No. 13-921

In the Supreme Court of the United States

STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Environmental Protection Agency's determination that a portion of Oklahoma's plan to implement the Clean Air Act, 42 U.S.C. 7401 *et seq.*, was not in accordance with federal law, see 42 U.S.C. 7410, because that State failed to follow certain requirements under the Act for analyzing the best available retrofit technology for one particular pollutant at four particular electrical generating units within the State.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-53) is reported at 723 F.3d 1201. The final rule of the United States Environmental Protection Agency (Pet. App. 56-208) is published at 76 Fed. Reg. 81,728.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2013. A petition for rehearing was denied on October 31, 2013 (Pet. App. 209-210). The petition for a writ of certiorari was filed on January 29, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Among Congress's central national goals for the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, is "the prevention of any future, and the remedying of any

existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. 7491(a)(1). The "class I Federal areas" protected by the Act's visibility program include certain national parks and wilderness areas. See 42 U.S.C. 7472(a). To assure "reasonable progress" toward meeting that national goal and compliance with Section 7491, Congress directed the Environmental Protection Agency (EPA) to promulgate implementing regulations. See 42 U.S.C. 7491(a)(4); 40 C.F.R. 51.300-.309. One measure the Act prescribes is that certain existing sources "shall procure, install, and operate * * * the best available retrofit technology [BART] * * * for controlling emissions from such source for the purpose of eliminating or reducing [visibility] impairment [in class I Federal areas]." 42 U.S.C. 7491(b)(2)(A).

Under the Act and the EPA's regulations, the several States are responsible in the first instance for developing programs within their jurisdictions to assure reasonable progress toward the national goal and compliance with Section 7491. Those programs take the form of state implementation plans (SIPs) administered by state authorities. See 42 U.S.C. 7410(a)(2)(J), 7491(b)(2); see also 40 C.F.R. 51.300(a). A SIP must include the State's determination of what constitutes BART for existing sources subject to that requirement. See 42 U.S.C. 7491(b)(2)(A); 40 C.F.R. 51.308(e).

At the most general level, BART is "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility." 40 C.F.R. 51.301. The BART requirement does not command a source to use any particular technology. Rather, a source complies

with the requirement by retrofitting technologies or by taking operational measures of its choosing to meet the emission limitation found to be BART.

The CAA and the EPA's regulations provide that BART should be determined on a case-by-case basis, considering five statutory factors: "the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." 42 U.S.C. 7491(g)(2); see 40 C.F.R. 51.308(e)(1)(ii)(A). The Act places further conditions on the State's determination of BART for certain large electrical generating units. For such units, BART must be determined pursuant to the so-called BART Guidelines, 40 C.F.R. Pt. 51, App. Y (Guidelines), that Congress directed the EPA to promulgate to aid BART determinations for those sources. See 42 U.S.C. 7491(b) ("In the case of a fossil-fuel fired generating powerplant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this paragraph [which include the BART limitation] shall be determined pursuant to guidelines, promulgated by the [EPA]."). Those Guidelines were promulgated through notice-and-comment rulemaking and upheld on judicial review. See 70 Fed. Reg. 39,104 (July 6, 2005); *Utility Air Regulatory Grp.* v. *EPA*, 471 F.3d 1333 (D.C. Cir. 2006).

A SIP does not fulfill a State's responsibilities under the CAA or become federally enforceable until it is approved by the EPA. 40 C.F.R. 51.104-.105; see *General Motors Corp.* v. *United States*, 496 U.S. 530, 540-541 (1990). As relevant here, the CAA gives the EPA two

conceptually distinct roles in granting or denying approval of a SIP. First, under 42 U.S.C. 7410(k)(1), the EPA must determine whether a SIP submission is complete—that is, whether the submission satisfies certain EPA-established "minimum criteria" by providing the EPA "the information necessary to enable the [EPA] to determine whether the plan submission complies with the provisions of [the CAA]." 42 U.S.C. 7410(k)(1)(A) and (B); see *NRDC, Inc.* v. *Browner*, 57 F.3d 1122, 1126 (D.C. Cir. 1995) ("Under the two-stage procedure established in [Section 7410(k)], EPA first makes an essentially ministerial finding of completeness, a process taking at most six months.").

Second, if the submitted SIP is complete, the EPA must conduct a detailed substantive review and decide whether to approve the SIP. See *NRDC* v. *Browner*, 57 F.3d at 1126 ("[T]he plan approval process may take up to twelve months due to the more extensive technical analyses necessary to ensure that the SIP meets the Act's substantive requirements."). In particular, the EPA must determine whether the SIP (which, as relevant here, includes BART determinations) is consistent with the CAA's requirements. The Act directs that the EPA "shall not approve" a SIP revision that "would interfere with any applicable requirement" of the statute. 42 U.S.C. 7410(*l*); see 42 U.S.C. 7410(a)(2) and (J) (requiring that a SIP "shall * * * meet the applicable requirements of * * * part C of [the CAA] (relating to * * * visibility protection)"), 7410(k)(3) (directing the EPA to approve a SIP "as a whole if it meets all of the applicable requirements of [the CAA]" and authorizing the EPA to approve any "portion of [a SIP] revision [that] meets all the applicable requirements of [the CAA]"); *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 250, 256-

257 (1976) (explaining that, although States have "wide discretion" in formulating SIPs, the CAA "nonetheless subject[s] the States to strict minimum compliance requirements").

Accordingly, if the EPA determines that a BART determination does not meet the Act's requirements—because, for example, it was not made in conformance with the relevant provisions of the Act and the EPA's regulations and Guidelines—the EPA must disapprove the SIP in relevant part. See 42 U.S.C. 7410(k)(3) (approval of SIPs, including partial approval and partial disapproval), 7410(*l*) (approval of SIP revisions). To ensure that the statutory BART requirements are met in the absence of a SIP, the EPA must then promulgate a Federal implementation plan (FIP) for the State within two years of the disapproval. 42 U.S.C. 7410(c); see 42 U.S.C. 7491(b)(2)(A) (requiring certain sources to comply with BART "as determined by the State (or the [EPA] in the case of a [FIP] promulgated under section 7410(c))").

Notwithstanding disapproval of its SIP or promulgation of a FIP, a State retains authority to prepare a SIP and submit it for the EPA's approval. If the EPA has disapproved a SIP but has not yet promulgated a FIP, the State may "correct[] the deficiency" in its SIP. 42 U.S.C. 7410(c)(1). And even after a FIP is in place, a State may displace it at any time with a newly submitted SIP that obtains the EPA's approval in the normal course. See generally 42 U.S.C. 7410(k)-(*l*).

2. Under the EPA's implementation of the Act's visibility program, States were required to submit SIPs addressing regional haze in class I Federal areas by late 2007. See 40 C.F.R. 51.308(b); 42 U.S.C. 7407(d)(7)(A). Regional haze is a form of visibility impairment caused by a number of sources and activities that emit fine par-

ticles and their precursors (including, of relevance here, sulfur dioxide). Fine particles impair visibility by scattering and absorbing light. See 76 Fed. Reg. 16,168, 16,170-16,171 (Mar. 22, 2011).

In early 2009, the EPA published its finding that petitioner Oklahoma and most other States and territories had missed the 2007 deadline for submitting SIPs that addressed regional haze. 74 Fed. Reg. 2392 (Jan. 15, 2009). The agency further recognized that the Act obligated the EPA to promulgate a FIP for those States and territories within two years, unless the agency subsequently received and approved regional-haze SIPs for those States and territories. See *id.* at 2393.

In early 2010, Oklahoma submitted a regional-haze SIP revision to the EPA. That SIP included, *inter alia*, BART determinations for several large electrical generating units in Oklahoma, including petitioner Oklahoma Gas & Electric's (OG&E) Sooner Units 1 and 2 and Muskogee Units 4 and 5, that the State had determined were subject to the BART requirement. 76 Fed. Reg. at 16,169. In the SIP, Oklahoma determined, *inter alia*, that controlling sulfur-dioxide emissions through the installation of dry flue gas desulfurization technology (a kind of "scrubber") at the four OG&E units could not be justified because Oklahoma believed that the cost of installing scrubbers would outweigh their estimated visibility benefits. See *id.* at 16,186. Having ruled out that technology, Oklahoma concluded that BART for the OG&E units could be achieved by maintaining the units' practice of burning low-sulfur coal, which corresponded to a 30-day average BART emission limit for those units of 0.65 pounds of sulfur dioxide emitted per million British thermal units of energy generated (lbs SO_2/MMBtu). See C.A. J.A. 141-142, 145.

3. In late 2011, after notice and comment, the EPA issued a final rule that approved the bulk of Oklahoma's regional-haze SIP, that disapproved Oklahoma's sulfur-dioxide BART determinations for the four OG&E units noted above, and that promulgated a FIP for the latter units. Pet. App. 56-208.[1]

The EPA explained that the CAA gave the federal agency a distinct but circumscribed role in determining whether to approve or disapprove a State's SIP. "Congress crafted the CAA to provide for [S]tates to take the lead in developing implementation plans, but balanced that decision by requiring EPA to review the plans to determine whether a SIP meets the requirements of the CAA." Pet. App. 77. The agency acknowledged that "[S]tates are assigned statutory and regulatory authority to determine BART," *id.* at 81, but explained that its review had led it to disapprove the portion of Oklahoma's SIP addressing the sulfur-dioxide BART determinations for the OG&E units. That portion of the SIP, the EPA concluded, did not meet the CAA's requirements because Oklahoma had "relied on cost estimates that greatly overestimated the costs of controls." *Id.* at 78.

In particular, the EPA concluded that the cost estimates that Oklahoma had provided in its SIP did not comply with the BART Guidelines' requirement (see 40 C.F.R. Pt. 51, App. Y, § IV.D.4.a.5 & n.15) that costs be

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[1] The EPA also disapproved sulfur-dioxide BART determinations for certain units owned by American Electric Power/Public Service Company of Oklahoma (AEP/PSO). Pet. App. 60-61. Although the EPA's reasoning for the AEP/PSO units was similar to its reasoning for the OG&E units, the AEP/PSO determinations are no longer at issue because Oklahoma submitted, and the EPA has approved, a revised regional-haze SIP with revised BART determinations for the AEP/PSO units. 79 Fed. Reg. 12,944 (Mar. 7, 2014).

calculated in a manner consistent with the EPA's Control Cost Manual (Manual). See Pet. App. 132-135. The EPA explained that the Manual generally demands that costs be calculated in current-year dollars as if the project would be constructed in a single day (the so-called "overnight method"). *Id.* at 133-135; see C.A. J.A. 1240-1244.[2] A key purpose of that method, and the Manual's methods more generally, is to establish consistent analytical benchmarks that allow meaningful assessment and comparison—across facilities nationwide—of the costs of possible BART technologies. See Pet. App. 134. The EPA concluded that Oklahoma's analysis of the OG&E units at issue had departed in meaningful ways from many of those analytical benchmarks, and that those departures had produced a significant overestimation of the costs of emission controls.

For example, the EPA explained that, because Oklahoma's cost estimates were generated in 2008 and 2009 by projecting costs up to the commercial operating dates of the installed scrubbers in 2014 and 2015, the results could not be used to compare the costs of installing controls on OG&E's units with the costs of other similar projects estimated in compliance with the Manual's

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[2] For example, the Manual states that "[Equivalent Uniform Annual Cash Flow] works best when the[re] is only one capital investment to incorporate and annual cash flows are constant or normalized to one year, typically year zero." C.A. J.A. 1681; see *id.* at 1677 (Manual tbl. 2.1 showing year zero as prior to the date of operation), 1678 (Manual fig. 2.5 showing the same). The Manual similarly excludes certain future costs like interest on construction financing, excessive contingencies, fees incurred to finance the project, and inflation. See *id.* at 1518-1530 (expert report elaborating on these), 2071, 2133 (Manual tbls. 1.4 and 2.5 showing cost of funds during construction as zero), 1691 (Manual's discussion of contingencies), 1697 (Manual's discussion of inflation).

methods. See Pet. App. 135; see also C.A. J.A. 1233-1237, 1240-1241. The EPA found in addition that Oklahoma had failed to support other departures from the Manual. See Pet. App. 135-143. These unsupported departures included counting interest on construction funding and excessive contingencies as costs, and double-counting certain other costs. See C.A. J.A. 1509-1510, 1518-1542, 1239-1261.

The EPA concluded that "the faults in [Oklahoma's] cost methodology were significant enough that they resulted in BART determinations for [sulfur dioxide] that were both unreasoned and unjustified." Pet. App. 78.[3] The agency therefore concluded that the CAA required it to disapprove the portion of Oklahoma's SIP that was based on the unsupported cost estimate, and to "step into the shoes of the [S]tate" by determining BART for the OG&E units. *Id.* at 81. The EPA emphasized, however, that it would "of course consider, and would prefer, approving a SIP if the [S]tate submits a revised plan for these units that [the EPA] can approve." *Id.* at 60.[4]

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[3] The EPA also found that, because Oklahoma's proposed sulfur-dioxide emission limit for the OG&E units was higher than that proposed by the State in the context of multistate regional-visibility modeling exercises, the SIP did not ensure that emissions from Oklahoma would not interfere with other States' visibility programs. Pet. App. 78; see 42 U.S.C. 7410(a)(2)(D)(i)(II).

[4] The particulars of the EPA's ensuing FIP for the OG&E units' sulfur-dioxide emissions are not directly at issue in this Court, though the EPA's BART analysis confirms how wide of the mark Oklahoma's analysis had been. In promulgating the FIP, the EPA adjusted Oklahoma's cost estimates to comply with the overnight method and eliminated other inappropriate costs. See C.A. J.A. 1509-1510, 1518-1542, 1236-1261. The result showed that Oklahoma had overestimated by a factor of 2 to 4 the cost of installing

4. The court of appeals denied in all respects petitioners' consolidated petitions for review of the EPA's partial disapproval of Oklahoma's SIP and the EPA's promulgation of a FIP. Pet. App. 1-49. The court explained that States are authorized to adopt SIPs "with federal oversight," *id.* at 5, and that the "EPA may not approve any plan that 'would interfere with any applicable requirement'" of the CAA, including the CAA's visibility provisions. *Ibid.* (quoting 42 U.S.C. 7410*(l)*); see *id.* at 12-14. The court further agreed with the EPA that the CAA's visibility program requires compliance with the Guidelines for large electrical generating units like the OG&E units at issue here. *Id.* at 13-14. The court of appeals concluded that "the [CAA] provides the [EPA] with the power to review Oklahoma's BART determination[s]" for the units "for compliance with the [G]uidelines." *Id.* at 12, 14.

Turning to the particulars of the EPA's decision to partially disapprove Oklahoma's SIP, and applying the familiar arbitrary-and-capricious standard of judicial review, the court of appeals concluded that the EPA had acted within its authority in disapproving the SIP. Pet. App. 19-28. The court discussed in technical detail its conclusion that the EPA had rationally explained why Oklahoma's cost estimates were not consistent with the Manual and therefore did not comply with the BART Guidelines. *Id.* at 20-27. Finally, the court determined

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scrubbers at the units. Pet. App. 59-60. The EPA also determined that significant visibility improvement could be expected at four nearby class I Federal areas through the installation of scrubbers. See *id.* at 112. Ultimately, the EPA concluded that a 30-day average emission limit of 0.06 lbs SO_2/MMBtu—less than one-tenth the level the SIP would have permitted—would be cost-effective. See *id.* at 69-73, 144-145.

that the EPA's FIP was neither arbitrary nor capricious because the EPA had adequately explained its adjustments to Oklahoma's cost estimates, the agency's analysis of cost-effectiveness, and the agency's determination that the installation of scrubbers would have a significant impact on visibility. See *id.* at 28-45.

Judge Kelly concurred in part and dissented in part. Pet. App. 49-53. He expressed disagreement with the panel majority's analysis of the EPA's FIP (*id.* at 49-50) because he found the EPA's analysis of certain BART options for the OG&E units to be unsupported (*id.* at 50-52). In Judge Kelly's view, that error undermined the EPA's disapproval of the SIP because "[t]he EPA rejected Oklahoma's evidentiary support with no clear evidence of its own to support its contrary conclusion." *Id.* at 52. Judge Kelly nonetheless agreed on the basic point that "the EPA has at least some authority to review BART determinations within a [S]tate's SIP." *Id.* at 53.

ARGUMENT

Petitioners complain alternately that the EPA's review of Oklahoma's SIP was insufficiently deferential (*e.g.*, Pet. i, 3, 19, 23), or that the court of appeals was overly deferential to the EPA's determination that part of Oklahoma's SIP was inconsistent with the CAA (*e.g.*, Pet. 4, 16, 21, 22). The decision below is correct, and neither contention warrants further review. The CAA assigns the EPA a substantive role in reviewing and approving SIPs (including BART determinations) for conformity with federal law, and the agency partially disapproved Oklahoma's SIP in its discharge of that responsibility. The court of appeals applied ordinary principles of judicial review of agency action to uphold the EPA's application of federal law.

Petitioners' true quarrel (Pet. 9-14, 22-23) is not with the framework for SIP review but with the particulars of its application to Oklahoma's analysis of the proper emission limits for one pollutant for four units in the State. Petitioners invite this Court to take a third look at complex methodological questions of federal law bearing on facility-specific technical and financial issues. Petitioners do not explain, however, what unsettled principle of wide application and significant importance would be clarified by such a case-specific exercise. Further review is not warranted.

1. Petitioners contend that the "EPA usurped authority that the [CAA] clearly delegates to the States." Pet. 4. That is incorrect. Both the agency and the court of appeals correctly articulated and applied the key principles governing federal and state roles under the CAA.

a. In partially disapproving Oklahoma's SIP, the EPA explained that "Congress crafted the CAA to provide for [S]tates to take the lead in developing implementation plans," Pet. App. 77, and that "[S]tates are assigned statutory and regulatory authority to determine BART," *id.* at 81. The court of appeals likewise recognized that States are responsible for crafting SIPs (*id.* at 4), and that "the statute gives [S]tates discretion in balancing the five BART factors" (*id.* at 12). No party disagrees with those principles.

At the same time, the Act unmistakably places on the EPA the responsibility to review the substance of a SIP for conformity with federal law before approving it:

- 42 U.S.C. 7410(*l*) prohibits the EPA from approving any SIP revision "if the revision would interfere with any applicable requirement concerning

attainment and reasonable further progress * * * or any other applicable requirement of [the CAA]."

- 42 U.S.C. 7410(a)(2)(J) requires SIPs to "meet the applicable requirements of" the part of the CAA that includes the visibility program.
- 42 U.S.C. 7491(b)(2), part of the visibility program, requires that States follow the EPA's Guidelines in making BART determinations of the sort at issue here.

See Pet. App. 12-13 (citing those provisions).

"Given that the statute mandates that the EPA must ensure SIPs comply with the statute," and that the CAA requires the States to adhere to the Guidelines in formulating their SIPs, the agency necessarily has "the authority to review BART determinations for compliance with the [G]uidelines." Pet. App. 13-14. To be sure, the EPA cannot disapprove a SIP that does not interfere with the Act, even if the SIP reflects choices that the EPA would not have made if the decision were entrusted to the federal agency in the first instance. In this case, however, the EPA reasonably determined that Oklahoma's BART determinations did not comply with the Guidelines, and the court of appeals accordingly sustained the EPA's decision under applicable principles of administrative law.

b. That understanding of the allocation of interlocking and complementary state and federal authority emerges naturally from this Court's cases. In *Train* v. *NRDC, Inc.*, 421 U.S. 60 (1975), for example, the Court explained that, following amendments to the CAA in 1970, the general "division of responsibilities" between the States and the federal government now reflects "sharply increased federal authority and responsibility in

the continuing effort to combat air pollution," including the authority to "devise and promulgate a specific plan of [the EPA's] own only if a State fails to submit an implementation plan which satisfies [the standards of Section 7410(a)(2)]." *Id.* at 64, 79. In *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), the Court similarly recognized that this division of responsibilities lies at "[t]he heart of the [1970 CAA] Amendments." *Id.* at 249. The Court explained that "each State [must] formulate, *subject to EPA approval*, an implementation plan[.] * * * [T]he Act provides that the [EPA] 'shall approve' the proposed plan if it has been adopted after public notice and hearing and *if it meets eight specified criteria.*" *Id.* at 249-250 (emphases added; citation omitted).[5]

c. Petitioners complain repeatedly that the EPA was insufficiently deferential to Oklahoma in reviewing the BART determinations underlying the SIP. That is in substance no more than a claim that the EPA crossed the line that separates permissible review of a SIP for conformity with federal law from impermissible second-guessing. Such a claim of case-specific error does not warrant this Court's review. See pp. 26-28 and note 7, *infra*. To the extent petitioners instead contend that the EPA acted *ultra vires* in reviewing Oklahoma's BART determination (or some component of its analysis) for substantive compliance with the CAA and Guidelines,

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[5] *Train* and *Union Electric* predate Congress's 1977 addition of the visibility program to the CAA, but the provisions of that program confirm the pre-existing statutory division of responsibilities and the requirement of meaningful EPA review. See 42 U.S.C. 7491(b) (requiring that BART determinations of the kind at issue here be made pursuant to the EPA's regulations and Guidelines), 7492(e)(2) (requiring States to submit SIPs to the EPA for review "under [S]ection 7410").

their position clashes with two basic features of the Act's design.

First, the CAA assigns the EPA, not the States, the primary role in interpreting and applying federal law. The apparent thrust of petitioners' position is that the EPA must defer to Oklahoma's interpretation of federal law—and, in particular, to the State's interpretation of the BART Guidelines that the CAA requires the EPA to issue, 42 U.S.C. 7491(b)(2). Petitioners identify nothing in the CAA that suggests such a division of responsibilities, and they identify no comparable federal administrative scheme that subordinates the federal Executive's interpretation of federal law to the interpretation given to it by a State. Cf. *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 492 (2004) ("It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court."). Petitioners' claim of state primacy is especially perplexing here, where the parties' dispute concerns the interpretation of Guidelines that the EPA itself promulgated through notice-and-comment rulemaking. Because the Guidelines are "a creature of the [federal agency's] own" design, the EPA's interpretation—not the several States'—is "controlling unless plainly erroneous or inconsistent with the [Guidelines]." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citation omitted); see *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013).

Second, if the framework petitioners advocate were adopted, the EPA would be relegated to an essentially ministerial role in approving SIPs. But the Act is structured otherwise. "Under the two-stage procedure established [for SIP review], EPA first makes an essentially ministerial finding of completeness." *NRDC, Inc.* v.

Browner, 57 F.3d 1122, 1126 (D.C. Cir. 1995); see 42 U.S.C. 7410(k)(1)(B). That completeness inquiry ensures that, when the EPA undertakes "the more extensive technical analyses necessary to ensure that the SIP meets the Act's substantive requirements," *NRDC* v. *Browner*, 57 F.3d at 1126, it has before it "the information necessary to enable [it] to determine whether the plan submission complies with the provisions of [the CAA]." 42 U.S.C. 7410(k)(1)(A). Under petitioners' approach, by contrast, the EPA's role would essentially be limited to the first step of that inquiry.

2. Petitioners contend that the court of appeals' decision conflicts with this Court's decision in *Alaska*, *supra*. That is incorrect. In fact, the framework applied below is a natural application of the principles announced in *Alaska*.

a. *Alaska* involved the CAA's Prevention of Significant Deterioration (PSD) program, which is designed to protect air quality by regulating, *inter alia*, the construction of new sources in areas that have attained certain national air-quality standards. 540 U.S. at 470-471; see 42 U.S.C. 7470(1), 7471. Under the substantive requirements of the PSD program and the general enforcement provisions of the CAA, the EPA can take measures to stop construction of sources that do not conform to PSD requirements. *Alaska*, 540 U.S. at 484-485 (citing 42 U.S.C. 7413(a)(5), 7477).

A central requirement of the PSD program is that a covered source's permit must include emission limitations based on "the best available control technology [BACT] for each pollutant subject to regulation under [the Act]." 42 U.S.C. 7475(a)(4); see *Alaska*, 540 U.S. at 472-473 (discussing Section 7475(a)(4)). Like BART determinations, BACT determinations are ordinarily

made by a State (through its permitting authority). See 42 U.S.C. 7471. Unlike BART determinations, BACT determinations are made in the context of issuing an individual permit (42 U.S.C. 7475(a)(1) and (4)), rather than as part of a SIP submitted for federal approval.

The parties in *Alaska* disputed whether the EPA may issue an order stopping construction when it finds that a state-issued permit contains "a determination of BACT [un]faithful to the statute's definition." 540 U.S. at 485. The state permitting authority argued that the federal agency's superintendence was limited, and extended to "inquir[ing] whether a BACT determination appears in a PSD permit, but not [to] whether that BACT determination was made on reasonable grounds properly supported on the record." *Id.* at 489-490 (internal quotation marks and citations omitted).

The Court rejected that contention, holding that the EPA's authority "extends to ensuring that a state permitting authority's BACT determination is reasonable in light of the statutory guides." *Alaska*, 540 U.S. at 484. The Court recognized that, in making that BACT determination in the course of performing its permitting responsibilities, "the [state] permitting authority * * * exercises primary or initial responsibility for identifying BACT in line with the Act's definition of that term." *Ibid.* The Court held, however, that "when a state agency's BACT determination is 'not based on a reasoned analysis,'" the EPA may "step in to ensure that the statutory requirements are honored." *Id.* at 490 (citation omitted). The Court explained that the EPA's "limited but vital [federal] role in enforcing BACT is consistent with a scheme that places primary responsibilities and authority with the States, backed by the Federal Gov-

ernment." *Id.* at 491 (internal quotation marks and citation omitted).

b. *Alaska* firmly supports the decision below because the federal and state roles in the BART context are in many respects analogous to the roles this Court recognized in the BACT context. Petitioners contend, however, that the EPA has a "greater supervisory role [under the PSD program at issue in *Alaska*] than in Regional Haze cases." Pet. 19. That is incorrect. Indeed, the BART context presents an even more compelling case for the EPA's substantive involvement than did the CAA program at issue in *Alaska*. The CAA requires the EPA to issue binding Guidelines for the sort of BART determinations at issue here, but it includes no comparably specific command for BACT determinations. Compare 42 U.S.C. 7491(b)(2) with 42 U.S.C. 7471. If Congress expected "meaningful EPA oversight" in the BACT context, *Alaska*, 540 U.S. at 489, then *a fortiori* it expected such agency oversight when the EPA's own statutorily required Guidelines are at issue. Cf. Pet. App. 19 n.3 (expressing puzzlement at the argument that "the EPA could provide [the Guidelines] * * * , but yet lack[] the authority to ensure [S]tates compl[y] with them").

In addition, the EPA authority challenged in *Alaska* was a discretionary enforcement power of general application, and the state permitting authority's BACT determination would control in the absence of EPA action. 42 U.S.C. 7475(d), 7477. If *Alaska* had been decided against the EPA, the EPA's enforcement power would have remained meaningful in a host of other contexts. Here, by contrast, 42 U.S.C. 7410 *required* the EPA to review and approve Oklahoma's SIP before it could take effect as a federally enforceable implementation of the

Act. See 42 U.S.C. 7410(c), (k) and (*l*), 7492(e)(2); 40 C.F.R. 51.105. The EPA's approach gives meaningful purpose to that required review; petitioners' does not.[6]

c. In a variation on the previous theme, the amici States contend that the EPA owes States more deference under the visibility program than under the PSD program because the former focuses on what the amici characterize as aesthetic goals, while the latter addresses health-related concerns. See States Amicus Br. 10-11. That argument lacks merit.

Even accepting amici's characterization of the programs, it is not evident why a State's decisions under a program addressing aesthetics would warrant greater deference than decisions under a program addressing health. To the contrary, the Act recognizes that both emissions regulated under the PSD program and emis-

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[6] In their effort to claim unique state authority for BART determinations, petitioners overstate the substantive differences between BART and BACT determinations. See Pet. 19-20. Both BART and BACT can, in appropriate circumstances, be determined either by a State or by the EPA. See 42 U.S.C. 7491(b)(2)(A) and (g)(2); 40 C.F.R. 51.166 (describing PSD SIP requirements), 124.3 (describing PSD application procedures for permits issued by States with approved PSD permitting programs, and by the EPA when there is no approved State program). Both BART and BACT are defined in similar terms that revolve around available control technologies, and both are flexible concepts designed to evolve as technology improves. Compare 42 U.S.C. 7491(g)(2) (BART is the "*best available* retrofit technology" determined according to five statutory factors) (emphasis added) and 40 C.F.R. 51.301 (EPA regulation defining BART as the emission limitation achieved by the "*best* system") (emphasis added), with 42 U.S.C. 7479(3) (defining "*best available* control technology" as an "emission limitation based on the *maximum* degree of reduction" determined on a case-by-case basis, taking into account several similar statutory factors) (emphases added).

sions regulated under the visibility program have the potential to affect States other than the one in which they originate. See, *e.g.*, 42 U.S.C. 7470(4) (PSD program), 7492(c) (visibility program). In addition, the PSD program's goals are broader than the amici States acknowledge. The PSD program serves not only to protect public health and welfare, but also "to preserve, protect, and enhance the air quality in national parks [and] national wilderness areas," including visibility. 42 U.S.C. 7470(2); see 42 U.S.C. 7475(d).

Finally, the amici States inappropriately minimize Congress's concern with visibility impairment in national parks and wilderness areas, as if that concern were merely a matter of local aesthetic preferences. Congress regarded remedying visibility impairment in class I Federal areas as an indispensable part of the Nation's deep and longstanding commitment to preserving national parks and wilderness areas for all. See, *e.g.*, 123 Cong. Rec. 16,203 (1977) (statement of Rep. Waxman) ("We have also provided a new program to protect visibility in the national parks and other areas which have been specifically set aside from the ravages of heavy industrial growth. Visibility is the most precious air quality value in such places as the Grand Canyon. * * * It is, therefore, essential that, wherever possible, steps be undertaken to control pollution from sources which would diminish visibility."). Indeed, given the visibility program's particular focus on preventing impairment of designated *federal* areas, a regulatory approach that would deprive the EPA of any meaningful oversight role would be especially anomalous.

3. Petitioners assert that the court of appeals "departed from other circuits, which have resoundingly recognized that States, not EPA, are entitled to defer-

ence in formulating plans under the [CAA]." Pet. 16. That contention is baseless. No circuit conflict exists, and the decision below accords with the only other decision addressing the EPA's role in reviewing BART determinations.

a. The only other decision directly addressing the EPA's authority to review States' BART determinations for compliance with federal law is *North Dakota* v. *EPA*, 730 F.3d 750 (8th Cir. 2013), petition for cert. pending, No. 13-940 (filed Feb. 5, 2014). The Eighth Circuit in that case applied the same principles as did the court below.

In *North Dakota*, the EPA disapproved one of the BART determinations in the State's SIP because the EPA discovered an error in the data the state agency had used to calculate the estimated costs of a control. 730 F.3d at 759-760. "EPA concluded that the State's SIP failed to properly consider the cost of compliance in any meaningful sense * * * because the cost of compliance analysis was based upon fundamentally flawed and greatly inflated cost estimates." *Id.* at 760. Although the State acknowledged the error, it argued that the EPA was nonetheless required to approve the SIP. The State observed that the SIP contained an analysis of each of the five statutory factors, and it argued that the EPA's oversight role is limited to "ensuring that at least minimal consideration is given to each factor and does not permit EPA to examine the rationality or reasonableness of the underlying decision." *Ibid.*

The Eighth Circuit rejected North Dakota's argument, applying the same principles as did the Tenth Circuit below. The court explained that, "if a [S]tate * * * submits a SIP that does not meet the statutory requirements, EPA is obligated to implement its own

FIP." *North Dakota*, 730 F.3d at 757. The Eighth Circuit further explained that, "[a]lthough the CAA grants [S]tates the primary role of determining the appropriate pollution controls within their borders, EPA is left with more than the ministerial task of routinely approving SIP submissions." *Id.* at 760-761. Like the court below, the Eighth Circuit concluded that the "EPA's disapproval of the State's BART determination for failing to consider the cost of compliance as required under the statute and the BART [G]uidelines was neither arbitrary, capricious, nor an abuse of discretion." *Id.* at 761.

North Dakota and the decision below are in keeping with other courts' descriptions in analogous contexts of the respective roles of the federal and state governments under the CAA. See, *e.g.*, *Montana Sulphur & Chem. Co.* v. *EPA*, 666 F.3d 1174, 1181 (9th Cir.) ("The [CAA] gives the EPA significant national oversight power over air quality standards * * * . A [S]tate must develop implementation plans that will satisfy national standards[,] * * * [b]ut when the state plan is inadequate to attain and maintain [those standards], then the EPA is empowered to step in."), cert. denied, 133 S. Ct. 409 (2012); *Virginia* v. *EPA*, 108 F.3d 1397, 1406-1408 (D.C. Cir.) (explaining the EPA's oversight role), decision modified on reh'g, 116 F.3d 499 (1997).

b. Petitioners contend (Pet. 16-18) that the decision below conflicts with the D.C. Circuit's decision in *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (2002) (per curiam) (*Corn Growers*). No conflict exists. The decision in *Corn Growers* does not address the EPA's authority to review SIPs for compliance with federal law, and no analytical tension otherwise exists between *Corn Growers* and the decision below.

Corn Growers concerned the EPA's 1999 regional-haze regulation, which the agency had promulgated to comply with a 1990 congressional requirement that the agency "carry out [its] regulatory responsibilities under [42 U.S.C. 7491]" within a specified time frame. 291 F.3d at 22 (internal quotation marks and citation omitted; first pair of brackets in original); see 42 U.S.C. 7492(e). That EPA regulation directed States to decide whether a source was subject to the BART requirement based on its location ("*within a geographic area* from which pollutants can be emitted and transported downwind to a Class I area"), rather than based on the source's actual emissions. 231 F.3d at 5. As a result, a source could be determined "BART-eligible" "even absent empirical evidence of that source's individual contribution to visibility impairment in a Class I area so long as the source is located within a region that may contribute to visibility impairment." *Ibid.* The EPA's regulation further required States, in determining what constitutes BART for such sources, to assess one of the five statutory BART factors (visibility improvement) based on the improvement that would be achieved by imposing BART limitations on *all* sources in the region. *Id.* at 6.

The D.C. Circuit vacated the rule in relevant part. First, it held that the rule did not reflect a permissible construction of the BART provisions because it treated one statutory BART factor in "dramatically different fashion" from the others without a justification in the statute. *Corn Growers*, 291 F.3d at 6. The court also found the EPA's rule problematic because it would create serious difficulties in conducting the BART analysis and possibly require considerable expenditures for no actual benefit in haze reduction. *Id.* at 6-7. Finally, the court found the rule inconsistent with the CAA for the

additional reason that it "tie[d] the [S]tates' hands and force[d] them to require BART controls at sources without any empirical evidence of the particular source's contribution to visibility impairment." *Id.* at 8. The D.C. Circuit explained that this "impermissibly constrain[ed] state authority" granted by the CAA. *Ibid.*

Nothing about *Corn Growers*' recognition of state authority casts doubt on the EPA's invocation of federal power to partially disapprove Oklahoma's SIP here. The dispute in *Corn Growers* concerned the EPA's latitude in interpreting particular statutory provisions addressing how States must make BART determinations, not (as here) the EPA's authority to *review* those state determinations for compliance with federal law. To be sure, the EPA could abuse the latter authority by disapproving SIPs based on the same sort of erroneous construction of the Act that the D.C. Circuit forbade it from imposing on the States by rule. The court below correctly recognized, however, that such an action by the EPA would properly be set aside on judicial review as in "conflict with the statute." Pet. App. 18. The court also noted that "petitioners have not argued that any conflict exists" between the CAA and the EPA's interpretation of the Guidelines. *Ibid.*

4. Petitioners also criticize the ordinary standards of arbitrary-and-capricious review applied by the court below as "overly deferential" and contrary to the standard "mandate[d]" by *Alaska*. Pet. 19-21. Petitioners argue that "[i]t is EPA that bears the burden of showing that Oklahoma's costing methods, and ultimately its BART determination, were unreasonable, and the panel erred in holding EPA to a lesser standard." Pet. 20. Petitioners cannot justify a departure from ordinary

principles of judicial review of agency action, and they misread *Alaska*.

a. The standard for judicial review of agency action is well settled. By statute, the EPA's promulgation of a FIP must be upheld unless petitioners demonstrate that the EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 7607(d)(1)(B) and (9)(A). There is no express statutory standard of review governing the EPA's disapproval of a SIP. This Court in *Alaska* held, however, that where the CAA does not specify a standard for judicial review, courts are to "apply the familiar default standard of the Administrative Procedure Act * * * and ask whether the [a]gency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 540 U.S. at 496-497 (internal quotation marks and citation omitted); see *Montana Sulphur*, 666 F.3d at 1182.

b. Contrary to petitioners' contention (Pet. 19-21), *Alaska* did not change this familiar standard of review. The enforcement provisions at issue in *Alaska* authorized the EPA to, *inter alia*, issue a stop-construction order or commence a civil action in federal court. See 42 U.S.C. 7413(a)(5), 7477. Petitioners rely (Pet. 19) on a passage in *Alaska* addressing the concern that the EPA might gain a "proof-related tactical advantage" by opting for a stop-construction order rather than a civil enforcement action. 540 U.S. at 493. That passage clarified that "in either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with EPA." *Id.* at 494.

Here, the EPA was acting not in an enforcement capacity, but in the discharge of its obligation to review and

approve or disapprove a SIP under 42 U.S.C. 7410. Action on a SIP is reviewed under the arbitrary-and-capricious standard, with the burden resting on the party seeking judicial review to demonstrate that the agency's action does not satisfy that standard. Petitioners cite no case applying any other standard. In that posture, *Alaska* is relevant insofar as the administrative record the EPA compiled in reviewing Oklahoma's SIP must "show[] that Oklahoma's costing methods, and ultimately its BART determination, were unreasonable." Pet. 20. If the EPA's administrative record does not support that characterization of the State's BART determination, the EPA's action should be set aside. But that does not affect the standard of review that the court of appeals should apply. And, as the court of appeals explained, Pet. App. 19-28, the EPA's decision to partially disapprove Oklahoma's SIP was supported by the administrative record.

5. a. At bottom, petitioners simply seek a third round of review of whether Oklahoma's sulfur-dioxide BART determinations for the affected OG&E units conformed to federal law. Petitioners themselves suggest as much in characterizing the EPA's action here as "a *de novo* review of [Oklahoma's BART] determinations" "[u]nder the guise of reviewing Oklahoma's BART determination for compliance with the [CAA's] statutory requirement[s]." Pet. 3. Even if that characterization were accurate, it would be nothing more than a call for this Court to correct the misapplication of a settled legal framework to a handful of power plants' emissions of a particular pollutant. That is not this Court's usual office. See Sup. Ct. R. 10.

b. In any event, the EPA had sound reasons for partially disapproving Oklahoma's SIP, and the agency's

explanation is well supported by the record. The agency explained in detail that Oklahoma's cost estimates did not comply with the Guidelines because, *inter alia*, the State had failed to calculate costs according to the Manual. See Pet. App. 135 ("OG&E and others incorrectly assume that BART cost-effectiveness should be based on the 'all-in' cost method, which includes all of the costs of a financial transaction, including interest, commissions, and any other fees * * * as of the assumed commercial operating dates of the scrubbers, 2014 and 2015."); see also C.A. J.A. 1236-1261. The EPA also explained that Oklahoma had failed to provide support for some items in its estimates. See, *e.g.*, Pet. App. 136 ("[M]uch of the documentation OG&E and others cite to support deviations from the Control Cost Manual was not provided to [the EPA]. Thus, [the agency was] unable to analyze their contents and determine whether these deviations were appropriate."); see also C.A. J.A. 1239. As the court below recognized, "many of OG&E's costing assumptions were unjustified," and the EPA reasonably rejected them. Pet App. 21-24.[7]

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[7] To the extent the EPA's analysis underlying the FIP is relevant to its disapproval of Oklahoma's SIP, the EPA offered appropriate responses to the issues petitioners raise for a third time in this Court. Pet. 22-23.

First, in assessing cost-effectiveness and in predicting the emissions reductions that would be gained by installing appropriately designed scrubbers, the EPA (unlike Oklahoma) accounted for both the technical design requirements of the units in question and their history of burning low-sulfur coal. C.A. J.A. 1280-1287. The EPA did so, moreover, in conformance with the Guidelines. In particular, the EPA explained that Oklahoma's cost-effectiveness analysis inflated the costs of the scrubber and underestimated anticipated emissions reductions, which led to an erroneous determination that scrubbers would not be cost-effective. See Pet.

App. 138-139; C.A. J.A. 1280-1281. Oklahoma had used vendor quotes for a costlier scrubber than the units needed given their history of burning low-sulfur coal. See Pet. App. 138-139; C.A. J.A. 1280. In addition, Oklahoma underestimated the amount of emissions that would be removed by the scrubbers by assuming that the units would continue to burn low-sulfur coal even after the installation of the costlier scrubbers, instead of assuming that the utility would make a rational business decision to switch to cheaper, high-sulfur coal. See Pet. App. 140.

The EPA reconciled the overdesigned, costlier scrubber with the units' operating history through two scenarios. See Pet. App. 138-140; C.A. J.A. 1280. In one scenario, the EPA assumed that costlier scrubbers would be used with cheaper, high-sulfur coal. See C.A. J.A. 1280. In the other scenario, the EPA estimated the cost of less efficient scrubbers capable of removing sulfur dioxide emitted from burning low-sulfur coal, taking into account the units' design parameters and assuming the units would operate at 100% capacity. See *id.* at 1283-1284. Under either scenario, the EPA concluded, the installation of scrubbers would be cost-effective. See *id.* at 1233, 1280-1287. Although the court of appeals stated that this particular issue was a "close case," Pet. App. 33, it correctly deferred to the EPA's technical judgments, see *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989), given that "EPA was aware of, and provided explanations contradicting, petitioners' comments," Pet. App. 33.

Next, the EPA provided several reasons for assuming a 30-year useful life for the scrubbers, including the EPA's long history of assuming such a lifespan and the fact that several scrubbers installed in the 1970s and 1980s remain in use. See C.A. J.A. 1262-1264. The EPA likewise explained why the agency's departure from the Manual on this point—in favor of more accurate, site-specific assumptions—was appropriately documented and thus consistent with the Guidelines. See *id.* at 1273; 40 C.F.R. Pt. 51, App. Y, § IV.D.4.a.5 n.15.

Finally, the EPA analyzed visibility improvement facility-by-facility rather than unit-by-unit, which is consistent with the Guidelines. See Pet. App. 95-96. Indeed, petitioners *supported* that facility-by-facility approach in their comments on the proposed rule, C.A. J.A. 1108, and they are consequently barred from

6. Petitioners and their amici portray this case as the bellwether of a coming stampede of EPA SIP disapprovals. See, *e.g.*, Pet. 24-26 & nn.6-7. The EPA's disapprovals under the CAA's visibility program, however, have all been *partial* disapprovals under which the great bulk of affected States' SIPs have been approved. The disapproval challenged in this Court, for example, relates to emissions of one pollutant from just four generating units at two facilities out of an entire State. The EPA has tabulated BART disapprovals of the sort at issue here, and it has informed this Office that it has taken action on 765 source-specific BART determinations for coal-fired generating units, approving 721 of them—an approval rate exceeding 94%. The EPA's conclusion that fewer than 6% of state BART determinations are inconsistent with federal law does not reflect the sort of extraordinary disruption of the federal-state balance that would require this Court's intervention.

Although the aggregate costs of the control technology required at the pertinent Oklahoma facilities are not trivial (about $600 million, see Pet. App. 165), they are not atypical, and like other fixed costs of power generation, they can be spread out across numerous ratepayers over the course of several decades. Nor is the FIP the last word on the BART determination for the units at issue, since Oklahoma is free to submit a SIP revision with a BART determination that is consistent with federal law. Indeed, the operator of the other units affected by the EPA's action reached an agreement with the EPA and Oklahoma in which Oklahoma agreed to submit a revised SIP including a BART determination agreeable to the operator. See note 1, *supra* (explaining that the

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arguing that the EPA should have used a unit-by-unit approach. See 42 U.S.C. 7607(d)(7)(B).

EPA has approved that revision to Oklahoma's SIP). So too the "FIP [as it relates to OG&E's units] can be replaced by a future state plan that meets the applicable CAA requirements." Pet. App. 63.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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