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

BRIEF FOR STATES OF NEW YORK, ARIZONA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN; THE DISTRICT OF COLUMBIA; HARRIS COUNTY, TEXAS; AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE

This case concerns whether one circuit court or seven circuit courts should review a single rulemaking of the U.S. Environmental Protection Agency (EPA) under the Clean Air Act. *See* Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336 (Feb. 13, 2023) ("SIP Disapproval Rule"). The Rule addresses the thorny problem of interstate pollution by applying a uniform framework to assess when each State's sources export pollution in quantities large enough to trigger statutory obligations to other States that must cope with the influx of interstate pollution. *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 514 (2014). The Rule concludes that twenty-one States possess those statutory obligations and that each failed to propose corresponding pollution-reduction measures.

The Act's venue provision vests the D.C. Circuit with exclusive jurisdiction to review EPA actions that are "nationally applicable" or that contain a published finding that the action is "based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1). In the published Rule, EPA explained that the Rule was "nationally applicable" because it applied to twenty-one States in ten judicial circuits. EPA further explained that the Rule was "based on a determination of nationwide scope or effect" because it was based on a uniform legal framework and nationwide air pollution modeling.

Notwithstanding these express findings, many States and industry groups filed dozens of petitions for review in seven different regional circuits. Pursuant to the venue provision, EPA moved to transfer these petitions to the D.C. Circuit for centralized review. The

Tenth Circuit concluded that the Rule was nationally applicable and that petitions challenging it therefore must be transferred to the D.C. Circuit.

Amici curiae are the States of New York, Arizona, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Wisconsin; the District of Columbia; Harris County, Texas; and the City of New York. Amici file this brief in support of EPA and affirmance of the Tenth Circuit's decision. Amici have substantial interests in this litigation because most Amici suffer from persistent ozone pollution driven in significant part by pollution that migrates from emitters in other States. Despite these Amici's successful efforts to reduce pollution from their own in-state sources, the ongoing influx of out-of-state pollution continues to impose severe health effects on Amici's residents, and regulatory and economic costs on Amici's industries—which must shoulder heavier burdens to offset pollution from other States.

Amici also have significant interests in the proper application of the Act's venue provision. Amici have decades of experience with EPA actions addressing interstate pollution and with legal challenges to those actions, including the challenges here. Based on this experience, Amici write to explain that the Act's venue provision requires centralized review of the Rule in the D.C. Circuit. Since February 2023, seven circuits have simultaneously reviewed the Rule, which has caused chaos and delay. This wasteful litigation has severely harmed Amici by prolonging the health and economic harms that flow from interstate pollution—contrary to Congress's intent under the Act's venue and good-neighbor provisions.

STATEMENT

A. Statutory Background

The Clean Air Act's judicial review provision assigns venue based on the geographical scope of an EPA action. An action that is "nationally applicable" may be reviewed "only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1). By contrast, an action that is "locally or regionally applicable" may be filed "only in the United States Court of Appeals for the appropriate circuit." *Id.*

However, a locally or regionally applicable action may be reviewed only in the D.C. Circuit if such action includes a published finding that it "is based on a determination of nationwide scope or effect." *Id.*

Here, the Tenth Circuit correctly found that the action at issue was nationally applicable. The ruling can in the alternative be affirmed on the ground that, even if locally or regionally applicable, the action was "based on a determination of nationwide scope or effect."

B. Factual and Procedural Background

1. Interstate ozone pollution and the "good neighbor" provision

Ground-level ozone is a harmful pollutant. When inhaled, ozone reacts with and inflames tissue in the airways, which can lead to asthma attacks, reduced lung function, and cardiac effects. *See* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292, 65302-10 (Oct. 26, 2015). When ozone levels are high, health authorities warn the public that spending time outdoors can be hazardous, especially for children and

the elderly.[1] Hospitals report more emergency room visits on high-ozone days, including from children experiencing asthma attacks.[2]

Although Amici tightly regulate ozone-forming pollutants (called "precursors") within their jurisdictions, sources of air pollution in dozens of "upwind" States emit precursors that travel with the wind—sometimes thousands of miles—into Amici's "downwind" jurisdictions. *See* Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654, 36,670 (June 5, 2023). The interstate movement of ozone precursors involves a complex web of pollution streams, sometimes numbering in the thousands. *See EME Homer City*, 572 U.S. at 496-97. Because many downwind States receive streams of precursor pollution from more than one upwind State, *id.* at 496, interstate ozone pollution "is a major determinant of local air quality," S. Rep. No. 101-228, at 264 (1989).[3]

Ozone precursors transported from upwind States, such as Oklahoma and Utah, contribute substantially to elevated ozone levels in downwind States, including

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[1] *See, e.g.*, Okla. Div. of Env't Quality, *Ozone Alert and Particulate Matter (PM) Alert* (n.d.).

[2] Nicholas Nassikas et al., *Ozone-Related Asthma Emergency Department Visits in the US in a Warming Climate*, 183 Env't Rsch. no. 109206 (Apr. 2020).

[3] For example, ozone transported from upwind States is responsible for as much as 57 percent of the total ozone in Fairfield County, Connecticut; 28 percent of the total ozone in Cook County, Illinois; and 52 percent of the total ozone in Kenosha, Racine, and Sheboygan Counties, Wisconsin—which struggle to meet federal ozone standards. *See* EPA, *Air Quality Modeling Technical Support Document: 2015 Ozone NAAQS SIP Disapproval Final Action* app. D at D-2 (2023).

many of Amici's jurisdictions. For example, Oklahoma's sources contribute up to 0.79 parts per billion (ppb) of ozone to the Greater Houston metropolitan area.[4] Galveston County, which has an "F" rating for ozone pollution from the American Lung Association, is home to over 69,000 children and adults who suffer from respiratory and cardiac diseases that make them especially vulnerable to ozone pollution.[5]

To offset this upwind pollution, downwind States must further tighten their already stringent emissions-control regulations. As this Court has recognized, squeezing further reductions from sources in downwind States is typically costlier and less effective than requiring upwind sources to take common pollution-reduction measures. *See EME Homer City*, 572 U.S. at 519-20.

Congress enacted the Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), to limit interstate pollution and to address these disparities. *See EME Homer City*, 572 U.S. at 497-99. When EPA revises a national ambient air quality standard, each State must submit a SIP consisting of permanent, enforceable mea sures to ensure the State achieves and maintains compliance with the federal standard. 42 U.S.C. § 7410(a)(1). The good-neighbor provision, *id.* § 7410(a)(2)(D)(i)(I), requires that each plan also prohibit emissions that will impede any other State's compliance, *see EME Homer City*, 572 U.S. at 509. If EPA determines that a SIP will not adequately control interstate pollution, in violation of the good-neighbor provision, EPA must disapprove it. 42 U.S.C. § 7410(c)(1). Within two years of such disapproval, EPA must issue

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[4] EPA, *Air Quality Modeling*, *supra*, at app. C at C-2.

[5] Am. Lung Ass'n, *State of the Air 2024: Texas* (2024) (click on "Populations at Risk").

a federal implementation plan (FIP) to replace the inadequate SIP. *Id.*

2. The SIP Disapproval Rule

This case involves a single EPA rule that disapproved twenty-one SIPs for failing to address good-neighbor obligations that arose after EPA revised the federal ozone standards. In 2015, EPA set the maximum acceptable concentration of ozone at 70 ppb. 80 Fed. Reg. at 65292. This revision triggered a requirement that States update their SIPs. *See* 42 U.S.C. § 7410(a)(1).

EPA explained that all States would be able to identify and address their good-neighbor obligations using the same four-step framework developed by EPA and upheld by this Court in *EME Homer City*, 572 U.S. at 500-03, 519-20.[6] EPA also offered to prepare the nationwide modeling necessary for the first two steps of that framework. The modeling would first identify the downwind areas that were projected not to attain or maintain the new ozone standards, and then identify the upwind States that were "linked" to those downwind areas by greater-than-de-minimis amounts of pollution.[7]

EPA issued the first version of this modeling in 2017. *See* Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data, 82 Fed. Reg. 1733 (Jan. 6, 2017). Oklahoma, Utah, and nearly every other State used this modeling to prepare their SIPs. *See* Air Plan Disapproval; Arkansas, Louisiana, Oklahoma, and

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[6] Mem. from Janet McCabe, Acting Assistant Adm'r, EPA, to Regional Administrators, Regions 1-10; Attachment: How Air Agencies and the EPA Will Move Forward to Implement the 2015 Ozone Standards 6-7 (Oct. 1, 2015).

[7] *Id.*

Texas, 87 Fed. Reg. 9798, 9816 (Feb. 22, 2022); Air Plan Disapproval; Utah, 87 Fed. Reg. 31470, 31475 (May 24, 2022).

The modeling revealed that about half of the States had no new good-neighbor obligations. *See* 88 Fed. Reg. at 9362. These States were not projected to contribute greater-than-de-minimis amounts of ozone—defined as one percent of the air-quality standard, or 0.70 ppb—to the identified downwind areas. *See*, *e.g.*, Air Plan Approval; [Idaho], 85 Fed. Reg. 65722, 65724 (Oct. 16, 2020). EPA began approving these SIPs in 2018. *See* 88 Fed. Reg. at 9362.

The modeling showed that the remaining States were projected to contribute more than 0.70 ppb of ozone pollution to downwind areas. These States were required to evaluate whether using common pollution-control technologies could reduce their contributions in a cost-effective manner. If so, their SIPs would need to require the use of those technologies (or other technologies that would reduce pollution by an equivalent amount). Under the Act's cooperative federalism structure, States were free to adopt the "mix" of technologies that made sense for their individual State. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

Instead, many States submitted SIPs asking EPA to disregard the contributions that the modeling had already confirmed. For example, many States argued that the 0.70 ppb threshold was too low, and instead argued that a more forgiving threshold of 1.0 ppb should apply.[8] Other States argued that EPA should disregard

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[8] *See, e.g.*, 87 Fed. Reg. at 9819-20 (Oklahoma); 87 Fed. Reg. at 31476 (Utah); Air Plan Disapproval; [Alabama], 87 Fed. Reg. 64412, 64423-24 (Oct. 25, 2022); 87 Fed. Reg. at 9804 (Arkansas); Air Plan

(*continues on next page*)

their contributions if emissions from Canada or Mexico also affected the same downwind area.[9] Still other States contended they did not have to evaluate common pollution-reduction technologies because EPA should deem an existing federal program—which addressed an earlier, weaker ozone standard—to satisfy the new standard.[10]

EPA proposed to disapprove these SIPs, applying "a consistent set of policy judgments across all states." *E.g.*, 87 Fed. Reg. at 31472 (Utah). For instance, EPA determined to continue applying the 0.70 ppb threshold to all States. *E.g.*, *id.* at 31474. EPA determined that pollution from Canada and Mexico did not excuse good-neighbor obligations under the Act. *E.g.*, *id.* at 31482. And EPA determined that the prior federal program did not demonstrate compliance with the new standard. *See, e.g.*, 87 Fed. Reg. at 9822-23 (Oklahoma). To support this determination, EPA cited updated nationwide modeling, which factored into the prior federal program. *Id.* at 9823.

Disapproval; Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin, 87 Fed. Reg. 9838, 9845-46, 9847, 9870-71 (Feb. 22, 2022) (Illinois, Indiana, Michigan, Ohio); Air Plan Disapproval; Kentucky, 87 Fed. Reg. 9498, 9509 (Feb. 22, 2022); 87 Fed. Reg. at 9811 (Louisiana); Air Plan Disapproval; [Alabama, Mississippi, Tennessee], 87 Fed. Reg. 9545, 9557 (Feb. 22, 2022) (Mississippi).

[9] *See, e.g.*, 87 Fed. Reg. at 31477 (Utah); *see also* 88 Fed. Reg. at 9378 (observing that Arkansas, California, Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, Utah, Wyoming, and West Virginia raised this argument).

[10] *See, e.g.*, 87 Fed. Reg. at 9822-23 (Oklahoma); 87 Fed. Reg. at 64425-26 (Alabama); 87 Fed. Reg. at 9857 (Indiana); 87 Fed. Reg. at 9512 (Kentucky); Air Plan Disapproval; New York and New Jersey, 87 Fed. Reg. 9484, 9494 (Feb. 22, 2022) (New York).

EPA also proposed to find that the D.C. Circuit would be the appropriate venue for judicial review if the disapprovals were finalized—for two independent reasons. First, EPA might publish the SIP disapprovals together in a single final action, rendering that action "nationally applicable," 42 U.S.C. § 7607(b). *E.g.*, 87 Fed. Reg. at 31484 n.65 (Utah). Second, and in any event, EPA proposed to publish a finding that the final disapprovals were "based on a determination of nationwide scope or effect," 42 U.S.C. § 7607(b). *E.g.*, 87 Fed. Reg. at 31484.

One year later, EPA published the SIP Disapproval Rule, a single final action finalizing the disapprovals for twenty-one States. *See* 88 Fed. Reg. 9336. The Rule contained published findings that it was both "nationally applicable" and "based on a determination of nationwide scope or effect." *Id.* at 9380. The Rule was "nationally applicable" because it applied "common, nationwide analytical methods" to disapprove SIPs for "21 states located across a wide geographic area in eight of the ten EPA Regions and ten Federal judicial circuits." *Id.* The Rule was "based on a determination of nationwide scope or effect" because it was based on "a common core of nationwide policy judgments and technical analysis concerning the interstate transport of pollutants." *Id.*

3. This litigation

Several States and industries filed petitions for review of the SIP Disapproval Rule in seven different regional circuits. Each petition purported to seek only partial review. For example, Utah's petition stated that it sought review of "only the portion of the final rule disapproving Utah's State Implementation Plan." Pet. 2, *Utah v. EPA*, No. 23-9509 (10th Cir. Feb. 13, 2023).

Several challengers—including petitioners here—also filed protective petitions for review in the D.C. Circuit.[11]

EPA moved to transfer the petitions to the D.C. Circuit, arguing that the Rule was both "nationally applicable" and, in the alternative, "based on a determination of nationwide scope or effect." *See* 42 U.S.C. § 7607(b)(1). Three circuits deferred the motions to merits panels. *See* Order, *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. July 3, 2023), ECF No. 27; Order, *Utah v. EPA*, No. 23-9509 (10th Cir. Apr. 27, 2023), ECF No. 93; Order, *Alabama v. EPA*, No. 23-11173 (11th Cir. July 12, 2023), ECF No. 24. One circuit denied the motion without explanation. Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. Apr. 25, 2023), Doc. #5269098. And three circuits issued opinions denying the motion, over strong dissents. *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) (per curiam) ("*Texas 2023*"); *Kentucky v. EPA*, No. 23-3216, 2023 WL 11871967 (6th Cir. July 25, 2023).

After merits briefing, a unanimous panel of the Tenth Circuit determined that the Act's venue provision required transfer of the petitions before it to the D.C. Circuit. The court concluded that the Rule was nationally applicable on its face because it disapproved SIPs "from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits"—which had "all failed to comply with the good-neighbor provision." Pet. App. 12a. The Tenth Circuit emphasized the deeply interrelated nature of the SIP disapprovals—

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[11] *See, e.g.*, Pet., *Utah v. EPA*, No. 23-1102 (D.C. Cir. Apr. 13, 2023), Doc. #1994857; Pet., *Oklahoma v. EPA*, No. 23-1103 (D.C. Cir. Apr. 14, 2023), Doc. #1994883; Pet., *PacifiCorp v. EPA*, No. 23-1112 (D.C. Cir. Apr. 14, 2023), Doc. #1995594.

explaining that the Rule applied "a uniform statutory interpretation and common analytical methods" to "overlapping and interwoven linkages between upwind and downwind states in a consistent manner." Pet. App. 12a-13a. The court rejected petitioners' attempt to challenge only a portion of the Rule because "the manner in which a petitioner frames their challenge does not alter the court in which the petition belongs." Pet. App. 14a (quotation and alteration marks omitted).

The Tenth Circuit acknowledged that the Fourth, Fifth, and Sixth Circuits had retained venue, but explained that those courts had erred by straying from the statute's text and applying "a petition-focused approach that we and other circuits have rejected." Pet. App. 17a. The Tenth Circuit noted that this "misdirected approach," if accepted, would result in multiple circuit courts "ruling on issues arising from the same nationwide EPA rule, thereby defeating the statute's purpose to centralize judicial review of nationally applicable actions in the D.C. Circuit." Pet. App. 18a.

Given its finding that the Rule was "nationally applicable," the court did not reach the independent, alternative ground that the Rule is based on a determination of nationwide scope or effect. Pet. App. 19a.

This Court granted certiorari.[12]

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[12] In the same order, this Court also granted certiorari in another case interpreting the same statutory venue provision. *See EPA v. Calumet Shreveport Refining LLC*, No. 23-1229.

SUMMARY OF ARGUMENT

I. The Tenth Circuit correctly held that the SIP Disapproval Rule, which applies to twenty-one States spanning ten judicial circuits, is nationally applicable. Typically, EPA approves or disapproves individual SIPs in State-specific actions. But when, as here, EPA addresses a nationwide problem, such as the long-range movement of pollution across state lines, it may disapprove multiple SIPs, or promulgate multiple FIPs, in a single action. Courts have consistently held that such a final action is "nationally applicable," contrary to the contentions of petitioners and their amici.

Contrary to petitioners' arguments, the SIP Disapproval Rule—not the individual disapproval determinations therein—is the "action" to which the venue provision must be applied. The statute does not permit a petitioner to select a local or regional venue by purporting to challenge only a portion of a nationally applicable action. Moreover, when courts have confronted the question whether judicial review should be unitary or piecemeal, courts have generally applied a test that examines, among other things, whether the agency decision arises from interrelated administrative proceedings and whether the administrative record would be required to be filed in more than one court. Applying that sensible test in this context demonstrates that the entire SIP Disapproval Rule is the proper object of review because each disapproval arises from interrelated agency proceedings about the same interstate ozone transport problem, and is based on common materials, such as nationwide modeling data, that would need to be filed in each court of review.

II. In the alternative, the Tenth Circuit's judgment should be affirmed on the ground that the Rule is based

on multiple determinations of nationwide scope or effect. These determinations include (but are not limited to) the application of a uniform numerical threshold to establish linkages between upwind States and downwind areas; the rejection of legal arguments about Canadian and Mexican emissions; and the conclusion, supported by nationwide modeling data, that preexisting measures taken under an earlier, weaker ozone standard do not satisfy any State's good-neighbor obligations under the new ozone standards.

The SIP Disapproval Rule litigations, in which nearly every petitioner has sought review of these common determinations, confirms that they are "of nationwide scope or effect." Review of identical nationwide issues across multiple circuits was the precise problem that Congress sought to avoid when it amended the venue provision in 1977. This Court must give effect to Congress's clear and pragmatic choice.

ARGUMENT

I. THE SIP DISAPPROVAL RULE IS NATIONALLY APPLICABLE.

A. The Rule Spans Twenty-One States and Ten Judicial Circuits.

The Tenth Circuit correctly determined that the SIP Disapproval Rule, which spans twenty-one States in ten judicial circuits, is "nationally applicable," 42 U.S.C. § 7607(b)(1). *See* Pet. App. 12a. Courts have long agreed that when the entities regulated by an EPA action are located in more than one judicial circuit, the action is "nationally applicable" on its face, and review lies only in the D.C. Circuit. *See Southern Ill. Power Coop. v. EPA*, 863 F.3d 666, 671 (7th Cir. 2017) (action

involving areas in twenty-four States); *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *3 (5th Cir. Feb. 24, 2011) ("*Texas 2011*") (action involving SIPs of thirteen States); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) (action involving thirty-one areas reaching "from coast to coast"); *West Virginia Chamber of Com. v. Browner*, 166 F.3d 336, 1998 WL 827315, at *5-6 (4th Cir. 1998) (table case) (action involving SIPs of twenty-two States and District of Columbia). This straightforward construction effectuates Congress's "obvious aim" to centralize judicial review of national issues in the D.C. Circuit. *See Southern Ill. Power Coop.*, 863 F.3d at 673.

Without discussing these precedents, petitioners point to language in the statute about action "in approving or promulgating any implementation plan under section 7410 of this title," and argue that this language requires review of all SIP-related actions in regional circuits. Okla. Br. 22-27; PacifiCorp Br. 29-30. But petitioners ignore the rest of the sentence containing that language, and the sentence's relationship to the statute as a whole. The sentence lists several types of actions that are primarily (but not exclusively) issued on a facility- or state-specific basis.[13] The sentence then

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[13] For instance, the statute lists "any order under section 7411(j)" of the Act as reviewable in a regional circuit. 42 U.S.C. § 7607(b)(1). Section 7411(j) allows EPA to waive application of the federal new source performance standards to allow a facility to use an innovative pollution-control technology. *See, e.g.*, Waiver from New Source Performance Standard for Homer City Unit No. 3 Steam Electric Generating Station, 46 Fed. Reg. 55975 (Nov. 13, 1981) (waiver for single Pennsylvania coal plant). On occasion, however, such waivers are granted to similar sources across multiple States. *See, e.g.*, Innovative Technology Waivers for Four Automobile and Light-Duty Truck Surface Coating Operations, 50 Fed. Reg. 36830

(*continues on next page*)

states that petitions for review of these actions, as well as "any other final action of the Administrator . . . *which is locally or regionally applicable*" may be filed only in "the appropriate circuit." 42 U.S.C. § 7607(b)(1) (emphasis added). Plainly, then, Congress intended this sentence to include only "*local or regional actions* under specifically enumerated provisions." *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 590 (1980) (emphasis added); *see also Texas 2023*, 2023 WL 7204840, at *4 (observing that not all SIP-related actions are local or regional). But where *national* actions issued under the specifically enumerated provisions are at issue, review belongs in the D.C. Circuit.

A case from the Fifth Circuit is instructive. In 2010, EPA issued an action finding thirteen SIPs inadequate and calling on those States to submit corrected SIPs. *See* Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions, 75 Fed. Reg. 77698 (Dec. 13, 2010). Texas-based challengers filed petitions for review in the Fifth Circuit, purporting to challenge only that portion of the action related to Texas's SIP. *See Texas 2011*, 2011 WL 710598, at *3. The challengers contended that venue was proper because the Act's venue provision states that action "approving or promulgating any implementation plan under section 7410 of this title" must be reviewed in a regional circuit—the same argument that petitioners make here. *See id.* at *1, 4 & n.10.

The Fifth Circuit correctly rejected that argument. Among other things, the court explained that the statutory language on which the challengers relied encom-

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(Sept. 9, 1985) (granting waivers to automotive plants in Georgia, Michigan, Minnesota, and Missouri).

passed only SIP-related actions "'*which run only to one air quality control region*.'" *Id.* at *4 (quoting S. Rep. No. 91-1196, at 41 (1970)). The Fifth Circuit further ruled, as many of its sister circuits had, that "EPA action involving the SIPs of numerous far-flung states are 'nationally applicable' and reviewable only in the D.C. Circuit." *Id.* at *5 (citing *West Virginia Chamber of Com.*, 166 F.3d 336; *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 300 (1st Cir. 1989)). That interpretation, the court reasoned, honored "a clear congressional intent to centralize review of national SIP issues in the D.C. Circuit." *Id.* at *4 (quotation marks omitted). That faithful interpretation of the statute should control here.[14]

Some of petitioners' amici misleadingly suggest that, since 1977, an unbroken chain of jurisprudence has interpreted the same statutory language to mean that SIP approvals and disapprovals are exclusively "locally or regionally applicable" actions.[15] *See* Br. for Amici

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[14] In its decision about the SIP Disapproval Rule here, the Fifth Circuit not only endorsed the holding in *Texas 2011* but also reiterated—contrary to petitioners' arguments—that "some final actions related to SIPs may be 'nationally applicable'" where they "uniformly apply to a broad swath of States." *Texas 2023*, 2023 WL 7204840, at *4.

However, the Fifth Circuit then circularly and erroneously focused only on the "three SIP disapprovals at issue" in the petitions at the Fifth Circuit, and held that these three disapprovals local or regional because they "involve only the regulation of Texas, Louisiana, and Mississippi." *Id.* at *5. As the Tenth Circuit's decision here correctly concluded, this petition-focused approach finds no support in the statute. Pet. App. 17a.

[15] Prior to 1977, the D.C. Circuit had held that "Congress did not intend that all suits involving approval of state implementation plans be brought in the judicial circuit where the state is located." *Natural Res. Def. Council, Inc. v. EPA*, 475 F.2d 968, 969 (D.C. Cir. 1973) (per curiam).

Arkansas et al. 1, 5-6. But the cases on which petitioners' amici rely involved actions covering only one State. *See Sierra Club v. EPA*, 47 F.4th 738, 743-45 (D.C. Cir. 2022); *American Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455-56 (D.C. Cir. 2013). Those cases do not control here, where the action covers multiple States located in different regional circuits.

In any event, amici are incorrect. The Third Circuit has held that a rule disapproving the SIPs of fifteen States under the good-neighbor provision was reviewable only in the D.C. Circuit. *National Parks Conservation Ass'n v. EPA*, 803 F.3d 151, 157, 159-60 (3d Cir. 2015). And the Fifth Circuit has transferred to the D.C. Circuit petitions for review of a rule disapproving fourteen SIPs for failure to comply with the Act's regional haze program.[16] Order, *Luminant Generation Co. v. EPA*, No. 12-60617 (5th Cir. May 3, 2013), ECF No. 84-1. Moreover, at least one of these amici have challenged disapprovals of their SIPs in the D.C. Circuit. *See, e.g.*, *Westar Energy, Inc. v. EPA*, 608 F. App'x 1 (D.C. Cir. 2015) (Kansas); *see also* Pet'r's Unopp. Mot. to Transfer, *Georgia v. EPA*, No. 11-14273 (11th Cir. Oct. 14, 2011), ECF No. 4 (requesting transfer of Georgia's SIP disapproval to the D.C. Circuit). Indeed, it is the decisions *retaining* venue in this litigation that "depart from all relevant precedent without adequate justification or explanation." *West Virginia*, 90 F.4th at 335 (Thacker, J., dissenting from Fourth Circuit's decision retaining review of SIP Disapproval Rule).

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[16] The regional haze program seeks to improve visibility in shared areas to which multiple States contribute pollution, such as national parks. *See Utility Air Regul. Grp. v. EPA*, 471 F.3d 1333, 1334 (D.C. Cir. 2006).

Petitioners' amici's argument is further contravened by the fact that the statute also speaks to actions "*promulgating* any implementation plan"—i.e., actions in which EPA issues a substitute FIP to replace a deficient or inadequate SIP. See *supra* at 5-6 (discussing this process). When EPA has issued an action "promulgating" multiple FIPs, courts have concluded that such actions are "nationally applicable" because of their broad geographical reach. *See, e.g.*, Order, *Kentucky Energy & Env't Cabinet v. EPA*, No. 23-3605 (6th Cir. Nov. 9, 2023), ECF No. 19 (rule promulgating twenty-three FIPs was "nationally applicable"); *see also* Order, *Energy Transfer LP v. EPA*, No. 23-2510 (7th Cir. Nov. 6, 2023), ECF No. 25 (transferring review of same rule to D.C. Circuit); Judgment, *Cedar Falls Utils. v. EPA*, No. 16-4504 (8th Cir. Feb. 22, 2017), ECF No. 4503949 (transferring petition for review of rule promulgating twenty-two FIPs). These decisions, like the Tenth Circuit's decision here, correctly give effect to the entire statute.

B. The Rule Is the Relevant "Action."

Petitioners err in claiming that each SIP disapproval decision within the SIP Disapproval Rule is a separate "action" requiring its own venue assessment. *See* Okla. Br. 22-23; PacifiCorp Br. 30-32. The Tenth Circuit correctly rejected this approach as contrary to the statute's text, which establishes venue based on EPA's "action" rather than the purported scope of a petitioner's challenge. Pet. App. 18a; *see also* EPA Br. 22-27. Other courts interpreting the venue provision have reached the same conclusion. *See Southern Ill. Power Coop.*, 863 F.3d at 671 (rejecting argument that rule was "amalgamation of many different locally or regionally applicable agency actions"); *West Virginia Chamber of Commerce*, 1998 WL 827315, at *6 (reject-

ing argument that SIP call was "nothing more than numerous separate EPA actions on state-specific implementation plans"); *see also ATK Launch Sys.*, 651 F.3d at 1200 (rejecting argument that rule containing multiple area designations was "mere amalgamation of numerous local actions"). Petitioners' view would improperly allow challengers to select venue through artful pleading in their petition—contrary to Congress's intent to focus solely on the agency's action.

Petitioners incorrectly argue that the relevant "action" is defined by the venue provision itself as the approval or disapproval of an individual SIP. *See* Okla. Br. 22-23; PacifiCorp Br. 30-32. To the contrary, the statute contains no definitional provision for the word "action." And the statute contemplates that a state plan approval may be a component of an action, rather than necessarily coextensive with it. *See* 42 U.S.C. § 7607(b)(1) (discussing "action *in approving or promulgating* any implementation plan" (emphasis added)). Indeed, petitioners here originally identified the "final action" as the entire SIP Disapproval Rule: their petitions stated that they were challenging "only the *portion of the final action*" disapproving a particular implementation plan. *See, e.g.*, Pet. 2, *PacifiCorp v. EPA*, No. 23-9512 (10th Cir. Feb. 23, 2023), Doc. No. 1-1.

Despite the lack of a statutory definition for "action," the proper object of judicial review in a notice-and-comment rulemaking is often "perfectly clear." 33 Wright & Miller, *Federal Practice & Procedure: Judicial Review* § 8392 (2d ed. June 2024 update) (Westlaw). But in the context of the multicircuit petition statute—which provides venue rules when multiple petitions for review of "the same order" of an agency have been filed in different circuits, 28 U.S.C. § 2112(a)—courts have sometimes faced the issue of whether the proper object of judicial

review is a unitary item (here, the SIP Disapproval Rule) or instead individual decisions contained within that item (here, each individual disapproval decision).[17] To address that issue, courts apply a multifactor test keyed to the nature of judicial review and the underlying agency administrative process that culminated in the order being challenged. Specifically, to determine whether two petitions seek review of "the same order," courts look to (i) the "unitary form of the order," (ii) the agency's "own characterization of its action," (iii) "the origin of the actions in the same or interrelated proceedings before the agency," and (iv) "the necessity of the agency's filing a single record in more than one court." *See Natural Res. Def. Council, Inc. v. EPA*, 673 F.2d 392, 399 (D.C. Cir. 1980) (per curiam). This test seeks to avoid an outcome where scarce judicial resources are unnecessarily consumed by parallel review of what is fundamentally the same agency decision. At the same time, the test does not require a court to defer blindly to the agency's chosen form of publication.

An example illustrates this sensible approach. In *Bristol Laboratories v. Richardson*, a drug manufacturer argued that an FDA order decertifying fifteen drugs in the same class was "not really a unitary order based on a unitary record" but rather "a series of orders, involving different manufacturers, drugs, and evaluations." 456 F.2d 563, 564 (1st Cir. 1971) (Coffin, J.). The court rejected that argument, reasoning that the same, consolidated order had decertified several "substantially

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[17] Although § 2112 uses the term "order," regulations and rulemakings are treated in the same manner under the statute. *See, e.g.*, *Saturn Airways, Inc. v. Civil Aeronautics Bd.*, 476 F.2d 907, 908 (D.C. Cir. 1973) (per curiam); *see also* U.S. Jud. Panel on Multidistrict Litig., *Multicircuit Petitions* (as of Jan. 15, 2025).

similar" drugs and had done so for the purpose of achieving "rational and comprehensive" regulation of a specific drug class—namely, drugs that combined antibiotics and over-the-counter medications. *Id.*

Here, these same commonsense factors confirm that the SIP Disapproval Rule should be treated as a single unitary action. First, the SIP Disapproval Rule was issued and published in a "unitary form." *See Natural Res. Def. Council*, 673 F.2d at 399. There is nothing surprising or concerning about this choice. By its nature, the interstate ozone problem can involve thousands of "overlapping and interwoven linkages between upwind and downwind States." *See EME Homer City*, 572 U.S. at 496-97; *see also id.* at 514 (noting "thorny causation problem" presented by interstate pollution). Because of the inherently national scope of long-range pollution, EPA has often published good-neighbor SIP disapprovals together in the same rule. *See, e.g.*, Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208, 48220-21 (Aug. 8, 2011).

Second, EPA here correctly described the Rule as resting on a common legal framework, a common set of modeling data performed on a nationwide basis, and a common suite of nationwide legal and factual determinations that addressed identical legal arguments from a wide cross-section of upwind States. See *supra* at 9.

Third, the SIP disapprovals at issue here originate "in the same or interrelated proceedings before the agency," which all aim to address good-neighbor responsibilities for ozone arising from the 2015 ozone standards. *See Natural Res. Def. Council*, 673 F.2d at 399. Indeed, in evaluating whether a prior good-neighbor SIP

call was one "nationally applicable" action or several "locally or regionally applicable" actions, the Fourth Circuit gave the interrelatedness of the agency's decisions substantial weight, explaining that the "nationwide scope and interdependent nature of the problem, the large number of states, spanning most of the country, being regulated, [and] the common core of knowledge and analysis involved in formulating the rule . . . all combine to make this a nationally applicable rule." *West Virginia Chamber of Com.*, 1998 WL 827315, at *7.

Fourth, the same administrative record documents —such as the nationwide modeling data, technical support documents, and EPA's response to comments document—are critical to reviewing all of EPA's disapprovals here. Treating each disapproval as the relevant "action" requires filing these same documents in seven different circuits for scrutiny by at least twenty-one different jurists.[18] *See Natural Res. Def. Council*, 673 F.2d at 399. Each of these four factors confirms that the proper object of judicial review is the SIP Disapproval Rule as a whole.

Petitioners resist this straightforward conclusion, arguing that treating the SIP Disapproval Rule as a single action would allow EPA to "manipulate venue" by publishing two completely unrelated actions—such as a SIP approval for Oklahoma and a "nonferrous smelter order" for Ohio—together in the same *Federal Register*

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[18] These documents have been posted to a single, unified docket. *See* Air Plan Disapproval; Interstate Transport of Air Pollution for the 2015 8-hour Ozone National Ambient Air Quality Standards, Docket ID No. EPA-HQ-OAR-2021-0663.

notice.[19] *See* Okla. Br. 31. But there is no indication that EPA has published or would publish two unrelated decisions in the same *Federal Register* notice for venue purposes. If EPA did so, the factors that courts have long applied would lead to the conclusion that those decisions were separate. For instance, a nonferrous smelter order for Ohio and a SIP approval for Oklahoma would neither originate "in the same or interrelated proceedings before the agency" nor share "a single record." *See Natural Res. Def. Council*, 673 F.2d at 399.

II. IN THE ALTERNATIVE, THE SIP DISAPPROVAL RULE IS BASED ON MULTIPLE DETERMINATIONS OF NATIONWIDE SCOPE OR EFFECT.

A. The Rule Contains Multiple Determinations of Nationwide Scope or Effect.

In the alternative, even if the Court were to conclude that the SIP Disapproval Rule is locally or regionally applicable, the Tenth Circuit's judgment should be affirmed on the ground that the Rule is based on multiple determinations of nationwide scope or effect. *See* 42 U.S.C. § 7607(b)(1). This Court may consider this alternative ground for affirmance because it was raised by EPA below. *See, e.g.*, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). Amici herein discuss three nationwide determinations upon which the Rule was based. These examples are not exhaustive.

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[19] A "nonferrous smelter order" is a now-defunct type of order that permitted an older smelter to delay compliance with the 1977 Clean Air Act amendments until no later than 1988. *See Kennecott Corp. v. EPA*, 684 F.2d 1007, 1010 (D.C. Cir. 1982).

1. One-percent contribution threshold

EPA's decision to disapprove each SIP was based on a nationwide determination that States were "linked"—and thus presumptively had good-neighbor obligations—if their contributions to downwind ozone problems exceeded a threshold of one percent of the federal ozone standards, or 0.70 ppb. 88 Fed. Reg. at 9342, 9370-75. EPA's determination gave this threshold nationwide effect: where States' own submissions had applied this one-percent threshold, EPA agreed that its use was appropriate. *See, e.g.*, Air Plan Disapproval; West Virginia, 87 Fed. Reg. 9516, 9525 (Feb. 22, 2022). And where States had attempted to rely on a higher contribution threshold (including through state-specific demonstrations), EPA rejected those arguments, and applied the one-percent contribution threshold instead. *See, e.g.*, 87 Fed. Reg. at 31478 (Utah); 87 Fed. Reg. at 9819 (Oklahoma).

This determination was quintessentially nationwide in scope. As EPA explained, much of the interstate ozone transport problem in the United States was "still the result of the collective impacts of contributions from many upwind states." 88 Fed. Reg. at 9371. The "great number of geographically dispersed emissions sources" required EPA to use a single threshold to capture all "greater-than-de minimis contributors" without unfairly singling out "the largest single or few upwind contributors." *Id.*

Moreover, the one-percent contribution threshold was clearly a "basis and rationale for every SIP submission covered by this final SIP disapproval action." *Id.* at 9374. If a State's contributions did not exceed the one-percent threshold, EPA approved its SIP. By contrast, if a State's contributions did exceed the one-percent

threshold, EPA proceeded to the next step of the analysis. Application of the threshold was thus a "but-for" cause, or a "necessary condition," of the action. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007).

Indeed, petitioners in nearly every SIP Disapproval Rule case have challenged EPA's determination to apply a one-percent threshold—further underscoring that this was a "determination of nationwide scope or effect" under section 7607(b)(1).[20] Allowing multiple circuits to review the same numerical threshold that EPA applied nationwide is plainly not what Congress intended when it enacted the "nationwide scope or effect" prong, which promotes uniformity by channeling review

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[20] *See, e.g.*, Opening Br. for Tex. State Pet'rs 25-28, *Texas v. EPA*, No. 23-60069 (5th Cir. May 30, 2023), ECF No. 328; Br. of Appellant La. Dep't of Env't Quality & State of La. 35-36, *Texas*, No. 23-60069 (May 30, 2023), ECF No. 332; Br. of La. Indus. Pet'rs 29-30, *Texas*, No. 23-60069 (May 30, 2023), ECF No. 333; Miss. Pet'rs' Joint Opening Br. 25-36, *Texas*, No. 23-60069 (May 30, 2023), ECF No. 335; Merits Br. of the Commonwealth of Ky. 30-35, *Kentucky v. EPA*, No. 23-3216 (6th Cir. Oct. 10, 2023), ECF No. 48; Br. of Pet'r Ky. Energy & Env't Cabinet 25-27, *Kentucky Energy & Env't Cabinet v. EPA*, No 23-3225 (6th Cir. Oct. 10, 2023), ECF No. 31-1; Pet'rs' Opening Br. 29-32, *Arkansas v. EPA*, No. 23-1320 (8th Cir. Aug. 10, 2023), Doc. No. 5305108; Pet'r's Br. 30-33, *Union Elec. Co. v. EPA*, No. 23-1751 (8th Cir. Aug. 14, 2023), Doc. No. 5305650; Pet'rs' Br. 46-49, *ALLETE, Inc. v. EPA*, No. 23-1776 (8th Cir. Aug. 11, 2023), Doc. No. 5305346; Pet'r Hybar LLC's Opening Br. 31-36, 44-46, *Hybar, LLC v. EPA*, No. 23-1777 (8th Cir. Aug. 14, 2023), Doc. No. 5305723; Pet'r's Am. Br. 31-33, *Arkansas League of Good Neighbors v. EPA*, No. 23-1778 (8th Cir. Aug. 14, 2023), Doc. No. 5305660; Prelim. Opening Br. of the State of Utah 30-32, *Utah v. EPA*, No. 23-9509 (10th Cir. July 14, 2023), ECF No. 146; Prelim. Pet'r Br. of Utah Indus. Pet'rs 23, 28-31, *PacifiCorp v. EPA*, No. 23-9512 (10th Cir. July 14, 2023), ECF No. 117; Prelim. Pet'rs' Br. 39-45, 50-53, *Oklahoma v. EPA*, No. 23-9514 (10th Cir. July 14, 2023), ECF No. 90; Br. of Ala. & Indus. Pet'rs 25-36, *Alabama v. EPA*, No. 23-11173 (11th Cir. Sept. 20, 2023), ECF No. 35.

of all nationwide determinations to the D.C. Circuit. See *infra* at 30-33.

Moreover, applying a 1.0 ppb contribution threshold to some States and not to others could have anomalous and unfair results. For instance, if the Eighth Circuit were to hold that applying a 1.0 ppb nationwide threshold is appropriate, but the Tenth Circuit were to uphold EPA's application of the 0.70 ppb nationwide threshold, Arkansas would have no responsibilities associated with its contribution of 0.94 ppb of ozone to Galveston County, Texas, whereas Oklahoma would have good-neighbor obligations associated with its smaller contribution of 0.79 ppb of ozone to the same county.[21]

2. International emissions

The Rule was also based on EPA's nationwide determination that international emissions (such as those from Canada or Mexico) do not excuse a State from complying with its statutorily mandated good-neighbor obligations. EPA did not consider emissions from Canada or Mexico in analyzing linkages between upwind States and downwind areas. 88 Fed. Reg. at 9353. Many different States proposed to rely on such international emissions to excuse their own obligations, and EPA uniformly rejected those arguments. *See id.* at 9378 (explaining that EPA responded to such arguments from Arkansas, California, Illinois, Indiana, Kentucky, Michigan, Missouri, Ohio, Utah, Wyoming, and West Virginia). This determination was consistent with the D.C. Circuit's holding in *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019), which had held that the word "contribute" in the good-neighbor provision does not require an

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[21] *See* EPA, 2016v3 DVs State Contributions (n.d.) (tab "2023gf Ozone Contributions"; line 637, cells H & AN).

upwind State's emissions to be the "but-for cause" of a downwind area's nonattainment, *id.* at 324-25 (rejecting arguments about international emissions). *See* 88 Fed. Reg. at 9378. That interpretation of the statute plainly had nationwide effect, as did EPA's reliance on the same statutory interpretation in determining in this Rule that international emissions do not excuse any State's good-neighbor obligations.

This determination was a "necessary condition" of each disapproval. *See Safeco Ins. Co.*, 551 U.S. at 63. The States that relied on international emissions urged EPA to rely on such emissions to disregard their linkages altogether, or to find an absence of "significant contribution" under the statute. EPA's rejection of that argument was thus a necessary prerequisite to the agency's conclusion in the Rule that these States possessed good-neighbor obligations that their SIPs failed to satisfy.

3. Preexisting control measures

EPA's disapproval of each SIP was likewise based on a nationwide determination that States could not rely on their preexisting "on the books" control measures to comply with the new, more stringent ozone standard. Instead, EPA determined that, once a more-than-de-minimis contribution had been established, each State was required to assess whether common pollution-control measures available to that State's sources could reduce those contributions.

This determination was nationwide in scope. No State with a disapproved SIP had proposed to take any additional measures to fulfill its good-neighbor obligations, and many States simply listed their "on-the-books" measures instead. *See, e.g.*, 87 Fed. Reg. at 9528 (West Virginia). EPA's updated modeling data had already

expressly accounted for all "on-the-books" measures of which EPA was aware, and to which individual States had called EPA's attention in their SIP submissions. *Id.* at 9530. EPA's updated modeling showed that, even factoring in these measures, the disapproved States were still expected to significantly contribute ozone to the downwind States.

Moreover, nearly every petitioner in the SIP Disapproval Rule litigation has challenged EPA's reliance on this updated modeling data.[22] The fact that so many different petitioners located in so many different States raised such similar challenges, none of which hinges on state-specific considerations, further confirms that this determination was of nationwide scope or effect.

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[22] *See, e.g.*, Pet'r's Opening Br. 43-53, *West Virginia v. EPA*, No. 23-1418 (4th Cir. Feb. 27, 2024), ECF No. 63; Opening Br. for Tex. State Pet'rs 34-39, *Texas*, *supra*; Br. of Appellant La. Dep't of Env't Quality & State of La. 42-48, *Texas, supra*; Br. of La. Indus. Pet'rs 38-42, *Texas*, *supra*; Miss. Pet'rs' Joint Opening Br. 43-54, *Texas*, *supra*; Merits Br. of the Commonwealth of Ky. 22-30, *Kentucky*, *supra*; Br. of Pet'r Ky. Energy & Env't Cabinet 20-24, *Kentucky*, *supra*; Pet'r's Br. 39-45, *Union Elec. Co.*, *supra*; Pet'rs' Br. 45-46, *ALLETE, Inc.*, *supra*; Pet'r Hybar LLC's Opening Br. 27-31, *Hybar, LLC*, *supra*; Pet'r's Am. Br. 40-44, *Arkansas League of Good Neighbors*, *supra*; *see also* Nev. Cement Co.'s Opposed Mot. to Stay the Final Rule 7-12, *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. May 10, 2023), ECF No. 9.1.

B. Congress Amended the Venue Provision to Avoid Precisely the Type of Chaotic Litigation That Occurred Here.

Congress amended the Clean Air Act in 1977 to prevent the precise problem that happened here: the delay, chaos, and inefficiency caused by different regional circuits each separately adjudicating challenges to the same nationwide aspects of a single action.

From its beginning, the course of the SIP Disapproval Rule litigation has violated Congress's obvious intent. Here, various States and industry groups first lodged dozens of petitions for review in seven regional circuit courts across the country—plus multiple protective petitions for review in the D.C. Circuit. Each circuit received motions to transfer the petitions to the D.C. Circuit, as well as motions to stay the Rule as applied only to particular States.

After this initial motion practice, which took as long as one year, even the threshold issue of venue remained largely unresolved. In three circuits, motions panels issued unpublished orders that did not bind the merits panels. In three other circuits, motions panels referred the transfer motions to merits panels without deciding whether venue was proper. And although EPA successfully pursued a settlement agreement in one circuit, merits briefing and oral argument proceeded in the remaining six circuits—largely on identical legal issues. See *supra* at 25 n.20, 28 n.22.

As described in more detail in Amici's brief in *EPA v. Calumet Shreveport Refining LLC*, a second wave of petitions hit the regional circuits after EPA issued a single final action promulgating FIPs to replace the SIPs that had been found deficient in the SIP Disapproval Rule. *See* Br. for Amici States and Local Governments

22-24, *EPA v. Calumet Shreveport Refining LLC*, No. 23-1229 (U.S. Dec. 20, 2024). That litigation produced further absurdities, including one petitioner filing nine petitions in five circuits to challenge different pieces of the same EPA action, and another petitioner filing active (not merely protective) petitions for review in both the Sixth Circuit and the D.C. Circuit. *See id.*

The history of the venue provision makes abundantly clear that the 1977 amendments were enacted specifically to prevent such chaos and delay. As originally enacted in 1970, the venue provision of the Act provided, in relevant part, that an EPA action "approving or promulgating any implementation plan" could be filed only in the United States Court of Appeals for the appropriate circuit." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 12(a), § 307(b), 84 Stat. 1676, 1707-08. At that time, the provision contained no mention of actions "based on a determination of nationwide scope or effect." *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(c)(2), (4), 91 Stat. 685, 776 (adding this language).

As this first iteration of the venue provision was implemented, however, it became clear that "not every question respecting [a state] implementation plan [was] of purely local significance." David P. Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1263 (1977). That uncertainty caused EPA to face sprawling litigation across multiple circuits in response to at least two rules involving SIPs. First, in 1972, EPA promulgated a single rule approving state implementation plans in all fifty States, the District of Columbia, and four U.S. territories. Petitions for review were filed in ten judicial circuits challenging uniform determinations that EPA had applied to each plan. Venue was settled only after the First Circuit and D.C. Circuit each

concluded that the petitions challenged nationwide determinations, making the D.C. Circuit the appropriate circuit under the venue statute. *See* Currie, *supra*, at 1263; *Natural Res. Def. Council, Inc. v. EPA*, 465 F.2d 492, 493 (1st Cir. 1972); *Natural Res. Def. Council*, 475 F.2d at 969.

Similarly, in 1974, EPA promulgated a rule containing SIP provisions for each State that classified certain areas for the purpose of preventing them from "backsliding" out of compliance with the air quality standards. *See Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 705 (6th Cir. 1975). Petitions for review were filed in six circuits. Venue was settled only after the Sixth Circuit, where the first petition had been filed, concluded that the rule applied "uniformly throughout the country," making the D.C. Circuit the appropriate venue under the statute. Currie, *supra*, at 1266 & n.300; *Dayton Power*, 520 F.2d at 705.

When Congress held hearings about amending the Clean Air Act, it heard testimony about these cases, including testimony explaining that the then-existing venue provision was vague and resulted in "useless threshold litigation." *See* Administrative Conference of the United States, Recommendation 76-4: Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (1976), in *Clean Air Act Amendments of 1977: Hr'g on S. 251, S. 252 & S. 253 Before the S. Subcomm. on Env't Pollution of the Comm. on Env't & Pub. Works*, 95th Cong., 1st Sess. pt. 3, at 327, 331 (1977); *see also id.* at 248-355.

Congress ultimately amended the Act's venue provision in 1977 to address the voluminous and duplicative threshold litigation and resulting delay generated by the question of where challengers should seek review

when, as had occurred in *Natural Resources Defense Council* (1972) and *Dayton Power*, a seemingly local or regional EPA action is based on nationwide determinations. To prevent this problem from recurring, Congress amended the Act to give the D.C. Circuit exclusive jurisdiction over challenges to a locally or regionally applicable EPA action "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." Pub. L. No. 95-95, § 305(c)(4), 91 Stat. at 776.

In enacting this amendment, Congress considered and rejected an approach that, like petitioners' approach here, would have resulted in regional circuits reviewing EPA actions that approve or promulgate state implementation plans even when those actions involve broadly applicable determinations of nationwide scope or effect. Congress received a recommendation from the Administrative Conference of the United States (ACUS)[23] to amend the Act by making "explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged." Administrative Conference, *supra*, at 249.

Congress rejected that approach, and instead adopted the view of G. William Frick, a member of ACUS and general counsel of EPA, who recommended that, "where 'national issues' are involved" in state implementation plans, those plans "should be reviewed in the D.C. Circuit." Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56767,

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[23] ACUS is an independent agency that studies and recommends improvements in federal administrative procedure, among other things. *See* 5 U.S.C. § 594(1).

56768 (Dec. 30, 1976); *see id.* at 56768-69; H.R. Rep. No. 95-294, at 324 (1977). As Frick explained, although SIP actions "usually involve issues peculiar to the affected States, such actions sometimes involve generic determinations of nationwide scope or effect," such as "the establishment or application of uniform principles for all States." 41 Fed. Reg. at 56769. And where state implementation plans involve such national issues, Frick explained, review should be centralized in the D.C. Circuit. *See id.* at 56769. Congress ultimately followed Frick's approach.

This drafting history and context plainly establish that Congress added the "nationwide scope or effect" prong to the venue statute to avoid precisely the situation that arose here and that petitioners seek to perpetuate—i.e., piecemeal review of a unified action in each regional circuit, regardless of whether such action involved uniform determinations of nationwide scope or effect. Congress instead enacted a law that centralized review of such actions in the D.C. Circuit to promote uniformity and prevent chaos and delay. The Court "must give effect to, not nullify, Congress' choice." *See Gallardo ex rel. Vassallo v. Marstiller*, 596 U.S. 420, 431 (2022).

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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