Nos. 23-1067, 23-1068

In the Supreme Court of the United States

STATE OF OKLAHOMA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

PACIFICORP, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

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

PETITIONERS' JOINT MOTION FOR DIVIDED ARGUMENT

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Pursuant to Rules 21 and 28.4 of this Court, Petitioners in Case Nos. 23-1067 (State Petitioners) and 23-1068 (Industry Petitioners) jointly move for divided argument. Petitioners request to divide their 30 minutes of argument time, with the State Petitioners receiving 20 minutes and the Industry Petitioners receiving 10 minutes. State Petitioners each filed separate petitions for review of the denial of their State Implementation Plans ("SIP") in the United States Court of Appeals for the Tenth Circuit, *see generally* Pet.App.9a, and although they have several counsel representing them, they have agreed to have a single counsel present oral argument on their behalf before this Court. Similarly, Industry Petitioners filed separate petitions for review in the Tenth Circuit and have several counsel representing them, *see generally id.,* and they have agreed to a single counsel to represent all Industry Petitioners at oral argument before this Court. Granting this motion would not require the Court to enlarge the overall time for argument.

1. This Court has often allowed private litigants and government entities to divide argument. *Ohio v. EPA*, 144 S. Ct. 691, (2024) (Mem.)*; Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 746 (2021) (Mem.); *United States v. Texas*, 142 S. Ct. 416 (2021) (Mem.); *Dep't of Homeland*

Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 398 (2019) (Mem.); *Trump v. NAACP*, 140 S. Ct. 398 (2019) (Mem.); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 951 (2019) (Mem.); *Tenn. Wine & Spirits Retailers Ass'n v. Blair*, 139 S. Ct. 783 (2019) (Mem.); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 466–67 (2017) (Mem.).

2. While all Petitioners share the goal of having the regional Courts of Appeals deciding local and regional issues, including the Environmental Protection Agency's ("EPA") actions on SIPs, 42 U.S.C. § 7607(b)(1), State Petitioners and Industry Petitioners bring different interests and perspectives to the case. State Petitioners have sovereign and governing interests in regulating emission sources within their respective States (including state enforcement of the SIPs and their regulations) and preserving the cooperative-federalism scheme that the Clean Air Act requires. Industry Petitioners provide power generation, transmission, and delivery in the affected States and employ thousands of workers. As the parties regulated by SIPs, they ultimately bear much of the economic cost imposed by Clean Air Act regulations.

3. Reflecting those distinct interests, the two groups of Petitioners have been consistently aligned on the need for SIP decisions to be heard

in regional courts. While the State Petitioners and Industry Petitioners make complementary arguments, there are important differences such that neither group can represent fully the interests of the other. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* 777 (10th ed. 2013) ("Having more than one lawyer argue on a side is justifiable . . . when they represent different parties with different interests or positions."). Allowing State Petitioners and Industry Petitioners to argue in this case would enable the Court to hear from two groups with unique insights on a matter of exceptional importance to States, businesses, and the public.

4. State Petitioners and Industry Petitioners present different approaches to EPA's (mis)application of Section 307(b)(1)'s third sentence. This sentence provides a narrow exception to the default venue rule created by Section 307(b)(1)'s first two sentences. That exception requires challenges to a "locally or regionally applicable" EPA action to 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). State Petitioners and Industry Petitioners present different understandings of

this sentence, although they all agree that venue is proper in the Tenth Circuit under either approach.

Beginning with State Petitioners, they argue that a "locally or regionally applicable action" is "based on" a "determination of nationwide scope or effect" within Section 307(b)(1)'s third sentence, 42 U.S.C. § 7607(b)(1), if "*the ultimate justifications* on which EPA's locally or regionally applicable action is based [ ] cover the entire country or necessarily result in consequences throughout the whole nation," States Br.43 (emphasis added). According to State Petitioners, the actions here are not within the venue provision's exception because "[t]he core findings that made the difference as to whether any given plan was approved or disapproved" were "unique to each State's submission," not nationwide. States Br.44-45.

While supportive of the States' position, Industry Petitioners, for their part, believe that a "locally or regionally applicable action" falls within Section 307(b)(1)'s third sentence "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)." Industry Br.47–48 (quoting 42 U.S.C. § 7607(b)(1)). As then-Judge Kavanaugh explained, Section

307(b)(1)'s third sentence only applies if "'otherwise locally or regionally applicable regulations have a nationwide scope or effect.'" Industry Br.48 (quoting *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013)).

State Petitioners' and Industry Petitioners' interpretations of Section 307(b)(1)'s third sentence are different, although, as noted, they each support venue in the regional courts if the Court applies either of their interpretations. State Petitioners' approach to Section 307(b)(1)'s third sentence considers EPA's "*ultimate reasons*" or "*ultimate justifications*" for taking the "locally or regionally applicable action" at issue, asking whether those "ultimate reasons" or "ultimate justifications" are of a "nationwide" "scope or effect." States Br.40–41, 43, 45 (quoting 42 U.S.C. § 7607(b)(1) (emphases added)). Industry Petitioners' approach to Section 307(b)(1)'s third sentence looks to the "locally or regionally applicable" action itself, asking whether EPA issued that action based upon its determination that the action itself has "a nationwide scope or effect." Industry Br.47–48 (quoting *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455).

Petitioners respectfully submit that this Court would benefit from exploring both of these approaches to Section 307(b)(1)'s third sentence at oral argument, which can most effectively occur by having the proponents of these different approaches present argument.

5. For all the reasons discussed above, the State and Industry Petitioners believe that allowing both groups of Petitioners to participate in oral argument would materially aid in the resolution of this case. Accordingly, Petitioners move for divided argument, with the State Petitioners receiving 20 minutes and the Industry Petitioners receiving 10 minutes.

Respectfully submitted,

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