No. _____

In the Supreme Court of the United States

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, PETITIONERS,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY *and* MICHAEL REGAN, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Environmental Protection Agency's disapproval of a State Implementation Plan may only be challenged in the D.C. Circuit under 42 U.S.C. § 7607(b)(1) if EPA packages that disapproval with disapprovals of other States' SIPs and purports to use a consistent method in evaluating the state-specific determinations in those SIPs.

PARTIES TO THE PROCEEDINGS

The Utah Industry Petitioners are PacifiCorp, Deseret Generation & Transmission Co-Operative, Utah Municipal Power Agency, and Utah Associated Municipal Power Systems. PacifiCorp, Deseret Generation & Transmission Co-Operative, and Utah Municipal Power Agency were the Petitioners in the Tenth Circuit below in case number 23-9512 and are Petitioners here. Utah Associated Municipal Power Systems was the Petitioner in the Tenth Circuit below in case number 23-9520 and is a Petitioner here.

The Oklahoma Industry Petitioners are Oklahoma Gas & Electric Company; Tulsa Cement LLC, d/b/a Central Plains Cement Company LLC; Republic Paperboard Company LLC; and Western Farmers Electric Cooperative. Oklahoma Gas & Electric Company was the Petitioner in the Tenth Circuit below in case number 23-9521 and is a Petitioner here. Tulsa Cement LLC, d/b/a Central Plains Cement Company LLC, and Republic Paperboard Company LLC were the Petitioners in the Tenth Circuit below in case number 23-9533 and are Petitioners here. Western Farmers Electric Cooperative was the Petitioner in the Tenth Circuit below in case number 23-9534 and is a Petitioner here.

The U.S. Environmental Protection Agency and Michael Regan, in his official capacity as the Administrator of the U.S. Environmental Protection Agency, are the Respondents here and were the Respondents in each of the Tenth Circuit cases below.

CORPORATE DISCLOSURE STATEMENTS

Petitioner PacifiCorp's common stock is 100% owned by PPW Holdings, LLC, a Delaware limited liability company, which is, in turn, wholly owned by Berkshire Hathaway Energy Company. Berkshire Hathaway Energy Company is a majority-owned subsidiary of Berkshire Hathaway Inc., a publicly held corporation. No publicly held company directly owns 10% or more of PacifiCorp's common stock.

Petitioner Deseret Generation & Transmission Co-Operative is a Utah non-profit corporation operating as a wholesale generation and transmission electric cooperative that is wholly owned by its member electric cooperatives, none of which are publicly traded. Deseret Generation & Transmission Co-Operative does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Utah Municipal Power Agency is a municipal power agency created pursuant to the Interlocal Cooperation Act. Utah Code Ann. §§ 11-13-101 *et seq*. Utah Municipal Power Agency is a not-for-profit body politic and corporate and political subdivision of the State of Utah, and it does not have a parent corporation or shareholders. As such, Utah Municipal Power Agency has no information to disclose pursuant to Rule 29.6.

Petitioner Utah Associated Municipal Power Systems is a political subdivision of the State of Utah. As such, Utah Associated Municipal Power Systems has no information to disclose pursuant to Rule 29.6.

Petitioner Oklahoma Gas & Electric Company is a corporation organized and existing under the laws of the state of Oklahoma, and has its principal office in Oklahoma City, Oklahoma. Oklahoma Gas & Electric Company is a wholly-owned subsidiary of OGE Energy Corp., a holding company that is exempt from registration under the Public Utility Holding Company Act of 2005. The common stock of OGE Energy Corp. is publicly traded and listed on the New York Stock Exchange. OGE Energy Corp. has no parent company, and no publicly held company has a 10% or greater ownership interest in OGE Energy Corp.

Petitioner Tulsa Cement LLC, doing business as Central Plains Cement Company LLC, is a limited liability company organized and existing under the laws of the State of Delaware, and has its principal office in Tulsa, Oklahoma. Central Plains Cement Company LLC is a wholly-owned subsidiary of Eagle Materials Inc., a corporation organized and existing under the laws of the State of Delaware. The common stock of Eagle Materials Inc. is publicly traded and listed on the New York Stock Exchange. Eagle Materials Inc. has no parent company, and no

publicly held company has a 10% or greater ownership interest in Eagle Materials Inc.

Petitioner Republic Paperboard Company LLC is a limited liability company organized and existing under the laws of the State of Delaware, and has its principal office in Lawton, Oklahoma. Republic Paperboard Company LLC is a wholly-owned subsidiary of Eagle Materials Inc., a corporation organized and existing under the laws of the State of Delaware. The common stock of Eagle Materials Inc. is publicly traded and listed on the New York Stock Exchange. Eagle Materials Inc. has no parent company, and no publicly held company has a 10% or greater ownership interest in Eagle Materials Inc.

Petitioner Western Farmers Electric Cooperative has no parent corporations, and no shareholders own 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Utah v. EPA*, No.23-9509 (10th Cir.);
- *PacifiCorp v. EPA*, No.23-9512 (10th Cir.);
- *Utah Associated Mun. Power Sys. v. EPA,* No.23-9520 (10th Cir.);
- *Oklahoma v. EPA,* No.23-9514 (10th Cir.);
- *Okla. Gas & Elec. Co. v. EPA*, No.23-9521 (10th Cir.);
- *Tulsa Cement LLC v. EPA*, No.23-9533 (10th Cir.);
- *W. Farmers Elec. Coop. v. EPA*, No.23-9534 (10th Cir.);
- *Utah v. EPA*, No.23-1102 (D.C. Cir.) (protective petition);
- *Oklahoma v. EPA*, No.23-1103 (D.C. Cir.) (protective petition);

- *Okla. Gas & Elec. Co. v. EPA*, No.23-1105 (D.C. Cir.) (protective petition);

- *Tulsa Cement LLC v. EPA*, No.23-1106 (D.C. Cir.) (protective petition);

- *W. Farmers Elec. Coop. v. EPA*, No.23-1107 (D.C. Cir.) (protective petition);

- *PacifiCorp v. EPA*, No.23-1112 (D.C. Cir.) (protective petition).

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PETITION FOR WRIT OF CERTIORARI

Section 307(b)(1) of the Clean Air Act ("CAA") establishes the venue for challenging certain Environmental Protection Agency ("EPA") actions, including EPA decisions on state implementation plans ("SIPs") submitted by individual States. A "locally or regionally applicable" action must be venued in "the appropriate [regional] circuit," whereas a "nationally applicable" action (or an action where EPA makes a valid determination of "nationwide scope or effect") is venued in the D.C. Circuit. 42 U.S.C. § 7607(b)(1).

Here, the States of Utah and Oklahoma challenged EPA's disapprovals of their SIPs for the interstate transport of ozone. Because the States, along with affected Industry Petitioners, challenged only the SIP disapprovals for Utah and Oklahoma, they naturally filed their challenges in the Tenth Circuit, the regional circuit where those States are located. Other States and their local industries followed the same approach, similarly challenging EPA's disapprovals of other individual States' ozone-transport SIPs in the Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, respectively.

EPA, however, believes that all of these challenges should have been brought only in the D.C. Circuit and so requested transfer all of the challenges

to that venue. To support its transfer requests, EPA argued that its decision to pack multiple disapprovals of individual state plans into a single *Federal Register* notice, along with references to its preferred and allegedly consistently applied methodology, rendered all of the SIP disapprovals, together, a single "nationally applicable" action reviewable only in the D.C. Circuit. 42 U.S.C. § 7607(b)(1).

The Courts of Appeals' dispositions of EPA's motions to transfer have resulted in a clear circuit split as to whether the States or EPA are correct on the Question Presented: whether EPA's packaging of SIP disapprovals together and purported use of a consistent methodology renders all such SIPs a single national action that must be challenged only in the D.C. Circuit. On one side of the split, the Fourth, Fifth, Sixth, and Eighth Circuits agree with Petitioners' approach, holding that the local circuits are the proper venue for challenging EPA's SIP disapprovals. These courts correctly answered the Question Presented, explaining that SIPs are quintessentially "locally or regionally applicable" actions because they are state-specific in nature, *id.*—regardless of how EPA packages or how allegedly consistent EPA acts in evaluating those SIPs. The Tenth Circuit, however, agreed with EPA, concluding that the D.C. Circuit is the only proper venue for the challenges to the Utah SIP and Oklahoma SIP disapprovals. The Tenth Circuit explicitly rejected

the reasoning of its sister circuits, while relying upon the dissenting opinions in those cases. Finally, the Ninth and Eleventh Circuits both have the Question Presented pending before them.

This Court should grant review to resolve this important circuit split, while bringing order to the chaos that the split created.

As this Court has previously recognized in the context of Section 307(b)(1)—the provision at issue here—"determining the locus of judicial review of the actions of EPA" is "importan[t]" enough to justify a grant of certiorari. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586 (1980). Clarity over preliminary matters such as venue is essential for the orderly litigation of important federal issues, and questions of the appropriate venue to challenge EPA action on SIPs regularly arise, given the frequency with which States submit SIPs to EPA and the balance of federal and state authority in the CAA.

This circuit split, arising in the context of ongoing litigation over twelve ozone-transport SIP disapprovals, calls out for immediate review and is analogous to the petition that this Court granted in *National Association of Manufacturers v. Department of Defense ("NAM")*, 583 U.S. 109 (2018). In *NAM*, the Sixth Circuit and district courts took different positions as to the proper federal forum for

adjudicating ongoing challenges to a rule issued by EPA under the Clean Water Act. Here, like in *NAM*, there is a split over the proper federal forum—but this time for challenges to disapprovals of ozone-transport SIPs that EPA only lumped together in a single *Federal Register* notice at the final rule stage—with the split here being more pronounced. Absent immediate review from this Court, challenges to the ozone-transport SIP disapprovals of ten sovereign States will be adjudicated in regional circuits, whereas the SIP disapprovals of Utah's and Oklahoma's ozone-transport SIPs will be decided by the D.C. Circuit. In other words, absent this Court's review, important rights of either two *or* ten sovereign States will be adjudicated in the wrong venue.

This Court should bring order to this chaos by granting this Petition.

DECISION BELOW

The Tenth Circuit's February 27, 2024, decision granting in part EPA's motions to dismiss or transfer and directing transfer is unreported but is available at 2024 WL 799356 and is reproduced at Pet.App.1a–17a.

JURISDICTION

The Tenth Circuit entered its order granting in part EPA's motions to dismiss or transfer and directing transfer on February 27, 2024. Pet.App.1a–17a. This Court has jurisdiction to review that order under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of 42 U.S.C. § 7607 and 42 U.S.C. § 7410 are set forth at Pet.App.26a–32a.

STATEMENT OF THE CASE

A. Legal Background

The CAA creates a cooperative federalism regime to regulate air pollution. *See* 42 U.S.C. § 7401; *Michigan v. EPA,* 268 F.3d 1075, 1083 (D.C. Cir. 2001); *accord Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the [CAA], the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation."). Congress directed EPA to establish national ambient air quality standards ("NAAQS") for pollutants, such as ozone, *see* 42 U.S.C. §§ 7408–09, and then gave States the

lead responsibility to develop programs to regulate air quality to meet the NAAQS, *id.* § 7410(a)(1); *accord id.* § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments").

A State meets its CAA responsibilities by creating a SIP, which must include provisions that satisfy the State's interstate-transport obligations under Section 110 of the CAA. *See Union Elec. Co. v. EPA,* 427 U.S. 246, 249–50 (1976); *see generally* 42 U.S.C. § 7410(a). A State has "wide discretion in formulating" a SIP, *Union Elec.*, 427 U.S. at 250, and "is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation," "so long as the ultimate effect of [the] State's choice of emission limitations is compliance with the national standards for ambient air," *Train*, 421 U.S. at 79. As relevant here, Section 110 provides that "upwind States" must "reduce emissions to account for pollution exported beyond their borders" that "contribute[s] significantly" to downwind States' compliance. 42 U.S.C. § 7410(a)(2)(D); *see also EPA v. EME Homer City Generation, L.P.,* 572 U.S. 489, 499 (2014). Specifically, a SIP must "contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with

respect to any . . . [NAAQS]." 42 U.S.C. § 7410(a)(2)(D).

To ensure that the SIP complies with the CAA, EPA must review each State's proposed SIP on an individual basis. *Id.* § 7410(k)(3); *Union Elec.*, 427 U.S. at 250. EPA "shall approve" a SIP if it "meets all the applicable requirements" of the Act. 42 U.S.C. § 7410(k)(3); *see Union Elec.*, 427 U.S. at 250. If EPA determines that a State has failed to submit an adequate SIP, EPA must promulgate a "Federal implementation plan" ("FIP") for the State within two years of that determination, "unless the State corrects the deficiency" before EPA issues a FIP. 42 U.S.C. § 7410(c)(1); *see EME Homer,* 572 U.S. at 498.

Section 307(b)(1) establishes the appropriate venue for a petition for review challenging EPA action under the CAA, including petitions challenging EPA's approval or disapproval of SIPs. 42 U.S.C. § 7607(b)(1); *see Harrison*, 446 U.S. at 584–85. Section 307(b)(1) provides three venue pathways. Section 307(b)(1)'s first sentence provides that a petition for review challenging "nationally applicable . . . final action taken[ ] by the Administrator . . . may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1). Section 307(b)(1)'s second sentence provides that "a petition for review of the Administrator's action in approving or promulgating any implementation plan"

or other final agency action that is "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." *Id.* Finally, Section 307(b)(1)'s third sentence creates an alternative venue pathway for challenges to a local or regional action that nevertheless has a nationwide scope or effect, notwithstanding the action's local or regional nature. *Id.* Under this third sentence, the D.C. Circuit is the proper venue for a petition challenging EPA's local/regional action if that 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." *Id.* This third venue pathway requires a court to determine *both* that EPA made a determination of nationwide scope or effect *and* that the local or regional action is actually based upon a determination of nationwide scope and effect. *Id.*

B. Factual And Procedural Background

1. In 2015, EPA lowered the NAAQS for ground-level ozone, for which NO_x is a precursor, to 70 parts per billion. 80 Fed. Reg. 65,292 (Oct. 26, 2015). That triggered the States' duty to develop and submit SIPs to meet this new NAAQs within three years, by 2018. *See* 42 U.S.C. § 7410(a)(1).

Following EPA's publication of the 2015 ozone NAAQS, the State of Utah developed its ozone-transport SIP to comply with this NAAQS. Joint Deferred App., Vol. I at 0074–112, Nos.23-9509, *et al.*, Doc.11037455 (10th Cir. Oct. 17, 2023) (hereinafter "JDA"). Utah closely collaborated with EPA for over a year to develop this SIP, with EPA commenting on drafts of Utah's SIP. *See* JDA, Vol. I at 0069–73. EPA encouraged Utah to follow approaches discussed in certain EPA guidance and recommended that Utah elaborate on certain components in its SIP. *See* JDA, Vol. I at 0072, 0146. After incorporating this feedback from EPA, Utah concluded in its SIP that its contributions to downwind-state air quality were not significant and, therefore, that additional emission reductions in Utah were not necessary. *See* JDA, Vol. I at 0092–100 (Utah's SIP). This conclusion relied upon state- and region-specific facts and analyses relating to Utah's unique topographical, geographical, and meteorological characteristics. JDA, Vol. I at 0097–100, 0147 & nn.7–8, 10; JDA, Vol. II at 0183 & n.1, 0195–96. For example, Utah considered the significant and outsized impact of uncontrollable sources of ozone like wildfires and international emissions on Colorado, the downwind State most likely to be affected by emissions from Utah. JDA, Vol. I at 0097–98. Utah submitted its proposed SIP to EPA on October 24, 2019. JDA, Vol. I at 0089. Two months later, EPA made an incompleteness determination on the SIP, alleging

that Utah had not provided adequate public notice. 84 Fed. Reg. 66,612 (Dec. 5, 2019). Utah then submitted a revised SIP the next month after providing additional opportunities for public participation. JDA, Vol. I at 0074–75.

Oklahoma submitted its SIP on October 25, 2018. Joint Deferred App., Vol. I at 0133, Nos.23-9521, *et al.*, Doc.11041131 (10th Cir. Nov. 1, 2023) (hereinafter "J. App'x"). In its SIP, Oklahoma concluded that in-state sources would not contribute significantly to downwind nonattainment or maintenance issues in any other State, based on the State's holistic review of multiple local and regional factors impacting the "significance" of the State's contributions. J. App'x, Vol. I at 0170–73. Oklahoma's analysis centered on the State's unique meteorological features and the special characteristics of its electricity generation market, relying in part on regional modeling developed to address some of the regional meteorological conditions affecting ozone formation and accounting for recent trends in regional ozone emissions. J. App'x, Vol. I at 0168–73. Oklahoma likewise made state-specific judgments regarding modeling performance, contribution thresholds, and trends at specific downwind receptors in analyzing its interstate transport obligations. J. App'x, Vol. I at 0175–77.

2. After an unexplained (and unlawful, 42 U.S.C. § 7410(k)(2)) delay of more than two years, EPA proposed to disapprove Utah's SIP. 87 Fed. Reg. 31,470 (May 24, 2022); JDA, Vol. I at 0130. In proposing to disapprove Utah's SIP, EPA disagreed with Utah's determination that sources within Utah did not significantly contribute to nonattainment of the 2015 NAAQS for ozone for certain areas in Colorado. 87 Fed. Reg. at 31,483. To reach that conclusion, EPA disagreed with each of the state- and region-specific findings that Utah had made in its SIP submission, *see id.* at 31,477, 31,482, as well as with Utah's state-specific analysis justifying the threshold Utah had chosen for determining significant contribution, *id.* at 31,478. So, for example, EPA dismissed Utah's conclusion that "contributions from other sources, including international or non-anthropogenic emissions," were important considerations for the overall impact to Colorado as an "excuse" by Utah to avoid addressing its own emissions. *Id.* at 31,482.

EPA similarly delayed acting on Oklahoma's SIP submission, proposing disapproval in a separate, regionally limited *Federal Register* notice over three years after the State's submittal. 87 Fed. Reg. 9,798 (Feb. 22, 2022). The substance of EPA's analysis focused on the local and regional matters at the core of Oklahoma's SIP submission, finding that Oklahoma's assessment of a higher contribution

threshold was not adequately justified, rejecting Oklahoma's analysis of collective contribution, and finding technical flaws in Oklahoma's analysis of specific downwind receptors using a state-developed regional pollution model. *See id.* at 9,818–24.

After evaluating Utah's and Oklahoma's SIPs separately in proposed disapprovals, on February 13, 2023, EPA combined its final disapprovals of Utah's SIP and Oklahoma's SIP within a single *Federal Register* notice that also included disapprovals of 19 other SIPs and a deferral on two other States' SIPs. 88 Fed. Reg. 9,336, 9,337–38, 9,354 (Feb. 13, 2023). EPA made clear that it judged each SIP "in light of the facts and circumstances of each particular state's submission." *Id.* at 9,340; *see also id.* at 9,354 ("[T]he contents of each individual state's submission were evaluated on their own merits[.]"). For EPA's disapprovals of Utah's SIP and Oklahoma's SIP, in particular, EPA provided only "a brief, high level overview" in the form of one-paragraph analyses that largely reiterated and incorporated EPA's points in its proposed disapprovals of Utah's SIP and Oklahoma's SIP. *Id.* at 9,354, 9,359–60.

EPA then asserted that any challenges to any of its SIP disapprovals included in this *Federal Register* notice must be filed in the D.C. Circuit under the first sentence of Section 307(b)(1) because EPA's actions were "nationally applicable" or, in the alternative,

under the third sentence of Section 307(b)(1) because EPA had made a finding of "nationwide scope or effect." *Id.* at 9,380–81 (quoting 42 U.S.C. § 7607(b)(1)).

3. On April 6, 2022—before EPA had disapproved Utah's SIP and Oklahoma's SIP—EPA proposed to issue FIPs for Utah and Oklahoma, in addition to issuing FIPs for 21 other States. 87 Fed. Reg. 20,036, 20,038 (Apr. 6, 2022). On June 5, 2023, EPA published a final rule imposing those FIPs on Utah and Oklahoma, as well as on the 21 other States. 88 Fed. Reg. 36,654, 36,656 (June 5, 2023). EPA set the effective date of these FIPs for August 4, 2023. *Id.* at 36,654. This Court recently heard oral argument on emergency applications to stay these FIPs filed by the States of Ohio, Indiana, and West Virginia, nationwide industry organizations, and other parties. *Ohio v. EPA*, No.23A349 (U.S. Feb. 21, 2024).

4. Petitioners are the Utah Industry Petitioners, who are industry members with significant interests in Utah, and the Oklahoma Industry Petitioners, who are industry members with significant interests in Oklahoma. *See generally* Pet.App.9a. The Utah Industry Petitioners filed their petitions for review in the Tenth Circuit challenging EPA's disapproval of Utah's SIP and, separately, the Oklahoma Industry Petitioners filed their petitions for review in the Tenth Circuit challenging EPA's disapproval of

Oklahoma's SIP. Pet.App.9a.[1] The States of Utah and Oklahoma also filed their own separate petitions for review in the Tenth Circuit, likewise challenging EPA's disapproval of their own SIPs. *See* Pet.App.9a. In these petitions for review, Petitioners, Utah, and Oklahoma specified that they were challenging only EPA's disapprovals of Utah's SIP and Oklahoma's SIP, respectively.[2] Thus, Petitioners, Utah, and Oklahoma asserted that venue for their respective challenges was appropriate in the Tenth Circuit, under Section 307(b)(1).

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[1] *See* Pet., *PacifiCorp v. EPA*, No.23-9512, Doc.10979118 (10th Cir. Feb. 23, 2023); Pet., *Utah Associated Mun. Power Sys. v. EPA*, No.23-9520, Doc.10983701 (10th Cir. Mar. 15, 2023); Pet., *Okla. Gas & Elec. Co. v. EPA*, No.23-9521, Doc.10983983 (10th Cir. Mar. 16, 2023); Pet., *Tulsa Cement LLC v. EPA*, No.23-9533, Doc.10991428 (10th Cir. Apr. 13, 2023); Pet., *W. Farmers Elec. Coop. v. EPA*, No.23-9534, Doc.10991510 (10th Cir. Apr. 13, 2023).

[2] *See* Pet. at 2, *Utah v. EPA*, No.23-9509, Doc.10976607 (10th Cir. Feb. 13, 2023); Pet. at 2, *PacifiCorp*, No.23-9512, Doc.10979118; Pet. at 2, *Utah Associated Mun. Power Sys.*, No.23-9520, Doc.10983701; Pet. at 2, *Oklahoma v. EPA,* No.23-9514, Doc.10980562 (10th Cir. Mar. 2, 2023); Pet. at 2, *Okla. Gas & Elec. Co.*, No.23-9521, Doc.10983983; Pet. at 2, *Tulsa Cement LLC*, No.23-9533, Doc.10991428; Pet. at 2, *W. Farmers Elec. Coop.*, No.23-9534, Doc.10991510.

In addition to filing petitions for review in the Tenth Circuit, Petitioners, Utah, and Oklahoma filed protective petitions in the D.C. Circuit. *See* Pet. at 2, *Utah v. EPA*, No.23-1102, Doc.1994857 (D.C. Cir. Apr. 13, 2023); *see also* Pet. at 3–4, *Oklahoma v. EPA*, No.23-1103, Doc.1994881 (D.C. Cir. Apr. 13, 2023); Pet. at 2, *Okla. Gas & Elec. Co. v. EPA*, No.23-1105, Doc.1994865 (D.C. Cir. Apr. 14, 2023); Pet. at 2, *Tulsa Cement LLC v. EPA*, No.23-1106, Doc.1994912 (D.C. Cir. Apr. 14, 2023); Pet. at 2, *W. Farmers Elec. Coop. v. EPA*, No.23-1107, Doc.1994920 (D.C. Cir. Apr. 14, 2023); Pet. at 2, *PacifiCorp v. EPA*, No.23-1112, Doc.1995594 (D.C. Cir. Apr. 14, 2023). After motions practice where EPA attempted to force Petitioners to litigate their protective petitions on the merits in the D.C. Circuit, the D.C. Circuit ordered that these protective petitions be held in abeyance. Order, *Utah*, Nos.23-1102, *et al.*, Doc.2005201 (D.C. Cir. June 27, 2023) (per curiam).

Thereafter, the parties and the Tenth Circuit engaged in extensive venue and stay proceedings. After EPA moved the Tenth Circuit to transfer venue for the petitions to the D.C. Circuit, Pet.App.9a,[3] the Tenth Circuit—Judges Tymkovich, Bacharach, and

[3] In each of EPA's venue-transfer motions discussed in this Petition, EPA also moved, in the alternative, for dismissal for improper venue.

Rossman—entered an order referring EPA's motions to transfer venue to the merits panel. Order, *Utah*, Nos.23-9509, *et al.*, Doc.10994985 (10th Cir. Apr. 27, 2023). Then, on July 27, 2023, the Tenth Circuit—Judges Tymkovich and Carson—granted motions to stay the disapprovals of Utah's SIP and Oklahoma's SIP, finding that "petitioners have satisfied their burden as to each" of the stay factors. Order at 4, *Utah*, Nos.23-9509, *et al.*, Doc.11016742 (10th Cir. July 27, 2023). The Tenth Circuit ordered, and the parties subsequently completed, full briefing on the merits, *see* Order at 3–4, *Utah*, Nos.23-9509, *et al.*, Doc.11002290 (10th Cir. Apr. 30, 2023); Minute Order, *Utah*, Nos.23-9509, *et al.*, Doc.11038946 (10th Cir. Oct. 25, 2023), with the Court setting the case for oral argument on March 21, 2024, Notice, *Utah*, Nos.23-9509, *et al.*, Doc.11058134 (10th Cir. Jan. 10, 2024).

5. Meanwhile, ten other States and/or their local industries challenged EPA's disapprovals of their ozone-transport SIPs in their regional circuits. *See* 88 Fed. Reg. 49,295, 49,296–97 (July 31, 2023); 88 Fed. Reg. 67,102, 67,103–04 (Sept. 29, 2023).

In the Fourth Circuit, the State of West Virginia challenged EPA's disapproval of West Virginia's SIP. *West Virginia v. EPA*, 90 F.4th 323, 325 (4th Cir. 2024). West Virginia moved to stay EPA's disapproval as to West Virginia's SIP, and EPA

moved to transfer the petition to the D.C. Circuit. *Id.* After oral argument on these issues, the Fourth Circuit rejected EPA's transfer motion, holding that it was the appropriate venue under Section 307(b)(1)'s second sentence, *id.* at 327–31, and stayed EPA's disapproval as to West Virginia's SIP, *id.* at 331–32. The parties have not yet concluded merits briefing.

In the Fifth Circuit, the States of Texas, Mississippi, and Louisiana, along with local industry, challenged EPA's disapproval of Texas's SIP, Mississippi's SIP, and Louisiana's SIP. *Texas v. EPA*, No.23-60069, 2023 WL 7204840, at *3 (5th Cir. May 1, 2023) (per curiam). The challengers moved to stay EPA's disapprovals, and EPA moved to transfer to the D.C. Circuit. *Id.* (addressing stay motions as to Texas's SIP and Louisiana's SIP, as well as EPA's transfer motion as to all petitions); Order, *Texas*, No.23-60069, Dkt.359 (5th Cir. June 8, 2023) (addressing stay motion as to Mississippi's SIP). The Fifth Circuit rejected EPA's transfer motion, holding in a detailed opinion that the regional circuit court was the appropriate venue, *Texas*, 2023 WL 7204840, at *3–6, and then it stayed EPA's disapprovals as to Texas's SIP, Louisiana's SIP, and Mississippi's SIP, *id.* at *6–11; Order, *Texas*, No.23-60069, Dkt.359. The parties have concluded merits briefing on the petitions, and the Fifth Circuit heard oral argument on December 4, 2023. *See* Notice, *Texas*, No.23-60069, Dkt.511 (5th Cir. Dec. 4, 2023).

In the Sixth Circuit, the Commonwealth of Kentucky challenged EPA's disapproval of Kentucky's SIP. Order at 1, *Kentucky v. EPA*, No.23-3216, Dkt.39-2 (6th Cir. July 25, 2023). Kentucky moved to stay EPA's disapproval, and EPA moved to transfer the petition to the D.C. Circuit. *Id.* at 1–2. The Sixth Circuit held that it was the appropriate venue and so denied EPA's motion, *id.* at 2–6, and then it stayed EPA's disapproval, *id.* at 6–9. The parties have concluded merits briefing, and the Sixth Circuit has set oral argument for May 8, 2024. Notice, *Kentucky*, No.23-3216, Dkt.80 (6th Cir. Mar. 11, 2024).

In the Eighth Circuit, the States of Arkansas and Missouri, as well as industry members and other entities in Minnesota, separately challenged EPA's disapprovals of Arkansas's SIP, Missouri's SIP, and Minnesota's SIP. *See* Pet., *Arkansas v. EPA*, No.23-1320, Doc.5246849 (8th Cir. Feb. 16, 2023); Pet., *Missouri v. EPA*, No.23-1719, Doc.5265074 (8th Cir. Apr. 13, 2023); Pet., *Allete, Inc. v. EPA*, No.23-1776, Doc.5265614 (8th Cir. Apr. 14, 2023) (Minnesota).[4]

[4] *See also* Pet., *Union Elec. Co. v. EPA*, No.23-1751, Doc.5265392 (8th Cir. Apr. 13, 2023); Pet., *Sw. Elec. Power Co. v. EPA*, No.23-1765, Doc.5265470 (8th Cir. Apr. 14, 2023); Pet., *City Utils. of Springfield v. EPA*, No.23-1774, Doc.5265562 (8th Cir. Apr. 14, 2023); Pet., *Hybar, LLC v. EPA*, No.23-1777,

These challengers moved to stay EPA's disapprovals, and EPA moved to transfer. *See, e.g.,* Mot. to Transfer or Dismiss, *Arkansas*, No.23-1320, Doc.5256958 (8th Cir. Mar. 20, 2023). The Eighth Circuit denied EPA's transfer motions, *see, e.g.*, Order, *Arkansas*, No.23-1320, Doc.5269098 (8th Cir. Apr. 25, 2023); Order, *Missouri*, No.23-1719, Doc.5281126 (8th Cir. May 26, 2023); Order, *Allete*, No.23-1776, Doc.5281229 (8th Cir. May 26, 2023), and then stayed EPA's disapprovals as to Arkansas's SIP, Missouri's SIP, and Minnesota's SIP, *see, e.g.*, Order, *Arkansas*, No.23-1320, Doc.5280996 (8th Cir. May 25, 2023); Order, *Missouri*, No.23-1719, Doc.5281126 (8th Cir. May 26, 2023); Order, *Allete*, No.23-1776, Doc.5292580 (8th Cir. July 5, 2023). The parties have concluded merits briefing, and the Eighth Circuit has not yet set an oral argument date.

In the Ninth Circuit, an industry member in Nevada challenged EPA's disapproval of Nevada's SIP. Pet., *Nevada Cement Co. v. EPA*, No.23-682, Dkt.1 (9th Cir. Apr. 14, 2023). That industry member moved to stay EPA's disapproval, and EPA moved to transfer to the D.C. Circuit. Order, *Nevada Cement Co.*, No.23-682, Dkt.27.1 (9th Cir. July 3, 2023). The

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Doc.5265597 (8th Cir. Apr. 14, 2023); Pet., *Ark. League of Good Neighbors v.* EPA, No.23-1778, Doc.5265611 (8th Cir. Apr. 14, 2023).

Ninth Circuit referred EPA's transfer motion to the merits panel and then stayed EPA's disapproval as to Nevada's SIP. *Id.* at 1–2. The State of Nevada was also then granted permission to intervene in support of the industry member. *Id.* at 1. The Ninth Circuit has temporarily closed the docket for administrative purposes until May 6, 2024, to allow the parties to engage in mediation. Order, *Nevada Cement Co.*, No.23-682, Dkt.40.1 (9th Cir. Dec. 6, 2023); Notice, *Nevada Cement Co.*, No.23-682, Dkt.43 (9th Cir. Feb. 28, 2024).[5]

Finally, in the Eleventh Circuit, the State of Alabama, along with two industry members, challenged EPA's disapproval of Alabama's SIP. Pet., *Alabama v. EPA*, No.23-11173, Dkt.1 (11th Cir. Apr. 13, 2023); Pet., *Ala. Power Co. v. EPA*, No.23-11196, Dkt.1 (11th Cir. Apr. 14, 2023). These challengers moved to stay EPA's disapproval, *see* Order, *Alabama*, Nos.23-11173, -11196, Dkt.33-2 (11th Cir. Aug. 17, 2023), and the Eleventh Circuit requested *sua sponte* that the parties address the question of whether the challenges were properly before that court, Jurisdictional Question, *Alabama*, Nos.23-11173, -11196, Dkts.9-1, 9-2 (11th Cir. Apr. 28, 2023). In

[5] The State of Nevada also filed a petition for review in the D.C. Circuit. Pet., *Nevada v. EPA*, No.23-1113, Doc. 1995624 (D.C. Cir. Apr. 14, 2023).

response, the challengers argued that the Eleventh Circuit was the proper court to hear their challenges, Joint Resp., *Alabama*, Nos.23-11173, -11196, Dkt.13 at 1 (11th Cir. May 5, 2023), while EPA requested that the Eleventh Circuit transfer the challenges to the D.C. Circuit, EPA Resp., *Alabama*, Nos.23-11173, -11196, Dkt.14 at 1 (11th Cir. May 12, 2023). The Eleventh Circuit referred the question to the merits panel, Order, *Alabama*, Nos.23-11173, -11196, Dkt.24 (11th Cir. July 12, 2023), and then stayed EPA's disapproval as to Alabama's SIP, Order, *Alabama*, Nos.23-11173, -11196, Dkt.33-2. The parties have concluded merits briefing, and the Eleventh Circuit has not yet set oral argument.

6. About a month before the oral argument date that the Tenth Circuit had set for the Utah and Oklahoma cases, the merits panel of the Tenth Circuit—Judges Moritz, Ebel, and Rossman—granted EPA's motion to transfer to the D.C. Circuit. Pet.App.18a–25a (granting motion to transfer, while indicating that a decision directing transfer would issue in due course); Pet.App.1a–17a (directing transfer, while providing the merits panel's reasoning). The Tenth Circuit held that the D.C. Circuit was the appropriate venue under Section 307(b)(1)'s first sentence, while declining to opine on the application of Section 307(b)(1)'s third sentence. Pet.App.9a–11a, 17a n.8. The Tenth Circuit held that EPA's actions here are "nationally

applicable" because EPA "disapprov[ed] SIPs from 21 states across the country," while "appl[ying] a uniform statutory interpretation and common analytical methods." Pet.App.11a. The Tenth Circuit "recognize[d] that the Fourth, Fifth, and Sixth Circuits recently reached the contrary conclusion: each denied the EPA's motions to transfer petitions challenging the same final rule at issue here." Pet.App.15a (citing *West Virginia,* 90 F.4th at 331; *Texas,* 2023 WL 7204840, at *1; and Order at 6, *Kentucky,* No.23-3216, Dkt.39-2). "But in [the Tenth Circuit's] view, all three courts strayed from § 7607(b)(1)'s text and instead applied a petition-focused approach that [the Tenth Circuit] and other circuits have rejected." Pet.App.15a. The Tenth Circuit also noted that "[t]he Eighth Circuit also denied the EPA's transfer motions, but [the Eighth Circuit] simply issued summary orders containing no analysis." Pet.App.15a n.6 (citing Order, *Arkansas,* No.23-1320, Doc.5269098).

REASONS FOR GRANTING THE PETITION

I. As The Tenth Circuit Acknowledged, Its Transfer Decision Created A Circuit Split Over The Question Presented

There is an acknowledged circuit split over the Question Presented, with the Tenth Circuit on the one side, and multiple other circuits squarely on the

other. This division of authority satisfies this Court's standard for granting certiorari. Sup. Ct. R. 10(a).

The Tenth Circuit below held that EPA could transform a locally or regionally applicable final action on a SIP into a nationally applicable action—thereby making the D.C. Circuit the only venue to hear petitions challenging that action, under Section 307(b)(1)—by packaging that action with other actions on other SIPs and using a consistent methodology in analyzing the SIP submittals. Pet.App.10a–12a. As the Tenth Circuit explained, EPA's packaged actions here are "nationally applicable" in its view because EPA "disapprov[ed] SIPs from 21 states across the country," while "appl[ying] a uniform statutory interpretation and common analytical methods, which required the agency to examine the overlapping and interwoven linkages between upwind and downwind states in a consistent manner." Pet.App.11a. The Tenth Circuit concluded that EPA's disapprovals of Utah's SIP and Oklahoma's SIP were nationally applicable actions despite the fact that EPA issued separate "proposed rules" and "could have chosen to issue standalone final SIP disapprovals" for each of these States. Pet.App.12a (emphasis omitted). In the Tenth Circuit's view, the action here is "a nationally applicable final rule . . . disapproving SIPs from 21 states across the country—not just one—because

those states failed to meet their good-neighbor obligations." Pet.App.12a.

The Fourth, Fifth, Sixth, and Eighth Circuits squarely split with the Tenth Circuit over the Question Presented, as the Tenth Circuit recognized. Pet.App.15a & n.7 (citing *West Virginia*, 90 F.4th at 331; *Texas*, 2023 WL 7204840, at *1; Order, *Kentucky,* No.23-3216, Dkt.39-2; *Arkansas*, No. 23-1320 (8th Cir. Apr. 25, 2023)).

The Fifth Circuit decided the issue first, holding that EPA's disapprovals are locally or regionally applicable actions under Section 307(b)(1), notwithstanding the fact that EPA "packaged the[ ] disapprovals together with the disapprovals of [ ] other States" in a single *Federal Register* notice. *Texas*, 2023 WL 7204840, at *3–6. "[T]he CAA makes clear that the EPA's relevant actions for purposes of" determining the appropriate venue under Section 307(b)(1) "are its various SIP denials." *Id.* at *4. The Fifth Circuit also rejected EPA's alternative argument that venue is proper in the D.C. Circuit under Section 307(b)(1)'s third sentence, concluding that the "SIP disapprovals at issue here were plainly based on a number of intensely factual determinations unique to each State," not on "a determination of nationwide scope or effect." *Id.* at *5 (citations omitted). This holding follows from the Fifth Circuit's previous decision in *Texas v. EPA*, 829

F.3d 405 (5th Cir. 2016), where it similarly held that EPA's disapprovals of Oklahoma's and Texas's regional-haze SIPs were not "based on any determinations that have nationwide scope or effect"—and thus were properly challenged in the regional circuit, not the D.C. Circuit—because EPA based those disapprovals on "a number of intensely factual determinations." *Id.* at 419–24. Judge Douglas dissented from the Fifth Circuit's venue holding, taking the same approach that the Tenth Circuit later adopted in this case. *Texas*, 2023 WL 7204840, at *11–13 (Douglas, J., dissenting).

The Fourth Circuit has taken the same approach to the Fifth Circuit on the Question Presented, issuing a published opinion after holding oral argument. *West Virginia*, 90 F.4th 323. The Fourth Circuit held that EPA's disapprovals of each State's SIP "was based entirely on [each State's] particular circumstances and its analysis of those circumstances," meaning those disapprovals were "locally or regionally applicable." *Id.* at 329 (Niemeyer, J., joined by Quattlebaum, J.) (referencing West Virginia's SIP, in particular). Thus, "the relevant agency action" for Section 307(b)(1) purposes is "EPA's disapproval of [each State's] SIP[,] [a]nd the fact that the EPA consolidated its disapprovals in a single final rule does not, by that fact alone, make its 21 separate decisions included within its final rule either a single nationally applicable action or one

based on a determination of nationwide scope or effect." *Id.* at 330. Finally, Section 307(b)(1) "does not focus on whether national standards were applied," but rather on "whether the final action is nationally applicable"; otherwise "there never could be a local or regional action . . . because every action of the EPA purportedly applies a national standard created by the national statute and its national regulations." *Id.* at 329–30. Judge Thacker dissented, generally taking the same view as the Tenth Circuit on the Question Presented. *Id.* at 332–35 (Thacker, J., dissenting).

The Sixth Circuit has taken the same approach as the Fourth and Fifth Circuits. Order, *Kentucky*, No.23-3216, Dkt.39-2. It too concluded that the "relevant unit of administrative action here is EPA's individual SIP denials" and that EPA's "packag[ing]" of each State's disapproval with other States "doesn't matter." *Id.* at 4 (McKeague & Nalbandian, JJ.) (referencing Kentucky's SIP, in particular). Further, it concluded that each SIP disapproval was locally or regionally applicable "[b]ecause the denial and legal impact of [each State's] SIP affects only [that State]." *Id.* at 5. Finally, the Sixth Circuit rejected EPA's claim that the SIP disapprovals were "based on a determination of nationwide scope or effect." *Id.* at 5–6. Judge Cole dissented, and he too took similar views as the Tenth Circuit on the Question Presented. *Id.* at 10–19 (Cole, J., dissenting).

Finally, the Eighth Circuit also rejected EPA's Section 307(b)(1) venue arguments in cases challenging individual ozone-transport SIP disapprovals, unlike the Tenth Circuit. The Eighth Circuit issued multiple separate orders for each State, without providing substantive analysis. *See, e.g.*, *Arkansas*, No.23-1320 (8th Cir. Apr. 25, 2023); *Missouri*, 23-1719 (8th Cir. May 26, 2023); *Allete*, No. 23-1776 (8th Cir. May 26, 2023) (Minnesota); *supra* pp.18–19.

II. It Is Imperative That This Court Decide The Question Presented Now, Just As It Did In Analogous Circumstances In *National Association Of Manufacturers*

The Question Presented is unquestionably of national "importance," as "determining the locus of judicial review of the actions of EPA" under Section 307(b)(1), *Harrison*, 446 U.S. at 586, is essential to the orderly and timely resolution of challenges to EPA decisions on SIPs. Further, the Court should resolve this important venue issue now, before the D.C. Circuit adjudicates Petitioners' challenges to the disapprovals of Utah's SIP and Oklahoma's SIP, just as this Court resolved a similar jurisdictional dispute in a similar posture in *NAM* in 2018.

A. Whether EPA's disapproval of a SIP is a locally or regionally applicable action challengeable in the

appropriate regional circuit or may be transformed into a nationally applicable action challengeable only in the D.C. Circuit through EPA's packaging the disapproval with other SIP denials in a single *Federal Register* notice, while using an allegedly consistent methodology, is an important question that this Court should answer. Sup. Ct. R. 10(a).

This Court has already recognized in the context of Section 307(b)(1), the same provision at issue here, that questions over "the locus of judicial review of the actions of EPA" are sufficiently "important[t]" to justify this Court's review. *Harrison*, 446 U.S. at 586. Congress has the power to decide the method for challenging EPA action in the lower federal courts, including by determining which circuit is the proper venue to hear such challenges. *See id.* at 592–93. So, when disputes over the proper interpretation of statutes like Section 307(b)(1) arise, this Court "must determine what Congress intended," out of the respect owed to congressional authority. *See id.* at 593.

States and others challenging SIP disapprovals (or approvals) need to know where they may challenge these EPA actions. States must submit SIPs to EPA every time EPA promulgates a new NAAQS, and EPA must review each of its six NAAQS every five years to determine whether a new, more-stringent standard is necessary. *See* 42 U.S.C. §§ 7409, 7410(a)(1); EPA,

NAAQS Table (last updated Feb. 7, 2024).[6] States must also submit SIPs to EPA to comply with the CAA's "Regional Haze Program," which has spawned dozens of individual SIP cases across the country. 42 U.S.C. §§ 7410(a)(2)(D)(II), 7491; EPA, *Regional Haze Program* (last updated Apr. 20, 2023).[7] And States must seek EPA approval for any SIP revisions needed to implement newly adopted regulations. 42 U.S.C. § 7410(k)(5). Thus, the question of venue for challenging SIP disapprovals or approvals is of great practical importance for many future EPA actions.

Parties knowing at the outset in which federal court to bring their lawsuits, including challenges to EPA actions on SIPs, is essential to the orderly and timely resolution of federal-court litigation. That is why, for example, the Federal Rules of Civil Procedure provide that a responding party must raise objections to venue at the earliest stages of a case, or else waive such venue challenges. *See* Fed. R. Civ. P. 12(h)(1) (referencing Fed. R. Civ. P. 12(b)(3), among other subsections). A lack of clarity over procedural matters like "the preliminary question of venue," *Mercantile Nat'l Bank at Dallas v. Langdeau*,

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[6] Available at https://www.epa.gov/criteria-air-pollutants/naaqs-table (all websites last visited Mar. 27, 2024).

[7] Available at https://www.epa.gov/visibility/regional-haze-program.

371 U.S. 555, 558 (1963), "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," *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (citation omitted); *see also Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980). Without such clarity, courts may be overburdened with venue-transfer motions, while also risking reversal on non-merits grounds on appeal after the conclusion of proceedings in the original federal court. *See Hertz Corp.*, 559 U.S. at 94; *Mercantile Nat'l Bank*, 371 U.S. at 558.

The ongoing litigation occurring in circuits across the country over EPA's disapprovals of twelve ozone-transport SIPs powerfully demonstrates the importance of the Question Presented. In each of these cases, States and/or their industries challenged EPA's individual SIP disapprovals in seven different regional circuits, under Section 307(b)(1)'s second sentence. *Supra* pp.16–21. Then, EPA requested that each of these seven regional circuits transfer the petitions to the D.C. Circuit, prompting corresponding oppositions from each of the twelve States and their industry challengers. *Supra* pp.16–21. Several of these circuit courts have had to spend considerable resources adjudicating a hotly contested dispute over "the preliminary question of venue." *Mercantile Nat'l Bank*, 371 U.S. at 558; *accord Hertz Corp.*, 559 U.S. at 94; *Navarro Sav. Ass'n*, 446 U.S. at 464 n.13. And if any of these regional circuits

incorrectly decide this venue question under Section 307(b)(1), the parties risk subsequent reversal on these non-merits grounds after the conclusions of the merits proceedings on the petitions. *Mercantile Nat'l Bank*, 371 U.S. at 558.

The extensive proceedings in the present case are particularly illustrative of the harms that parties and courts suffer from the lack of clarity as to proper venue. Petitioners, Utah, Oklahoma, and EPA fully briefed the venue question during motions practice before the Tenth Circuit, and then the Tenth Circuit deferred ruling on that issue and issued stays without mentioning the question of venue. *Supra* pp.13–16. Meanwhile, Petitioners, Utah, and Oklahoma litigated with EPA over their protective petitions for review filed in the D.C. Circuit, with EPA attempting to force litigation on the merits in the D.C. Circuit even though these parties only filed there protectively. *Supra* pp.13–16. The parties in the Tenth Circuit then fully briefed the complex merits of Petitioners' challenges, as well as re-briefing the venue question, only to have the Tenth Circuit order transfer of venue to the D.C. Circuit one month before the Tenth Circuit was set to hear oral argument. *Supra* pp.13–16, 21–22.

Finally, this Court's review of the Question Presented is also important to uphold the choice of Congress in Section 307(b)(1) to empower the States

and others to challenge EPA's SIP denials individually in their local, regional circuit, rather than funneling all such challenges *en masse* to the D.C. Circuit for treatment as a national issue. *See* 42 U.S.C. § 7607(b)(1). With Section 307(b)(1), Congress empowered challengers of EPA's SIP denials to bring their challenges to the appropriate regional circuit, not the D.C. Circuit, thus allowing fulsome circuit-court review of individual SIPs and leveraging the regional circuits' comparative expertise vis-à-vis the D.C. Circuit over the local/regional issues inherent in such SIP denials. *Accord Texas*, 2023 WL 7204840, at *4; 42 U.S.C. § 7401(a)(3) ("[A]ir pollution . . . at its source is the primary responsibility of States and local governments[.]"). This is an important procedural right under the CAA, given the frequency with which the Act requires States to submit SIPs to EPA for approval and EPA's obligation to approve all SIPs that meet CAA requirements, as discussed above. *Supra* pp.6–7, 28–29.

B. It is imperative that this Court resolve the Question Presented now, rather than after a merits ruling on Petitioners' petitions in the D.C. Circuit, given the delay and waste of litigation resources caused by the circuit split here, as well as the unfairness of forcing litigation over the disapprovals of only Utah's and Oklahoma's ozone-transport SIPs into the D.C. Circuit, while other States and their supporting industries get to litigate in their regional

circuits, as is their statutory right. *See Harrison*, 446 U.S. at 586 (granting certiorari review before final judgment to review dispute over Section 307(b)(1)).

The context of this circuit split, arising out of ongoing litigation over EPA's disapprovals of twelve States' ozone-transport SIPs, calls out for this Court's immediate review. Unless this Court grants immediate review of the Tenth Circuit's venue decision, only the disapprovals of Utah's SIP and Oklahoma's SIP will, in all likelihood, be reviewed by the D.C. Circuit, while the ozone-transport SIP disapprovals for ten other States will be reviewed by the appropriate regional circuits. *See supra* pp.13–22. So, unless this Court resolves the circuit split now, either the important CAA rights of two States or of ten States will be adjudicated in the wrong federal forum under Section 307(b)(1).

In this respect, the Question Presented is analogous to the situation that this Court faced in *NAM*. There, this Court resolved a dispute over "which federal court" had jurisdiction over challenges to an EPA rule under the Clean Water Act: the circuit courts, or the district courts. *NAM*, 583 U.S. at 113–14. As the Court explained, under the Administrative Procedure Act, parties may generally file challenges to final EPA actions in the federal district courts. *Id.* at 114. But the Clean Water Act contains its own judicial-review provision that "enumerates seven

categories of EPA actions for which review lies directly and exclusively in the federal courts of appeals." *Id.* (citation omitted). After EPA promulgated the rule at issue, various parties challenged it both in the federal district courts and—due to "[u]ncertainty" over the Clean Water Act's judicial-review provision—in various Courts of Appeals. *Id.* at 119. The Sixth Circuit (in which the circuit-court challenges had been consolidated, 28 U.S.C. § 2112(a)(3)) held that the circuit courts had original jurisdiction over such challenges by denying motions to dismiss for lack of jurisdiction, while one district court had concluded that the district courts had original jurisdiction. *Id.* at 119–20 (also noting that other district courts had taken the Sixth Circuit's view). This Court granted certiorari to review the Sixth Circuit's interlocutory order denying the motions to dismiss for improper venue, and thereafter settled the division between the Sixth Circuit and a district court over the correct federal court to hear challenges to EPA's rule. *Id.* at 113–20. Further, the Court determined to resolve this split even after EPA proposed to rescind the rule at issue. *Id.* at 120 n.5.

Like in *NAM*, the Question Presented here asks "which federal court" may hear challenges to certain actions by the EPA, *id.* at 113–14, either the appropriate regional circuit or the D.C. Circuit, 42 U.S.C. § 7607(b)(1). And, like in *NAM*, there is a division of authority over this question—although the

division of authority in this case is even clearer than in *NAM*, as here multiple circuits have divided over the Question Presented. *See* Sup. Ct. R. 10(a).

III. The Tenth Circuit Wrongly Decided The Question Presented

A. Petitioners' challenges to EPA's disapprovals of Utah's SIP and Oklahoma's SIP belong in the Tenth Circuit—"the appropriate circuit"—because those EPA actions are only "locally or regionally applicable" under Section 307(b)(1)'s second sentence, while Section 307(b)(1)'s third sentence does not alter the applicable-venue analysis. 42 U.S.C. § 7607(b)(1).

The "relevant actions" for purposes of Section 307(b)(1)'s venue analysis are EPA's "various SIP denials." *Texas*, 2023 WL 7204840, at *4; *see also West Virginia*, 90 F.4th at 330; Order at 3–4, *Kentucky*, No.23-3216, Dkt.39-2. That is because the CAA provides that EPA must approve or disapprove "*each State's* SIP." *Texas*, 2023 WL 7204840, at *4 (citing 42 U.S.C. § 7410(k)(3)); *see also West Virginia*, 90 F.4th at 330 (Section 7410(k)(3)'s use of "'plan' in the singular" indicates that EPA "acts on *each plan*"); Order at 3–4, *Kentucky*, No.23-3216, Dkt.39-2. That is what EPA did here: it "separately considered and disapproved" each SIP. *Texas*, 2023 WL 7204840, at *4 (emphasis omitted); *see also West Virginia*, 90 F.4th at 330. For example, for Utah's SIP

disapproval, EPA considered and rejected Utah's reliance on "contributions from other sources, including international or non-anthropogenic emissions," to Colorado, concluding that these did not "excuse Utah from addressing its own significant contribution to nonattainment or interference with maintenance at downwind areas." 87 Fed. Reg. at 31,482; 88 Fed. Reg. at 9,359–60 (incorporating these conclusions). And for Oklahoma's SIP disapproval, EPA determined that the regional modeling cited by Oklahoma was "technically flawed" and rejected Oklahoma's analysis of site-specific factors impacting attainment at downwind receptors. 88 Fed. Reg. at 9,359–60.

EPA's decisions on submitted SIPs—including a disapproval of a SIP—"are the prototypical locally or regionally applicable action that may be challenged only in the appropriate regional court of appeals," as courts have long held. *Texas*, 2023 WL 7204840, at *4 (citations omitted); *see also, e.g.*, *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013) (Kavanaugh, J.); Order at 5, *Kentucky*, No.23-3216, Dkt.39-2. Section 307(b)(1)'s second sentence itself recognizes this, as it provides that a "petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title"—*the Section governing SIPs*—"or any other final action of the Administrator . . . which is locally or regionally applicable may be filed *only* in

the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1) (emphasis added); *see Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455 (Kavanaugh, J.).

EPA's disapprovals of the States' SIPs in the *Federal Register* notice here, including Utah's SIP and Oklahoma's SIP, belong to the prototypical category of SIP denials and so are locally or regionally applicable actions. *Texas*, 2023 WL 7204840, at *4; *West Virginia*, 90 F.4th at 328–31; Order at 4–5, *Kentucky*, No.23-3216, Dkt.39-2. EPA's disapprovals of Utah's SIP and Oklahoma's SIP involve only the regulation of Utah and Oklahoma emissions sources. *Texas*, 2023 WL 7204840, at *5; Order at 5, *Kentucky*, No.23-3216, Dkt.39-2. EPA disapproved the SIPs by assessing "the local and regional circumstances of each of the 21 States" and based the disapprovals on those circumstances, while "giving a unique mixture of reasons for each rejection, even though some of the individual reasons overlapped." *West Virginia*, 90 F.4th at 330 (emphasis omitted); *see also id.* at 328–29 ("[EPA] focused on the data particular to [each State] and the analyses that [each State] conducted with respect to those state-specific data"); 88 Fed. Reg. at 9,340, 9,354 ("[EPA assessed each SIP] in light of the facts and circumstances of each particular state's submission"; "the contents of each individual state's submission were evaluated on their own merits"). That is why, in denying Utah's SIP and

Oklahoma's SIP, EPA directed parties to "consult" EPA's previous individually issued, state-specific proposed disapprovals for the basis for each SIP disapproval. 88 Fed. Reg. at 9,359–60.

Finally, EPA's alternative determination under Section 307(b)(1)'s third sentence that the disapprovals of Utah's SIP and Oklahoma's SIP were "based on a determination of nationwide scope or effect," 42 U.S.C. § 7607(b)(1); 88 Fed. Reg. at 9,380–81, is invalid. Thus, Section 307(b)(1)'s third sentence does not change the appropriate venue here. *Texas*, 2023 WL 7204840, at *5; *West Virginia*, 90 F.4th at 328–31; Order at 5–6, *Kentucky*, No.23-3216, Dkt.39-2. Again, SIP disapprovals are "usually highly fact-bound and particular to the individual State," rather than based on a determination of nationwide scope or effect, given the Clean Air Act's requirement that EPA separately approve or disapprove each SIP. *Texas*, 2023 WL 7204840, at *5 (citations omitted); *see* Order at 5–6, *Kentucky*, No.23-3216, Dkt.39-2; 42 U.S.C. § 7410(k)(3). And here, EPA's SIP disapprovals were "based on a number of intensely factual determinations unique to each State," not on a determination of nationwide scope or effect. *Texas*, 2023 WL 7204840, at *5 (citations omitted); *see West Virginia*, 90 F.4th at 328–31; Order at 5–6, *Kentucky*, No.23-3216, Dkt.39-2. EPA explained here that it considered each SIP "in light of the facts and circumstances of each particular state's submission,"

Texas, 2023 WL 7204840, at *5 (emphasis omitted) (quoting 88 Fed. Reg. at 9,340); *see West Virginia*, 90 F.4th at 329; Order at 6, *Kentucky*, No.23-3216, Dkt.39-2. There was no new nationwide rule or "determination" being applied in the final *Federal Register* notice. EPA merely incorporated its separate and state-specific proposed disapprovals into that single publication. *West Virginia*, 90 F.4th at 330–31; Order at 6, *Kentucky*, No.23-3216, Dkt.39-2.

B. The Tenth Circuit held that EPA's disapprovals of Utah's SIP and Oklahoma's SIP were nationally applicable under Section 307(b)(1) because the single *Federal Register* notice contained two "features": EPA disapproved "SIPs from 21 states across the country," and EPA "applied a uniform statutory interpretation and common analytical methods." Pet.App.11a. But neither of these features make EPA's disapprovals nationally applicable under Section 307(b)(1).

EPA's chosen method of publishing or labeling the action—whether out of administrative convenience, its desire to choose the litigation forum, or for some other reason—does "not define the relevant 'action' for § 7607(b)(1)'s purposes" and "isn't controlling" on the question of whether EPA's action is nationally applicable or locally/regionally applicable. *Texas*, 2023 WL 7204840, at *3 n.3, *4 (citations omitted); *see*

Fed. R. App. 15 (a)(2)(C) (providing that parties may challenge only "part" of an agency's "order"). Instead, the "relevant agency action" here for purposes of Section 307(b)(1) is EPA's disapproval of each SIP, *West Virginia*, 90 F.4th at 330, given the source of EPA's authority under the CAA, *Texas*, 2023 WL 7204840, at *4; 42 U.S.C. § 7410(k)(3); Order at 3–4, *Kentucky*, No.23-3216, Dkt.39-2. The Tenth Circuit, with all respect, did not adequately consider the import of EPA's statutory source of authority here, even as it addressed the Fourth, Fifth, and Sixth Circuits' decisions on different points. *See* Pet.App.11a–17a.

Second, the Section 307(b)(1) analysis does not turn on whether EPA "applied a uniform and nationally consistent approach to the SIPs that it disapproved." *West Virginia*, 90 F.4th at 329 (citations omitted). EPA must generally apply a consistent approach or methodology in acting on SIPs—after all, an "[u]nexplained inconsistency" would render those actions unlawfully arbitrary. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46–57 (1983)). Thus, the claimed consistency of EPA's approach to reviewing SIPs is routine and does not affect the appropriate venue for actions that turn on local facts and circumstances and involve the

application of individual state discretion and judgment. Section 307(b)(1) "does not focus on whether national standards were applied," but rather on "whether the final action is nationally applicable, as opposed to locally or regionally applicable." *West Virginia*, 90 F.4th at 329. Indeed, "if application of a national standard to disapprove a plan were the controlling factor, there never could be a local or regional action . . . because every action of the EPA purportedly applies a national standard." *Id.* Regardless, EPA's review of an individual SIP, in particular, will necessarily be locally or regionally applicable, even if EPA applies a claimed uniform standard, given the state-specific nature both of SIPs and of the CAA's grant of authority to the States. *See* 42 U.S.C. § 7410(k)(3). EPA's analyses of Utah's SIP and Oklahoma's SIP here are cases in point, as EPA relied upon intensely local or regional considerations to disapprove these SIPs. *Supra* pp.37–38.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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March 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-9514

STATE OF OKLAHOMA, BY AND THROUGH ITS ATTORNEY GENERAL; GENTNER F DRUMMOND; OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix A

No. 23-9521

OKLAHOMA GAS & ELECTRIC COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9533

TULSA CEMENT LLC, D/B/A CENTRAL PLAINS CEMENT COMPANY LLC; REPUBLIC PAPERBOARD COMPANY LLC,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Appendix A

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9534

WESTERN FARMERS ELECTRIC COOPERATIVE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9509

STATE OF UTAH, BY AND THROUGH ITS GOVERNOR, SPENCER J. COX, AND ITS ATTORNEY GENERAL, SEAN D. REYES,

Petitioner,

Appendix A

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9512

PACIFICORP; DESERET GENERATION & TRANSMISSION CO-OPERATIVE; UTAH MUNICIPAL POWER AGENCY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Appendix A

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

No. 23-9520

UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix A

Petitions for Review of Orders From the
Environmental Protection Agency
(EPA Nos. EPA-R08-OAR-2022-315 &
EPA-R06-OAR-2021-0801 &
EPA-HQ-OAR-2021-0663)

Submitted without oral argument:*

Before **MORITZ**, **EBEL**, and **ROSSMAN**, Circuit Judges.

MORITZ, Circuit Judge.

In a February 2023 final rule, the U.S. Environmental Protection Agency (EPA) disapproved state implementation plans (SIPs) from 21 states across the country because those states all failed to adequately address their contributions to air-quality problems in downwind states. These seven petitions seek review of that final rule: Oklahoma and various industry groups challenge the EPA's decision to disapprove Oklahoma's SIP; Utah and other industry groups challenge the disapproval of Utah's SIP. But the EPA has moved to dismiss or transfer the petitions to the D.C. Circuit under the Clean Air Act's judicial-review provision, 42 U.S.C. § 7607(b)(1), which assigns to the D.C. Circuit any petition seeking review of a "nationally applicable" agency action. And because we agree with the EPA that the challenged rule is nationally applicable, we grant the EPA's motions in part, to transfer

* After examining the motions, responses, replies, and supplemental authority, this panel has determined unani-mously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

the petitions to the D.C. Circuit, and thus do not reach the merits.

BACKGROUND

The Clean Air Act establishes "a cooperative-federalism approach to regulate air quality." *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012). The Act directs the EPA to establish and periodically revise National Ambient Air Quality Standards (NAAQS), which represent "the maximum airborne concentration[s] of [certain air] pollutant[s] that the public health can tolerate." *West Virginia v. EPA*, 597 U.S. 697, 707, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)). After the EPA revises or sets a new air-quality standard, the agency must designate geographic regions around the country as areas of "attainment" or "nonattainment" (or label them "unclassifiable"). 42 U.S.C. § 7407(d)(1); *see also EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498, 134 S. Ct. 1584, 188 L. Ed. 2d 775 (2014). The burden then shifts to the states to each adopt and submit for the EPA's approval a SIP that will implement, maintain, and enforce the NAAQS within its boundaries. *See* 42 U.S.C. § 7410(a)(1); *EME Homer City*, 572 U.S. at 498. But because air pollutants travel with the wind, "heedless of state boundaries," emissions in upwind states can threaten a downwind state's ability to attain and maintain the NAAQS. *EME Homer City*, 572 U.S. at 496. To tackle this complex interstate pollution problem, the Act includes a good-neighbor provision requiring each SIP to prohibit emissions that will "contribute significantly to

nonattainment" or "interfere with maintenance" in any other state. § 7410(a)(2)(D)(i).

In 2015, the EPA tightened the NAAQS for ozone. *See* National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292 (Oct. 26, 2015). This revision triggered each state's duty to submit a SIP to implement the 2015 ozone NAAQS. *See* § 7410(a)(1). In February 2023, the EPA issued a final rule disapproving SIPs submitted by 21 states because those states all failed to meet their good-neighbor obligations. *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) [hereinafter Air Plan Disapprovals].[2] In evaluating these SIPs, the EPA applied a four-step framework it developed to implement the good-neighbor provision. *See id.* at 9338. Under this framework, the EPA (1) identifies downwind areas expected to have problems attaining or maintaining the relevant NAAQS; (2) determines which upwind states contribute to these identified problems in amounts sufficient to link them to the downwind air-quality problems; (3) identifies the emissions reductions necessary to eliminate each linked upwind state's significant contribution to downwind nonattainment through a multifactor analysis; and (4) adopts enforceable control measures to achieve those reductions. *Id.* In applying the framework, the EPA also considered any alternative approach states proposed in their SIPs "with an eye to ensuring national consistency." *Id.* at 9338, 9381.

2. We note that as to two of these 21 states, Minnesota and Wisconsin, the EPA partially approved and partially disapproved the proposed SIPs. *See* Air Plan Disapprovals, 88 Fed. Reg. at 9336, 9354.

Here, two such states—Oklahoma and Utah, joined by various industry groups—have petitioned for review of the final rule, challenging the EPA's decision to disapprove their SIPs. The EPA responded by moving to dismiss or transfer the petitions to the D.C. Circuit under § 7607(b)(1).[3] We stayed the Oklahoma and Utah SIP disapprovals pending our review and referred the EPA's motions to the panel assigned to hear these cases on their merits.

ANALYSIS

The EPA argues that we must dismiss or transfer the petitions to the D.C. Circuit under the Clean Air Act's judicial-review provision, which divides reviewable EPA actions into three categories and designates the proper forum for each.[4] *See* § 7607(b)(1). It provides that a petition

3. Utah and its industry groups suggest in a footnote that the EPA's motion to dismiss their petitions is untimely. In support, they note that under Tenth Circuit Rule 27.3(A)(3)(a), a motion to dismiss "should be filed within 14 days after the notice of appeal is filed, unless good cause is shown." But we agree with the EPA that it has shown good cause for filing its March 16, 2023 motion slightly more than 14 days after Utah and its industry groups petitioned for review on February 13 and 23, 2023: various petitioners have sought review of the same final rule in regional circuit courts across the country, and the "EPA has acted as expeditiously as practicable in moving to [dismiss or] transfer these cases [to the D.C. Circuit] in a coordinated fashion." EPA Utah Mot. 2 n.1.

4. We need not decide whether § 7607(b)(1) is a jurisdictional or venue provision. *See ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1196 n.1 (10th Cir. 2011). For our purposes, it is enough that the provision is mandatory and that the EPA invokes it here. *See Eberhart v. United States*, 546 U.S. 12, 19, 126 S. Ct. 403, 163 L.

for review of a "nationally applicable" final action "may be filed only in [the D.C. Circuit]." *Id.* By contrast, a petition for review of a "locally or regionally applicable" final action "may be filed only in the . . . appropriate [regional] circuit."[5] *Id.* But if that "locally or regionally applicable" action "is based on a determination of nationwide scope or effect" and if the EPA, in taking that action, "finds and publishes that such action is based on such a determination," then the petition "may be filed only in the [D.C. Circuit]." *Id.*

Under the statute's plain text, then, whether a petition for review belongs in the D.C. Circuit turns exclusively on the nature of the challenged agency action. *See ATK Launch Sys.*, 651 F.3d at 1197. We must therefore ask whether the action itself is "nationally applicable" or "locally or regionally applicable." *Id.* (quoting § 7607(b)(1)). And in answering that question, we look only to the face of the action, not its practical effects or the scope of the petitioner's challenge. *Id.*

Ed. 2d 14 (2005) (explaining that nonjurisdictional claim-processing rules "assure relief to a party properly raising them").

5. We reject petitioners' cursory suggestion that § 7607(b)(1), by its text, assigns all petitions challenging a SIP disapproval to the regional circuits. The statute merely provides that "[a] petition for review of the [EPA]'s action in approving or promulgating any implementation plan . . . or any other final action . . . (including any denial or disapproval . . .) *which is locally or regionally applicable* may be filed only in the . . . appropriate [regional] circuit." § 7607(b)(1) (emphasis added). It does not, as petitioners assert, say that any such approval, promulgation, denial, or disapproval *is* locally or regionally applicable.

On its face, the final EPA action being challenged here is nationally applicable. Petitioners seek review of a final rule disapproving SIPs from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits—because those states all failed to comply with the good-neighbor provision. *See* Air Plan Disapprovals, 88 Fed. Reg. at 9380. And in promulgating that rule, the EPA applied a uniform statutory interpretation and common analytical methods, which required the agency to examine the overlapping and interwoven linkages between upwind and downwind states in a consistent manner. *Id.* Because a final action with these features is "nationally applicable" under § 7607(b)(1), judicial review is proper only in the D.C. Circuit. *See ATK Launch Sys.*, 651 F.3d at 1197.

Seeking to avoid this conclusion, petitioners urge us to view the 21 SIP disapprovals in the final rule as separate, locally or regionally applicable agency actions. They maintain that each of their seven petitions challenges just one such action: either the Oklahoma SIP disapproval or Utah SIP disapproval. Those final SIP disapprovals, petitioners say, turned on state-specific facts and grew out of several proposed rules signed by regional administrators. And in petitioners' view, the EPA cannot transform a locally or regionally applicable SIP disapproval into a nationally applicable action by deciding to "packag[e] it together with 20 other SIP disapprovals" in a single final rule. Utah Resp. 13.

But petitioners' arguments collide with § 7607(b)(1)'s plain text, which directs courts to consider only the face of the "final action," establishing an action-focused method

for determining the proper forum for judicial review. It is simply not material to the analysis that the EPA issued several *proposed* rules or that it could have chosen to issue standalone final SIP disapprovals. What matters is the nature of the agency's final action. *See ATK Launch Sys.*, 651 F.3d at 1197. And here, that action is a nationally applicable final rule, signed by the EPA administrator, disapproving SIPs from 21 states across the country—not just one—because those states failed to meet their good-neighbor obligations.

Nor is it material that petitioners each purport to challenge only one such SIP disapproval. By its terms, § 7607(b)(1) "assigns to the D.C. Circuit all challenges to 'nationally applicable [final actions],' not, for instance, all national challenges or all challenges that will have a national effect." *Id.* (quoting § 7607(b)(1)). Thus, we have made clear that "the manner in which a petitioner frames [their] challenge" does not "alter the court in which the [petition] belongs"; "[t]he nature of the [agency action], not the challenge, controls." *Id.* And we are not alone in making this unremarkable observation. *See, e.g., Hunt Refin. Co. v. EPA*, 90 F.4th 1107, 1110 (11th Cir. 2024) ("When deciding whether a final action is 'nationally applicable,' we begin by 'analyzing the nature of the EPA's action, not the specifics of the petitioner's grievance." (quoting *RMS of Ga., LLC v. EPA*, 64 F.4th 1368, 1372 (11th Cir. 2023))); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 670 (7th Cir. 2017) ("Under the straightforward (if wordy) statutory text [of § 7607(b)(1)], venue depends entirely on—and is fixed by—the nature of the agency's action; the scope of the petitioner's challenge has no role to play

in determining venue."); *Sierra Club v. EPA*, 926 F.3d 844, 849, 441 U.S. App. D.C. 376 (D.C. Cir. 2019) ("The court need look only to the face of the agency action, not its practical effects, to determine whether an action is nationally applicable.").

We applied this action-focused approach in *ATK Launch Systems*. There, the petitioners sought review of a final EPA rule listing attainment and nonattainment designations for the NAAQS for fine particulate matter. 651 F.3d at 1195. Although the petitions challenged the nonattainment designations of only two counties in Utah, the rule "enumerate[d] designations for areas across the country." *Id.* at 1195-96. The EPA moved to dismiss or transfer the petitions under § 7607(b)(1), arguing that they belonged in the D.C. Circuit because the rule was nationally applicable. *Id.* at 1196-97. We agreed, explaining the statute "makes clear that this court must analyze whether the [final action] itself is nationally applicable, not whether the effects complained of or the petitioner's challenge to that [action] is nationally applicable." *Id.* at 1197. Because the rule there applied "a uniform process and standard across the country" and "reache[d] geographic areas from coast to coast," we held that it was nationally applicable and therefore transferred the petitions to the D.C. Circuit. *Id.* at 1197-98, 1200; *see also Hunt*, 90 F.4th at 1110-11 (holding that two EPA final actions were "nationally applicable" because they denied 105 small-refinery exemptions to refineries across the nation and because EPA applied "new statutory interpretation and analytical framework that is applicable to all small refineries no matter their

location or market"); *S. Ill. Power Coop.*, 863 F.3d at 671 (holding that similar air-quality designation rule was "nationally applicable" because it was "a final rule of broad geographic scope" and "promulgated pursuant to a common, nationwide analytical method," even though petitioners challenged only EPA's designation of one Illinois county as nonattainment area). Here, too, the final rule is nationally applicable: it applies a consistent statutory interpretation and uniform analytical methods to disapprove SIPs from 21 states around the country.[6]

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6. Petitioners attempt to distinguish *ATK Launch Systems* and *Southern Illinois Power Cooperative* by focusing on the nature of the statutory authority under which the EPA took the challenged actions. They highlight that the Clean Air Act assigns to the EPA the responsibility to make air-quality designations, and the states merely offer recommendations on how to designate areas within their boundaries. *See* § 7407(d)(1)(A)-(B). By contrast, petitioners note, the statute delegates to the states the responsibility to craft SIPs, and the EPA must approve such a plan if the agency determines that it is complete and meets all applicable requirements. *See* § 7410(a), (k). So according to petitioners, the EPA's authority "differ[s] significantly" when the agency makes air-quality designations than when it approves or disapproves SIPs, with the EPA taking a more back-seat role when reviewing SIPs. Utah Resp. 19. But we discern no material distinction here. Whether an EPA action is nationally applicable does not turn on the "type" of statutory authority delegated to the agency, *id.* at 22; again, it depends entirely on the nature of the agency's action, *ATK Launch Sys.*, 651 F.3d at 1197. Thus, as the EPA points out, it is appropriate to challenge in a regional circuit court even a final action that sets air-quality designations if that action applies only locally or regionally. *See, e.g., Texas v. EPA*, 983 F.3d 826, 832 (5th Cir. 2020) (holding that final rule establishing attainment and nonattainment designations for counties in Texas was "'locally or regionally applicable' because it [wa]s directed only at . . . contiguous Texas counties" (quoting § 7607(b)(1))). But when a final action

See Air Plan Disapprovals, 88 Fed. Reg. at 9380. So any challenge to that rule belongs in the D.C. Circuit. *See* § 7607(b)(1).

We recognize that the Fourth, Fifth, and Sixth Circuits recently reached the contrary conclusion: each denied the EPA's motions to transfer petitions challenging the same final rule at issue here.[7] *See Texas v. United States EPA*, No. 23-60069, 2023 U.S. App. LEXIS 13898, 2023 WL 7204840, at *1 (5th Cir. May 1, 2023) (unpublished); *Kentucky v. United States EPA*, No. 23-3216, 2023 U.S. App. LEXIS 18981 (6th Cir. July 25, 2023); *West Virginia v. EPA*, 90 F.4th 323, 331 (4th Cir. 2024). But in our view, all three courts strayed from § 7607(b)(1)'s text and instead applied a petition-focused approach that we and other circuits have rejected. Indeed, the Fifth Circuit conceded that its own precedent recognizes "§ 7607(b)(1)'s use of 'action' means 'the rule or other final action taken by the agency that the petitioner seeks to prevent or overturn.'" *Texas*, 2023 U.S. App. LEXIS 13898, 2023 WL 7204840, at *3-4 (quoting *Texas v. EPA*, 829 F.3d 405, 419 (5th Cir. 2016)). Nevertheless, rather than focusing its analysis on the face of the rule as is required, the Fifth Circuit focused on the nature of the petitions before it—which each challenged a single SIP disapproval

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concerns states around the country and applies a common analytical method—as in *ATK Launch Systems, Southern Illinois Power Cooperative*, and this case—then the action is nationally applicable.

7. The Eighth Circuit also denied the EPA's transfer motions, but it simply issued summary orders containing no analysis. *See, e.g., Arkansas v. EPA*, No. 23-1320 (8th Cir. Apr. 25, 2023).

contained in the final rule—to conclude that "the relevant unit of administrative action" was each individual SIP disapproval and that such disapprovals were "locally or regionally applicable." 2023 U.S. App. LEXIS 13898, [WL] at *4. The Fourth and Sixth Circuits followed suit. *See Kentucky*, 2023 U.S. App. LEXIS 18981 (following *Texas* and wrongly characterizing "EPA's [disapproval] of *Kentucky's* SIP," not the final rule itself, as the relevant "final action"); *West Virginia*, 90 F.4th at 330-31 (joining *Texas* and *West Virginia* and improperly framing "the relevant agency action" as "EPA's disapproval of West Virginia's SIP").

All three decisions generated strong dissents highlighting critical flaws in the majority opinions. In *West Virginia*, for example, the dissent sharply criticized the majority opinion for "jettison[ing the well-established] analysis altogether and instead look[ing] to the nature of West Virginia's challenge to hold that the [f]inal [r]ule is locally applicable." 90 F.4th at 334 (Thacker, J., dissenting). The dissent further pointed out that the decisions from the Fifth and Sixth Circuits likewise "depart[ed] from all relevant precedent," including our decision in *ATK Launch Systems*, "without adequate justification or explanation." *Id.* at 333-35 ; *see also Kentucky*, 2023 U.S. App. LEXIS 18981 (Cole, J., dissenting) (relying on *ATK Launch Systems* and other cases to explain that majority's "limiting [of] the 'action' to Kentucky's state-specific challenge is inappropriate" when "the 'scope of the [final rule]' is much broader" (quoting *Nat. Res. Def. Council v. Thomas*, 838 F.2d 1224, 1249, 267 U.S. App. D.C. 274 (D.C. Cir. 1988))); *Texas*, 2023 U.S. App. LEXIS 13898, 2023

WL 7204840, at *11-12 (Douglas, J., dissenting) (same). Moreover, this misdirected approach may well result in ten regional 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. *See Texas*, 2023 U.S. App. LEXIS 13898, 2023 WL 7204840, at *13 (Douglas, J., dissenting); *Kentucky*, 2023 U.S. App. LEXIS 18981 (Cole, J., dissenting).

In short, because the Fourth, Fifth, and Sixth Circuit decisions denying the EPA's transfer motions all depart from § 7607(b)(1)'s plain text and our binding precedent, we decline to follow them. *See Hunt*, 90 F.4th at 1111-13 (distinguishing *Texas* and *Kentucky* and further disagreeing with *Calumet Shreveport Refining, LLC v. EPA*, 86 F.4th 1121 (5th Cir. 2023), in which the Fifth Circuit held that two EPA final actions denying 105 small-refinery exemptions were locally or regionally applicable). And applying § 7607(b)(1) as written, we readily conclude that these petitions belong in the D.C. Circuit because they seek review of a nationally applicable final rule.[8]

CONCLUSION

Because petitioners seek review of a nationally applicable final rule, we grant the EPA's motions to dismiss or transfer in part and transfer the petitions to the D.C.

8. Given this conclusion, we need not address the EPA's alternative argument that the petitions belong in the D.C. Circuit even if the final action is "locally or regionally applicable" because it "is based on a determination of nationwide scope or effect" made and published by the EPA. § 7607(b)(1).

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 23-9514
(EPA No. EPA-RO6-OAR-2021-0801)
(Environmental Protection Agency)

STATE OF OKLAHOMA, BY AND THROUGH ITS ATTORNEY GENERAL; GENTNER F DRUMMOND; OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix B

No. 23-9521
(EPA No. EPA-HQ-OAR-2021-0663)
(Environmental Protection Agency)

OKLAHOMA GAS & ELECTRIC COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix B

No. 23-9533
(EPA No. EPA-HQ-OAR-2021-0663)
(Environmental Protection Agency)

TULSA CEMENT LLC, D/B/A CENTRAL PLAINS CEMENT COMPANY LLC; REPUBLIC PAPERBOARD COMPANY LLC,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix B

No. 23-9534
(EPA No. EPA-HQ-OAR-2021-0663)
(Environmental Protection Agency)

WESTERN FARMERS ELECTRIC COOPERATIVE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix B

No. 23-9509
(EPA No. EPA-R08-OAR-2022-315)
(Environmental Protection Agency)

STATE OF UTAH, BY AND THROUGH ITS GOVERNOR, SPENCER J. COX, AND ITS ATTORNEY GENERAL, SEAN D. REYES,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix B

No. 23-9512
(EPA No. EPA-R08-OAR-2022-315)
(Environmental Protection Agency)

PACIFICORP; DESERET GENERATION & TRANSMISSION CO-OPERATIVE; UTAH MUNICIPAL POWER AGENCY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

SIERRA CLUB; HEALTHY ENVIRONMENT ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL DIVERSITY; DOWNWINDERS AT RISK; UTAH PHYSICIANS FOR A HEALTHY ENVIRONMENT; SOUTHERN UTAH WILDERNESS ALLIANCE; CLEAN AIR TASK FORCE,

Amici Curiae.

Appendix B

No. 23-9520
(EPA No. EPA-R08-OAR-2022-315)
(Environmental Protection Agency)

UTAH ASSOCIATED
MUNICIPAL POWER SYSTEMS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; MICHAEL S.
REGAN, ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS.

SIERRA CLUB; HEALTHY ENVIRONMENT
ALLIANCE OF UTAH; CENTER FOR BIOLOGICAL
DIVERSITY; DOWNWINDERS AT RISK; UTAH
PHYSICIANS FOR A HEALTHY ENVIRONMENT;
SOUTHERN UTAH WILDERNESS ALLIANCE;
CLEAN AIR TASK FORCE,

Amici Curiae.

ORDER

These matters are before the court on *Respondents' Opposed Motion to Transfer the Petition for Review to*

the D.C. Circuit or Dismiss Based on Improper Venue.[1] We also have responses from Petitioners, replies from Respondents, and supplemental authority from the parties. On April 27, 2023, the motions, responses, replies, and supplemental authority were referred to the panel of judges who would later be assigned to decide the merits of these petitions for review. As a result, merits briefing proceeded and these matters are set for oral argument on March 21, 2024.

Upon careful consideration of the aforementioned filings, and at the specific direction of the merits panel, the Transfer Motions are GRANTED IN PART and these matters will be transferred to the United States Court of Appeals for the District of Columbia. A decision directing the transfer of these matters will issue in due course, and the transfers will be effectuated at that time.

In light of the foregoing, the March 21, 2024 oral arguments in these matters are VACATED, and all counsel are excused from attendance. The pending motions to enlarge time for oral argument and for amici to participate in oral argument are DENIED AS MOOT.

Entered for the Court,

/s/ Christopher M. Wolpert, Clerk
CHRISTOPHER M. WOLPERT, Clerk

1. Respondents filed substantially similar motions to transfer or dismiss each of the above-captioned petitions for review. Collectively, those motions are referred to herein as the "Transfer Motions."

APPENDIX C — RELEVANT STATUTORY PROVISIONS

42 U.S. Code § 7607 Administrative proceedings and judicial review

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 USCS § 7412], any standard of performance or requirement under section 111 [42 USCS § 7411][,], any standard under section 202 [42 USCS § 7521] (other than a standard required to be prescribed under section 202(b)(1) [42 USCS § 7521(b)(1)]), any determination under section 202(b)(5) [42 USCS § 7521(b)(5)], any control or prohibition under section 211 [42 USCS § 7545], any standard under section 231 [42 USCS § 7571] any rule issued under section 113, 119, or under section 120 [42 USCS § 7413, 7419, or 7420], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 USCS § 7410 or 7411(d)], any order under section 111(j) [42 USCS § 7411(j)], under section 112 [42 USCS § 7412],[,] under section 119 [42 USCS § 7419], or under section 120 [42 USCS § 7420], or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or revising

regulations for enhanced monitoring and compliance certification programs under section 114(a)(3) of this Act, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I [42 USCS §§ 7401 et seq.]) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia 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. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or

criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

Appendix C

42 U.S. Code § 7410 State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems.

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 [42 USCS § 7409] for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this Act shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

> **(A)** include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act;
>
> **(B)** provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—
>
> > **(i)** monitor, compile, and analyze data on ambient air quality, and
> >
> > **(ii)** upon request, make such data available to the Administrator;
>
> **(C)** include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D [42 USCS §§ 7470 et seq., 7501 et seq.];

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C [42 USCS §§ 7470 et seq.] to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 126 and 115 [42 USCS §§ 7426, 7415] (relating to interstate and international pollution abatement);

* * *

(k) Environmental Protection Agency action on plan submissions.

(1) Completeness of plan submissions.

Appendix C

(A) Completeness criteria. Within 9 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this Act.

(B) Completeness finding. Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness. Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action. Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval. In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this Act. If a portion of the plan revision meets all the applicable requirements of this Act, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this Act until the Administrator approves the entire plan revision as complying with the applicable requirements of this Act.

(4) Conditional approval. The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions. Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 176A or section 184 [42 USCS § 7506a or § 7511c], or to otherwise comply with any requirement of this Act, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this Act to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D [42 USCS §§ 7501 et seq.], unless such date has elapsed).

(6) Corrections. Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such

action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.