LEHOTSKY KELLER COHN LLP

January 27, 2025

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, NE
Washington, DC 20543-0001

RE: *Oklahoma, et al. v. EPA, et al.*, No. 23-1067

Pursuant to Rule 21.4 of this Court, Petitioners in Case No. 23-1067 oppose Respondents' motion to hold the briefing schedule in abeyance indefinitely while the EPA reassesses the agency actions challenged in this case. Whether EPA ultimately changes position months or years from now on the underlying agency actions is distinct from the question presented here: the proper venue in which Petitioners must challenge EPA's actions. All parties previously agreed that the venue question needs resolution now—for this case and many other Clean Air Act disputes. The Court can and should decide the venue issue while EPA conducts its reassessment.

1. In 2023, EPA published disapprovals of twenty-one States' plans implementing national ozone standards under 42 U.S.C. § 7410. Parties from a dozen states sought judicial review of their respective state plan disapprovals. They filed in their respective regional courts of appeals because the Clean Air Act's venue provision plainly requires it. That provision specifies that "[a] petition for review of the [EPA's] action in approving or promulgating any implementation plan … or any other final action of the [EPA] under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in" the appropriate regional circuit, while challenges to "nationally applicable regulations … may be filed only in" the D.C. Circuit. 42 U.S.C. § 7607(b)(1). The EPA moved in the regional circuits to transfer the challenges to the D.C. Circuit. The Fourth, Fifth, Sixth, and Eighth Circuits denied EPA's requests and held that the plan disapprovals of States within those circuits are appropriately challenged in their respective regional courts of appeals. But in the decision below, the Tenth Circuit held that challenges to the disapprovals of Oklahoma's and Utah's plans can be brought only in the D.C. Circuit, explicitly disagreeing with the decisions of its sister circuits. This Court granted review: EPA has already filed its merits brief; and Petitioners' reply is due shortly.

Now, EPA requests this Court to hold briefing in abeyance indefinitely while EPA "reassess[es] the basis for and soundness of the underlying disapproval action[s]" that Petitioners are challenging. Mot. 3. That intended action does not warrant holding this case in abeyance.

2. To begin with, EPA has committed to reconsider only its decision to disapprove the twenty-one state implementation plans. The agency has not represented that it intends to reassess its interpretation of the Clean Air Act's venue provision—the question on which certiorari was granted. Those two issues are legally distinct. Unless and until EPA conclusively rescinds the underlying disapproval actions, the dispute between the parties over the proper interpretation of § 7607(b)(1) remains fully in controversy.

3. Nor is it certain EPA *will* take new actions on the state plans. EPA has promised only to "reassess" its basis for disapproving state plans. Mot. 3-4. That representation is not sufficiently concrete to warrant abeyance, even if EPA's hypothesized action would, at some unknown point in the future, moot these cases. In an almost precisely analogous situation, this Court previously rejected the federal government's request for abeyance in a dispute about the proper forum for challenges to an agency action despite representations by a new Administration that the challenged action may be rescinded or revised. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (April 3, 2017). By contrast, the questions presented in the cases EPA cites in support of abeyance, Mot. 4, concerned the validity of the underlying actions a new Administration was in the process of rescinding—in cases where abeyance was unopposed.

4. Even if EPA concludes that it should not have disapproved some or all of the twenty-one state plans it intends to assess, it may be many months (if not years) until the agency can take final action to correct its unlawful disapprovals. In addition to reevaluating the state plans themselves, EPA will subject its proposed state plan approvals to notice and comment, consider and address comments, and prepare final approvals. That process will take time—likely a longer time than this Court's resolution of this case. Last go-around, EPA took *years* to act on the state plans at issue in this case, despite violating a statutory deadline. *See Ohio v. EPA*, 603 U.S. 279, 285 (2024); *Kentucky v. EPA*, 123 F.4th 447, 452, 456 (6th Cir. 2024). So even if new action on the underlying state plans will eventually moot these cases, that will likely not occur until long after this Court has heard and decided this venue dispute. Holding this case in abeyance would unnecessarily delay resolution of an important and ripe issue based only on the mere possibility that EPA may at some unspecified time take action that could moot the underlying case.

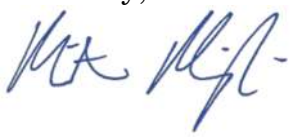
5. Moreover, as explained in the petition for certiorari, this Court's review is necessary to resolve not only the live dispute over venue for the numerous challenges to the 2023 disapproval of state plans for cross-state ozone pollution, but also venue for myriad future challenges to EPA actions under a variety of Clean Air Act provisions. Pet. 22-27. EPA agreed that certiorari was warranted on the meaning of the Act's venue provision, Section 7607(b)(1), because "[q]uestions concerning Section 7607(b)(1) have arisen repeatedly in connection with a variety of EPA actions," which "has produced wasteful and time-consuming litigation on the venue issues

themselves." Pet. Resp. 20; *see also* Pet. Reply 1. Thus, EPA urged "this Court [to] provide guidance to the courts of appeals regarding the proper application of Section 7607(b)(1)." Pet. Resp. 9. None of that has changed. New EPA actions on the state plans that precipitated this particular dispute will not resolve the ongoing venue uncertainty plaguing Clean Air Act cases. Indeed, if EPA does approve Petitioners' state plans, others may challenge EPA's approval, which may lead to an identical dispute over proper venue. In short, the question presented is certain to recur. Abeyance would simply prolong the ongoing uncertainty about the Clean Air Act's venue provision, requiring yet more multi-year litigation before this Court would have an opportunity to once again resolve the issue.

6. To be sure, Petitioners welcome EPA's reconsideration of the challenged actions, which may ultimately moot these cases *after* this Court decides the venue question presented but before the merits are decided on remand. Resolving the venue dispute on which certiorari was granted will not interfere with EPA's reconsideration of the underlying agency actions nor yield wasteful or needless litigation. As explained above, the opposite is true: abeyance would mean the years-long venue litigation up to this point would be in vain and would need to be repeated in some future case disputing venue under the Clean Air Act before this Court could resolve the recurring question presented.

For the reasons discussed above, the Petitioners oppose abeyance and ask this Court to hear and resolve this case in accordance with the existing briefing schedule. Respectfully submitted,

Sincerely,



Mithun Mansinghani
LEHOTSKY KELLER COHN LLP
629 W. Main St.
Oklahoma City, OK 73102
(512) 693-8350
mithun@lkcfirm.com

Counsel of Record for Petitioners in Case No. 23-1067

Derek Brown
Attorney General
Stanford E. Purser
Solicitor General
OFFICE OF THE UTAH
ATTORNEY GENERAL
Utah State Capitol Complex
350 North State St.,
Ste. 230
Salt Lake City, UT 84114

William L. Wehrum
WEHRUM ENVIRONMENTAL LAW LLC
1629 K St., N.W., Ste. 300
Washington, D.C. 20006

Emily C. Schilling
HOLLAND & HART LLP
222 South Main St.,
Ste. 2200
Salt Lake City, UT 84101

Kristina R. Van Bockern
Aaron B. Tucker
HOLLAND & HART LLP
555 Seventeenth St.,
Ste. 3200
Denver, CO 80202

Counsel for Petitioner State of Utah

Gentner Drummond
Attorney General
Garry M. Gaskins, II
Solicitor General
Jennifer L. Lewis
Deputy Attorney General
OKLAHOMA ATTORNEY
GENERAL'S OFFICE
313 N.E. 21st St.
Okla. City, OK 73105

Michael B. Schon
Drew F. Waldbeser
LEHOTSKY KELLER COHN LLP
200 Mass. Ave. N.W.
Washington, DC 20001

Counsel for Petitioners State of Oklahoma and Oklahoma Department of Environmental Quality

cc: All counsel of record