No. 13-921

In the Supreme Court of the United States

STATE OF OKLAHOMA; OKLAHOMA INDUSTRIAL ENERGY CONSUMERS; OKLAHOMA GAS AND ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SIERRA CLUB,
Respondents.

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

REPLY BRIEF OF PETITIONERS

Michael Graves
Thomas P. Schroedter
HALL ESTILL,
Attorneys at Law
320 South Boston Ave.
Suite 200
Tulsa, OK 74103
(918) 594-0443

Attorneys for Petitioner Oklahoma Industrial Energy Consumers

E. Scott Pruitt
Oklahoma Attorney General
Patrick R. Wyrick
Solicitor General
Counsel of Record
P. Clayton Eubanks
Deputy Solicitor General
OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
patrick.wyrick@oag.ok.gov

Attorneys for Petitioner State of Oklahoma

(*additional counsel listed on inside cover*)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Brian J. Murray
Charles T. Wehland
Dennis Murashko
JONES DAY
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939

Michael L. Rice
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
(832) 239-3640

Attorneys for Petitioner
Oklahoma Gas And Electric
Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY BRIEF

The Government's opposition brief is largely premised on the same error that plagued the Tenth Circuit's decision: the failure to recognize that there are two distinct decision points at issue in these unique regional haze cases.

In the Government and Tenth Circuit's view, if a State settles on a particular Best Available Retrofit Technology to control regional haze, but the EPA prefers a different technology, EPA's preference will always win the day so long as EPA was not "arbitrary and capricious."

But by treating these unique regional haze cases like any other involving federal agency action to which the courts must defer, the Tenth Circuit glossed over the critical *initial* decision point. The important question is not whether an appeals court must defer to EPA when reviewing EPA's rejection of a State's SIP and promulgation of a FIP. The important question is whether *EPA* must defer to the *State* when conducting its review of the SIP. The Tenth Circuit erred by not requiring EPA to accord the States the deference they are due, and then entrenched that error by according EPA's de novo review of Oklahoma's SIP the greatest of after-the-fact judicial deference.

That approach simply does not square with the text of the uniquely state-centric Regional Haze Program, where Congress unequivocally gave the States the authority to determine Best Available Retrofit Technology for regional haze. 42 U.S.C. § 7491(b)(2)(A). The EPA's "heads we win, tails you lose" approach allows it to displace the States and

federalize those determinations based on nothing more than policy-based differences of opinion.

If the Court denies certiorari, it will effectively read the Regional Haze Program's unique delegation of authority to the States right out of the Clean Air Act. The impact will be widespread and will cost tens of millions of citizens tens of billions of dollars, as those citizens see their utility bills spike in the eight other states where EPA has rejected Best Available Retrofit Technology determinations for electric generating units.

I. THE GOVERNMENT AND TENTH CIRCUIT'S VIEW OF EPA'S ROLE IN THE REGIONAL HAZE PROGRAM DOES NOT SQUARE WITH THE CLEAN AIR ACT'S TEXT.

1. There is no dispute that EPA, in rejecting Oklahoma's regional haze plan and replacing it with its own, did not afford Oklahoma any sort of deference. That is why Petitioners complain here that (1) EPA applied the wrong standard of review when examining Oklahoma's SIP and (2) the Tenth Circuit blessed that lack of deference—*not* that EPA misapplied the appropriate standard, as the Government claims is the case. Gov't's Br. 14. So this is hardly a claim of "case specific error." *Id*. Rather, it is a claim that EPA is unabashedly and pervasively applying the wrong standard of review when reviewing scores of SIPs nationwide.

In order for EPA to reject Oklahoma's SIP, EPA should have been required to—at the very least—show that Oklahoma acted "unreasonably," as that is the

standard that this Court has required EPA to apply when reviewing SIPs in the context of Best Available Control Technology determinations. *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 494 (2004) (*"Alaska DEC"*).

In other words, EPA should have been required to afford Oklahoma the same sort of deference that EPA was afforded by the Tenth Circuit, as "reasonable" is the language this Court routinely deploys to describe the highly deferential *Chevron* standard of review that the Tenth Circuit applied to EPA's review of Oklahoma's SIP. *See, e.g.*, *E.P.A. v. EME Homer City Generation, L.P.*, No. 12-1182, 2014 WL 1672044 (U.S. Apr. 29, 2014) ("We routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language.") (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *see also United States v. Minnkota Power Coop.*, 831 F. Supp. 2d 1109, 1121 (D.N.D. 2011) (reversing EPA's rejection of a State's Best Available Control Technology determination because the State's "conclusions regarding such highly technical matters are entitled to deference unless the EPA proves them to be unreasonable, arbitrary, or capricious.").

This Court has already recognized the distinction that the EPA and Tenth Circuit failed to observe between the standard for review of EPA's action and the standard EPA is required to employ in reviewing the underlying state action. *See Alaska DEC*, 540 U.S. 461. The distinction is not simply a procedural one as EPA suggests. Gov't's Br. 25. Instead, *Alaska DEC* recognized that EPA's review of the State's action in selecting Best Available Control Technology required

EPA to approve the State's determination as long as the State had a reasonable basis for its decision. The Court's acknowledgment that EPA was required to give such deference to the permitting authority is significant here. In selecting Best Available Control Technology, a permitting authority must choose the available technology that will accomplish the maximum degree of emission reduction considering various factors. 42 U.S.C. § 7479(3). In the context of selecting Best Available Retrofit Technology under regional haze, EPA has conceded that States are free to balance the statutory factors as they deem appropriate and that no particular result is required. *See* 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) ("States are free to determine the weight and significance to be assigned to each factor."). *Alaska DEC* must necessarily mean that EPA had to show that Oklahoma's Best Available Retrofit Technology determination was at the very least unreasonable. EPA did not even attempt such a showing.

The result of a denial of certiorari will be to rewrite the Clean Air Act to give EPA, not the States, the authority to determine Best Available Retrofit Technology under regional haze for every affected source in the country. That is not the system Congress created for regional haze.

2. The Government's response to all this is to repeat the mantra that this is just another case of a federal agency interpreting federal law, Gov't's Br. 15, and thus the Tenth Circuit's reflexive deference to EPA was entirely appropriate. This is wrong for two reasons.

First, it makes the EPA's "Control Cost Manual" (the federal law EPA claims it is merely interpreting) something it is not—a concrete set of rules that must be rigidly applied. The Control Cost Manual consists of guidelines, and it recognizes that its application is flexible and can vary, subject to the judgment and interpretation of the reviewing authority. EPA Air Pollution Control Cost Manual, § 1.4 (6th Ed. 2002) (stating "the user has to be able to exercise 'engineering judgment' on those occasions when the procedures may need to be modified or disregarded"). Indeed, in adopting its guidelines for selecting Best Available Retrofit Technology, EPA itself acknowledged that "States have flexibility in how they calculate costs." *See* 70 Fed. Reg. 39,104, 39,127 (July 6, 2005) ("We believe that the Control Cost Manual provides a good reference tool for cost calculations, but if there are elements or sources that are not addressed by the Control Cost Manual or there are additional cost methods that could be used, we believe that these could serve as useful supplemental information.").

Second, it ignores the unique language of the Clean Air Act, which hardly gives EPA the authority to promulgate guidelines and then apply them however it sees fit. Rather, the Act authorizes EPA to issue guidance to *aid* the States, *see* 42 U.S.C. § 7491(b)(1), but unequivocally leaves to the States the task of applying and reaching conclusions based on those guidelines. Despite what the Government claims, this is not a case of EPA merely "interpreting" its own guidelines. Rather, it is a case of EPA taking its guidelines and applying them de novo to facts on the ground in Oklahoma to reach a conclusion that EPA desired, without having first made any showing that

Oklahoma unreasonably applied the guidelines to the facts on the ground (i.e., acted arbitrarily and capriciously).

Worse yet, EPA sometimes rejected Oklahoma's conclusions in *contradiction* of its own guidelines. For example, in conducting its analysis, Oklahoma used an expected useful life of 20 years for the scrubbers, which EPA could not and did not contend was inconsistent with the Control Cost Manual, because the Manual is filled with guidance suggesting a 20-year useful life for scrubbers.[1] EPA, however, rejected that 20-year useful life and substituted a 30-year useful life because doing so made the scrubbers that EPA desired seem more cost effective.

While a 30-year useful life could have been a reasonable term for Oklahoma to use in its cost estimates, it plainly was not required by the Control Cost Manual or other EPA guidance. Thus, other than its own preference, EPA had no basis to reject Oklahoma's use of 20 years. The selection of the useful life for the scrubbers puts on stark display the core issue in need of review—whether the State's determination of Best Available Retrofit Technology was entitled to deference such that EPA had to show the State acted unreasonably.

---

[1] *See* Technical Support Document for EPA's Proposed Rule for Four Corners Power Plant: Navajo Nation, Docket No. EPA-R09-OAR-2010-0683-0002, available at http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=EPA-R09-OAR-2010-0683, undated, at 43 ("amortization period of 20 years . . . is consistent with the EPA Control Cost Manual.").

Moreover, the Tenth Circuit's decision will have a long-lasting impact on the continuing obligations of the States to address visibility under the remaining fifty years of the Regional Haze Program. The next state regional haze plan is due in 2018, and additional state regional haze plans are required every ten years thereafter. *See* 40 C.F.R. § 51.308(f). Thus, the constraints on state authority inherent in the standard adopted by the Tenth Circuit will be repeatedly imposed by EPA over the next several decades contrary to the clear directive of the Clean Air Act.[2]

II. THE GOVERNMENT'S ATTEMPT TO MINIMIZE THE SIGNIFICANCE OF THE DECISION BELOW ACTUALLY HIGHLIGHTS THE STAGGERING COSTS THAT WILL BE IMPOSED ON TAXPAYERS ABSENT THIS COURT'S INTERVENTION.

The Government makes no attempt to argue that the question presented will not recur. It *will*, time and again in multiple circuits because EPA is using the limited review authority granted to it by the Clean Air Act to substitute its judgment for the States' judgment in nearly every case where a State has determined that additional controls are not required to protect visibility. Excluding States regulated by the Clean Air Interstate

---

[2] While EPA claims there is no need for review here, in circumstances where EPA's authority is at stake, EPA has not hesitated to suggest that the Court's intervention is clearly warranted. *See Petition for a Writ of Certiorari, EPA v. EME Homer City, L.P.*, No. 12-1182, at 28-29 (filed Mar. 29, 2012). The authority of the States deserves no less consideration.

Rule (CAIR),[3] sixteen States have submitted source-specific retrofit technology determinations for electric generating units. EPA has fully approved the retrofit technology determinations made by only half of those States for electric generating units.[4] For the other eight States, EPA disapproved some or all of each State's work related to retrofit technology determinations for electric generating units,[5] and cases challenging those disapprovals are percolating through various circuits.

So instead, the Government focuses on trying to minimize the significance of the sure-to-recur question presented, suggesting without any citation or record reference that it has approved 94 percent of state determinations of Best Available Retrofit Technology. Gov't's Br. 29. But even assuming the Government's numbers are right, EPA has denied approval of Best

---

[3] EPA allowed States to rely on emission reductions from CAIR in lieu of source-specific retrofit technology determinations for electric generating units. 70 Fed. Reg. 39,104, 39,137 (July 6, 2005).

[4] *See* 78 Fed. Reg. 10,546 (Feb. 14, 2013) (Alaska); 76 Fed. Reg. 34,608 (June 14, 2011) (California); 77 Fed. Reg. 76,871 (Dec. 31, 2012) (Colorado); 76 Fed. Reg. 36,329 (June 22, 2011) (Idaho); 77 Fed. Reg. 50,602 (Aug. 22, 2012) (New Hampshire); 76 Fed. Reg. 38,997 (July 5, 2014) (Oregon); 77 Fed. Reg. 24,845 (Apr. 26, 2012) (South Dakota); 77 Fed. Reg. 72,742 (Dec. 6, 2012) (Washington)).

[5] *See* 77 Fed. Reg. 72,514 (Dec. 5, 2012) (Arizona); 77 Fed. Reg. 40,150 (July 6, 2012) (Nebraska); 77 Fed. Reg. 50,936 (Aug. 23, 2012) (Nevada); 76 Fed. Reg. 52,388 (Aug. 22, 2011) (New Mexico); 77 Fed. Reg. 20,894 (Apr. 6, 2012) (North Dakota); 76 Fed. Reg. 81,728 (Dec. 28, 2011) (Oklahoma); 77 Fed. Reg. 74,355 (Dec. 14, 2012) (Utah); 79 Fed. Reg. 5032 (Jan. 30, 2014) (Wyoming)).

Available Retrofit Technology submittals for forty-four sources at staggering costs. *See id*. Using the costs of $150 million to $300 million per unit from the various estimates in this case as a guide,[6] the costs imposed on these sources collectively (and on their rate payers and customers) is in the range of $6.6 billion to $13.2 billion. While those sorts of costs may seem insignificant to the EPA, they will ultimately be borne by millions of rate-paying Americans from all walks of life—even those for whom a few dollars a month on a utility bill can be make or break.

III. IN ORDER TO PERSUADE THIS COURT NOT TO ACCEPT THIS CASE, THE SIERRA CLUB REPEATEDLY MISREPRESENTS THE RECORD BELOW.

The Sierra Club is well aware of the importance of this case. If this Court accepts this case, and reverses the Tenth Circuit, the federalization of the Regional Haze Program favored by the Sierra Club will fail. Therefore, in a last-ditch effort to persuade this Court not to accept this case, the Sierra Club has repeatedly misrepresented the record below.

First, Sierra Club claims that the question presented—whether the EPA could conduct a de novo review of the State's plan—was not at issue below. Sierra Club's Br. 1. This claim is flatly contradicted by

---

[6] EPA admits that the cost of installing scrubbers on the four electric generating units at issue in this case is at least $600 million, or $150 million per unit. EPA's Br. 29. Petitioners estimate that the cost of installing scrubbers on the four electric generating units at issue in this case is $1.2 billion, or $300 million per unit. Pet. 4.

the record, which plainly shows that this issue was *the* central issue litigated below. Oklahoma argued repeatedly that "the [Clean Air Act] unambiguously prescribes a limited role for the EPA as regards BART determinations," Pet. App. 11, and that "[a] State's freedom to weigh the BART factors would be illusory . . . if EPA could simply choose to *override* the State's conclusion." Pet. 16; *see also* ECF No. 01019020547, Audio Recording of Oral Argument (where counsel for Oklahoma opened his argument by saying: "We are here today, your honors, because the EPA unlawfully substituted its judgment in determining Best Available Retrofit Technology under the regional haze statute."). And not only did Oklahoma raise the issue in briefing and at oral argument, the Tenth Circuit plainly understood this to be at issue. *See* Pet. App. 10 ("First, [Oklahoma] argue[s] that the EPA exceeded its statutory authority by disapproving Oklahoma's BART determination."). Even worse yet, the Sierra Club's own briefing below proves that they plainly understood Oklahoma was arguing that EPA had overstepped its authority by failing to defer to the State's conclusions. *See* Resp. 7. ("Oklahoma insists that EPA may review only whether the State mentioned the relevant factors . . . such limited review is tantamount to no review at all.").

Second, Sierra Club claims that in the proceedings below that Oklahoma *requested* that EPA's rejection of the State Plan be reviewed according to an arbitrary and capricious standard of review. Sierra Club's Br. 1, 2, 3. The briefs and oral argument audio from below plainly show that Oklahoma consistently and unequivocally argued that (1) EPA failed to accord Oklahoma's BART determination proper deference, but

(2) even if the court disagreed and instead simply deferred to EPA, EPA's actions were arbitrary and capricious. *See* Pet. 10 (where Oklahoma argued that "*[e]ven if* EPA could use a disagreement with how the State balanced the statutory factors to justify disapproval of a [state plan], the Final Rule would still have to be vacated because it is based on an arbitrary and capricious consideration of . . . [the] factors.") (emphasis added); *see also* ECF No. 01019020547, Audio Recording of Oral Argument (where counsel for OG&E stated that "we could make a substantial case for arbitrary and capricious even as to how EPA promulgated their federal plan, but that's the second determination. The first is 'should they have displaced the State?'"). Nor was there any confusion in the Tenth Circuit's mind on this point. Pet. App. 10-11 ("First, [petitioners] argue that the EPA exceeded its statutory authority by disapproving Oklahoma's BART determination. Second, they argue that, ***even if*** the EPA had this authority, the EPA acted arbitrarily and capriciously by disapproving Oklahoma's SIP.") (emphasis added). Sierra Club is *grossly* mischaracterizing the proceedings below when it claims that Oklahoma "advocated" in favor of deference to EPA.

Third, Sierra Club contends that Oklahoma argued below that *Alaska DEC* was "wholly inapposite" to this case. Sierra Club's Br. 3, 10, 12. In support of this claim, Sierra Club cites Petitioners' reply brief below, but in that passage Petitioners were simply refuting Sierra Club's claim that *Alaska DEC* actually supported *their* position. Pet. Reply 6. Oklahoma unequivocally argued that *Alaska DEC* supported its contention that EPA had failed to properly defer to

Oklahoma's BART determination. Pet. for Reh'g 9-12 (relying on *Alaska DEC* in support of Oklahoma's contention that EPA "must accord appropriate deference to a state's BART determination and that it may not 'second guess' a state's decision.").

Because of these repeated mischaracterizations of the proceedings below, Sierra Club's arguments—which are not joined by the Government—can, and should be, afforded no weight.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

E. Scott Pruitt
Oklahoma Attorney General
Patrick R. Wyrick
Solicitor General
Counsel of Record
P. Clayton Eubanks
Deputy Solicitor General
Oklahoma Attorney
General's Office
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
fc.docket@oag.ok.gov
scott.pruitt@oag.ok.gov
patrick.wyrick@oag.ok.gov
clayton.eubanks@oag.ok.gov

Attorneys for Petitioner
State of Oklahoma

Michael Graves
Thomas P. Schroedter
HALL ESTILL, Attorneys at Law
320 South Boston Ave., Suite 200
Tulsa, OK 74103
(918) 594-0443
mgraves@hallestill.com
tschroedter@hallestill.com

Attorneys for Petitioner Oklahoma Industrial Energy Consumers

Brian J. Murray
Charles T. Wehland
Dennis Murashko
JONES DAY
77 West Wacker Drive
Chicago, IL 60601
(312) 782-3939
bjmurray@jonesday.com
ctwehland@jonesday.com
dmurashko@jonesday.com

Michael L. Rice
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
(832) 239-3640
mlrice@jonesday.com

Attorneys for Petitioner Oklahoma Gas And Electric Company