IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1320

STATE OF ARKANSAS, et al.,

Petitioners,

EAST TEXAS ELECTRIC COOPERATIVE, et al.,

Intervenors,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 23-1719

STATE OF MISSOURI,

Petitioner,

ASSOCIATED ELECTRIC COOPERATIVE, INC.,

Intervenor,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 23-1751

UNION ELECTRIC COMPANY, DOING BUSINESS AS AMEREN MISSOURI,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 23-1765

SOUTHWESTERN ELECTRIC POWER COMPANY AND ARKANSAS ELECTRIC COOPERATIVE CORPORATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 23-1774

CITY UTILITIES OF SPRINGFIELD, MISSOURI BY AND THROUGH THE BOARD OF PUBLIC UTILITIES,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 23-1776

ALLETE, INC., DOING BUSINESS AS MINNESOTA POWER, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 23-1777

HYBAR, LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

No. 23-1778

ARKANSAS LEAGUE OF GOOD NEIGHBORS,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petitions for Review of Final Agency Action of the
United States Environmental Protection Agency
88 Fed. Reg. 9336

CONSOLIDATED BRIEF OF AMICI CURIAE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, MARYLAND, NEW JERSEY, AND WISCONSIN, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA, THE DISTRICT OF COLUMBIA, AND HARRIS COUNTY, TEXAS IN SUPPORT OF RESPONDENTS

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GLOSSARY

Act	Clean Air Act
EPA	U.S. Environmental Protection Agency
FIP	Federal Implementation Plan
Good Neighbor Rule	Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36,654 (June 5, 2023)
NOx	Nitrogen oxides
ppb	Parts per billion
SIP	State Implementation Plan
Disapproval Rule	Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9,336 (Feb. 13, 2023)
Amici	States of New York, Connecticut, Illinois, Maryland, New Jersey, and Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and Harris County, Texas

INTRODUCTION AND INTERESTS OF AMICI CURIAE

In these cases, the States of Arkansas and Missouri, and various industry petitioners, challenge the U.S. Environmental Protection Agency's final rule disapproving state implementation plans (SIPs) for Arkansas, Missouri, and Minnesota. *See* Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9,336 (Feb. 13, 2023) (Disapproval Rule). In the Disapproval Rule, EPA disapproved these three SIPs—and SIPs submitted by 18 other States—for failing to satisfy the Clean Air Act's Good Neighbor Provision, which requires each State to prohibit in-state emissions that will significantly impede another State's ability to achieve healthy air.

Amici the States of New York, Connecticut, Illinois, Maryland, New Jersey, and Wisconsin, Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and Harris County, Texas are States and local governments that receive ozone-forming pollutants emitted from sources in upwind States, including Arkansas, Missouri, and Minnesota. Amici have a substantial interest in reducing the amount of such interstate ozone pollution that upwind States transmit into

Amici's jurisdictions. Amici have strong interests in protecting their residents from the deleterious health effects of ozone pollution, and in protecting industry in their States from being unfairly burdened by upwind States' sources that operate without even rudimentary pollution controls.

Amici submit this brief to emphasize three points. First, the petitions should be transferred to the D.C. Circuit. The Act requires that challenges to nationally applicable rules be filed in the D.C. Circuit. The SIP Disapproval Rule is nationally applicable on its face, and the national scope of the Rule is further underscored by the more than two dozen challenges to the Rule that have been filed across seven circuits nationwide, in addition to the D.C. Circuit. The Act's venue provision was designed to prevent such overlapping, piecemeal challenges to EPA rules.

Second, contrary to Petitioners' contentions, EPA does not play a ministerial or secondary role in reviewing SIP submissions. Rather, the Act directs EPA to substantively evaluate States' SIP submissions to determine whether they will adequately prohibit interstate pollution. EPA's substantive review is critical to the Good Neighbor Provision's core purpose of protecting downwind States from upwind pollution.

Third, EPA reasonably rejected Arkansas's and Missouri's proposals to apply a less stringent threshold in identifying an upwind State's significant contributions of ozone to a downwind State. As an initial matter, this decision did not prejudice Arkansas and Missouri because their contributions of ozone exceeded even their own proposed threshold. In any event, contrary to Petitioners' assertions, a nonbinding guidance document did not give States blanket permission to use the less stringent numerical threshold. Indeed, EPA clearly stated that upwind States would need to justify their use of such a threshold—something Arkansas and Missouri failed to do here.

BACKGROUND

A. Interstate Ozone Pollution and the Good Neighbor Provision

Ozone pollution poses major health threats. High levels of ozone can trigger asthma, worsen bronchitis and emphysema, and cause early death.[1] EPA, Health Effects of Ozone Pollution (last updated May 24,

[1] *See also* Rachel Rettner, *High Ozone Levels Linked to Cardiac Arrest*, Fox News (updated Oct. 25, 2015); Jim Carlton, *Study Links Deaths in Many Urban Areas to Increases in Ozone*, Wall St. J. (Nov. 17, 2004). For sources available online, full URLs appear in the Table of Authorities.

2023). To protect their residents from ozone, Amici States stringently regulate power plants, industrial facilities, and other in-state sources of ozone-forming pollution. Comment Letter from Att'ys Gen. 8 (June 21, 2022).

Although Amici States tightly regulate such sources within their borders, emissions sources in upwind States generate ozone-forming pollutants (known as "precursors") that travel with the winds into downwind States—sometimes thousands of miles away. *See* 88 Fed. Reg. at 36,658. "Most upwind States propel pollutants to more than one downwind State," and "many downwind States receive pollution from multiple upwind States." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014). The interstate transport of pollutants "is a major determinant of local air quality." S. Rep. No. 101-228, at 264 (1989).

Ozone and ozone precursors transported from upwind States contribute substantially to the elevated ozone levels in downwind States, including in Amici's jurisdictions. For example, ozone transported from upwind States is responsible for as much as 57 percent of the ozone in Fairfield County, Connecticut; 28 percent of the ozone in Cook County, Illinois; and 52 percent of the ozone in Kenosha, Racine, and Sheboygan

Counties, Wisconsin—all areas that struggle to meet federal ozone standards. *See* EPA, *Air Quality Modeling Technical Support Document: 2015 Ozone NAAQS SIP Disapproval Final Action* app. D at D-2 (2023).

To compensate for pollution from upwind States, downwind States must regulate their in-state sources more stringently—at greater cost to these in-state sources. But further tightening already stringent emissions regulations is both more costly and less effective than requiring upwind sources to reduce their own emissions—particularly when many upwind sources have not been required to install low-cost, widely available pollution-control equipment. *Cf. EME Homer City*, 572 U.S. at 519-20 (discussing comparative costs of reduction efforts); Comment Letter from Att'ys Gen. 8, 13-15 (June 21, 2022).

Congress enacted the Good Neighbor Provision to address these interstate pollution problems. 42 U.S.C. §7410(a)(2)(D)(i)(I). Under the Act, EPA must periodically review and set federal standards for the amounts of certain pollutants, including ozone or its precursor pollutants, that can safely be present in the air. *See id.* § 7409(a). When EPA promulgates or revises a federal air quality standard, each State must submit a SIP consisting of air pollution regulations or other

requirements that will achieve and maintain compliance with the federal standard. *See id.* § 7410(a)(1). The Good Neighbor Provision, in turn, requires that each State's SIP contain "adequate provisions" to prohibit emissions within that State in amounts that will contribute significantly to nonattainment, or interfere with maintenance, of federal air quality standards in a downwind State. *See id.* § 7410(a)(2)(D)(i)(I); *see also EME Homer City*, 572 U.S. at 509.

EPA uses a two-step process to review SIP submissions. First, EPA must initially determine within six months whether a SIP submission is "complete"— i.e., contains the "minimum criteria" established by EPA. *See* 42 U.S.C. § 7410(k)(1)(B). If the SIP submission does not contain the minimum criteria, EPA must deem the SIP incomplete and proceed as though the State had not submitted any SIP. *Id.* § 7410(k)(1)(C).

Second, if a SIP submission is deemed complete, *id.* § 7410(k)(2), EPA must review the SIP submission within twelve months and approve the SIP only "if it meets all of the applicable requirements of" the Clean Air Act, including the Good Neighbor Provision, *id.* § 7410(k)(3). If EPA determines that a SIP inadequately prohibits harmful interstate pollution, EPA must disapprove it. *Id.* § 7410(c)(1). Within two years of

such disapproval, EPA *must* issue a federal implementation plan (FIP) to replace the inadequate SIP. *Id.*; *see also EME Homer City*, 572 U.S. at 507-08.

B. The SIP Submissions of Arkansas, Missouri, and Minnesota

In 2015, EPA strengthened the air quality standards for ozone, and set deadlines for States to achieve these standards. National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015). Around this time, EPA's modeling projected that ozone-forming emissions from two dozen upwind States—including Arkansas and Missouri (State Petitioners)—would impair the ability of multiple downwind States to attain or maintain the federal ozone standards by the applicable deadlines. *See* 82 Fed. Reg. 1,733 (Jan. 6, 2017).

But many upwind States, including State Petitioners, failed to propose emissions reductions in their SIPs to address their contributions to ozone pollution in downwind States—as required by the Good Neighbor Provision. Instead, State Petitioners (and other States) submitted SIPs that downplayed the severity of ozone pollution in downwind States or their in-state sources' contributions to such pollution. *See, e.g.*, 87 Fed. Reg. 9,798, 9,803-06 (Feb. 22, 2022)

(describing Arkansas submission); 87 Fed. Reg. 9,533, 9,538-40 (Feb. 22, 2022) (describing Missouri submission).

EPA failed to timely act on these inadequate SIP submissions. None of the Petitioners here sought to compel EPA to act on these SIPs, despite now complaining about EPA's delay. Instead, New York and other downwind States, and several nongovernmental organizations, sued EPA to enforce the Clean Air Act's deadlines. EPA ultimately entered into multiple consent decrees establishing deadlines for EPA to approve or deny certain SIPs. See Resp. Br. for Resp'ts (EPA Br.) 41.

In compliance with the consent-decree deadlines, in February 2022, EPA proposed to disapprove the SIPs of Arkansas, Missouri, Minnesota, and 18 other States, and, in February 2023, finalized those disapprovals. 88 Fed. Reg. at 9,336 . In the Disapproval Rule, EPA explained that many SIP submissions had acknowledged that ozone emissions from that State impaired air quality downwind, yet failed to justify that State's conclusion that its pollution contributions were not significant or that additional emissions controls were inappropriate. *See id.* at 9,343 & n.43.

C. EPA's 2023 Good Neighbor Rule

The Disapproval Rule triggered EPA's mandatory duty to promulgate a FIP for each of the 21 States that had submitted a disapproved SIP, within two years of the disapproval. 42 U.S.C. § 7410(c)(1). In June 2023, EPA published the final the Good Neighbor Rule, which contained FIP requirements for the 21 States with disapproved SIPs, plus two States that had not submitted SIPs. 88 Fed. Reg. 36,654 (June 5, 2023).

The Good Neighbor Rule's FIP requirements operate directly to reduce ozone-forming emissions from sources in the upwind States with disapproved SIPs. As relevant here, the FIP requirements specify that power plants in covered States are required, beginning in 2023, to operate the pollution-control equipment that they have already installed. In some States, power plants may also be required, by 2026, to install additional control equipment that is already commonly used across the power-generation sector.[2] *See id.* at 36,659-61.

[2] Under the Good Neighbor Rule, power plants in Minnesota are not required to install additional equipment by 2026. 88 Fed. Reg. at 36,658.

D. Petitions for Review of the Disapproval Rule

States and other regulated parties filed petitions for review challenging the Disapproval Rule in seven different circuit courts, even though the Clean Air Act expressly specifies that petitions for judicial review of "nationally applicable" regulations must be filed in the D.C. Circuit. *See* 42 U.S.C. §7607(b)(1); *see also* 88 Fed. Reg. at 9,380-81.

In this Court, Arkansas and Missouri filed petitions for review challenging the Disapproval Rule as to their respective SIPs. *See* Case Nos. 23-1320 (Arkansas); 23-1719 (Missouri). Various industry and trade association petitioners also challenged the Disapproval Rule as to particular SIPs.[3] Minnesota did not challenge the Disapproval Rule; only Allete and three other electric utilities challenged that Rule as to Minnesota. *See* Case No. 23-1776.

[3] Industry Petitioners are Union Electric Company (Case No. 23-1751); Southwestern Electric Power Company and Arkansas Electric Cooperative Corporation (Case No. 23-1765); City Utilities of Springfield, Missouri (Case No. 23-1774); Allete, Inc., Northern States Power Co. – Minnesota, Great River Energy, and Southern Minnesota Municipal Power Agency (Case No. 23-1776); and Hybar LLC (Case No. 23-1777). Trade association Arkansas League of Good Neighbors also filed a petition (Case No. 23-1778).

Several Petitioners here moved to stay enforcement of the Disapproval Rule while their petitions for review were pending. EPA opposed these motions and moved to transfer the cases to the D.C. Circuit. In nonprecedential, unsigned orders, administrative panels of this Court stayed enforcement of the Disapproval Rule as to Arkansas, Missouri, and Minnesota, pending adjudication of the petitions for review. *See* Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. May 25, 2023), Doc. #5280996; Order, *Missouri v. EPA*, No. 23-1719 (8th Cir. May 26, 2023), Doc. #5281126; Order, *Allete v. EPA*, No. 23-1776 (8th Cir. July 5, 2023), Doc. #5292580. In unsigned, nonprecedential orders, administrative panels of the Court also denied the motions to transfer without explanation. *See, e.g.*, Order, *Arkansas v. EPA*, No. 23-1320 (8th Cir. Apr. 25, 2023), Doc. #5269098; Order, *Missouri v. EPA*, No. 23-1719 (8th Cir. May 26, 2023), Doc. #5281126; Order, *Allette, Inc. v. EPA*, No. 23-1776 (8th Cir, Jul. 8, 2023).

ARGUMENT

POINT I

THE PETITIONS SHOULD BE TRANSFERRED TO THE D.C. CIRCUIT

Amici agree with EPA that this Court should transfer the petitions to the D.C. Circuit. *See* EPA Br. 92-114. Transfer is required by the plain text of the Act's judicial review provision and is consistent with the overwhelming weight of judicial authority interpreting that provision.

As EPA explains, the D.C. Circuit is the appropriate venue for these challenges because the Disapproval Rule is both "nationally applicable" and "based on a determination of nationwide scope or effect"—either of which is independently sufficient to establish venue in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1); 88 Fed. Reg. at 9,336. *See* EPA Br. 92-114. Here, the national applicability and nationwide scope of the Disapproval Rule are clear not only from the face of the Rule, but also from the breadth of the litigations challenging it. More than 60 petitioners have filed 25 actions in seven circuits (not including the D.C. Circuit) and that challenge the Disapproval Rule as to 13 different States.[4]

[4] *See* Resp't EPA's Mot. to Confirm Venue and to Expedite Consideration 8, *Utah v. EPA*, No. 23-1102 (D.C. Cir. May 15, 2023), Doc. #1999261 (summarizing litigation landscape).

This unprecedented situation is inconsistent with Congress's venue directives in the Act. It is implausible that Congress enacted a venue provision specifically delineating the D.C. Circuit as the sole venue for challenging nationally applicable rules that EPA has promulgated under the Act, while also permitting any challenger to disregard that statutory requirement simply by lodging a petition in another jurisdiction that purports to challenge only a portion of such rule. To the contrary, the Act's judicial review provision is intended precisely to guard against such "[o]verlapping, piecemeal, multicircuit review of a single, nationally applicable EPA rule"—which is "destabilizing to the coherent and consistent interpretation and application of the Clean Air Act." *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 674 (7th Cir. 2017). Here, allowing seven different circuit courts to rule on the Disapproval Rule would "utterly defeat[] the statute's obvious aim of centralizing judicial review of national rules in the D.C. Circuit." *See id.* at 673. Indeed, many cases reflect a judicial consensus that the D.C. Circuit remains the proper venue for petitions challenging an EPA rule promulgated under the Act where the rule consists of "numerous separate EPA actions on state-specific implementation plans." *W. Va. Chamber of Commerce v.*

Browner, 166 F.3d 336 (4th Cir. 1998); *see also ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1200 (10th Cir. 2011); *RMS of Ga., LLC v. EPA*, 64 F.4th 1368, 1374 (11th Cir. 2023); *Texas v. EPA*, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011). The Court should follow this judicial consensus.

For Amici, piecemeal review of the Disapproval Rule across multiple circuits has been destabilizing and prejudicial. Amici like Illinois, Wisconsin, and Harris County, Texas, receive ozone pollution not only from the three States with SIPs challenged here, but also from other States that have challenged the Disapproval Rule in other judicial circuits, including Texas, Mississippi, and Louisiana (Fifth Circuit); Oklahoma (Tenth Circuit); and Alabama (Eleventh Circuit). Other Amici receive pollution from States located within different judicial circuits.[5] Accordingly, Amici have spent substantial resources defending the Disapproval Rule across several circuits, in multiple procedural motions and on the merits.

[5] For example, Connecticut, New Jersey, and New York receive ozone pollution from, among other places, West Virginia (Fourth Circuit); Michigan and Ohio (Sixth Circuit); and Illinois and Indiana (Seventh Circuit)—each of which has challenged (or has industry petitioners located in their jurisdictions that have challenged) the Disapproval Rule or the Good Neighbor Rule.

Amici will also be severely prejudiced by inconsistent judicial decisions that may delay or excuse emissions reductions from certain upwind States, based purely on regional happenstance. Ozone transported from upwind States is collectively responsible for a significant portion of the ozone in Amici's jurisdictions. See *supra*, at 4-5. If some circuit courts uphold the Disapproval Rule while others reach a contrary determination as to the Rule's application to certain upwind States, downwind States like Amici would not receive the full upwind emissions reductions they need, and are entitled to, under the Act, despite having won on the merits as to other States.

Amici also agree with EPA that this Court should decide the issue of venue now, at the merits stage. *See* EPA Br. 89, 91-92. First, considering this issue at the merits stage aligns with at least three other circuits—each of which has reserved consideration of venue for the merits stage of challenges to the Disapproval Rule.[6] This Court should follow

[6] *See* Order, *Alabama v. EPA*, No. 23-11173 (11th Cir. July 12, 2023), ECF 24 (referring venue issue to merits panel); Order, *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. July 3, 2023), ECF 27.1 (same); Order, *Utah v. EPA*, No. 23-9509 (10th Cir. Apr. 27, 2023), Doc. 010110851072 (same).

that approach, particularly since the full scope of Petitioners' challenges is now before the Court. Petitioners' briefing shows their arguments are not unique to Arkansas, Missouri, or Minnesota. For example, Petitioners' central contention that the Clean Air Act prohibits EPA from conducting a substantive review of States' SIP submissions is plainly a question with nationwide implications. Indeed, this issue has also been raised by petitioners in the Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits.[7] There is nothing state-specific about this argument, which attempts to cabin the scope of EPA's statutory authority to review SIPs submitted by any State across the nation. Similarly, Petitioners' contention that EPA improperly applied a 2018 guidance document distributed to all EPA regional offices has legal ramifications extending

[7] *See, e.g.*, Br. of Tex. Indus. Pet'rs 30-34, *Texas v. EPA*, No. 23-60069 (5th Cir. May 30, 2023), ECF 329; Br. of Commonwealth of Ky. 36-37, *Kentucky v. EPA*, No. 23-3216 (6th Cir. Oct. 10, 2023), ECF 48; Prelim. Opening Br. of State of Utah 32-33, *Utah v. EPA*, No. 23-9509 (10th Cir. July 14, 2023), Doc. # 010110888479; Br. of Ala. & Indus. Pet'rs 21-25, *Alabama v. EPA*, No. 23-11173 (11th Cir. Sept. 20, 2023), ECF 35; *see also* Pet'r's Mot. to Stay 13-16, *West Virginia v. EPA*, No. 23-1418 (4th Cir. July 18, 2023), ECF 23-1 (previewing this merits argument); Nevada Cement Co. Mot. to Stay 12-16, *Nevada Cement Co. v. EPA*, No. 23-682 (9th Cir. May 10, 2023), ECF 9.1 (same).

beyond the three SIPs here, and is a contention that has been raised in four other circuits.[8] See EPA Br. 110 & nn.51-53.

The one-sentence order of an administrative panel denying EPA's motion to transfer does not alter the result. *See also* EPA Br. 89, 91-92. A merits panel is not precluded from assessing questions previously decided by an administrative panel without explanation. *See Nyffeler Constr., Inc. v. Sec'y of Lab.*, 760 F.3d 837, 841 (8th Cir. 2014) (law of the case did not preclude a merits panel from revisiting issue disposed of in an administrative panel's unpublished, unexplained order).

POINT II

EPA'S ACTIONS WERE FULLY CONSISTENT WITH COOPERATIVE FEDERALISM

EPA's robust enforcement of the Good Neighbor Provision is critical to its core statutory responsibility to protect downwind States from upwind pollution that they cannot control themselves. EPA properly exercised that responsibility here when it disapproved the SIP

[8] *See, e.g.*, Br. of Appellant La. Dep't of Env't Quality & State of La. 19-20, 49-51, *Texas v. EPA*, No. 23-60069 (5th Cir. May 30, 2023), ECF 332; Br. of Ky., *supra*, at 31-35; Br. of Utah, *supra*, at 30-31; Br. of Ala. & Indus. Pet'rs, *supra*, at 25-36.

submissions of Arkansas, Missouri, and Minnesota, each of which failed to require any emissions reductions. Contrary to Petitioners' assertions, EPA was not required to excuse these States from their statutory good-neighbor obligations.

The Act's cooperative federalism framework relies on EPA to protect downwind States from upwind pollution. Petitioners err in arguing that the Act confines EPA to a "ministerial" or "secondary" role in reviewing States' SIP submissions. *See* Associated Elec. Coop. Br. 24; Allete Br. 40; SwEPCo Br. 25. As the Supreme Court has explained, downwind States are "unable to achieve clean air because of the influx of out-of-state pollution they lack authority to control." *EME Homer City*, 572 U.S. at 495. Accordingly, Congress specified in the Act that each State's SIP must not only prohibit emissions that will prevent that State from achieving the federal air quality standards within its borders, but must also prohibit emissions that will travel across state lines and "contribute significantly" to another State's air quality problems. 42 U.S.C. § 7410(a)(2)(D)(I)(i). Congress gave States "the primary role of determining the appropriate pollution controls within their borders," but also EPA "the authority to review state plans to ensure they meet 'all of

the applicable requirements of [the Act].'" *Nebraska v. EPA*, 812 F.3d 662, 666-67 (8th Cir. 2016) (quoting 42 U.S.C. § 7410(k)(3)) (other quotation marks omitted).

EPA's substantive role is a critical feature of Congress's statutory framework. Absent meaningful federal oversight, upwind States would have little incentive to require in-state sources to reduce emissions for the benefit of downwind States. This is because allowing in-state sources to emit pollution that travels out of the State permits that State to "reap[] the benefits of the economic activity causing the pollution without bearing all the costs," *EME Homer City*, 572 U.S. at 495. *See Maryland v. EPA*, 958 F.3d 1185, 1190 (D.C. Cir. 2020) (per curiam). Congress thus required EPA to play a substantive role in disapproving SIPs that fail to satisfy the Good Neighbor Provision to prevent upwind States from engaging in a deregulatory "race to the bottom" to attract industry away from other States—at the expense of the public health, welfare, and economic interests of other States and their residents. *See Texas v. EPA*, 726 F.3d 180, 193 (D.C. Cir. 2013); *Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 486 (2004); *see also* H.R. Rep. No. 95-294, at 330 (1977); S. Rep. No. 101-228, at 289.

A substantive federal role has been critical to achieving necessary emissions reductions. Congress has repeatedly strengthened the Good Neighbor Provision because prior versions that depended on upwind States to police their own cross-state contributions proved ineffective. See Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2360 (1996); *see also* Karl James Simon, *The Application and Adequacy of the Clean Air Act in Addressing Interstate Ozone Transport*, 5 Envtl. Law. 129, 142-44 (1998). In the earliest version of the Good Neighbor Provision, Congress "relied solely on intergovernmental cooperation on the part of the state governments, with no federal role." Revesz, supra, at 2360. But relying purely on interstate cooperation was "an inadequate answer to the problem of interstate air pollution." *See* H.R. Rep. No. 95-294, at 330. Accordingly, in 1977, Congress strengthened the Good Neighbor Provision by requiring States to submit SIPs that prohibited pollution that will "'prevent attainment or maintenance [of air quality standards] by any other State.'" *EME Homer City*, 572 U.S. at 499 (quoting 42 U.S.C. § 7410(a)(2)(E) (1976 ed., Supp. II)). In 1990, Congress strengthened the Good Neighbor Provision, requiring upwind States to limit in-state

sources' emissions that "contribute significantly to" ozone problems in downwind States. *Id.* (quoting 42 U.S.C. § 7410(a)(2)(D)(i) (2006)).

Consistent with these principles, this Court and others have already rejected Petitioners' argument about EPA's role under the Good Neighbor Provision. As this Court and others have explained, EPA is not limited to "the ministerial task of routinely approving SIP submissions." *North Dakota v. EPA*, 730 F.3d 750, 761 (8th Cir. 2013); *accord Nebraska*, 812 F.3d at 667 ("EPA's role in reviewing state . . . determinations is more than ministerial." (quotation marks omitted)). Nor is EPA's role limited "to ensuring that at least minimal consideration is given to" the Act's statutory requirements. *North Dakota*, 730 F.3d at 760. Instead, EPA's role includes reviewing SIPs for substantive compliance. *See id.* at 760-61; *accord Nebraska*, 812 F.3d at 668; *see also Arizona ex rel. Darwin*, 815 F.3d at 532 (rejecting argument that "EPA lacks authority substantively to review the SIP for consistency with the Act"). Accepting Petitioners' argument "would reduce EPA's approval of [state] implementation plan[s] to a rubber stamp"—a result that "Congress did not intend." *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1293-94 (9th Cir. 1977).

The text of the Act illustrates the problems with Petitioners' approach. As explained *supra* (at 6-7), the Act requires EPA to use a two-step process to review States' SIP submissions under which EPA (i) initially determines whether a SIP submission is "complete," i.e., whether it contains the required materials and documentation; and then (ii) reviews the complete submission to determine "if it meets all of the applicable requirements of" the Act, including the Good Neighbor Provision, *id.* § 7410(k)(3). If, as petitioners argue here, EPA may examine a SIP only to determine if the State has offered a superficially plausible analysis, the textual and practical distinctions between "completeness" review, 42 U.S.C. § 7410(k)(1)(B), and review of whether a SIP "meets all of the applicable requirements" of the Act, *id.* § 7410(k)(3), collapse. The Court should not interpret the Act to render portions of the statute superfluous. *See Gettler v. Lyng*, 857 F.2d 1195, 1199 (8th Cir. 1988).

POINT III

EPA Reasonably Rejected Arkansas' and Missouri's Unsupported Proposals to Use a Higher Screening Threshold

The Good Neighbor Provision requires an upwind State to control in-state emissions that "contribute *significantly*" to a downwind State's inability to achieve or maintain the federal air quality standards. 42 U.S.C. § 7410(a)(2)(D)(I)(i) (emphasis added). EPA has long interpreted the word "significantly" to include contributions at or above one percent of the relevant federal air quality standards.[9] Here, the one-percent screening threshold was equal to 0.70 parts per billion (ppb) of ozone. Yet in their SIP submissions, Arkansas and Missouri each proposed to discard the 0.70 ppb screening threshold for a less demanding 1 ppb threshold. EPA rejected the 1 ppb screening threshold, and Petitioners now argue that EPA acted arbitrarily in doing so. Petitioners' arguments fail for multiple reasons.

[9] *See, e.g.*, 76 Fed. Reg. 48,208, 28,238 (Aug. 8, 2011); 81 Fed. Reg. 74,504, 74,518 (Oct. 26, 2016); 86 Fed. Reg. 23,054, 23,057 (Apr. 30, 2021); 88 Fed. Reg. 36,654, 36,658 (June 5, 2023).

A. Arkansas and Missouri Significantly Contribute to Downwind Pollution Under Their Own Proposed Higher Screening Threshold.

First, Petitioners' arguments about the proposed 1 ppb screening threshold are a red herring because the pollution contributions of both Arkansas and Missouri to downwind States were "significant" regardless. Arkansas and Missouri each contributed more than 1 ppb of ozone to at least one receptor in a downwind State under any version of the modeling data, including the version that these States chose to use in their own SIP submissions.[10] *See* Ark. Br. 10 (acknowledging contribution of 1.64

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[10] The version of the EPA modeling data that Arkansas and Missouri used for their SIP submissions predicted Arkansas would contribute 1.64 ppb to Allegan County, Michigan, *see* 87 Fed. Reg. at 9,804, and Missouri would contribute 2.61 ppb to Allegan County, Michigan and 1.37 ppb to Sheboygan County, Wisconsin, *see* 87 Fed. Reg. at 9,543.

Likewise, in the version of the EPA modeling data that was made available for public comment before States' proposed SIP disapprovals, Arkansas was projected to contribute 1.39 ppb to Brazoria County, Texas, and 1.38 ppb and 1.34 ppb to two receptors in Harris County, Texas. *See* 87 Fed. Reg. at 9,808. Missouri was projected to contribute 1.66 ppb and 1.08 ppb to two receptors in Kenosha County, Wisconsin. *See* 87 Fed. Reg. at 9,544.

And in the version of EPA's modeling data that was used in the SIP Disapproval Rule, Arkansas was projected to contribute 1.21 ppb of ozone to Brazoria County, Texas. Missouri was projected to contribute 1.87 ppb

(Continued on next page)

ppb to Allegan County, Michigan, and conceding that application of the 0.70 ppb threshold would have been "gratuitous" for its SIP submission at that time); Mo. Br. 12-13 (acknowledging contributions greater than 1 ppb). Consequently, even if EPA erred in rejecting the proposed 1 ppb threshold (which it did not, see *infra* at 26-30), any such error would have been harmless, as EPA explained at the time. *See* 87 Fed. Reg. at 9,806; 87 Fed. Reg. at 9,542.

Nor did EPA's rejection of the higher threshold otherwise prejudice Arkansas or Missouri. Arkansas's and Missouri's SIP submissions each disclaimed any responsibility for ozone problems downwind. As a result, neither State calculated the amount of emissions that it would be required to reduce, nor adopted any pollution-control measures to achieve any such reductions. No Petitioner suggests that Arkansas and Missouri would have acted differently had they applied the 0.70 ppb contribution threshold. In fact, several Petitioners suggest that Arkansas would not have proposed pollution-control measures no matter which

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of ozone to Sheboygan County, Wisconsin and 1.39 ppb of ozone to Cook County, Illinois. *See* SIP Disapprovals TSD, at C-2.

screening threshold was applied. *See* Ark. League Br. 11-12; SwEPCo Br. 8-9.

B. EPA Reasonably Rejected a Higher Screening Threshold.

EPA reasonably determined that Arkansas and Missouri each failed to support their reliance on the 1 ppb threshold. Arkansas and Missouri err in relying on an August 2018 EPA memorandum (the "Threshold Memo"), which evaluated potential alternative screening thresholds of 1 ppb and 2 ppb.[11] *See* 87 Fed. Reg. at 9,804 (Arkansas); 87 Fed. Reg. at 9,539 (Missouri). Petitioners claim that the Threshold Memo required EPA to accept a State's use of the less demanding 1 ppb threshold, even where the State failed to provide sufficient analysis to support such an approach for that State. *See, e.g.*, Ark. Br. 29-30; East Ex. Elec. Coop. Br. 25-26. Petitioners are plainly incorrect.

All parties appear to agree that the Threshold Memo was not binding. *See, e.g.*, Ark. Br. 31. The Threshold Memo stated that it did "not substitute for provisions or regulations of the Clean Air Act" and did "not

[11] Memorandum from Peter Tsirigotis, Director, EPA Office of Air Quality Planning and Standards to Regional Air Division Directors, Regions 1-10 (Aug. 31, 2018).

impose binding, enforceable requirements on any party." Threshold Memo at 1. In this respect, the Threshold Memo was consistent with other nonbinding guidance documents that EPA had previously issued to States ahead of SIP submission deadlines. *See, e.g.*, *Mississippi Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 161 (D.C. Cir. 2015); *accord Catawba Cnty. v. EPA*, 571 F.3d 20, 22-34 (D.C. Cir. 2009). Because the Threshold Memo was nonbinding, it did not (and could not) require EPA to accept any State's use of a 1 ppb threshold in its SIP submission.

Petitioners incorrectly assert that the Threshold Memo, although nonbinding, somehow guaranteed SIP approval if a State applied its recommendations. *See* Ark. Br. 29; Mo. Br. 9. The Threshold Memo itself refutes this assertion, specifically warning that "[f]ollowing these recommendations does not ensure that EPA will approve a SIP revision in all instances where the recommendations are followed." Threshold Memo at 1.

Petitioners also incorrectly contend that the Threshold Memo gave States blanket authorization to adopt a 1 ppb screening threshold without providing any further analysis. *See* Ark. Br. 29-30; SwEPCo Br. 22-23; *see also* East Ex. Elec. Coop. Br. 25-26. As the memo cautioned,

"the guidance may not apply to the facts and circumstances underlying a particular SIP." Threshold Memo at 1. This was not mere boilerplate. Instead, EPA explained that applying the 1 ppb threshold might be appropriate only if the 1 ppb threshold captured approximately the same amount of ozone contribution from upwind States as the 0.70 ppb threshold. *Id.* 2, 4. And while the Threshold Memo observed that applying the two thresholds did not produce a meaningful difference when applied on a *nationwide scale*, *id.* at 4, the Threshold Memo itself showed that applying the two thresholds could produce a meaningful difference at an *individual downwind receptor*, *id.* at 6-7.

For example, at one receptor in Milwaukee, Wisconsin, the Threshold Memo showed that applying the 0.70 ppb screening threshold would capture 87 percent of the total interstate ozone affecting that receptor, whereas applying the 1 ppb threshold would capture just 73 percent of the total interstate ozone affecting that receptor. Threshold Memo at 7. This is a 14 percentage-point difference. *Id.* And for one receptor in Harris County, Texas, a 1 ppb threshold would capture only

half the amount of interstate ozone as a 0.70 ppb threshold.[12] *Id.* As the Threshold Memo itself noted, using a screening threshold that "captures only half of the net contribution" as the traditional screening threshold would not be appropriate. *See id.* at 4.

In sum, EPA's analysis in the Threshold Memo showed that applying the 1 ppb threshold could produce significantly different results at different downwind receptors. Accordingly, EPA required States to justify their reliance on the 1 ppb memo based on their individual circumstances, including the particular downwind receptors to which they contributed.

Arkansas and Missouri failed to do so. Arkansas "bas[ed] its entire SIP submission on the premise that *it didn't have to* justify 1 ppb." Ark Br. 30. And contrary to its contentions (Mo. Br. 43), Missouri's analysis of the 1ppb threshold was deficient for multiple reasons. *See* 87 Fed. Reg. at 9,539-42. Missouri failed to address whether the 1 ppb threshold would capture an amount of upwind ozone pollution comparable to the 0.70 ppb threshold at two receptors (including one in Harris County, Texas) to

[12] This drastic difference was due to Arkansas contributing 0.99 ppb of ozone to that receptor. *See* 87 Fed. Reg. at 9,804.

which it was linked. *Id.* at 9,541. And, as EPA explained, Missouri's argument that other sources of ozone (such as in-state sources) "caused" those receptors' problems was legally irrelevant because the Good Neighbor Provision requires reductions from upwind States regardless of other contributing factors. *See id.* EPA thus reasonably rejected Arkansas's and Missouri's proposals to use the 1 ppb threshold.

C. A Higher, Static Screening Threshold Would Have Prejudiced Downwind States.

Finally, EPA correctly determined, after reviewing States' SIP submissions and receiving public comments, that there is no sound basis for applying a static 1 ppb threshold rather than a dynamic screening threshold of one percent of the applicable ozone standards. A screening threshold of one percent of the applicable ozone standards adjusts with changes to the federal air quality standards that States must meet. For example, if the ozone standard changes from 85 ppb to 80 ppb, the screening threshold will change from 0.85 ppb to 0.80 ppb. By contrast, a static threshold of 1 ppb, as Arkansas and Missouri proposed, would remain the same regardless of whether the ozone standard was set at 100 ppb, 85 ppb, or any other amount. Here, EPA reasonably rejected the proposed static threshold.

First, using the dynamic, one-percent threshold to screen for significant interstate contribution best effectuates the text and structure of the Act. The Act requires EPA to reevaluate the federal air quality standards periodically in light of the latest science and, if appropriate, to strengthen such standards in order to protect human health and the environment. See *supra* at 5. After EPA strengthens such standards, the Good Neighbor Provision requires each State to revise its SIP not only to ensure that the State will meet the strengthened standards within its own borders, but also to ensure that the State will prohibit cross-border emissions that "contribute significantly" to another State's nonattainment of the strengthened standards. See *supra* at 6.

In other words, the statute designates downwind States' achievement of the federal air quality standards as the touchstone of an upwind State's good-neighbor obligations. A screening threshold that adjusts dynamically with such alterations to the federal air quality standards best effectuates the Act's good-neighbor mandate by requiring upwind States to reexamine whether their own pollution contributions will significantly interfere with any downwind State's attainment under the strengthened standards. By contrast, a static screening threshold

improperly decouples upwind States' good-neighbor obligations from the stronger air quality standards that downwind States must meet.

Prior ozone standards illustrate the irrationality of using a static threshold. In 2008, EPA set the federal air quality standards for ozone at 75 ppb. *See* 73 Fed. Reg. 16,436 (Mar. 27, 2008). Application of the dynamic, one-percent approach resulted in an 0.75 ppb screening threshold (as one percent of the 75-ppb ozone standard equals 0.75 ppb). *See* 76 Fed. Reg. at 48,236-37. In 2015, EPA strengthened the relevant federal ozone standards to 70 ppb. 80 Fed. Reg. 65,292. Application of the dynamic, one-percent approach resulted in a 0.70 ppb threshold (as one percent of the new 70-ppb ozone standard equals 0.70 ppb). 88 Fed. Reg. at 9,342. EPA's approach thus appropriately strengthened the screening threshold to reflect the strengthened ozone standards.

Had EPA instead accepted a static 1 ppb threshold, upwind contributions deemed significant under the less protective 2008 ozone standard would bizarrely have been deemed not significant under the more protective 2015 ozone standard. To illustrate, under the 2008 ozone standards, Arkansas's contributions of 0.95 ppb to Denton County, Texas, and 0.97 ppb to Tarrant County, Texas, were both screened as potentially

significant because these contributions exceeded 0.75 ppb.[13] But had EPA adopted Arkansas's proposed approach under the 2015 ozone standards here, Arkansas's increased pollution contribution of 0.99 ppb to Harris County, Texas would have been screened as *not* significant—despite the fact that 0.99 ppb is greater than 0.97 ppb—because this contribution would not have exceeded a static 1 ppb screening threshold. *See* 87 Fed. Reg. at 9,804. In other words, the static threshold would have allowed Arkansas to pollute *more* under the more protective 2015 ozone standards than under the less protective 2008 ozone standards. EPA correctly determined that such an approach was incompatible with the Act.

Second, it would be inequitable for upwind States such as Arkansas and Missouri to apply a static screening threshold, such as 1 ppb, while downwind States and municipalities like Amici must achieve increasingly stringent federal air quality standards. Such an imbalance would require downwind States to reduce their emissions even more, at even greater cost to their in-state sources, to compensate for upwind

[13] *See* Memorandum from Stephen D. Page 10 (Jan. 22, 2015).

States contributing more ozone—contrary to the Good Neighbor Provision. *See EME Homer City*, 572 U.S. at 519-20. And such an imbalance would exacerbate the disparities in costs between upwind States and downwind States, allowing upwind States to "reap[] the benefits of the economic activity causing the pollution without bearing all the costs." *Id.* at 495; *accord Maryland*, 958 F.3d at 1190. EPA correctly determined that a static 1 ppb screening threshold was inappropriate here.

CONCLUSION

The petitions should be transferred to the D.C. Circuit. In the alternative, the petitions should be denied.

Dated: November 16, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Claiborne E. Walthall, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,492 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

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Dated: November 16, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2023, the foregoing brief for amici curiae was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: Albany, NY
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