Troutman Pepper Locke LLP
111 South Wacker Drive, Suite 4100
Chicago, IL 60606

troutman.com

Misha Tseytlin
D 608.999.1240
misha.tseytlin@troutman.com

January 28, 2025
VIA ELECTRONIC MAIL & HAND DELIVERY

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

Re: *No. 23-1068, PacifiCorp, et al. v. EPA, et al.*

Dear Clerk:

Industry Petitioners* in the above-captioned case oppose the request of the Environmental Protection Agency, *et al.* ("EPA"), to hold merits briefing in abeyance while the Acting EPA Administrator "reassesses the basis for and soundness of the disapproval" of the Oklahoma and Utah State Implementation Plans ("SIP"). Mot.4–5.

This Court should deny EPA's request to hold this case in abeyance and, instead, should resolve the Question Presented, just as this Court did in materially indistinguishable circumstances in *National Association of Manufacturers v. Department of Defense*, 137 S. Ct. 1452 (2017) (Mem.). There, this Court had granted review on the question of "in which federal court" certain "challenges" to EPA and the Army Corps of Engineers' (Corps) "Waters of the United States Rule" (WOTUS Rule) "must be filed." *Nat'l Ass'n of Mfrs. v. Dep't of Def*., 583 U.S. 109, 114 (2018) ("*NAM"*). In February 2017, while that case was pending, a new administration "issued an Executive Order directing the agencies to propose a rule rescinding or revising the WOTUS Rule." *Id.* at 120 n.5. The agencies then moved to abate the briefing schedule. Mot. To Hold Briefing Schedule In Abeyance, No.16-299 (U.S. Mar. 6, 2017). This Court denied that motion, 137 S. Ct. 1452, and thereafter proceeded to decide the venue question presented, even though the agencies had already proposed a rule to rescind the WOTUS Rule. *NAM*, 583 U.S. at 120 n.5. As this Court explained, there was not even a suggestion of mootness, as the WOTUS Rule "remains on the books for now." *Id.* Here, as in *NAM*, this Court should

* Petitioners are PacifiCorp; Deseret Generation & Transmission Co-Operative; Utah Municipal Power Agency; Utah Associated Municipal Power Systems; Oklahoma Gas & Electric Company; Tulsa Cement LLC, d/b/a Central Plains Cement Company LLC; Republic Paperboard Company LLC; and Western Farmers Electric Cooperative.

decide the important venue question presented, as the SIP denials in question are still "on the books." *Id.* Notwithstanding EPA's point that it may reassess these denials, there is no serious possibility that this reassessment would be complete in time to render this case moot before this Court is likely to issue a merits decision.

While Petitioners support EPA's indication that it may reassess the SIP denials, any such reassessment, when finalized, will almost certainly trigger more litigation where the issue of venue will again arise. Thus, the reassessment of the denials adds to the urgent need for this Court to resolve the ongoing and deepening circuit split on venue.

Parties need to know where they can challenge EPA actions on SIPs under the Clean Air Act. Without certainty from this Court, litigation over venue for these SIP actions will only continue—regardless of EPA's decision on the SIPs after additional review. In granting the Petition here, this Court necessarily recognized that the current patchwork of venue rules cannot continue, with the Fourth, Fifth, Sixth, and Eighth Circuits holding that the regional circuits are the proper venue to hear challenges to packaged SIP disapprovals, while the Tenth Circuit found the opposite and transferred the SIP challenges to the D.C. Circuit. *See* Pet. 22–27. Since then, in *Kentucky v. EPA*, 123 F.4th 447 (6th Cir. Dec. 6, 2024), the Sixth Circuit took the Fourth, Fifth, Sixth, and Eighth Circuits' side on this circuit split.

Resolving this split now is critical. Challenges to EPA's actions on SIPs are ubiquitous. *See* Pet.16–21. This litigation demonstrates that the Courts of Appeals, EPA, and the public require guidance from this Court to ensure consistent interpretation of the venue provision, both for the current SIP actions and before the next EPA action on these and other SIPs. Unless this Court resolves the Question Presented, additional confusion and litigation that "eat[s] up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims" will continue to reoccur. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

EPA claims that orders in two cases support holding this case in abeyance: *Biden v. Sierra Club*, No.20-138 (Feb. 3, 2021) and *Mayorkas v. Innovation Law Lab*, No.19-1212 (Feb. 3, 2021). Mot.4. But in both of those cases, the parties all agreed that abeyance was the appropriate course of action and petitioners made the motion—as the party aggrieved by the ruling appealed. Mot. Of The Pet'rs To Hold The Briefing Schedule In Abeyance, at 2, *Mayorkas*, No.19-1212 (Feb. 1, 2021) ("respondents consent to petitioners' request to hold the briefing schedule in abeyance"); Mot. Of The Pet'rs To Hold The Briefing Schedule In Abeyance, at 2, *Biden*, No.20-138 (Feb. 1, 2021) (same). Unlike those cases, Petitioners, as well as State Petitioners in *Oklahoma, et al. v. EPA, et al.*, No.23-1067, oppose abeyance here. Further, unlike the present case, the questions presented in *Biden* and *Mayorkas* involved challenges to discrete agency actions and not the rules governing the venue for challenging those actions.

Sincerely,

/s/ Misha Tseytlin
Misha Tseytlin
Counsel of Record
TROUTMAN PEPPER LOCKE LLP
111 South Wacker Drive, Suite 4100
Chicago, IL 60606
(608) 999-1240
(312) 443-0336 (fax)
misha.tseytlin@troutman.com

cc: Sarah M. Harris, Acting Solicitor General of the United States for Respondents
Stanford Edward Purser, Solicitor General of Utah for Petitioner State of Utah
Mithun Mansinghani, Counsel of Record for Petitioner State of Oklahoma