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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Clean Air Act requires the United States Environmental Protection Agency to disapprove implementation plans, prepared by states pursuant to the Act's various pollution-control provisions, if the plans do not comply with the Act's "applicable requirement[s]." 42 U.S.C. § 7410(l). In this case, the agency partially disapproved an implementation plan prepared by the State of Oklahoma to meet the Act's provisions governing emissions that impair visibility in National Parks and other federal lands, 42 U.S.C. § 7491. The question presented is whether the Tenth Circuit erred when that court, in accord with governing precedent from this Court and all other courts of appeal to have considered the question, and in accord with petitioners' own position in the court below, applied the 'arbitrary and capricious' standard of review to the agency's partial disapproval decision.

PARTIES TO THE PROCEEDING

Petitioners State of Oklahoma, Oklahoma Gas and Electric Company, and Oklahoma Industrial Energy Consumers were petitioners in the court below. Respondents are the United States Environmental Protection Agency and the Sierra Club, and were respondent and intervenor-respondent, respectively, in the court below.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Sierra Club has no parent companies, nor has it issued publicly held stock.

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 723 F.3d 1201. The opinion may be found in the Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App.") at 1a.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2013. That court denied petitions for rehearing en banc on October 31, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Petitioners request certiorari ostensibly to have this Court determine whether the Environmental Protection Agency (EPA) may "conduct a *de novo* review of the State of Oklahoma's plan." Pet. for Writ of Cert. at i. But petitioners raise that issue for the first time in their petition for certiorari. In the court of appeals, they advocated for the very 'arbitrary and capricious' standard that they now protest. Furthermore, the decision below correctly applies governing Supreme Court precedent, is consistent with many years of decisions from other courts of appeal, conflicts with no decision of any other circuit, nor of this Court, and the Tenth Circuit had no opportunity to address the issue now presented. Certiorari should, accordingly, be denied.

The petition asks this Court to change existing law dramatically by imposing a standard of judicial review that would give deference to the State, instead of the 'arbitrary and capricious' standard applied by the court below that gives deference to EPA. Pet. for Writ of

Cert. at 4. However, petitioners themselves requested that the Tenth Circuit apply an arbitrary and capricious standard of review when it reviewed EPA's actions, Pet. 10th Cir. Opening Br. at 1-2, 12 & n.6, June 15, 2012, ECF No. 01018863057. At no point did they argue that a different standard should apply.

Additionally, petitioners conceded below that the Clean Air Act, 42 U.S.C. § 7410, gives EPA authority to disapprove a state plan that does not comply with the federal statutory requirements. Oral Arg. at 6:27, Mar. 6, 2013 (conceding that EPA has ultimate authority to determine what constitutes best available retrofit technology (BART) and acknowledging petitioners' sole argument was that EPA had acted in an arbitrary and capricious manner);[1] *see also* Pet. for Writ of Cert. at 7-8, 21-22, 23 (stating that EPA can review whether a

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[1] *See* ECF No. 01019020547. The oral argument recording was sent to the parties via email and no official transcript is available. Sierra Club has transcribed the relevant section for the Court's convenience, and can provide the recording upon request.

"Counsel for Oklahoma: We believe, in fact, that the EPA has review authority. It is the State's position that the EPA cannot use its review authority to deprive the State of its ability to determine best available retrofit technology, which is what they did here.

Judge Lucero: But there is an irreconcilable conflict in those two propositions, because somebody's got to make….to determine whether you are or are not properly exercising your authority.

Counsel: That's correct, your honor, but we believe…

Judge Lucero: Hasn't Congress vested that authority in the EPA? I mean for better or for bad…

Counsel: We believe that they had review authority and that they acted in an arbitrary and capricious way..."

state BART determination is a reasonable application of the EPA Guidelines).[2]

The Tenth Circuit thus applied the standard of review requested by petitioners – and prescribed by statute, precedent of this Court and courts of appeals: it asked whether EPA's disapproval was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," based on the record before it. Pet. App. at 19a. Petitioners now ask this Court to reverse the Tenth Circuit because it failed to apply a standard of review that petitioners never raised in their briefs, a standard which would turn well-settled law on its head. The panel majority had no opportunity to address petitioners' current arguments; indeed, even the dissenting opinion below makes no mention of them.

Petitioners argued before the Tenth Circuit that this Court's *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (*Alaska*), decision did not apply because of "key differences" between the Act's prevention of significant deterioration permitting program addressed in *Alaska* and the regional haze program, at issue here. Pet. 10th Cir. Reply Br. at 6, Oct. 9, 2012, ECF No. 01018928682. Petitioners now argue that the Tenth Circuit erred by failing to apply that decision.

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[2] Similarly, in its unsuccessful challenge in the Eighth Circuit to EPA's partial disapproval of its regional haze plan, the State of North Dakota "all but conceded EPA's ability to review the substantive content of the BART determination…" *North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013), *petition for cert. filed*, Feb. 5, 2014, No. 13-940.

Even if petitioners' current arguments had been raised in the lower court, there would be no reason for further review. The decision below correctly applies the same traditional 'arbitrary and capricious' standard of review employed in *Alaska*, and every circuit to consider the issue has applied the same standard to EPA's highly technical and fact-specific determination under section 7410 that a state plan fails to meet the requirements of the Act. *E.g., North Dakota v. EPA*, 730 F.3d 750, 758 (8th Cir. 2013), *petition for cert. filed*, Feb. 5, 2014, No. 13-940; *Luminant Generation Co. v. EPA*, 714 F.3d 841, 857-59 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 387 (2013); *Sierra Club v. EPA*, 671 F.3d 955, 961 (9th Cir. 2012) (all applying arbitrary and capricious review to EPA's partial or total disapproval of a state plan). The Tenth Circuit's decision applies the well-established review standard governing EPA authority and conflicts with no decision of any other circuit or this Court. Moreover, even if petitioners' erroneous position on the review standard were applied, the outcome in this case would not change.

STATEMENT OF THE CASE

A. Statutory Background

Recognizing air pollution as one of the greatest threats to the "intrinsic beauty and historical and archeological treasures" of National Parks, Wilderness Areas, and other federal lands, Congress added the regional haze provisions to the Clean Air Act. H.R. Rep. No. 95-294, at 203-04 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1282; 42 U.S.C. § 7491(a)(1) (declaring the national visibility goal as "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"). Those provisions require states to devise and implement plans to restore natural visibility conditions in those areas by, *inter alia*, imposing pollution-reduction requirements reflecting the "best available retrofit technology" (BART) on power plants and other large sources of air pollution that were excepted from other pollution-reduction requirements of the Act. 42 U.S.C. § 7491(b)(2)(A); 40 C.F.R. § 51.308(e). *See* Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations, 70 Fed. Reg. 39,104, 39,111 (July 6, 2005) (describing grandfathering provisions excepting these sources from other programs). BART compels these disproportionately-polluting sources to install up-to-date and cost-effective pollution controls.

The Act mandates these pollution sources to "procure, install, and operate, as expeditiously as practicable ... [BART] ... for controlling emissions ... for the purpose of eliminating or reducing any such impairment," and it requires EPA to promulgate BART Guidelines specifying "appropriate techniques and methods for implementing [BART]." Pet. App. at 6-7a; 42 U.S.C. §§ 7491(a)(1) & (4), (b). States are obligated to apply EPA's BART Guidelines for large power plants (greater than 750 megawatts). 42 U.S.C. § 7491(b)(2); 40 C.F.R. Pt. 51, app. Y.

As with all state plans implementing the Clean Air Act, states must submit regional haze plans to EPA. 42 U.S.C. § 7410(a)(1). The agency must disapprove those plans if they fail to meet "any applicable requirement" of the Act – including BART. 42 U.S.C. § 7410(c), (l); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60,

64-65 (1975) (recognizing EPA authority under these provisions serves to ensure nationally consistent standards). *See also Alaska Dep't of Envtl. Conservation v. EPA*, 298 F.3d 814, 823 (9th Cir. 2002), *aff'd*, 540 U.S. 461 (2004) (Congress granted EPA ultimate enforcement authority under the Act "to protect states from industry pressure to issue ill-advised permits"). If the state fails to timely submit an adequate plan, the Clean Air Act obligates EPA to promulgate a federal plan implementing the relevant requirements. 42 U.S.C. § 7410(c).

The standard of judicial review governing EPA's promulgation of a federal plan is prescribed by statute. 42 U.S.C. § 7607(d)(1)(B), (9)(A) ("[T]he court may reverse any such action found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). While the Act does not prescribe a specific standard of review for EPA's disapproval of a state plan under 42 U.S.C. § 7410(l), this Court and multiple circuits have held that the same arbitrary and capricious review standard applies where the Act does not specify a review standard. *See Alaska*, 540 U.S. at 496-97 (arbitrary and capricious review applies to EPA enforcement orders under 42 U.S.C. §§ 7413(a)(5)(A) & 7477); *Luminant Generation*, 714 F.3d at 857-59 (same review standard applies to EPA's approval or disapproval of a state implementation plan implementing national ambient air quality standards); *Sierra Club v. EPA*, 671 F.3d at 961.

B. EPA Disapproved Oklahoma's State Implementation Plan Because It Was "Rife with Errors"

Oklahoma Gas & Electric's thirty-year old coal-fired power plants lack modern pollution controls, known as scrubbers, and currently emit tens of thousands of tons of harmful sulfur dioxide pollution every year. EPA, Quarterly Emissions Tracking.[3] The plant's pollution diminishes the scenic views in six federal areas in five states. The plants are subject to BART emission limits. *See* 42 U.S.C. § 7491(b)(2)(A).

Oklahoma sought EPA's approval of a regional haze plan that imposed no additional pollution-control technologies on those plants, and which allowed the plants to increase their pollution from then-current levels. EPA determined that the plan failed to meet the Act's requirements; among other flaws, Oklahoma's submission departed markedly from EPA's Guidelines, and from the procedures specified by EPA's cost manual.

As a result, Oklahoma vastly overestimated the cost of sulfur-dioxide controls (scrubbers), and at the same time greatly underestimated the visibility improvement that would result from installing and operating those controls. EPA noted that Oklahoma's analysis was "rife with errors," the most egregious of which included:

- double-counting of costs;

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[3] Available at http://www.epa.gov/airmarket/images/CoalUnitCharacteristics2011.xls.

- assuming an abbreviated lifespan of twenty years for pollution-reduction technologies that last more than thirty years; and
- relying on costs of scrubbers that were significantly larger in size than necessary to achieve the prescribed emission limits.

Pet. App. at 22a, 32-33a & n.10, 39-41a. Based on a careful review of the State's technical claims, EPA determined that Oklahoma had overestimated the costs of superior sulfur-dioxide controls *by a factor of six*. *See id*. at 9a.

Both before and after its decision, EPA made extensive efforts to work with Oklahoma (as it has with other states),[4] to craft an alternative state regional haze plan that complies with the statutory requirements. EPA even stated its preference of working with the State on a revised plan in the final rule. Approval and Promulgation of Implementation Plans; Oklahoma, 76 Fed. Reg. 81,728, 81,728 (Dec. 28, 2011); Pet. App. at 60a ("We will of course consider, and would prefer, approving a SIP if the state submits a revised plan for these units that we can approve.") Oklahoma's other utility, Public Service Company of

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[4] EPA has also stayed implementation of New Mexico's final haze rule to give the State and stakeholders further opportunity to submit a compliant SIP. Stay of the Effectiveness of Requirements, New Mexico, 77 Fed. Reg. 41,697 (July 26, 2012). *See also* Partial Approval and Partial Disapproval of Air Quality State Implementation Plans, Arizona, 78 Fed. Reg. 29,292 (proposed May 20, 2013) (after identifying deficiencies in Arizona's plan, EPA provided the State an opportunity to submit a revised plan to address EPA's concerns).

Oklahoma, whose Northeastern coal-fired power plant was also covered by EPA's regional haze rule, worked with EPA on a revised plan that EPA approved. *See* Revised BART Determination for American Electric Power/Public Service Company of Oklahoma Northeastern Power Station Units 3 and 4, 79 Fed. Reg. 12,944 (Mar. 7, 2014) (EPA's final rule approving new state implementation plan for Northeastern). Oklahoma and Oklahoma Gas & Electric instead sought judicial review.

Oklahoma challenged EPA's final regional haze decision at the Tenth Circuit, raising several record-specific claims. *See, e.g.*, Pet. 10th Cir. Opening Br. at 22, 28 (claiming EPA erred in estimating the scrubber cost by, *inter alia*, rejecting labor productivity, overtime inefficiencies, and owner's costs; applying a multiple-unit discount; and assuming a technically infeasible scrubber size for the plants). Oklahoma did not contest EPA's obligation to disapprove Oklahoma's submission if it failed to meet the "applicable requirements" of the Act. *See* Oral Arg. at 6:27; *see also* Pet. for Writ of Cert. at 7-8, 21-22, 23. Oklahoma stated in its Tenth Circuit briefs, "[t]he standard of review for an EPA action under the Clean Air Act is the standard of review found in the APA [Administrative Procedure Act]." Pet. 10th Cir. Opening Br. at 1-2, 12 & n.6 (*citing, inter alia, Texas v. EPA*, 499 F.2d 289, 296 (5th Cir. 1974)); *see also Alaska*, 540 U.S. at 496-97; *Sierra Club v. EPA*, 671 F.3d at 961. *Cf.* Pet. for Writ of Cert. at 4 (complaining that the Tenth Circuit erroneously gave EPA "highly deferential 'arbitrary and capricious' review").

Oklahoma did not ask the court of appeals to apply *Alaska* to establish the scope of the court's review of EPA's decision. Rather, petitioners argued that *Alaska* was "wholly inapposite." Pet. 10th Cir. Reply Br. at 6 (responding to Intervenor's citation of *Alaska*). *Cf.* Pet. for Writ of Cert. at 20 (complaining that "the panel below largely ignored *Alaska Department*, and disregarded its guidance").

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Decision Correctly Applies This Court's Governing Precedent and Is Consistent with the Decisions of All Other Courts of Appeal That Have Addressed the Question

A. The Lower Courts Are in Agreement

EPA is expressly obligated by statute to review state plans implementing the Act's regional haze requirements under the same provision compelling EPA to review all other state implementation plans, 42 U.S.C. § 7410. *See* Pet. for Writ of Cert. at 8. There is no disagreement in the abundant case law on the scope of EPA's authority or the standard of review of EPA's actions under section 7410. EPA must disapprove a state plan that does not comply with the Act's "applicable requirement[s]." 42 U.S.C. § 7410(l); *see, e.g.*, *Luminant Generation*, 714 F.3d at 858 ("[I]n disapproving a plan, the agency is required to provide reasoning supporting its conclusion that the disapproved provision would interfere with an applicable requirement of the Act."). When reviewing an EPA rulemaking on a state implementation plan, EPA's actions, not the state's, are subject to the

arbitrary and capricious standard of review. *E.g.*, *Luminant Generation*, 714 F.3d at 850, 857-59; *Mont. Sulfur & Chem. Co. v. EPA*, 666 F.3d 1174, 1182, 1197 (9th Cir. 2012) (both upholding EPA's partial or total disapproval of a state plan under 42 U.S.C. § 7410). Arbitrary and capricious review of EPA's action is particularly appropriate in these cases, given the technical, record-based nature of the issues.

Though the Tenth Circuit's decision was the first judicial decision reviewing EPA's disapproval of a state regional haze program, the Court recognized that nothing in the regional haze program alters the scope of EPA's authority under section 7410, or differentiates the well-established case law on EPA's authority to review state implementation plans to ensure compliance with the Act. Pet. App. at 16a (noting that the regional haze program "does not differ from other parts of the CAA – states have the ability to create SIPs, but they are subject to EPA review").[5] The Eighth Circuit subsequently ruled on this same regional haze question – and it favorably relied on the Tenth Circuit's ruling, and utilized the same standard of review. *North Dakota v. EPA*, 730 F.3d at 761 ("EPA's disapproval of the State's BART determination for failing to consider the cost of compliance as required under the statute

[5] In fact, the same argument that petitioners present here in attempt to differentiate the regional haze program from other parts of the statue has been rejected in at least one section 7410 case. *Michigan Dep't of Envtl. Quality v. EPA*, 230 F.3d 181, 184-85 (6th Cir. 2000) ("[P]etitioners claim that CAA unequivocally grants states primary responsibility for regulating air emissions … [however] ... [t]he CAA prohibits the EPA from approving a revision that would interfere with attainment or any other applicable CAA requirement.").

and the BART guidelines was neither arbitrary, capricious, nor an abuse of discretion."). The circuits are thus in agreement on the question presented in the petition.

Petitioners centrally rely on a 2002 decision in *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), where the D.C. Circuit invalidated EPA's initial nationally-applicable regional haze rule. The court in that case found that the rule's "collective contribution" approach, which required that states evaluate one of the five statutory factors, visibility improvement, on an "area wide" basis, was inconsistent with statutory language requiring that each factor be considered on a source-specific basis. *Id.* at 5-6, 8. The decision did not question EPA's express statutory authority under 42 U.S.C. § 7410 to disapprove any particular regional haze plan, or the standard for judicial review of EPA's action on a technical matter involving significant policy judgment. *See* Pet. App. at 14-16a (rejecting petitioners' Corn Growers argument); *id.* at 12-13a (recognizing EPA's authority under 42 U.S.C. § 7410(l) & (a)(2)(J) to ensure state regional haze plans comply with the statute).

B. The Tenth Circuit's Decision is Consistent with This Court's Decisions

Alaska As noted, petitioners argued in the court of appeals that this Court's decision in *Alaska* does not apply and that EPA was not entitled to review a state's BART decision for reasonableness. *See* Pet. 10th Cir. Reply Br. at 6. Because petitioners never asked the Tenth Circuit to apply *Alaska*'s holding regarding EPA's burden in enforcement cases, petitioners' argument that "the panel below largely ignored *Alaska*

Department, and disregarded its guidance" is both audacious and not properly raised here. Pet. for Writ of Cert. at 20. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (a grant of certiorari is normally precluded when "the question presented was not pressed or passed upon below.") (citation omitted).

In any event, petitioners' new *Alaska* argument has no merit. *Alaska* did not address the scope of EPA's authority under 42 U.S.C. § 7410; in that case, EPA had already approved the pertinent portions of Alaska's implementation plan under section 7410 as compliant with the Act's requirements. *Alaska* addressed EPA's enforcement authority under 42 U.S.C. §§ 7413(a)(5)(A) & 7477 to challenge the reasonableness of the State's best available control technology (BACT) determination, pursuant to that approved implementation plan. *See Alaska*, 540 U.S. at 502.

Alaska confirmed the well-established principle that where the Act does not specify a review standard, the standard of court review of EPA's actions is the arbitrary and capricious review standard:

> Because the Act itself does not specify a standard for judicial review in this instance, we apply the familiar default standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and ask whether the Agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

540 U.S. at 496-97 (footnote omitted). Applying this standard of review, this Court concluded that "the Agency did not act arbitrarily or capriciously in finding

that ADEC's BACT decision in this instance lacked evidentiary support. EPA's orders, therefore, were neither arbitrary nor capricious." *Id.* at 502. The Tenth Circuit explicitly relied on *Alaska* as a controlling authority for applying the arbitrary and capricious standard of review. Pet. App. at 20a.

Alaska's fact-specific holding that "*in either an EPA-initiated civil action or a challenge to an EPA stop-construction order* [under 42 U.S.C. §§ 7413(a)(5)(A) & 7477], the production and persuasion burdens remain with EPA…" is not applicable to Oklahoma's challenge of EPA's rulemaking action under 42 U.S.C. § 7410(l) disapproving a state implementation plan. *Alaska*, 540 U.S. at 494 (emphasis added). In *Alaska*, instead of initiating a civil action against the state permitting agency, EPA issued a stop-construction enforcement order to challenge a state-issued permitting decision. Because EPA has a range of enforcement options for challenging a state permitting action, and because EPA would bear the production and persuasion burdens in the civil action option, the Court noted that EPA should bear the same burdens under any of those options. *Id.* In the *Oklahoma* case, EPA determined, as part of the agency's rulemaking duties to review all state plans under 42 U.S.C. § 7410(l), that it could not approve Oklahoma's regional haze plan because it did not comply with federal statutory requirements. It is well-established that EPA receives deference when courts review EPA's rulemaking actions under section 7410. *See infra* Section I.A. Consequently, the discussion in the *Alaska* case regarding EPA's burden in bringing enforcement actions has no application to *Oklahoma*, where the State has the burden of proving EPA's rulemaking action to be arbitrary and capricious.

The Tenth Circuit's *Oklahoma* decision is nevertheless consistent with the Court's approach to reviewing EPA's enforcement orders in *Alaska*. In *Alaska*, the Court upheld EPA's decision to overturn a state's determination that was "not based on a reasoned analysis" through enforcement action, *Alaska*, 540 U.S. at 490-91; the Tenth Circuit similarly upheld EPA's disapproval of Oklahoma's determination because it was "rife with errors" and did not comply with the Guidelines. Pet. App. at 33a n.10. *Accord North Dakota*, 730 F.3d at 761 (explicitly recognizing that *Alaska* supports EPA's authority to review the substance of a state BART determination). Even though EPA does not bear the burden of persuasion when a party challenges its approval or disapproval of a state plan under 42 U.S.C. § 7410, in fact, the Tenth Circuit gave greater deference to the State and applied a "higher standard ...when evaluating [EPA's] actions in rejecting a [state plan]." Pet. App. at 24-25a n.7 ("EPA has less discretion when it takes actions to reject a [state plan] than it does when it promulgates a [federal plan].")

Train and *Union Electric* Contrary to petitioners' contentions (Pet. for Writ of Cert. at 18), the court of appeals' decision in this case is entirely consistent with the Clean Air Act's long-recognized "division of responsibilities" explained in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975), and *Union Electric Co. v. EPA*, 427 U.S. 246, 249-50 (1976). Both of those decisions recognize the Clean Air Act "sharply increased federal authority and responsibility in the continuing effort to combat air pollution." *Train*, 421 U.S. at 64; *Union Elec.*, 427 U.S. at 256-57. The Act divides responsibilities by "plac[ing]

the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject[s] the States to strict minimum compliance requirements...of a 'technology-forcing character.'" *Union Elec.*, 427 U.S. at 256-57. EPA must review the state plans for consistency with the Act's requirements, and courts give EPA's interpretation of the Act's requirements "great deference." *Id.* at 256; *Train*, 421 U.S. at 75. The Tenth Circuit deferred to EPA's decision to disapprove Oklahoma's plan because that plan failed to meet the statutorily-required, EPA-issued BART Guidelines. That exercise of federal authority was consistent with *Train*, *Union Electric*, and many decades of Clean Air Act precedent based upon those cases.

II. There Is No Recurring Issue of National Importance

Petitioners claim there is an urgent need for review because the Tenth Circuit's decision is the first of multiple expected judicial decisions on EPA's disapprovals of states' regional haze decisions. Pet. for Writ of Cert. at 24-26. But the Tenth Circuit decision is in harmony with many years of court decisions reviewing EPA's actions under section 7410 to disapprove state implementation plans. *See* Pet. App. at 16a. And the Tenth and the Eighth Circuits, the first two courts to review EPA's disapproval of a state's plan under section 7410 in the regional haze context, are in harmony. The regional haze issue is pending in cases at other courts of appeals, which are likely to follow *Oklahoma*, *North Dakota*, and other relevant case law. The concerns raised by various state amici regarding regional haze plans applicable in their states will be

subject to independent judicial review in federal courts of appeals, where the states will have the opportunity to present the legal issues raised by *Oklahoma* petitioners here for the first time in their petition for certiorari.

III. Petitioners' View of the Review Standard Would Not Change the Result Here

Even if petitioners had properly raised their current position that some unusually non-deferential standard of review should apply, no amount of deference to the State could fix the errors in the State's analysis and cause the court to alter its ruling. The court correctly rejected petitioners' arguments challenging EPA's disapproval of a state plan as being "without merit" and agreed with EPA that petitioners' 2008 and 2009 estimates were not valid under the Guidelines. *Id.* at 20-25a & n.7 ("OG&E has yet to provide any justification for providing estimates that departed from the guidelines.").

The Tenth Circuit acknowledged the dissenting opinion when it stated that the issue about the size of the proposed scrubbers presented a "close case," *id.* at 33a, but that issue involved the court's review of EPA's actions *in promulgating the federal plan*, not EPA's disapproval of the state plan — the issue on which the State now claims that greater judicial deference was required. Although the court may have found the scrubber size issue to be somewhat "close," the court clarified that it would rule the same even if it had accorded the State greater deference. *Id.* at 24-25a n.7. And, putting the scrubber size issue aside entirely, the court would have disapproved the Oklahoma plan anyway because "the EPA had sufficient reasons for

rejecting cost estimates - rife with errors - submitted by OG&E." *Id.* at 33a n.10.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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