contribute to any nonattainment outside of Utah. *Supra* p.15. EPA's disapproval also rejected Utah's explanation that ozone transport operates differently in the western States than the eastern States due to topographical and other geographic realities. *Supra* p.15. In disapproving Oklahoma's SIP, EPA faulted Oklahoma for relying on Texas's own regional air modeling for counties in Texas. 88 Fed. Reg. at 9,359. And EPA rejected Oklahoma's weight of the evidence analysis including Oklahoma's review of domestic emissions trends and projected contribution (or non-contribution) of site-specific programs. *Id.*

Similarly, EPA did not issue its disapprovals of Utah's SIP and Oklahoma's SIP based upon a determination that those disapprovals had "nationwide . . . *effect[s]*." 42 U.S.C. § 7607(b)(1) (emphasis added). Even under EPA's erroneous analysis of its two disapprovals here, emissions from Utah and Oklahoma only sufficiently linked those States to a handful of receptors in one part of Colorado for Utah and two receptors in parts of Texas for Oklahoma. EPA identified only five potential receptors where Utah's contributions exceeded more

than 1 percent of the 2015 ozone NAAQS, *and all of these receptors were located in Colorado's Denver Metro/North Front Range Nonattainment Area*. *Supra* pp.13–14, 17 (also explaining that Utah concluded that it was linked only to four receptors, after further review). EPA only identified two potential receptors where Oklahoma's linked contributions exceeded more than 1 percent of the 2015 ozone NAAQS, *one in Denton County, Texas* and *one in Galveston County, Texas*.[6] *Supra* pp.17–18. EPA disapproved the two SIPs because EPA (erroneously) concluded Utah's SIP failed to address impacts to receptors in Colorado, and Oklahoma's SIP failed to address impacts to receptors in Texas, which is plainly not a nationwide effect.

3. None of EPA's justifications in its Federal Register notice would support placing venue for these challenges in the D.C. Circuit under Section 307(b)(1)'s third sentence.

EPA asserted in that notice that "applying a nationally uniform approach to the identification of nonattainment and maintenance receptors" showed its final action had "nationwide scope or effect." 88 Fed. Reg. at 9,380–81. But that justification points to

[6] Each iteration of EPA's modeling (two of which were released after Oklahoma submitted its plan) identified different receptors linked to Oklahoma's emissions. In every model, EPA's analysis focused on linkages to specific sites in, at most, two downwind states.

the wrong final action, *i.e.*, the Federal Register notice, and not individually disapproving Utah's SIP or Oklahoma's SIP. The reasoning also fails to show that EPA's "otherwise locally or regionally applicable" actions "have a nationwide scope or effect," *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455. As Judge Niemeyer explained, "if application of a national standard to disapprove a plan were the controlling factor, 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." *West Virginia*, 90 F.4th at 329–30; *see also supra* pp.43–46. And if EPA could determine that a locally or regionally applicable action had a nationwide scope or effect simply because the action "applie[d] a broad regulation to a specific context" or "set a precedent for future [agency] proceedings," *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455, the exception would render the default venue rule surplusage, at EPA's option, *see Diaz v. United States*, 602 U.S. 526, 536–37 (2024); *accord Corley*, 556 U.S. at 314 (citation omitted) (canon against surplusage).

EPA alleged that the Federal Register notice had nationwide scope or effect because the agency applied a "common core of nationwide policy judgments and technical analysis" to assess obligations under the 2015 ozone NAAQS. 88 Fed. Reg. at 9,380. But EPA's "analy[sis]" is merely a "preliminary choice[ ]" and not EPA's final disposition, so it cannot serve as the "determination." *Kentucky*, 2024 WL 5001991, at *11–12. Even if considered, EPA conceded that it

evaluated each State's "use of alternative approaches or alternative sets of data" to "avoid[ ] inconsistent or inequitable results among" upwind and downwind States. 88 Fed. Reg. at 9,381. This analysis cannot be done nationwide—EPA must look at each upwind State and the specific, affected downwind States. Whether the result is "inequitable" is an individual determination for that State, as the CAA envisions. *See* 42 U.S.C. § 7410(k). And to the extent that EPA suggests applying a common method of analysis is sufficient for venue purposes, that fails for the same reasons that a SIP disapproval is not nationally applicable. *Supra* pp.33–37.

Finally, EPA claimed in its notice that the CAA afforded it "the complete discretion" to determine whether its action has nationwide scope or effect and direct any challenges to that action to the D.C. Circuit. 88 Fed. Reg. at 9,380. Although Section 307(b)(1) provides EPA with discretion *whether* to publish a determination of nationwide scope or effect, *see Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 456, publishing the determination satisfies only the second of the necessary conditions for the D.C. Circuit to adjudicate a "locally or regionally applicable" action, 42 U.S.C. § 7607(b)(1). Section 307(b)(1), entitled "Judicial Review," also requires that "such action is based on a determination of nationwide scope or effect." *Id.* In upholding the "basic presumption of judicial review" of agency action, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16–17 (2020) (citation omitted),

courts confine any exception to that presumption to "those rare 'administrative decision[s] traditionally left to agency discretion,'" such as an agency decision not to act, *id.* at 17 (citation omitted). This rare exception does not apply to the question of whether EPA took an action "based on" the "nationwide scope or effect" of the action because Congress directed courts to examine the "geographical aspects of the factual and analytical circumstances of the agency's determination." *West Virginia*, 90 F.4th at 328; *see Texas,* 2023 WL 7204840, at *5 (applying "nationwide scope or effect" standard (citation omitted)); *Kentucky*, 2024 WL 5001991, at *7 (same). Congress did not set up a carefully balanced venue scheme for "nationally applicable" and "locally or regionally applicable" actions only to permit EPA to select the D.C. Circuit for any action by merely publishing a finding insulated from judicial review.

CONCLUSION

This Court should reverse the judgment of the Tenth Circuit and remand with instructions to proceed to the merits of these petitions for review.

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