

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-1067

STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 23-1068

PACIFICORP, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

MOTION OF THE RESPONDENTS
TO HOLD THE BRIEFING SCHEDULE IN ABEYANCE

Pursuant to Rule 21.1 of the Rules of this Court, the Acting Solicitor General, on behalf of respondents United States Environmental Protection Agency (EPA) and James Payne in his official capacity as the Acting Administrator of EPA, respectfully moves to hold the briefing schedule in abeyance, without prejudice to any

party requesting to have the briefing schedule reinstated should the matter not be resolved.* Petitioners' reply briefs are currently due on February 18, 2025, and the cases have not yet been scheduled for argument. Petitioners oppose respondents' request to hold the briefing schedule in abeyance and intend to file a response.

1. When a petitioner seeks review of a "final action" taken by the EPA under the Clean Air Act (CAA), 42 U.S.C. 7401 et seq., Section 7607(b)(1) of Title 42 authorizes direct court of appeals review of the petitioner's challenge. That provision makes the D.C. Circuit the exclusive venue for a petition for review of certain specified actions or "any other nationally applicable regulations promulgated, or final action taken, by" EPA. 42 U.S.C. 7607(b)(1). By contrast, a petition for review of an action that is "locally or regionally applicable may" generally "be filed only in the United States Court of Appeals for the appropriate circuit." Ibid. But a petition for review of a locally or regionally applicable EPA action must be filed in the D.C. Circuit if the agency 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." Ibid.

* Acting Administrator Payne is substituted as a party for his predecessor in office. See Sup. Ct. R. 35.3.

At issue in this case is a final action disapproving 21 States' implementation plans for reducing ozone pollution transported across state lines. 88 Fed. Reg. 9336 (Feb. 13, 2023). Petitioners Oklahoma and Utah (State petitioners), as well as eight industry petitioners (Industry petitioners) filed petitions for review of the disapproval action in both the Tenth and D.C. Circuits. In the Tenth Circuit, EPA moved to transfer venue to the D.C. Circuit or to dismiss for improper venue. Pet. App. 8a. A motions panel stayed the disapproval action as to the state plans submitted by Oklahoma and Utah, and it referred the motion to dismiss or transfer venue to the merits panel. Id. at 10a-11a. The merits panel then granted EPA's motion and transferred the petitions to the D.C. Circuit. Id. at 1a-19a. The court concluded that "[o]n its face," the disapproval action is nationally applicable because it disapproves state plans "from 21 States across the country." Id. at 12a.

On March 28, 2024, State and Industry petitioners filed separate petitions for writs of certiorari, which present the question whether venue for challenges to the disapproval action lies in the D.C. Circuit or the Tenth Circuit. On October 21, 2024, this Court granted both petitions and consolidated the cases.

2. After the change in Administration, EPA's Acting Administrator has determined that the agency should reassess the basis for and soundness of the underlying disapproval action. Such a reassessment could obviate the need for this Court to determine

the proper venue for challenges to that action. Accordingly, respondents respectfully request that this Court hold the briefing schedule in abeyance. Petitioners' reply briefs are currently due on February 18, 2025, and the case has not yet been scheduled for argument. Given the Acting Administrator's determination, it would be appropriate for the Court to hold further proceedings in this case in abeyance to allow for EPA to reassess the basis for and soundness of the disapproval action. The Court has previously held the briefing schedule in abeyance in light of developments arising after the grant of certiorari in other cases. See, e.g., Biden v. Sierra Club, No. 20-138 (Feb. 3, 2021); Mayorkas v. Innovation Law Lab, No. 19-1212 (Feb. 3, 2021). Respondents therefore request an order holding the briefing schedule in abeyance, without prejudice to any party requesting to have the briefing schedule reinstated should the matter not be resolved.

3. We have consulted with counsel for petitioners, who have informed us that they oppose the relief requested and intend to file a response. If this motion is granted, we will advise the Court of material developments that would support further action by the Court.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record

JANUARY 2025