No. 24-961

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

v.

KENTUCKY, ET AL., *Respondents*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Clean Air Act's cooperative federalism framework requires States to adopt state implementation plans (SIPs) to meet national ambient air quality standards (NAAQS), with the Environmental Protection Agency then reviewing those plans. 42 U.S.C. § 7410. In 2023, EPA disapproved 21 States' SIPs for interstate-transport requirements for ozone in a single *Federal Register* notice. Kentucky's SIP was among them. Kentucky challenged that disapproval in the Sixth Circuit because a petition for review of a SIP disapproval that 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). The Sixth Circuit twice agreed that it, not the D.C. Circuit, was the proper venue for Kentucky's challenge.

This case presents the following question:

Whether the proper venue to seek review of EPA's disapproval of Kentucky's SIP under 42 U.S.C. § 7607(b)(1) is the Sixth Circuit.

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INTRODUCTION

The Clean Air Act requires that challenges to local or regional actions be brought in the "United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). An "'action in approving or promulgating any implementation plan' is the prototypical 'locally or regionally applicable' action that may be challenged only in" a regional Court of Appeals. *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013) (Kavanaugh, J.) (citation omitted). So when "EPA acted in an 'arbitrary' way by telling Kentucky one thing and then doing another," Pet. App. 3a (quoting 5 U.S.C. § 706(2)(A)), Kentucky and its Energy & Environment Cabinet challenged the action in the Sixth Circuit.

EPA twice sought to transfer Kentucky's petitions for review to the D.C. Circuit. *Id.* at 14a. It argued that its disapproval of 21 States' plans was a national, not local or regional, action. *Id.* at 17a. And if its action was local, it argued that it was "based on a determination of nationwide scope or effect." *Id.*

The Sixth Circuit rejected EPA's arguments. Because the action applied to less than the entire country, by definition it was not national. *Id.* at 18a. Nor could EPA make a single local action national by combining the Kentucky disapproval with others, given that the Clean Air Act makes clear that disapproval actions are local. *Id.* at 20a–25a. EPA's alternative argument fared no better. Its "fact-specific denial of Kentucky's plan" was not a nationwide determination. *Id.* at 34a. Turning to the merits, the Sixth Circuit vacated the disapproval of Kentucky's plan "[b]ecause

the EPA has not justified its inconsistencies here." *Id.* at 3a.

EPA now seeks this Court's review. It asks that the Court hold its petition for certiorari for the Court's decision in *Oklahoma v. EPA*, 145 S. Ct. 411 (2024) (No. 23-1067), and *PacifiCorp v. EPA*, 145 S. Ct. 411 (2024) (No. 23-1068) (together *Oklahoma*). Those cases raise the same venue question as this one. But further delay in this matter benefits no one. It keeps Kentucky in the regulatory limbo that EPA wrought when it disapproved 21 States' SIPs in one *Federal Register* notice. And it is in tension with EPA's recently stated goal of ending the follow-on federal implementation plan (FIP) it imposed after disapproving Kentucky's SIP. So the Court should deny EPA's petition. If the Court holds the petition, it should deny the petition if it reverses in *Oklahoma*.

STATEMENT OF THE CASE

1. The Clean Air Act's "experiment in cooperative federalism" divides labor between EPA and the States. *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). EPA identifies air pollutants and sets NAAQS for them. 42 U.S.C. §§ 7408 (a), 7409 (a), (d)(1). And States "in the first instance" decide how to control pollution "to meet the ambient pollution target." *West Virginia v. EPA*, 597 U.S. 697, 707 (2022). Doing so requires, in part, formulating or revising a SIP. *See* 42 U.S.C. § 7407 (a). SIPs are "subject to EPA approval," but States have "wide discretion in formulating" them. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249–50 (1976).

After a State submits its SIP, the process is supposed to be straightforward. EPA has 18 months to conduct its review. 42 U.S.C. § 7410 (k)(1)–(3). It must

approve a SIP "if it meets all of the applicable requirements of [the Clean Air Act]." *Id.* § 7410(k)(3). And if it identifies a "deficiency," the Clean Air Act provides EPA two years to work with a State to "correct[]" it. *Id.* § 7410(c)(1). Final disapproval of a SIP, however, allows EPA to promulgate a FIP for the State. *Id.* § 7410(c)(1)(B).

2. Kentucky developed the SIP at issue here to comply with EPA's revised ozone NAAQS—it lowered the standard from 75 ppb to 70 ppb in 2015. 80 Fed. Reg. 65,292, 65,292 (Oct. 26, 2015). In particular, Kentucky updated its ozone SIP to comply with the Clean Air Act's good-neighbor requirement that "upwind States . . . reduce emissions to account for pollution exported beyond their borders." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 499 (2014); *see also* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

EPA offered Kentucky and its fellow States two guidance memoranda to help formulate their good-neighbor SIPs. Pet. App. 7a. A March 2018 memorandum described the four-step approach EPA planned to use to evaluate a State's good-neighbor obligations: (1) "'identify downwind' locations" with potential attainment issues; (2) identify "upwind States" that contribute to those problems; (3) calculate (with costs in mind) the amount of reductions "an upwind State must make"; and (4) identify the "permanent and enforceable measures" that could achieve those reductions. *Id.* at 7a–8a. States "could follow this approach or 'alternative frameworks' that comported with the Good Neighbor Provision." *Id.* at 8a (citation omitted). And States could "consider using" modeling data from 2011 to identify downwind locations that would be in nonattainment (nonattainment receptors) or would be

struggling to maintain the NAAQS (maintenance receptors). *Id.*

The recommendations did not end there. In August 2018, the second memorandum advised States on how to screen out upwind States with a sub-1% contribution to the NAAQS in another State. *Id.* Under the revised standard, that meant a .7 ppb contribution threshold. *Id.* EPA found that threshold "generally comparable" to a "higher 1 ppb threshold," so it let States treat sub-1 ppb contributions as too low to trigger more review in the four-step process, with the caveat that individual facts could warrant disapproval. *Id.* at 8a–9a.

Kentucky relied on EPA's advice in preparing its SIP. It used both the 2011 modeling data and the 1 ppb threshold, combined with some Kentucky-specific modeling. *Id.* at 9a–10a. And, being connected as a contributor to only one Maryland maintenance receptor, Kentucky decided not to impose more emissions reductions. *Id.* During a state comment period, EPA advised that Kentucky should simplify its approach and rely on the "straightforward approach" of using the 2011 data and 1 ppb threshold alone. *Id.* at 10a. Kentucky did just that in its 2019 submission. *Id.*

Next came administrative delay. The Clean Air Act gave EPA a July 2020 deadline to review Kentucky's submission. 42 U.S.C. § 7410(k)(1)(B), (2). Yet it did not propose to disapprove Kentucky's SIP until February 2022—almost 20 months late. 87 Fed. Reg. 9,498, 9,498 (Feb. 22, 2022).

Aside from tardiness, EPA's proposal had two serious problems. The first was its reliance on modeling data from 2016 (called 2016v2 modeling), instead of

the 2011 modeling data EPA's March 2018 Memorandum recommended. Pet. App. 11a. The second was its rejection of the 1 ppb threshold recommended in the August 2018 Memorandum in favor of returning to a 1%, or .7 ppb, threshold. *Id.* Both changes threatened to make the analysis in Kentucky's SIP obsolete.

Kentucky objected to the proposed disapproval, but EPA nevertheless finalized it in February 2023. 88 Fed. Reg. 9,336, 9,356 (Feb. 13, 2023). The disapproval was combined with 20 others in a single *Federal Register* notice. *Id.* at 9,336–38 & n.8. And EPA yet again relied on new modeling data, this time called 2016v3 modeling. *Id.* at 9,339, 9,344–45.

3. Kentucky and its Energy and Environment Cabinet petitioned the Sixth Circuit for review of the disapproval. They chose the Sixth Circuit because the Clean Air Act mandates that challenges to local or regional actions be brought in the "United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). EPA sought to transfer the case to the D.C. Circuit, and Kentucky sought a stay pending review. Pet. App. 12a. Many other States likewise sought stays. *See Ohio v. EPA*, 603 U.S. 279, 288–89 (2024). The Sixth Circuit denied EPA's transfer motion and granted Kentucky's stay. *Kentucky v. EPA*, 2023 WL 11871967, at *5 (6th Cir. July 25, 2023) (order).

EPA renewed its transfer request before the merits panel. Pet. App. 14a. Facing a split in authority, the panel agreed with the majority of circuit courts "that they (not the D.C. Circuit) represent the proper tribunal for" the challenges. *Id.* at 17a.

The Sixth Circuit first rejected EPA's argument that combining many disapprovals in one *Federal Register* notice creates a single, nationwide action. *Id.* In the court's view, an action could not be "nationally applicable" if it "formally applies to just 21 States—not the whole country." *Id.* at 18a. It confirmed that plain reading with two canons of construction. The *ejusdem generis* canon meant that the phrase "nationally applicable regulations" should be placed in the same class as the specific actions listed before it in Section 7607(b)(1). *Id.* at 18a–19a. Those actions would all apply nationwide. *Id.* at 19a. The panel also found its reading—which asks simply whether an action formally applies to the whole country—a better fit with the presumption that Congress intends to write clear jurisdictional rules. *Id.* at 19a–20a.

EPA's claim that combining 21 SIP disapprovals together created a single final action was no more persuasive. The court agreed with Kentucky's reading of Section 7607(b)(1) "that the disapproval of each state plan qualifies as a distinct 'action' that falls on the local side of [the judicial-review provision's] divide." *Id.* at 22a. With "no textual theory for its view" and "no claim that a rule disapproving 21 state plans formally applies everywhere," EPA had no good argument that it can render several local actions national by issuing them together. *Id.* at 22a–24a.

The Sixth Circuit also rejected EPA's alternative argument that even its "locally or regionally applicable" action belongs in the D.C. Circuit because it was based on underlying, nationwide policy decisions. *Id.* at 25a–26a. In EPA's view, any "analytical step"—like the use of a "four-step 'framework'"—that applies nationwide can qualify an action for review in the D.C.

Circuit. *Id.* at 26a (citation omitted). But the court held that "determination" means "ultimate decision," rejecting the broad meaning EPA proposed. *Id.* at 26a–27a (emphasis omitted). EPA's duty to "ground its actions in a 'national rule or standard' in the Clean Air Act or its regulations" does not allow it to "send every action to the D.C. Circuit." *Id.* at 27a (citation omitted). In disapproving Kentucky's SIP, EPA had to rest its ultimate decision on Kentucky-specific facts. *Id.* at 28a–30a.

With the venue question resolved, the Sixth Circuit vacated the SIP disapproval as arbitrary and capricious. *Id.* at 34a–47a. It held that EPA departed from its prior positions without adequate explanation or consideration of reliance interests. *Id.* at 35a–36a. In particular, EPA's rejection of the 2011 modeling data and the 1 ppb contribution threshold, despite recommending that Kentucky follow both, rendered its disapproval arbitrary.

The panel began with the threshold change. It first noted that EPA did not even acknowledge "that its switch from a 1 ppb threshold to a .7 ppb threshold changed anything." *Id.* at 37a. But by flipping the presumption in favor of the higher threshold to a presumption against it, EPA "was disagreeing with itself." *Id.* at 38a. And worse still, it was pulling the rug out from under the Bluegrass State by rejecting the approach the agency recommended it follow. *Id.*

On the change in modeling data, the court held that EPA disregarded Kentucky's reliance on the 2011 modeling when it switched to the 2016v3 modeling. *Id.* In fact, "EPA did not . . . warn that it might still reject

the state plan despite [its] recommendation" that Kentucky "*rely entirely* upon" the 2011 modeling and 1 ppb threshold. *Id.* at 40a (citation omitted). Yet it "denied Kentucky's plan in large part because Kentucky had done what EPA told it to do." *Id.* at 41a. That decision gave short shrift to the "sovereign reliance interest" the Clean Air Act grants to Kentucky. *Id.* at 42a.

EPA also argued that the court should "find its mistakes harmless" because it would have disapproved the SIP even using the methods it earlier recommended. *Id.* The panel disagreed. *Id.* Instead, it could not identify "how the EPA would have acted if it had not committed the legal errors [the panel] identified." *Id.* at 44a.

Judge Murphy concurred to explain why EPA's failure to meet its statutory deadline might also make vacatur appropriate. Addressing the proper remedy for violating a mandatory deadline, he focused on the potentially prejudicial nature of "EPA's decision to base its untimely disapproval on data in the 2016v3 modeling that *postdated* the EPA's deadline to act." *Id.* at 52a. In doing so, rather than asking Kentucky to revise its submission, EPA "kicked Kentucky out of this process." *Id.* at 53a. Judge Murphy suggested that "undercut the [Clean Air] Act's primary 'cooperative federalism' design." *Id.* at 56a (citation omitted).

4. EPA now seeks certiorari. It asks (at 7–8) that the Court "hold this petition" pending its decision in *Oklahoma*, which was argued on March 25. EPA notes that *Oklahoma* raises the same venue question under section 7607(b)(1) that the Sixth Circuit resolved in Kentucky's favor.

Of note is that EPA does *not* challenge the Sixth Circuit's merits holding that EPA's disapproval was arbitrary and capricious. In fact, EPA acknowledges (at 7) that it "is reassessing the basis for and soundness of the disapproval action" based in part on "the concerns raised by the decision below." And EPA has since announced that it is "[e]nding" the "so-called 'Good Neighbor Plan'"—*i.e.*, the FIP that EPA imposed on Kentucky following the SIP disapproval. EPA, *EPA Launches Biggest Deregulatory Action in U.S. History* (Mar. 12, 2025);[1] *see also* EPA, *Trump EPA Announces Plan to Work with States on SIPs to Improve Air Quality and Reconsider "Good Neighbor Plan"* (Mar. 12, 2025).[2]

ARGUMENT

Although Kentucky agrees that this case raises the same venue question as in *Oklahoma*, it respectfully submits that denying certiorari is warranted under the unique circumstances here.

By all indications, EPA no longer wishes to defend the lawfulness of its disapproval of Kentucky's SIP. With good reason, given that the Sixth Circuit unanimously found EPA's merits position "a bit rich." Pet. App. 38a (quoting *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 740 (D.C. Cir. 2016) (Kavanaugh, J., dissenting)). EPA's petition here offers not one word of defense for disapproving Kentucky's SIP. To the contrary, EPA states (at 7) that it is "reassessing the basis for and soundness of the disapproval action" and

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[1] https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history.

[2] https://www.epa.gov/newsreleases/trump-epa-announces-plan-work-states-sips-improve-air-quality-and-reconsider-good.

that "the concerns raised by the decision below are part of that reassessment." And elsewhere, EPA has pledged "to advance cooperative federalism and work with states on [SIPs]" after walking back its FIP. *Trump EPA Announces Plan to Work with States on SIPs*, *supra*. So if it was "'far from certain' that the EPA [would] reach th[e] same conclusion on remand" when the Sixth Circuit issued its opinion in December, Pet. App. 46a–47a (citation omitted), it now appears all but certain that EPA will not double down on its prior disapproval.

Although Kentucky appreciates that EPA's petition is following the government's "usual practice," the reality is that the position here is an empty formalism. One way or another, this case is headed toward a new administrative process. Holding this case for *Oklahoma* simply delays reaching that inevitable end. The SIP approval process has already gone on for too long. As noted above, Kentucky submitted its SIP *in 2019*. At best, holding this case for *Oklahoma* may delay starting the administrative process by several months. But at worst, it could mean consolidating Kentucky's petition for review in the D.C. Circuit with many others followed by an abeyance—all for a dispute that by all appearances now involves little to no disagreement on the merits. Denying certiorari here gets Kentucky and EPA back to an administrative process more quickly. That in turn promotes the "cooperative federalism" ends of the Clean Air Act.

To be sure, an affirmance in *Oklahoma* could mean abrogation of the Sixth Circuit's venue holding. But that would just mean that future litigants cannot rely on the venue-related part of the Sixth Circuit's decision when bringing a challenge to an EPA action. That

consequence is an ordinary feature of vertical stare decisis. *See, e.g.*, *United States v. Canada*, 123 F.4th 159, 162 (4th Cir. 2024) (recognizing that a "decision has been abrogated by later ones we are bound to follow"); *Doe v. Franklin Square Union Free Sch. Dist.*, 100 F.4th 86, 102 (2d Cir. 2024) (similar). And even if a litigant attempts to rely on an abrogated decision, lower courts will have no problem "yield[ing] to th[is] Court's contrary decisions" as necessary. *See, e.g.*, *Maryville Baptist Church v. Beshear*, 132 F.4th 453, 455–56 (6th Cir. 2025) (overruling a line of Sixth Circuit precedents abrogated by *Lackey v. Stinnie*, 145 S. Ct. 659 (2025)); *see also Hawver v. United States*, 808 F.3d 693, 694 (6th Cir. 2015).

In sum, Kentucky asks this Court to give the benefits of finality and a quicker administrative process more weight than the risk of one potentially abrogated Court of Appeals opinion. Denying certiorari allows Kentucky and EPA to get on with the SIP approval process. It is well past time for this "long delay" to end. *See* Pet. App. 46a.

One last note. If the Court agrees with EPA and holds its petition pending the outcome in *Oklahoma*, Kentucky asks that the Court dispose of this petition in a manner consistent with EPA's own stated policy goals of working with States on their SIPs. If the Court agrees with the *Oklahoma* petitioners that venue in a case like this is appropriate in a State's regional circuit, it should simply deny certiorari in this matter to move this matter along.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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