

No. 24-961

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL. PETITIONERS

v.

COMMONWEALTH OF KENTUCKY, ET AL.

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

**BRIEF OF THE KENTUCKY ENERGY AND
ENVIRONMENT CABINET IN OPPOSITION**

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QUESTION PRESENTED

Whether, under 42 U.S.C. 7607(b)(1), the United States Environmental Protection Agency's disapproval of an individual State Implementation Plan, which is traditionally viewed as a local or regionally applicable action, is appropriately reviewed in the regional Circuit Court of Appeals where that state is situated or whether EPA can strategically shift that review to the D.C. Circuit by grouping twenty-one (21) unique State Implementation Plan disapprovals into a single final rulemaking citing similar nationwide policy concerns and preferences to disregard individual state-specific determinations.

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STATEMENT OF THE CASE

The Sixth Circuit vacated the United States Environmental Protection Agency’s (“EPA”) untimely and improper Final Rule disapproving Kentucky’s State Implementation Plan (“SIP”) for the 2015 Primary 8-Hour Ozone National Ambient Air Quality Standard (“NAAQS”). The revised 2015 Primary 8-Hour Ozone NAAQS rulemaking was initiated by EPA pursuant to the Clean Air Act (“CAA”), 42 U.S.C. 7401 *et seq.* The final agency action giving rise to this controversy began with the publication of the final rule disapproving Kentucky’s unique SIP alongside the separate and distinct SIPs from twenty (20) other States (the “Final Rule”). The omnibus disapprovals included various EPA determinations that each individual state plan was deficient to achieve the revised 2015 ozone standard because it would not adequately “prohibit[] * * * emissions activity within [each individual] State” from “contribut[ing] significantly to nonattainment in standard, or interfer[ing] with maintenance by, any other State”. 42 U.S.C. 7410(a)(2)(D)(i)(I).

The Commonwealth of Kentucky and the Kentucky Energy and Environment Cabinet (“Cabinet”) each filed a Petition for Review of EPA’s Final Rule in the Sixth Circuit. There, a motions panel and, ultimately, the court’s merit panel, concluded that the Sixth Circuit was the appropriate venue for Kentucky’s challenge under 42 U.S.C. 7607(b)(1) before vacating EPA’s disapproval of Kentucky’s SIP. Here, the only relief Petitioners seek is related to the Sixth Circuit’s venue ruling. No other issues have been preserved for this appeal.

REASON FOR OPPOSITION TO GRANTING A WRIT OF CERTIORARI

Respondent, Cabinet, files this Brief in Opposition to clarify that venue is the only question before this Court, and that very question is already being considered by this Court in parallel challenges to the Final Rule in the consolidated matters of *Oklahoma v. EPA*, 145 S. Ct. 411 (2024) (No. 23-1067) and *PacifiCorp v. EPA*, 145 S. Ct. 411 (2024) (No. 23-1068). The parties acknowledge that the question of venue was briefed and argued to this Court in *Oklahoma* and *PacifiCorp*, and, although EPA worded its question differently than those petitioners, EPA's Petition here presents an identical question of law.

With those considerations in mind, resolution of the question being considered in *Oklahoma* and *PacificCorp* will similarly decide the only question preserved herein, which, in its simplest form, is whether or not the Court will affirm the Sixth Circuit's analysis determining it was the appropriate venue to review the Final Rule disapproving Kentucky's SIP for the 2015 Primary 8-Hour Ozone NAAQS under 42 U.S.C. 7607(b)(1), or whether EPA can change an inherently local and regional determination into one that is of "nationwide scope or effect" simply by grouping it with other determinations disapproving twenty (20) other states' SIPs.

An action by the Administrator in disapproving a state plan is, unambiguously, an inherently local and regional determination. The D.C. Circuit agrees, previously holding that EPA's "action in approving or promulgating any implementation plan' is the

prototypical ‘locally or regionally applicable’ action that may be challenged only in the appropriate regional court of appeals.” *Am. Road & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013) (Kavanaugh, J.) (see also: *Chevron U.S.A. Inc. v. EPA*, 45 F.4th 380, 386 (D.C. Cir. 2022); *Texas Municipal Power Agency v. EPA*, 89 F.3d 858, 866 (D.C. Cir. 1996); *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194, 1199 (10th Cir. 2011) (describing SIPs as “purely local action” and an “undisputedly regional action”). Thus, EPA’s argument that the Final Rule at issue here is one of “nationwide scope or effect” is impermissibly contrary to the plain language of the Act and prior holdings of its preferred venue, the D.C. Circuit.

To be sure, grouping the individual SIP denials into an omnibus publication in the Federal Register does not make the individual SIP disapprovals an agency determination of nationwide scope or effect. In fact, per the Final Rule itself, EPA claimed to have evaluated each SIP on its own individual merits and based disapprovals on a combination of specific deficiencies and general policy considerations. See Final Rule, 88 Fed. Reg. 9,336 at 9,340 and 9,354. EPA’s general policy considerations cannot elevate an individual state compliance plan to one of nationwide scope solely because the policy concerns were universally cited.

The relevant portion of 42 U.S.C. 7607(b)(1) addressing venue provides that an action approving “any implementation plan *** or any other final action of the Administrator under [the CAA] (including any denial or disapproval [under Title I of the CAA]) 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). Like Kentucky, several other states challenged EPA’s disapproval of their

individual SIPs, and most states appropriately filed their challenges in the regional Circuit Courts where those states are located.* Further, every court ruled on the question of venue presented by EPA. Nearly all ruled that the regional Circuit Court was the appropriate venue to hear the SIP disapproval challenges under 42 U.S.C. 7607(b)(1).

The Tenth Circuit did not follow this line of thinking and transferred two SIP disapproval challenge cases brought before it to the D.C. Circuit, and the question of venue that is the sole subject of the Petition here was fully addressed in the *Oklahoma* and *PacifiCorp* cases. The Petition in this matter presents no additional questions for review. As such, the Petition makes clear that EPA does not intend to challenge the merits of the Sixth Circuit’s decision with regard to the disapproval of Kentucky’s SIP. Because no other questions that challenge the merits of the Sixth Circuit’s decision were presented in the Petition, none of the findings and conclusions contained therein should be disturbed on review. EPA agrees, admitting in the Petition that the Agency is “reassessing the basis for and the soundness of the disapproval action, and the concerns raised by the decision below are part of that reassessment.” Petition at p 7. Therefore, the Cabinet agrees with EPA that

* See, e.g., *West Virginia v. EPA*, No. 23-1418 (4th Cir. Apr. 14, 2023); *Texas v. EPA*, No. 23-60069 (5th Cir. Feb. 14, 2023); *Kentucky v. EPA*, No. 23-3216 (6th Cir. Mar. 13, 2023); *Arkansas v. EPA*, No. 23-1320 (8th Cir. Feb. 16, 2023); *Missouri v. EPA*, No. 23-1719 (8th Cir. Apr. 13, 2023); *ALLETE, Inc. v. EPA*, No. 23-1776 (8th Cir. Apr. 14, 2023); *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. Apr. 14, 2023); *Utah v. EPA*, No. 23-9509 (10th Cir. Feb. 13, 2023); *Oklahoma v. EPA*, No. 23-9514 (10th Cir. Mar. 2, 2023); *Alabama v. EPA*, No. 23-11173 (11th Cir. Apr. 13, 2023).

this Court’s forthcoming opinion from the *Oklahoma* and *PacifiCorp* appeals on the issue of venue should be dispositive of this present Petition in its entirety. To the extent EPA later seeks any sort of substantive ruling as to the merits of the Sixth Circuit’s opinion on matters other than venue, the Cabinet, objects to the granting of EPA’s Petition.

Further, because EPA has announced its intent to reconsider the disapproval in response to the Sixth Circuit’s ruling, notwithstanding the outcome of *Oklahoma* and *PacificCorp*, there will not be a case and controversy that survives this Petition. As such, there is no practical reason for EPA’s Petition to be granted.

CONCLUSION

The Petition to this Court only involves a challenge to the Sixth’s Circuit’s decision on the question of venue. EPA is not challenging any finding or ruling on the merits in the underlying opinion of the Sixth Circuit in this case. EPA acknowledges in its Petition that it is reconsidering Kentucky’s SIP disapproval based on the Sixth Circuit’s opinion on the substantive merits of the Final Rule, leaving no case or controversy to decide. Therefore, the Petition for a Writ of Certiorari should be denied, or if not denied, held pending this 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), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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