No. 23-1067

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA, ET AL.,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF U.S. SENATORS MIKE LEE, TED BUDD, BILL CASSIDY, M.D., CYNTHIA LUMMIS, AND ROGER MARSHALL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JENNIFER L. MASCOTT*
R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
COLUMBUS SCHOOL OF LAW
THE CATHOLIC UNIVERSITY OF AMERICA
3600 John McCormack Rd.
Washington, DC 20064
(202) 706-5488
mccotter@cua.edu

* *Admitted in Virginia and Maryland; supervised by D.C. bar member*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are United States Senators Mike Lee (UT), Ted Budd (NC), Bill Cassidy, M.D. (LA), Cynthia Lummis (WY), and Roger Marshall (KS). As Senators, they have a strong interest in the federal courts correctly interpreting and preserving the federalism-focused judicial review scheme that Congress fashioned in the Clean Air Act to ensure that disputes over EPA's regional actions will be heard by the regional circuit courts, not funneled to the far-away and insular D.C. Circuit.

Indeed, the Tenth Circuit's decision blessing the Executive's wordplay gerrymandering to escape the plain language of the Clean Air Act's venue provision works to undermine the separation of powers and Congress's role in determining where actions may be filed. This Court should reject the outlier decision below.

---

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from the *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

There are a lot of hard Clean Air Act cases. This is not one. The CAA's venue provision states, in essence, that a nationwide action should go to the D.C. Circuit, but a regional action should go to the region's court of appeals. And all agree that the paradigmatic example of a regional action is the EPA's approval or denial of a state implementation plan. Unsurprisingly, every court of appeals had uniformly held that judicial review over SIP decisions must go to the applicable regional circuit court—not the D.C. Circuit.

That is until the decision below. Here, the Tenth Circuit held that the SIP decisions at issue must go to the D.C. Circuit, because the EPA chose to bundle its announcement of the proposed region-by-region actions within a single Federal Register notice—thus making them superficially "national." That is so even though the legal review—a fact-heavy inquiry requiring individual, region-by-region analysis of each SIP decision—remains the same as if the EPA had announced its decisions one-by-one.

The Tenth Circuit's decision is egregiously wrong. Text, purpose, and precedent all confirm what common sense would compel: The CAA's venue provision turns on substance, not form; and it does not allow the EPA to pick its chosen forum based on how the agency chooses to package its Federal Register notices.

This Court should reverse. The Tenth Circuit's decision broke from a circuit consensus, and its outlier position promises serious and immediate repercussions, both in practice and for federalism.

At bottom, the Act is designed so that States will be able to have their SIP decisions reviewed within their regional circuits, composed of judges who know that area, and who have more localized expertise. But as the Tenth Circuit would have it, States would need to schlep to D.C. to litigate these cases in the EPA's backyard whenever that agency chooses to bundle multiple such decisions together. That makes no sense—and it is not the scheme that Congress wrote.

ARGUMENT

I. Section 7607(b)(1) Guarantees Regional Review of Regional Decisions.

The Clean Air Act divides judicial review of EPA actions into one of two general categories: Actions that are either nationally applicable or of nationwide effect go to the D.C. Circuit; but "local or regional" actions—lacking true nationwide effect—go to the circuit for that particular region. 42 U.S.C. § 7607(b)(1).

This venue rule reflects the federalism principles core to the CAA's longstanding judicial review scheme and its cooperative federalist regulatory function. The Act is a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). And as part of that arrangement, the "Act envisions extensive cooperation between federal and state authorities." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011). The CAA thus assigns certain decisions—those bearing on the whole country—to the federal government, while reserving those that turn more on local expertise to the States, in the first instance. For

example, and as especially relevant here, the Act "relegate[s]" the federal government to a "secondary role" over specific decisions about the "prevention and control of air pollution at its source," because that type of decision has traditionally been the "primary responsibility of States and local governments." *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 64, 79 (1975).

The Act's venue provision tracks this division of responsibility. "All nationally applicable actions go to the D.C. Circuit, which promotes national uniformity." *Texas v. EPA*, 983 F.3d 826, 835 (5th Cir. 2020). In other words, nationwide rules go to a single court to apply a single understanding of the law to a single federal action. By contrast, "[a]ll locally or regionally applicable actions that are based on local and regional determinations go to the regional circuits, which promotes responsiveness and attention to local and regional diversity." *Id.* That is, where an action lacks a nationwide effect, courts from the communities that will actually bear the consequences of the EPA's decision are assigned by Congress to assess its lawfulness.

This just "makes sense." *Id.* While the CAA has only one meaning, of course, how its standards cash out on the ground are often fact-intensive inquiries. *See, e.g.*, *Texas v. EPA*, 829 F.3d 405, 423 (5th Cir. 2016). Those sorts of inquiries should be evaluated by voisinage judges who are familiar with the lands, businesses, and people being regulated—as opposed to judges reading about (or discovering) the Mountain West, the Deep South, or Rust Belt from hundreds or thousands of miles away. More, as touched on above, these types of actions often involve federal regulation

of traditional State prerogatives, such as administering and overseeing air quality. Congress believed that it was important for political buy-in and accountability that the States have a hand in the judges supervising those delicate decisions. *Cf.* 28 U.S.C. § 44(c) (providing "there shall be at least one circuit judge in regular active service appointed from the residents of each state in that circuit").

All in all, the CAA's venue provision was a conscious policy decision to guarantee regional review of regional decisions. After all, Congress knows how to send cases exclusively to the D.C. Circuit when it wants to do so. *See, e.g.*, 8 U.S.C. § 1226a(b)(3) (detention review provision). And it knows how to do the opposite—including in analogous statutory schemes. *See, e.g.*, 33 U.S.C. § 1369(b)(1). With the CAA, Congress struck a balance, centralizing review for truly federal actions, and decentralizing review over regional decisions.

II. SIP Decisions Are Quintessential Regional Decisions.

The CAA is often complicated. And the line between what is national and what is regional is not necessarily always crystal clear in every case. But none of those uncertainties are present here: This case involves the EPA's review (and disapproval) of a set of state implementation plans—*the* quintessential regional decision.

Just take then-Judge Kavanaugh's word for it: "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) (internal citations omitted); *accord Sierra Club v. EPA*, 47 F.4th 738, 743 (D.C. Cir. 2022) (Srinivasan, C.J.). Or as the Tenth Circuit put it, in a decision joined by then-Judge Gorsuch: The EPA's decision to approve or reject a SIP is an "undisputably regional action," because it is "purely local." *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011).

Judges Kavanaugh and Gorsuch were right. "[T]he vast majority of actions involving SIPs are necessarily about individual States." *Texas v. EPA,* No. 23-60069, 2023 WL 7204840, at *4 (5th Cir. 2023). Or in slightly blunter terms: "[T]he *State* Implementation Plans, of course, primarily involve individual *States*." *Id.* at *5; *see also id.* ("SIP disapprovals are usually highly fact-bound and particular to the individual State." (internal markings omitted)).

SIP approvals or rejections like the ones at issue are thus the *precise* sorts of actions that are supposed to go to the regional circuits. Indeed, the Act expressly says as much, providing that a "petition for review of the Administrator's action in approving or promulgating any implementation plan under section ... 7410" of this title —the relevant provision here— "may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1).[2]

---

[2] As Petitioners explained in their cert petition (at 31-32), the Tenth Circuit simply blew past this language, reasoning that it applied only to SIP decisions that were "locally or regionally

In short, every single tool of interpretation—text, purpose, precedent, logic, etc.—points the same way here: SIP decisions are reviewed by regional circuits.

III. The Executive Cannot Evade Regional Review through Wordplay and Labels.

Congress thus made a deliberate choice for SIP decisions to go to the regional circuits. This case asks whether that rule goes out the window when the EPA decides to bundle those decisions within a single Federal Register notice. The answer is obviously no.

The whole point of a venue provision like the one here—one that assigns specific actions to specific courts, versus one that lays out a range of options (*e.g.*, 28 U.S.C. § 1391)—is to cabin the discretion of the litigants. Truly, the *only* function of a provision like § 7601(b)(1) is to remove decisions about venue from the hands of individual parties and codify what Congress has decided is the proper forum for a given matter.

The Tenth Circuit's position destroys this function. On its logic, the federal government can now forum shop to its heart's content: If it likes the judges on a regional court, it will issue a standalone SIP decision; if it feels it has better odds in its own backyard, it will

---

applicable." Not so. The court focused on the provision's catch-all—"any other final action of the Administrator under this chapter … which is locally or regionally applicable"—and plucked a portion of it to limit the preceding terms, in square violation of the rule of the last antecedent. Rather, the catch-all picks up items *in addition* to those expressly provided before—and Congress made express that petitions reviewing SIP decisions like those here must go only to the regional circuits.

bundle a few SIP decisions—and presto, it is a "nationally applicable" action.

No rational Congress would craft a venue provision in this directionless fashion—and no Congress did. As touched on above, the reason Congress wanted to direct SIP decisions to regional circuits is that such decisions are typically fact-intensive, and review of those decisions will benefit from "local and regional" expertise. *Texas*, 983 F.3d at 835; *see also Texas*, 829 F.3d at 421 (discussing how state plan approvals and disapprovals involve "intensely factual determinations" specific to each state). But in the Tenth Circuit's view, Congress wanted those fact-intensive decisions to be made by regional circuits *only when* the EPA issues standalone SIP decisions; otherwise, it wanted the D.C. Circuit to review when the EPA opted for an omnibus action. That is nonsensical. Whether bundled within a single Federal Register notice or issued seriatim, the judicial review of those individual SIP decisions looks *exactly the same*—it is the same fact-intensive, regionally dependent inquiry no matter what. There is zero cogent reason why Congress wanted the regional circuits to review those decisions only when the EPA issued one on its own.

Instead, Congress cared here about substance over form. That is the default rule in the law. *See, e.g.*, *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942). It is blackletter law under the APA, for instance, that what matters is the substance of the agency's action, not how the agency chooses to brand it. *See, e.g.*, *Clarian Health W., LLC v. Burwell*, 206 F. Supp. 3d 393, 407 (D.D.C. 2016) (Jackson, J.), *rev'd on*

other grounds, 878 F.3d 346. So much so here. As the Fourth Circuit explained: "An action is local or regional if it assesses and analyzes local or regional circumstances that are distinct from the circumstances in other localities or regions and it rules on those circumstances," while a "determination would be national in scope and effect if it addressed and analyzed circumstances common to all regions in the Nation." *West Virginia. v. EPA*, 90 F.4th 323, 328 (4th Cir. 2024). Whether an action is regional or national does not turn on the label or the packaging. Rather, it turns on the *substance* of the action—and it is the *substance* of the action that determines what part of § 7601(b)(1) applies. *See, e.g.*, *Texas*, 2023 WL 7204840, at *4 ("Yes, the EPA packaged these disapprovals together" but "the EPA's chosen method of publishing an action isn't controlling. What controls is the CAA. And the CAA is very clear.").

More fundamentally, permitting the EPA to gerrymander venue in this way would undermine the separation of powers. One of the most important authorities vested in Congress is its plenary authority over the jurisdiction of the lower federal courts. *Sheldon v. Sill*, 49 U.S. 441, 449 (1850); *see also, e.g.*, *Mark v. Republic of the Sudan*, 77 F.4th 892, 896 (D.C. Cir. 2023). Through § 7607(b)(1), Congress exercised that constitutional structural prerogative. But the effect of the Tenth Circuit's decision is to hollow out § 7607(b)(1), and transfer determinations of venue from Congress to the Executive. As explained, under the Tenth Circuit's decision, the EPA can now decide for itself where it wants to litigate—the precise sort of discretion that Congress wanted to eliminate here, in

guaranteeing regional judicial review over regional EPA decisions. *See, e.g.*, *Travis v. United States*, 364 U.S. 631, 634 (1961) ("[V]enue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorite' to it." (citation omitted)).

Finally, the Tenth Circuit's decision cannot be justified on the ground that the EPA's decisions are nationally applicable, because it applied a uniform "analytical framework" or "generally consistent approach" when it evaluated each State's plan. That logic would make *every* EPA action national, because the EPA is already expected (indeed, commanded) to apply federal standards in a consistent and uniform way. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

In short, the Tenth Circuit significantly erred with weighty repercussions, both in practical terms and for federalism. This Court ought to restore a single venue rule across the country—and pick the one that Congress clearly provided in § 7607(b)(1).

.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the decision below.

Respectfully submitted,

JENNIFER L. MASCOTT*
R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
COLUMBUS SCHOOL OF LAW
THE CATHOLIC UNIVERSITY OF AMERICA
3600 John McCormack Rd.
Washington, DC 20064
(202) 706-5488
mccotter@cua.edu

** Admitted in Virginia and Maryland; supervised by D.C. bar member*

December 20, 2024