No. 13-921

# In the Supreme Court of the United States

STATE OF OKLAHOMA, OKLAHOMA INDUSTRIAL ENERGY CONSUMERS, OKLAHOMA GAS & ELECTRIC COMPANY

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

*Respondents.*

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

## BRIEF OF AMICUS CURIAE STATES OF ARIZONA, NEBRASKA AND THIRTEEN OTHER STATES AND STATE AGENCIES IN SUPPORT OF PETITION

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Like the State of Oklahoma, Amici States Arizona, Louisiana, the Louisiana Department of Environmental Quality, Michigan, Nebraska, North Dakota, Utah and Wyoming have submitted regional haze plans to the U.S. Environmental Protection Agency (EPA) that contain determinations of Best Available Retrofit Technology (BART) or similar determinations for certain large industrial facilities.[1] As was the case with Oklahoma's plan, EPA disapproved the BART and other determinations that these Amici States made. These Amici States have filed Petitions for Review of EPA's disapprovals.[2]

The additional Amici States Alabama, Alaska, Kansas, Montana, Ohio, South Carolina, and West Virginia are interested in the issues presented here because of the important precedent the lower courts' decision sets for future regional haze plans and for BART and similar determinations that these States may make and for other cases involving State-Federal relationships under the Clean Air Act (CAA).

## INTRODUCTION

Confusion exists in the lower courts regarding the correct standard of review to apply where a State or other party appeals an EPA finding that the State acted unreasonably in carrying out obligations that

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[1] Amici provided timely notice of this brief to the parties under Rule 37(2)(a).

[2] *See* citations *infra*.

the CAA delegates to the State. *See Oklahoma v. EPA*, 723 F.3d 1201 (10th Cir. 2013) ("*Oklahoma*"); *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013) ("*North Dakota*"). These courts have failed to apply this Court's holding in *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) ("*ADEC*"). This Court should grant Oklahoma's Petition for Writ of Certiorari so that the Court can correct the lower courts' error and to ensure that the essential holding of *ADEC* on standard of review is not undermined in these and other pending and future cases.[3]

In *ADEC*, this Court ruled that EPA's CAA "supervisory" authority over State determinations of best available control technology (BACT) empowers the agency to disapprove a State BACT determination that it finds to be unreasonable. *ADEC*, 540 U.S. at 484-88. The Court, however, carefully limited its decision by ruling that EPA does not have a roving commission to substitute its judgment for what a reasonable BACT determination should be in place of a State's reasonable determination. *Id.* at 488-89. EPA's task instead is to determine whether the State had acted arbitrarily. *Id.* The Court recognized that its decision as to the respective EPA and State BACT roles necessarily affects the standard by which courts should review an EPA disapproval of a State BACT determination. *Id.* at 494. According to the Court, because the statute delegates authority to States in the first instance to make BACT determinations and restricts EPA to an

[3] North Dakota has also filed a Petition for Writ of Certiorari, Docket No.13-940, and the amici States here are also filing an amicus brief in support of North Dakota's Petition.

"oversight" role, EPA bears the burden in court of proving that the State indeed had acted unreasonably. *Id.*

The four-member dissent in *ADEC* warned that the Court's decision would result in lower courts being forced to apply an "unwieldy" standard of review. *ADEC*, 540 U.S. at 510. As the dissent wrote, "EPA and the majority concede that, because States enjoy substantial discretion in making BACT determinations, courts reviewing EPA's order must ask not simply whether EPA acted arbitrarily but the convoluted question whether EPA acted arbitrarily in finding the State acted arbitrarily." *Id.*

The dissent's concern about potential confusion over the standard of review has proved to be prescient, as the *Oklahoma* and *North Dakota* courts, in contravention of *ADEC*, required the States to prove that EPA had acted arbitrarily, rather than requiring EPA, per *ADEC*, to prove that the States had acted arbitrarily. *Oklahoma*, 723 F.3d at 1216-17; *North Dakota*, 730 F.3d at 766. The two decisions involve State determinations that are similar to the State BACT determinations that were at issue in *ADEC*. In *Oklahoma*, the State determined BART under the CAA visibility-improvement program, 42 U.S.C. § 7491; in *North Dakota*, the State determined the level of controls required to make reasonable progress in improving visibility under the same program. Both Courts, applying the traditional arbitrary and capricious test, assumed that they must defer to EPA's reasonable determinations even if EPA had failed to show that the State's contrary determinations were arbitrary. *Id.* Neither Court

recognized that, under *ADEC*, a State's reasonable determination must be upheld. As a result, contrary to *ADEC*, States can no longer count on their reasonable decisions under the CAA being affirmed in the appellate courts, at least to the extent that EPA can advance another reasonable outcome that it prefers. The *Oklahoma* and *North Dakota* decisions are particularly problematic because their context was the CAA's visibility-improvement program, where Congress granted States especially broad authority. *See Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002) ("*Corn Growers*").

It is critical that this Court grant the Writ of Certiorari to correct the lower courts' error at this time. As discussed below, EPA has disapproved BART and similar State determinations in the visibility-improvement program in a number of states, and challenges to these disapprovals are now pending in several federal appellate courts. The *Oklahoma* decision has already been used as key precedent in the *North Dakota* decision, *North Dakota*, 730 F.3d at 761, and these precedents are now likely to be relied on in the other pending appeals. The *Oklahoma* and *North Dakota* decisions are also likely to serve as precedent in numerous other cases in which courts review EPA disapprovals of CAA state implementation plans (SIPs) and, indeed, as the *ADEC* dissent highlighted, in numerous other cases involving federal statutes which create State-Federal partnerships to carry out Congress' intent. *ADEC*, 540 U.S. at 518.

## BACKGROUND

The CAA controls air pollution through a system of shared Federal and State responsibility. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). In general, EPA promulgates air quality standards and States formulate SIPs to achieve those standards. *See* 42 U.S.C. §§ 7407-10; *ADEC*, 540 U.S. at 469-70. EPA may disapprove a SIP if it finds that the plan does not meet "the applicable requirements" of the Act. 42 U.S.C. § 7410(k)(3).

Among the CAA requirements that a SIP must meet is the requirement to implement the statutory Prevention of Significant Deterioration (PSD) program. 42 U.S.C. § 7471; *ADEC*, 540 U.S. at 470-73. Under the PSD program, States issue PSD preconstruction permits for new and modified facilities. 42 U.S.C. § 7475; *ADEC*, 540 U.S. at 472-73. In order to grant a permit, States must determine the BACT controls that the permittee must install to limit air pollution. 42 U.S.C. § 7475(a)(4); *ADEC*, 540 U.S. at 470-73. The statute gives EPA authority to take enforcement action to prevent the construction or modification of a facility where the construction or modification "does not conform to the [PSD] requirements," 42 U.S.C. § 7477, or where a "State is not acting in compliance with any requirement or prohibition of the Act," including PSD, 42 U.S.C. §7413(a)(5). *See ADEC*, 540 U.S. at 473-74.

A SIP must also contain measures to implement the statutory visibility-improvement program. 42 U.S.C. § 7491; *see also Corn Growers*,

291 F.3d at 2-5. The program's goal is to eliminate manmade visibility impairment in national parks and wilderness areas, termed "class I areas." 42 U.S.C. § 7491(a). Congress did not specifically mandate that this goal be achieved by any particular date, but instead mandated that EPA promulgate regulations requiring States to submit SIPs that include such measures "as may be necessary to make reasonable progress toward meeting the national goal." *Id.* § 7491(b)(2). Congress also required that, as a part of making "reasonable progress," States should determine BART emissions limits for certain large industrial facilities. *Id.* § 7491(b)(2)(A).

States determine BART by considering five cost-effectiveness factors set forth in § 7491(g)(2). As explained by the D.C. Circuit in *Corn Growers*, States consider these factors in making the discretionary determination of whether "'the degree of improvement in visibility obtained from installing a particular set of emissions controls'" is "justified by the cost." *Corn Growers*, 291 F.3d at 7.

EPA adopted regulations specifically addressing the effect of regional haze on Class I area visibility impairment in 1999. Regional Haze Regulations, 64 Fed. Reg. 35,714 (July 1, 1999). These regulations require States to submit plans to EPA setting forth State reasonable-progress goals and long-term strategies for meeting those goals. 40 C.F.R. § 51.308 (2013). The States are required to submit new plans reassessing and revising their goals and strategies on July 31, 2018 and every ten years thereafter. *Id.* § 51.308(f). The States' long-term strategies must include enforceable emission

limitations, including determinations of BART. *Id.* § 51.308(d)(3), (e).

The BART provisions of EPA's 1999 Regional Haze Rule were overturned in *Corn Growers*, in part because they intruded on authority Congress had delegated to the States. *Corn Growers*, 291 F.3d at 7-9. EPA issued new regulations on remand of *Corn Growers* in 2005 that called on States to submit first-phase SIPs by December 2007. Regional Haze Regulations for Best Available Retrofit Technology (BART) Determinations, 70 Fed. Reg. 39,104 (July 6, 2005).

For the program's first phase, EPA allowed most eastern states to rely on a stringent EPA regional pollution-transport program instead of having to make BART determinations in the power sector.[4] This exemption, however, is under judicial review,[5] and if the D.C. Circuit overturns this exemption, some eastern States could be required to make numerous power-sector BART determinations. In the Midwest and West, including in Oklahoma, North Dakota and some of the Amici States, EPA has overridden a number of State first-phase BART and similar determinations and replaced them with its own much more costly requirements. *See infra*, Argument II.

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[4] Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans, 77 Fed. Reg. 33,642 (June 7, 2012).

[5] *Nat'l Parks Conservation Ass'n v. EPA*, No. 12-1343 (D.C. Cir., filed Aug. 6, 2012).

In the *Oklahoma* case, a divided Tenth Circuit panel affirmed EPA's disapproval of BART determinations set forth in Oklahoma's regional haze SIP. *Oklahoma,* 723 F.3d at 1204. In the *North Dakota* decision, the Eighth Circuit affirmed an analogous EPA disapproval of North Dakota's determination that two electric generating units were not required to install pollution controls in order for the State to make reasonable progress in improving Class I area visibility. *North Dakota,* 730 F.3d at 755.

## ARGUMENT

### I. The Tenth and Eighth Circuits Misapprehended the Standard of Review.

In both the *Oklahoma* and *North Dakota* cases, EPA disapproved the States' determinations as unreasonable because it credited its own technical judgments over the contrary technical judgments of the States. *Oklahoma,* 723 F.3d at 1215-17; *North Dakota,* 730 F.3d at 764-66. The records before these courts therefore contained directly conflicting expert judgments, forcing the courts to make a choice. *Id.* Both courts made their choice by applying the standard of review. The courts found that that the applicable standard of review was the Administrative Procedure Act's arbitrary and capricious test, 5 U.S.C. § 706(2), *see Oklahoma,* 723 F.3d at 1211, *North Dakota,* 730 F.3d at 758, and they found that the arbitrary and capricious standard required them to defer to EPA's expert judgments over those of the States. *See Oklahoma,* 723 F.3d at 1216-17; *North Dakota,* 730 F.3d at 766.

Te courts' application of the standard of review, however, was erroneous. Under *ADEC*, the courts should have inquired whether the *States'* judgments were reasonable, not whether EPA's were. *ADEC*, 540 U.S. at 494. As a result, they should have deferred to the States' judgments, not EPA's, unless EPA carried its burden of showing that the States' judgments were unreasonable.

1. In *ADEC*, the Supreme Court examined the division of Federal and State authority under the CAA in the context of an appeal by Alaska of an EPA enforcement action that sought to prohibit the State from issuing a PSD permit. *ADEC*, 540 U.S. at 468. EPA took the position that Alaska's BACT determinations were unreasonable, *id.* at 485, but Alaska argued that EPA lacked power to disapprove State BACT determinations on the grounds of reasonableness, *id.* Alaska maintained that because the CAA gives States authority to determine BACT requirements, EPA's BACT authority is limited to determining whether the State-issued PSD permit contains a BACT condition. *Id.*

This Court disagreed. Relying on the fact that the statutory enforcement provisions under which EPA acted, 42 U.S.C. §§ 7413(a)(5) and 7477, grant EPA "notably capacious" authority over State permitting decisions, *ADEC*, 540 U.S. at 484, the Court ruled that EPA had "supervisory responsibility" over the construction and modification of pollutant-emitting facilities, including the authority to disapprove unreasonable State BACT determinations. *Id.* at 484-485. The Court, however, was careful to note that EPA's authority in this

regard was limited "to ensur[ing] that a State's BACT determination is reasonably moored to the Act's provisions." *Id.* at 484-89. The Court said that because the statute gives States "considerable leeway" and "'places primary responsibilities and authority with the States,' EPA must give 'appropriate deference" to the State's BACT determinations. *Id.* at 490-91. EPA may step in "[o]nly when a state agency's BACT determination is 'not based on a reasoned analysis'" and is 'arbitrary." *Id.* at 490-91. *See also id.* at 487 (quoting EPA guidance and decisions that EPA's role is to ensure that the State determination is based "'on a reasoned analysis'" and "'on reasonable grounds'").

The Court recognized that its formulation of the relative EPA and State BACT roles affects the standard of review that a Court must apply when reviewing an EPA disapproval of a State BACT determination. According to the Court, consistent with EPA's limited oversight role, "*the production and persuasion burdens remain with EPA* and the underlying question a reviewing court resolves remains the same: "*[w]hether the state agency's [] determination was reasonable.*" *Id.* at 494 (emphasis added). Although this Court in *ADEC* affirmed EPA's disapproval of the Alaska's BACT determination, it did so only after assuring itself that EPA had met its burden of proving the State's decision was arbitrary. *Id.* at 488.

2. The Supreme Court's decision in *ADEC* does not capture the full degree of deference that EPA owes States under 42 U.S.C § 7491, the statutory provision at issue in *Oklahoma* and *North Dakota*.

As stated above, this Court's basis in *ADEC* for finding authority in EPA to disapprove State BACT determinations that the Agency found to be unreasonable was the "notably capacious" enforcement authority that 42 U.S.C. §§ 7413(a)(5) and 7477 grant EPA. *ADEC*, 540 U.S. at 484. Those enforcement sections were not at issue in *Oklahoma* or *North Dakota*. Moreover, unlike the PSD program reviewed in *ADEC*, the § 7491 visibility-improvement program does not address the National Ambient Air Quality Standards or health-based concerns but is concerned instead with the aesthetic value of improving visibility. Nor does § 7491 grant EPA "notably capacious" authority. To the contrary, the provision is highly deferential to State authority. *Corn Growers*, 291 F.3d at 8 (States have "broad authority over BART determinations").

As set forth in Corn *Growers*, the Conference Committee that authored the final version of § 7491 inserted the phrase "as determined by the State" in two places in the text specifically to clarify that States have overarching authority to make BART determinations. *Corn Growers*, 291 F.3d at 8. This language was inserted as part of "an agreement to reject the House bill's provisions giving EPA the power to determine whether a source contributes to visibility impairment and, if so, what BART controls should be applied to that source." *Id.* As EPA has explained, "how *[S]tates* make BART determinations or how they determine which sources are subject to BART" is an area "where the Act and legislative history indicate that *Congress evinced a special concern with insuring that States would be the decision makers.*" Regional Haze Regulations, 70

Fed. Reg. at 39,137 (emphasis added).

3. Perhaps given the (as the *ADEC* dissent put it) "unwieldy" nature of the standard of review in cases of this nature, in which a court must ask "whether EPA acted arbitrarily in finding that the State acted arbitrarily," *ADEC,* 540 U.S. at 510, the *Oklahoma* and *North Dakota* courts simply got the standard of review wrong. Both courts affirmed EPA disapprovals of highly technical, discretionary determinations that the CAA explicitly entrusted to the States, because the courts were under the mistaken view that they were required by the arbitrary and capricious standard of review to defer to EPA's expert judgments. *Oklahoma,* 723 F.3d at 1217; *North Dakota,* 730 F.3d at 766. In doing so, however, they failed to conform to *ADEC*'s admonition that, where EPA disapproves discretionary State determinations, EPA bears the burden of proving that the State's determination was arbitrary. *ADEC,* 540 U.S. at 494 ("the underlying question a reviewing court resolves remains the same: "[w]hether the state agency's [] determination was reasonable). Contrary to the courts' view, the State does not bear the burden of proving that EPA was arbitrary. *Id.*

In *Oklahoma,* EPA disapproved the State's BART determinations because EPA chose to believe the technical conclusions of its own experts over those of the State's experts on the question of whether the State, in analyzing the cost-effectiveness of installing pollution control equipment, should have assumed the need to install larger or smaller equipment, whether installing smaller equipment would have

been feasible, and a number of other technical questions. *Oklahoma*, 723 F.3d at 1216-17.[6] In affirming EPA in what it termed a "close case," *id.* at 1217, a divided panel of the court felt that the standard of review required it to credit EPA's experts over the State's experts. As the court said, "[l]eft to evaluate the arguments of the parties' experts, we must give deference to the EPA," citing *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1045 (10th Cir. 2011) ("The deference we give agency action is especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise."). *Oklahoma*, 723 F.3d at 1216-1217. The court also made clear that Oklahoma had the substantial burden of proving that EPA's expert opinions were unreasonable, as opposed to EPA having the burden of proving that the State's expert opinions were unreasonable. *Id.* ("While the petitioners criticize some of the engineering assumptions made by the EPA, they do not explain why the EPA was not justified in relying on OG&E's own consultant's model, or why the EPA's detailed responses in its technical support document were

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[6] The Court's discussion of the technical disagreement between EPA's and Oklahoma's experts on the cost-effectiveness issue is set forth in the portion of the court's opinion that addresses the State's challenge to EPA's federal implementation plan. *Oklahoma*, 723 F.3d at 1215-17. The court stated, however, that its analysis of this same issue was a basis for its affirmance of EPA's disapproval of Oklahoma's BART determination. *Id.* at 1213 ("And, as we discuss below in evaluating the EPA's action in promulgating its FIP, many of OG&E's costing assumptions were unjustified.").

insufficient in addressing its concerns.").[7]

Similarly, in *North Dakota*, EPA disapproved the State's determination that new emission controls were not required at two electric generating facilities to achieve the State's goals for making "reasonable progress" in improving visibility, because it chose to credit its own expert judgments over North Dakota's. *North Dakota*, 730 F.3d at 765. Specifically, EPA's expert view was that North Dakota's visibility model did not accurately simulate visibility improvement resulting from installing controls at the two facilities. *Id.* at 766. EPA believed that North Dakota's model underestimated visibility improvement "'because of the nonlinear nature of visibility impairment,'" which means, according to EPA, that as an area "'becomes more polluted, any individual source's contribution to changes in impairment becomes geometrically less.'" *Id.* North Dakota's experts disagreed. North Dakota Petition for Writ of Certiorari at 14-16. On this dispositive technical question, the court decided it must affirm EPA because "EPA's determination on this matter is entitled to judicial deference, as it involves technical matters within its area of expertise[.]" *North Dakota*, 730 F.3d at 766 (citations

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[7] Judge Kelly, dissenting, correctly formulated the standard of review and hence would have reversed EPA: "Usually the court grants deference to the EPA's technical determinations. (Citation omitted.) The EPA deserves no such deference, however, where it does not support a conclusion contradicting Oklahoma's first, reasonable, detailed technical conclusion. . . . Oklahoma considered the cost and resulting benefit of such a large investment in scrubbers, and its conclusion was not unreasonable." *Oklahoma*, 723 F.3d at 1225-26.

and internal quotation marks omitted). The court quoted *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) to support this view, *id.*, thus implicitly recognizing that the only issue for the court was whether EPA's expert conclusions were reasonable under a highly deferential standard, not whether North Dakota's expert conclusion might also have been reasonable or even more persuasive to the court. *Marsh*, 490 U.S. at 378 ("[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").

The result of these decisions is to significantly expand EPA authority at the expense of State authority in administering the CAA. In any case involving a State's exercise of discretion under the CAA, there may obviously be more than one reasonable way for the State to exercise that discretion. The Court in *ADEC* recognized this fact and indeed cited the possibility of more than one reasonable BACT determination as support for its conclusion that EPA could take action if a State acted unreasonably. According to the Court, "the fact that the relevant statutory guides – maximum pollution reduction, considerations of energy, environmental, and economic impacts – may not yield a single, objectively correct BACT determination ... surely does not signify that there can be no *unreasonable* determinations." *ADEC*, 540 U.S. at 488-89 (emphasis in original, internal citations omitted). The Court noted, however, that EPA "asserts only authority to guard against unreasonable" State BACT determinations. *Id.* at 489.

The *Oklahoma* and *North Dakota* decisions thus would allow EPA to intrude into areas the statute reserves for the States, as within what could be a broad range of reasonable outcomes the one that the State must select is the one EPA—not the State—prefers. If, as these courts found, courts must defer to EPA's judgments over those of the States, EPA's role changes from one where it merely ensures that the State acts reasonably to one in which EPA can enforce its own view of reasonableness on the States. In the same way, the State's role shrinks from one where the States truly exercise discretion—by choosing the option the State prefers —to the much more limited role of simply having to anticipate what choice EPA would make. But that is not the division of State-Federal authority that this Court found in *ADEC*.

## II. The Petition Raises Issues of Great Precedential Importance that Need to Be Resolved Now.

In affirming EPA's disapproval of Alaska's BACT determinations, the Court in *ADEC* took comfort in EPA's representations that "'[i]t has proven to be relatively rare that a state agency has put EPA in the position of having to exercise [its] authority,' noting that only two other reported judicial decisions concern EPA orders occasioned by States' faulty BACT determinations." *ADEC*, 540 U.S. at 491 n.14 (citing EPA's brief). States do not normally act arbitrarily, and so the Court emphasized that only in an "unusual case" could a State be expected to make a BACT determination that was sufficiently arbitrary to necessitate EPA

intervention. *Id.* at 491.

But EPA's assurances to the Court of the limited number of instances in which it would intrude into State decision-making have proved ephemeral, at least in the context of the regional haze program. Even though, as discussed above, EPA must be even more deferential to State regional haze determinations than it must be to State BACT determinations, it has intruded into State regional haze authority on numerous occasions, including in the *Oklahoma* and *North Dakota* cases. In fact, in just the first phase of EPA's long-term regional haze program—where EPA has not required eastern State BART determinations for electric generators given the stringency of EPA's other eastern regulations—it has disapproved State BART determinations or taken similar action in twelve States,[8] leading to lawsuits in many of the cases.[9]

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[8] 77 Fed. Reg. 72,512 (Dec. 5, 2012); 78 Fed. Reg. 46,142, (July 30, 2013) (Arizona); 77 Fed. Reg. 14,604 (Mar. 12, 2012) (Arkansas); 77 Fed. Reg. 39,425 (July 3, 2012) (Louisiana); 77 Fed. Reg. 71,533 (Dec. 3, 2012) (Michigan); 78 Fed. Reg. 8,706 (Feb. 6, 2013) (Minnesota and Michigan); 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. 5,032 (Jan. 30, 2014) (Wyoming).

[9] *Arizona v. EPA*, No. 13-70366 (9th Cir., filed Jan. 31, 2013); *Arizona v. EPA*, No. 13-73383 (9th Cir., filed Sept. 27, 2013); *Michigan v. EPA*, No. 13-2130 (8th Cir., filed May 21, 2013); *Cliffs Natural Resources, Inc. v. EPA*, No. 13-1758 (8th Cir., filed Apr. 4, 2013) (Michigan and Minnesota); *PPL Montana, LLC v. EPA*, No. 12-73757 (9th Cir., filed Nov. 16, 2012); *Martinez et al*

The *Oklahoma* decision was the first federal appellate decision issued on review of EPA's actions on State first-phase regional haze SIPs and BART determinations, and the *North Dakota* decision, which relied on *Oklahoma*, *North Dakota*, 730 F.3d at 761, was the second. Many more are to come. After the *Oklahoma* decision was issued, EPA filed a Rule 28(j) letter in a number of the pending cases in which EPA argued that the decision supported its position.[10] As EPA issues other first-phase decisions, and as EPA issues decisions on review of future-phase regional haze plans across the country, these two decisions will be cited as important authority on the respective roles of EPA and the States in the regional haze program.

As a result, a number of federal appellate cases may soon be decided based on the wrong standard of review. The role of the States as sovereign decisionmakers under the Clean Air Act, subject only to limited EPA oversight, is at stake. These cases also collectively involve the potential expenditure of billions of dollars in what the States believe are unnecessary and wasteful pollution control costs. The States' citizens' economic resources are not unlimited; these significant sums would be better spent elsewhere.

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*v. EPA*, No. 11-9567 (10th Cir., filed Oct. 21, 2011) (New Mexico); *Nebraska v. EPA*, No. 12-3084 (8th Cir., filed Sept. 4, 2012); *North Dakota v. EPA*, 730 F.3d 750 (8th Cir. 2013); *Oklahoma v. EPA* (the instant case); *Utah v. EPA*, No. 13-9535 (10th Cir., filed Mar. 21, 2013).

[10] *See, e.g.*, Citation of Supplemental Authorities, *Arizona v. EPA*, No. 13-70366 (9th Cir. July 24, 2013), ECF No. 29.

The effect of these decisions, however, will not be limited to just the regional haze program but will extend to any of the many CAA programs that Congress implemented through joint Federal-State cooperation, where EPA formulates air quality standards which the States implement through SIPs. *Gen. Motors Corp.*, 496 U.S. at 532. Moreover, as the *ADEC* dissent pointed out, the precedent will reach beyond the CAA and into numerous other federal statutes which create State-Federal partnerships to carry out Congress' intent. *ADEC*, 540 U.S. at 518.

## CONCLUSION

This Court should grant Oklahoma's Petition for Writ of Certiorari to ensure that the division of State and Federal authority that this Court enunciated in *ADEC* is not undermined by lower courts misapplying the standard of review.

Respectfully submitted,

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