No. 23-1418

United States Court of Appeals for the Second Circuit

WEST VIRGINIA,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review of a Final Agency Action of the United States Environmental Protection Agency

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

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Dated: May 6, 2024

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1418 Caption: State of West Virginia v. U.S. Environmental Protection Agency, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

New York; Connecticut; Illinois; Maryland; Massachusetts; New Jersey; Pennsylvania; Wisconsin;
(name of party/amicus)

the District of Columbia; Harris County, Texas; and the City of New York

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: Elizabeth Brody Date: 5/6/2024

Counsel for: New York

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INTRODUCTION AND INTERESTS OF AMICI

In this case, West Virginia challenges the U.S. Environmental Protection Agency's final rule disapproving its state implementation plan (SIP) for meeting the EPA's air quality standard for ozone under the Clean Air Act. *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, 9,360 (Feb. 13, 2023) (Disapproval Rule). In the Disapproval Rule, EPA disapproved West Virginia's SIP—and SIPs submitted by twenty other States—for failing to comply with the Clean Air Act's Good Neighbor Provision with respect to ozone. The Good Neighbor Provision requires each State to prohibit in-state sources' emissions that will significantly impede other States' abilities to satisfy the EPA's standards for various pollutants. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I).

Amici the States of New York, Connecticut, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin; the District of Columbia; Harris County, Texas; and the City of New York are States and local governments that receive ozone-forming pollutants emitted from sources in upwind States, including West Virginia. 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 forced to bear the costs of pollution from sources in upwind states, where the sources may operate without basic pollution controls.

Amici submit this brief to emphasize three points. First, as West Virginia's merits brief itself makes clear, the Disapproval Rule is based on a determination of nationwide scope or effect, and the petition should therefore be transferred to the D.C. Circuit, as required by the Clean Air Act. Although a motions panel of this Court previously denied EPA's motion to transfer, that decision is not binding on the merits panel and was based on West Virginia's inaccurate representation that the Rule rested exclusively on state-specific determinations.

Second, the Clean Air Act assigns to EPA a critical role in reviewing SIP submissions, and not a minor or "secondary" role as described by West Virginia. In particular, the Act directs EPA to substantively evaluate States' SIP submissions to determine whether they will adequately prohibit interstate pollution, and indeed to issue a federal plan should they fail to do so. EPA's substantive review is critical to the Good Neighbor Provision's core purpose of protecting downwind States from upwind pollution.

Finally, there is no merit to West Virginia's arguments regarding EPA's use of updated modeling data. Initially, this argument provides no basis to grant West Virginia's petition because West Virginia's own SIP concluded that the State was significantly contributing to ozone problems in downwind States, while failing to propose corresponding pollution controls as required by the Clean Air Act. Subsequent modeling data merely confirmed this result. In any event, EPA reasonably consulted updated data in proposing to disapprove, and eventually disapproving, West Virginia's SIP submission when that data was pertinent to evaluating the submission's sufficiency.

BACKGROUND

A. Interstate Ozone Pollution and the Good Neighbor Provision

Ozone pollution poses major health threats.[1] High levels of ozone can trigger asthma, worsen bronchitis and emphysema, and cause early death.[2] For that reason, EPA periodically sets an air quality standard for ozone. To meet EPA's standards and protect their residents from ozone, Amici stringently regulate emissions of ozone-forming pollutants (known as "ozone precursors") from power plants, industrial facilities, and other sources of air pollution in their jurisdictions.[3]

Although Amici tightly regulate emissions within their jurisdictions, sources of air pollution in dozens of upwind States generate emissions that travel with the wind—sometimes thousands of miles—into Amici's jurisdictions. *See* 88 Fed. Reg. 36,654, 36,670 (June 5, 2023). Because "many downwind States receive pollution from multiple upwind States,"

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[1] Am. Lung Ass'n, *Health Impact of Air Pollution* (n.d.) (under "Health Effects of Ozone Pollution," click "What Can Ozone Pollution Do to Your Health?"). For sources available online, full URLs appear in the Table of Authorities. All websites were last visited May 6, 2024.

[2] EPA, *Health Effects of Ozone Pollution* (updated Apr. 9, 2024).

[3] *See* Comment Letter from Att'ys Gen. 8 (June 21, 2022).

EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 496 (2014), interstate pollution "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 elevated ozone levels in downwind States, including Amici's jurisdictions.[4] Pollution from West Virginia in particular impacts many Amici. For example, the monitoring location most severely affected by West Virginia's ozone precursor emissions is in New Haven County, Connecticut, which receives as much as 1.49 parts per billion (ppb) of ozone pollution from West Virginia. *See* 88 Fed. Reg. at 9,360. New Haven County, which has received an "F" rating for ozone pollution from the American Lung Association, is home to approximately 140,000

[4] For example, ozone transported from upwind States is responsible for as much as 57 percent of the total ozone in Fairfield County, Connecticut; 28 percent of the total ozone in Cook County, Illinois; and 52 percent of the total 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).

children and adults who suffer from asthma and other respiratory diseases that make them especially vulnerable to ozone pollution.[5]

New York is also severely affected by ozone precursor emissions from West Virginia. West Virginia contributes 1.18 ppb of ozone to Suffolk County, New York—which also has an "F" rating for ozone pollution and is home to over 220,000 children and adults who suffer from asthma and other respiratory diseases.[6] West Virginia also contributes at least 0.70 ppb of ozone—the longstanding federal screening threshold of one percent of the federal air quality standards—to every single ozone monitor in Maryland, New Jersey, Pennsylvania, and the District of Columbia.[7] And Massachusetts has measured unhealthy spikes in ozone levels, partly due to ozone precursors from West Virginia.[8]

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[5] *See* Am. Lung Ass'n, *State of the Air 2024: Connecticut: New Haven* (2024).

[6] *See* EPA, *Air Quality Modeling Technical Support Document: 2015 Ozone NAAQS SIP Disapproval Final Action* app. C at C-5 (2023); Am. Lung Ass'n, *State of the Air 2024: New York: Suffolk* (2024).

[7] *See* EPA, Final GNP O3 DVs_Contributions (2023) ("2023gf Ozone Contributions" tab); *see also* 88 Fed. Reg. at 9,371 (discussing longstanding federal screening threshold).

[8] *See, e.g.*, EPA, *Massachusetts* (n.d.) (registering exceedances of the ozone standards at eight different monitors in 2021); EPA, Final GNP O3 DVs_Contributions, *supra* ("2023gf Ozone Contributions" tab).

To compensate for such upwind pollution, downwind States must further tighten their already stringent emissions-control regulations.[9] As the U.S. Supreme Court has recognized, squeezing further emissions reductions from sources in downwind States is more costly and less effective than regulating upwind sources—particularly because many upwind sources have not installed low-cost, widely available pollution-control equipment that has already been installed in downwind States. *Cf. EME Homer City*, 572 U.S. at 519-20 (discussing comparative costs of reduction efforts).

Congress enacted the Good Neighbor Provision of the Clean Air Act to limit interstate pollution and to address these disparities. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I). The Clean Air Act requires EPA to 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. *Id.* § 7409(a). When EPA establishes or revises a federal air quality standard, each State must submit a SIP consisting of air pollution regulations or other permanent, enforceable measures that will ensure the State achieves

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[9] *See also* Comment Letter from Att'ys Gen., *supra*, at 8.

and maintains compliance with the federal standard. *Id.* § 7410(a)(1). Congress enacted the Good Neighbor Provision, *id.* § 7410(a)(2)(D)(i)(I), to require that each State, in addition to ensuring its own compliance, prohibit emissions that impede compliance by other States, *see EME Homer City*, 572 U.S. at 509.

EPA may approve a SIP submission only "if it meets all of the applicable requirements of" the Clean Air Act, including the Good Neighbor Provision. 42 U.S.C. § 7410(k)(3). If EPA determines that a SIP will not adequately control interstate pollution, in violation of the Good Neighbor Provision, 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.*

B. West Virginia's SIP Submission

In 2015, EPA strengthened the federal air quality standards for ozone. *See* 80 Fed. Reg. 65,292 (Oct. 26, 2015). Around this time, modeling from both EPA and other organizations projected that ozone precursors from two dozen upwind States—including West Virginia—would significantly impair the ability of multiple downwind States to achieve or maintain these more protective ozone standards. See *infra* at 9-10.

To prepare its SIP, West Virginia consulted four different models.[10] As West Virginia observed in its SIP submission, the results of those models were largely similar. *See* Br. for Pet'r (Br.) at 9. For instance, in three of the models, emissions from West Virginia were linked to ozone problems in Connecticut, Maryland, and New York—meaning West Virginia sources were modeled to contribute more than 0.70 ppb of ozone to a downwind location (called a "receptor") in those States. And in the fourth model (the Alpine model), emissions from West Virginia were linked to ozone problems in Maryland, New Jersey, New York, and Pennsylvania. For reference, a chart summarizing the four modeling results is below:

[10] *See* W. Va. Dep't of Env't Prot. (WVDEP), *Final Supplement to the State Implementation Plan Revision for Clean Air Act § 110*, at 5-12 (Feb. 2019) ("SIP").

	Modeling (All figures in parts per billion)			
Receptor	**EPA (Dec. 2016)[11]**	**EPA (Mar. 2018)[12]**	**Alpine (June 2018)[13]**	**LADCO (Aug. 2018)[14]**
Fairfield County, Connecticut (90013007)	0.92	1.1		1.06
Fairfield County, Connecticut (90019003)	0.83	1.14		1.10
New Haven County, Connecticut (90099002)	0.90			
Harford County, Maryland (240251001)	2.59	2.78	2.52	2.72
Gloucester County, New Jersey (340150002)			1.63	
Queens County, New York (360810124)		1.01		0.98
Richmond County, New York (360850067)	1.33	1.54	0.71	1.61
Suffolk County, New York (361030002)	0.86	0.81		0.78
Philadelphia County, Pennsylvania (421010024)			1.21	

[11] SIP, app. A, 2015 Ozone NAAQS Transport Assessment Modeling at A-83 (Dec. 2016) (app. B. at B-3).

[12] SIP, app. C, Updated 2023 Transport Modeling at C-18 (Mar. 2018) (attach. C at C-3).

[13] SIP, app. E, "Good Neighbor" Modeling by Alpine at E-38 (June 2018).

[14] SIP, app. F, LADCO Transport Modeling at F-60-61 (Aug. 2018).

West Virginia elected to use the modeling from Alpine (shaded in gray above), which West Virginia called "the most appropriate, robust modeling available," and concluded that the State was linked to four downwind receptors.[15]

Despite acknowledging the State's linkages to downwind ozone problems, West Virginia's SIP proposed no action in response. Instead, West Virginia argued that its good-neighbor obligations were already satisfied by existing permitting requirements for new and modified facilities, as well as the completed and anticipated shutdowns of thirteen power plants and other facilities in the State since 2011.[16] West Virginia also contended that an existing federal rule designed to achieve the prior, less stringent federal ozone standards satisfied its obligations under the new, more stringent federal ozone standards.[17]

Between February and May 2022, EPA proposed to disapprove West Virginia's SIP, *see* 87 Fed. Reg. 9,516 (Feb. 22, 2022), along with the SIPs

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[15] SIP, *supra*, at 13, 22-23.

[16] *Id.* at 25, 27, 32; SIP, app. G: 2011en & 2023en Emission Inventory Data New Sources and Shutdowns Since 2011 at G-3 (Feb. 2019).

[17] SIP, *supra*, at 25, 30-32.

of twenty other States. In February 2023, EPA finalized its disapproval of these twenty-one SIPs. *See* 88 Fed. Reg. at 9,336. In the Disapproval Rule, EPA explained that West Virginia had not adequately assessed whether cost-effective emissions control opportunities were available and had not supported its conclusion that no further action was required. *See id.* at 9,360.

C. EPA's 2023 Good Neighbor Rule

The Disapproval Rule triggered EPA's mandatory duty to promulgate a FIP for each State that had submitted a disapproved SIP. *See* 42 U.S.C. § 7410(c)(1). In June 2023, EPA published the Good Neighbor Rule, which contains FIP requirements for each of the twenty-one States with disapproved SIPs, and for two other States that had not submitted complete SIPs. 88 Fed. Reg. at 36,656. Among other things, the Good Neighbor Rule requires power plants in these twenty-three States to consistently operate pollution-control equipment that they have already installed and, by 2026, to install additional equipment that is already commonly used across the power-generation sector. *See id.* at 36,659-61.

D. Petitions for Review of the Disapproval Rule

Several upwind States and other regulated parties filed petitions for review challenging the Disapproval Rule in seven circuit courts, despite the Clean Air Act's requirement that petitions for judicial review of "nationally applicable" regulations or regulations based on a "determination of nationwide scope or effect" must be filed in the D.C. Circuit. 42 U.S.C. § 7607(b)(1).

In this Court, the State of West Virginia filed a petition for review challenging the Disapproval Rule as to West Virginia. West Virginia moved to partially stay the Disapproval Rule while this proceeding was pending. EPA opposed these motions and moved to transfer the petition to the D.C. Circuit.

On January 10, 2024, a motions panel of this Court denied EPA's motion to transfer and stayed enforcement of the Disapproval Rule as to West Virginia, pending adjudication of the petition for review. *West Virginia v. EPA*, 90 F.4th 323 (4th Cir. 2024). Judge Thacker dissented. *Id.* at 332-35.

ARGUMENT

POINT I

THE PETITION SHOULD BE TRANSFERRED TO THE DISTRICT OF COLUMBIA CIRCUIT

This Court has acknowledged that it has discretion "to reconsider a ruling on the same issue presented in the same action," including the "prior ruling of a motion panel," if "a showing is made which compels [the Court] to reconsider [its] prior decisions." *Owens v. Stirling*, 967 F.3d 396, 425 (4th Cir. 2020) (quotation marks omitted). Here, the Court should reconsider the motions panel's ruling because, as West Virginia's merits brief now confirms, venue in this Court is improper.

The Clean Air Act mandates that petitions for review of regulations that are based on a "determination of nationwide scope or effect" must be filed in the D.C. Circuit. 42 U.S.C. § 7607(b)(1). In opposing EPA's motion to transfer venue, West Virginia argued that EPA's denial of its SIP "hinged on West-Virginia-specific factors" and "rested on its disagreement with State-specific facts and analyses." Pet'r's Opp'n to Resp'ts' Mot. to Transfer at 14, 19 (May 16, 2023), ECF No. 15. In determining to retain venue, the motions panel credited West Virginia's arguments, reasoning that EPA had "assessed the local and regional circumstances

of each of the 21 States and *based on those circumstances*, it rejected each SIP." *West Virginia*, 90 F.4th at 330. But the panel acknowledged that transfer would be appropriate if the Disapproval Rule turned on the application of a national uniform framework, as EPA argued. As the panel observed, "if the reason for rejecting all state SIPs was based on circumstances *common to all States*, the EPA's argument would make sense." *Id.*

As West Virginia's merits brief now confirms, the Disapproval Rule turns on circumstances common to all States because EPA applied at least one uniform determination to confirm that all States in the Disapproval Rule were significantly contributing to downwind pollution. Indeed, in an apparent about-face, West Virginia now urges this Court to grant its petition principally *because* EPA imposed a presumption of "national uniformity" to disapprove its SIP. *See* Br. at 28-43. And West Virginia's merits brief now makes clear that its challenges turn entirely on determinations in the Disapproval Rule that are *not* unique to West Virginia, and that mirror challenges raised against the Rule in other circuits across the country, specifically, (i) whether EPA has authority to substantively review SIP submissions and (ii) whether EPA may consult

updated modeling that postdates a SIP submission. See *infra* at 17-25, 31-35.

Transfer thus accords with the plain text of the Clean Air Act, which requires the D.C. Circuit to hear challenges to rules that are based on a "determination of nationwide scope or effect." *See* 42 U.S.C. § 7607(b)(1). Moreover, as Judge Thacker explained in dissent from the motions panel's order, transferring a rule concerning twenty-one States to the D.C. Circuit is consistent with the overwhelming weight of judicial authority interpreting the Act's venue provision. *See West Virginia*, 90 F.4th at 333 (collecting cases). Indeed, relying in part on Judge Thacker's straightforward reading of the venue provision, the Tenth Circuit recently issued a unanimous decision transferring several other petitions for review of the Disapproval Rule to the D.C. Circuit. *See Oklahoma v. EPA*, 93 F.4th 1262, 1267 (10th Cir. 2024), *petitions for cert. filed,* Nos. 23-1067, 23-1068 (U.S. Mar. 28, 2024).

Piecemeal review of the Disapproval Rule across multiple circuits has proven especially destabilizing for Amici, who receive ozone pollution not only from West Virginia but also from other States and sources currently challenging the Disapproval Rule across multiple circuits,

including Texas, Mississippi, Louisiana (Fifth Circuit); Kentucky (Sixth Circuit); Arkansas, Missouri, Minnesota (Eighth Circuit); Oklahoma (D.C. Circuit, formerly Tenth Circuit); and Alabama (Eleventh Circuit). The strong likelihood of inconsistent rulings from these courts threatens to create a patchwork of upwind state requirements and further burden downwind States such as Amici. Allowing these simultaneous challenges to continue would defeat the Act's "obvious aim of centralizing judicial review of national rules" in the D.C. Circuit. *Southern Ill. Power Coop. v. EPA*, 863 F.3d 666, 673 (7th Cir. 2017).

POINT II

EPA'S ACTIONS WERE FULLY CONSISTENT WITH COOPERATIVE FEDERALISM PRINCIPLES

A. The Clean Air Act Requires EPA to Substantively Review SIPs for Compliance.

West Virginia fundamentally errs in arguing that the Clean Air Act confines EPA to a "limited" role in reviewing States' SIP submissions. *See* Br. at 28. While States have authority to select the pollution-control measures and strategies that they will use to fulfill their responsibilities under the Act, including their good-neighbor responsibilities, States possess no authority to ignore such responsibilities altogether, as West

Virginia's SIP submission proposed to do here. Nor does cooperative federalism require EPA to defer to obvious deficiencies in a State's SIP submission.

The Good Neighbor Provision vests EPA with authority to ensure that downwind States are protected from an "influx of out-of-state pollution they lack authority to control." *EME Homer City*, 572 U.S. at 495. After EPA sets a national air quality standard, downwind States must meet that standard by a target deadline (called an "attainment deadline") that is fixed by statute.[18] *See* 42 U.S.C. § 7511(a)(1); *Natural Res. Def. Council v. EPA*, 941 F.2d 1207, 1991 WL 157261, at *3 (4th Cir. 1991) (table). A State must achieve the standard by the attainment deadline regardless of where the offending pollution originates. Thus, when upwind pollution is transported into downwind States, sources in downwind States must bear the higher cost of additional pollution controls to ensure that downwind States can still achieve clean air by the

[18] For example, the first deadline by which certain downwind States were required to achieve the new ozone standard was August 3, 2021. 88 Fed. Reg. at 36,690. States that did not meet the standard by that deadline became subject to mandatory requirements intended to push them into attainment by August 3, 2024. *Id.*; *see* 42 U.S.C. § 7511a(a).

attainment deadlines. Indeed, in amending the Good Neighbor Provision in 1977, Congress explained that West Virginia sources were disadvantaged in this manner by emissions from Ohio, observing that West Virginia must "cope with pollution not generated by a source under its own control; and must require more stringent control of West Virginia sources to attain the ambient air quality standards." S. Rep. No. 95-127, at 41-42 (1977).

Accordingly, to protect downwind States, Congress gave EPA "substantive authority to assure that a state's proposals comply with the Act, not simply the ministerial authority to assure that the state has made *some* determination." *Arizona ex rel. Darwin v. EPA*, 815 F.3d 519, 531 (9th Cir. 2016); *accord Alaska Dep't of Env't Conservation v. EPA*, 540 U.S. 461, 490 (2004) (Congress vested EPA with "explicit and sweeping authority" to verify States' "substantive compliance" with the Act's permitting provisions); *Nebraska v. EPA*, 812 F.3d 662, 667 (8th Cir. 2016) (EPA's role is more than "ministerial"). Further, when a SIP does not comply with the Good Neighbor Provision, Congress provided that EPA is statutorily *required* to disapprove that SIP. 42 U.S.C. § 7410(k)(3); *see also id.* § 7410(*l*).

West Virginia incorrectly contends that a State's authority to determine the particular methods and control strategies that it will use to achieve compliance with the Act also allows it to define—and ultimately entirely exempt itself from—its statutory good-neighbor obligations. *See* Br. at 28-33. As the Supreme Court has explained, the ultimate result of a State's choice of emission limitations must be compliance. *See Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). And here, West Virginia did not propose *any* pollution-reduction measures to meet its obligations under the Good Neighbor Provision, nor did it demonstrate that the ultimate result of that choice would be compliance. *See* 88 Fed. Reg. at 9,360.

For example, although West Virginia acknowledged that emissions from the petroleum sector and related industries accounted for approximately twenty-three percent of its ozone precursor emissions, West Virginia simply declared that federal statutory requirements that have been in effect since the 1970s, and which were incorporated into state law, were sufficient to satisfy West Virginia's good-neighbor obligations

with respect to this sector.[19] *See* 87 Fed. Reg. at 9,528-29. This conclusion was plainly unwarranted given that modeling consistently linked West Virginia to downwind pollution problems. See *supra* at 10. And West Virginia offered no explanation of its failure to assess whether widely available pollution controls could reduce ozone-precursor emissions from this sector.[20]

In addition, although West Virginia acknowledged that emissions from power plants constituted approximately thirty percent of its ozone precursor emissions, West Virginia relied on the State's implementation of a 2016 federal ozone regulation (called the Cross-State Air Pollution Rule (CSAPR) Update) and preexisting shutdowns of certain power plants, to argue that further controls were not necessary. *See* 87 Fed. Reg. at 9,529-30. But the pollution-control measures required under the CSAPR Update—a partial remedy for good-neighbor obligations under a prior, less stringent air quality standard, *see* 81 Fed. Reg. 74,504, 74,505,

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[19] SIP, *supra*, at 25, 36-38; *e.g.*, *id.*, at 37 (noting that minor new source review permitting program has been in place since 1972).

[20] *Compare* SIP, app. K: NOx Emissions per Source Classification Code at K-16 (quantifying emissions from natural gas compressors in West Virginia), *with* 88 Fed. Reg. at 36,822-23 (describing cost-effective controls for the same types of compressors).

74,508 (Oct. 26, 2016)—plainly do not satisfy the State's obligations under the newer, more protective air quality standard. *See* 87 Fed. Reg. at 9,531. And agreements to close individual power plants do not automatically constitute the "permanent and enforceable" emissions reductions measures contemplated by the Clean Air Act.[21] When an individual power plant closes, its emissions can be replaced, or even exceeded, by ramping up generation at existing plants or building new plants—neither of which is subject to the agreement that governed the closed plant. To illustrate, total heat input (i.e., the amount of fuel burned to generate electricity) at West Virginia's power plants *increased* from 2019 to 2021—notwithstanding the shutdowns that West Virginia had identified in its SIP submission.[22] Thus, individual closures, in and of themselves, do not necessarily indicate an overall reduction of interstate pollution, such that good-neighbor obligations are presumptively satisfied.

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[21] *See* SIP, *supra*, at 21.

[22] *Compare* EPA, State Emission Budget Calculations and Engineering Analytics Analysis (xls) for the Revised CSAPR Update (n.d.) (in "2021" tab, cell C50, showing 287,902,710 mmBtu of total heat input during the 2019 ozone season), *with* EPA, Appendix A: Final Rule State Emission Budget Calculations and Engineering Analytics (xlsx) for the Good Neighbor Rule (Mar. 2023) (in "State 2023" tab, cell F47, showing 306,845,495 mmBtu for the 2021 season).

Further, to the extent West Virginia argues (Br. at 29) that States have primary discretion to determine *if* they have any good-neighbor obligations, that contention is belied by the Act (see *supra* at 18-20), history, and common sense. Upwind States have little incentive to require in-state sources to reduce emissions for the benefit of downwind States—as demonstrated by West Virginia's inadequate SIP submission here. Congress anticipated that upwind States might adopt SIPs that fail to satisfy the Good Neighbor Provision, and Congress required EPA to take the critical action of disapproving such SIPs. In this way, EPA prevents upwind States from shifting the costs of its pollution onto the residents and industries in downwind States. *See Alaska Dep't of Env't Conservation*, 540 U.S. at 486; *Texas v. EPA*, 726 F.3d 180, 193 (D.C. Cir. 2013); *cf.* H.R. Rep. No. 95-294, at 330 (1977) (importance of strengthening federal rule).

Indeed, downwind jurisdictions like Amici already bear the economic brunt of upwind pollution, even though the cost to squeeze marginal emissions reductions from sources in Amici's jurisdictions far exceeds the cost to reduce readily controllable emissions from sources in West Virginia. For example, due in part to out-of-state pollution, Connecticut already requires its in-state sources to install and operate pollution

controls that cost up to $13,000 per ton of ozone precursors that are reduced, *see* 86 Fed. Reg. 48,357, 48,360 (Aug. 30, 2021), and New York likewise requires controls costing up to $5,500 per ton, *see* 87 Fed. Reg. 9,484, 9,490 (Feb. 22, 2022). By contrast, if West Virginia's power plants spent up to $1,600 per ton to operate pollution controls that they *already have installed*, West Virginia could eliminate 835 tons of ozone precursor emissions annually. *See* 88 Fed. Reg. at 36,720 (describing cost), 36,737 (quantifying potential reductions).

The history of the Good Neighbor Provision confirms that Congress intended a substantive federal role to achieve necessary emissions reductions. Congress repeatedly strengthened the Good Neighbor Provision because prior versions of the statute that depended on upwind States to police their own interstate contributions proved ineffective. *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2,341, 2,360 (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 1970 version of the Good Neighbor Provision, for example, Congress "relied solely on intergovernmental cooperation on the part of

the state governments, with no federal role." Revesz, *supra*, at 2,360. 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 prohibit pollution that will "prevent attainment or maintenance [of air quality standards] by any other State." *EME Homer City*, 572 U.S. at 489-99 (quoting 42 U.S.C. § 7410(a)(2)(E) (1976 & Supp. II 1978)). And in 1990, Congress further strengthened the Good Neighbor Provision by requiring States to prohibit pollution that will "contribute significantly to" ozone problems in any other State, even if it is not the but-for cause of nonattainment. *Id.* at 499 (quoting 42 U.S.C. § 7410(a)(2)(D)(i) (2006)). This history belies West Virginia's assertions that Congress intended EPA to defer to States' determinations about whether they possess any good-neighbor obligations at all.

B. In Any Event, the Purported Cooperative Federalism Errors Do Not Affect the Outcome Here.

West Virginia principally argues (Br. at 33-35) that EPA violated cooperative federalism by not granting appropriate deference to certain studies that West Virginia included in its SIP. These studies were ostensibly included to demonstrate that West Virginia sources are not the primary cause of ozone problems in downwind areas. That conclusion is both factually incorrect and legally irrelevant under the Good Neighbor Provision. Moreover, West Virginia's own SIP concluded that, notwithstanding these analyses, West Virginia remained linked to downwind air pollution.

For example, West Virginia incorrectly argues (Br. at 34-35) that EPA violated cooperative federalism by ignoring studies that purportedly demonstrated that emissions from vehicles driving through downwind areas are the primary cause of ozone problems in those areas.[23] But as discussed (*supra* at 5 n.4), transported upwind pollution (not local vehicle pollution) is responsible for as much as 57 percent of the total ozone in Fairfield County, Connecticut, an area to which West Virginia was repeat-

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[23] *See* SIP, *supra*, at 17-20.

edly linked in multiple sets of modeling data. And even if local vehicle emissions are the "primary" cause of ozone problems in a downwind area, sources in upwind States still make their own significant contributions, and the Clean Air Act still requires each upwind State to prohibit its own significant contributions of pollution from its sources. *See* 42 U.S.C. § 7410(a)(2)(D)(i)(I); *Wisconsin v. EPA*, 938 F.3d 303, 324 (D.C. Cir. 2019) (upwind States have good-neighbor responsibilities even if they are not the but-for cause of nonattainment). And West Virginia's argument that it need not take any steps to reduce its power-plant emissions before downwind States take additional steps to reduce their local vehicle emissions is particularly surprising, considering that West Virginia has sued to prevent downwind States from doing exactly that; it has sued to prevent downwind States from adopting stronger vehicle emissions standards within their own borders. *See Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024) (per curiam).

West Virginia's cooperative federalism arguments fail in any event because West Virginia itself did not give dispositive weight to these studies. Specifically, in a section of its SIP titled "West Virginia's Contributions to Nonattainment and Maintenance Receptors," West Virginia

stated that it was "projected to be 'linked'" to receptors in Maryland, New Jersey, New York, and Pennsylvania.[24] The next section of West Virginia's SIP considered other evidence, like the vehicle studies, to determine whether its chosen modeling data "overstated" these linkages. Br. at 10. But after considering the studies, West Virginia reiterated its conclusion that the State was linked to the same receptors.[25] And West Virginia proceeded to discuss why it did not plan to institute further emissions reductions[26]—a step that would have been unnecessary had the studies decoupled West Virginia from downwind pollution. EPA did not violate cooperative federalism by agreeing with West Virginia's bottom-line conclusions.

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[24] SIP, *supra*, at 13.

[25] *Id.* at 22-23.

[26] *Id.* at 23.

POINT III

EPA Reasonably Considered Updated Modeling Data in Disapproving West Virginia's SIP

A. West Virginia's Arguments Are Meritless Because Every Model, Including West Virginia's Preferred Model, Linked West Virginia to Downwind Ozone Problems.

As a threshold matter, because EPA's consideration of updated modeling data was not outcome-determinative, any argument that EPA erred in considering such data does not support granting West Virginia's petition here. *See* 5 U.S.C. § 706; *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 202 (5th Cir.), *clarified on reh'g on other grounds*, 885 F.2d 253 (5th Cir. 1989); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 541 (D.C. Cir. 1983). Every model that West Virginia consulted when submitting its SIP linked emissions from West Virginia to downwind air quality problems. See *supra* at 10 (table). Indeed, in West Virginia's preferred model, West Virginia was projected to contribute as much as 2.52 ppb of ozone to a receptor in Maryland—well above EPA's

longstanding screening threshold of one percent of the ozone standards (here, 0.70 ppb).[27]

EPA's updated modeling merely confirmed that West Virginia remained linked to downwind ozone problems when EPA acted. For example, in proposing to disapprove West Virginia's SIP in 2022, EPA explained that the agency had consulted updated modeling that used emissions data from 2016, rather than 2011, to extrapolate future ozone pollution levels. 87 Fed. Reg. at 9,519. The results remained largely unchanged from the 2011-based data: under the 2016-based modeling, West Virginia remained linked to three receptors in Connecticut, each of which had also been linked to West Virginia under at least one of the models from West Virginia's SIP submission. Compare *id.* at 9,525, with *supra* at 10. And although the 2016-based modeling linked West Virginia to an additional receptor in Bucks County, Pennsylvania, that receptor is just seven miles away from the Pennsylvania receptor to which West Virginia was linked under its own preferred modeling.[28] *Compare* 87 Fed.

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[27] SIP, *supra*, at 10, 13-14.

[28] *See* EPA, *AirData Map* (n.d.). Click the "Layer" icon and select "Ozone – Active." Then, in the address search bar, search and select

(*continued on the next page*)

Reg. at 9,525, *with supra* at 10. Likewise, in the final Disapproval Rule, EPA explained that it had made further adjustments to the 2016-based modeling in response to comments that EPA received during the notice-and-comment period. 88 Fed. Reg. at 9,339. This adjusted modeling continued to link West Virginia to the same three Connecticut receptors.[29] Thus, EPA's updated modeling simply confirmed what West Virginia's preferred modeling had already found.

B. Regardless, EPA Reasonably Consulted Updated Modeling to Confirm Its Decision.

In any event, contrary to West Virginia's contentions (Br. at 43-53), EPA acted reasonably in consulting updated modeling data to confirm that West Virginia had not eliminated its significant contribution to downwind States by the time EPA acted. The Clean Air Act requires EPA to exercise its authority to confirm that an upwind State's SIP will not

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"Philadelphia, PA, USA." The two receptors are in the top righthand corner. The Philadelphia County receptor is "North East Airport," No. 421010024," and the Bucks County receptor is "Bristol," No. 420170012. Click the "Measurement" icon and select the "Distance" tool, then click each of the sites to calculate the distance between them.

[29] EPA, *Air Quality Modeling Technical Support Document: 2015 Ozone NAAQS SIP Disapproval Final Action* app. D at D-2 (2023).

hinder downwind States' future attainment and maintenance of the federal air quality standards. *EME Homer City*, 572 U.S. at 513-14.

In fulfilling this statutory mandate here, EPA reasonably consulted updated information that was available at the time of its decision and that EPA had recently used in issuing a separate ozone regulation. In 2020, EPA completed the first version of its 2016-based ozone modeling data in response to a court-ordered remand of a *different* ozone transport regulation, the CSAPR Update. *See* 85 Fed. Reg. 68,964, 68,964, 68,981-82 (Oct. 30, 2020). That updated data was pertinent to evaluating the sufficiency of West Virginia's and other States' good-neighbor SIPs here because the data analyzed the same pollutants and downwind problem areas at issue in the Disapproval Rule. EPA reasonably considered this new and better data. *See District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015) (agencies "do not have free rein to use inaccurate data" and "cannot ignore new and better data"). Indeed, EPA might have stood "on shaky legal ground [by] relying on significantly outdated data," *Sierra Club v. EPA*, 671 F.3d 955, 966 (9th Cir. 2012), and instead "acted responsibly" by taking account of newer data, *see Hearth, Patio & Barbecue Ass'n v. EPA*, 11 F.4th 791, 808 (D.C. Cir. 2021).

Under West Virginia's proposed cutoff date, EPA would be required to ignore this pertinent data because of procedural SIP submission deadlines, at the expense of the Clean Air Act's substantive attainment deadlines and goals. "Unlike the various deadlines by which the states must submit proposals, the attainment deadlines are central to the regulatory scheme" because they represent the time by which States must achieve the clean air promised by the Act. *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (quotation and alteration marks omitted); *see Wisconsin*, 938 F.3d at 322; *see also Train*, 421 U.S. at 66-67. West Virginia's approach would invert the statutory structure, forcing EPA to approve deficient SIPs based on stale data that is keyed to a procedural submission deadline—even when more recent data that is available to EPA can better inform the agency's decision. Such an approach would hobble downwind States' efforts to achieve safe ozone levels by the statutory deadlines. *See Wisconsin*, 938 F.3d at 322 (rejecting argument that EPA should have used modeling predating a 2011 SIP submission deadline when setting emissions-reduction obligations for the 2017 ozone season).

Contrary to West Virginia's contention that it could not have foreseen EPA's development of new modeling (Br. at 45), West Virginia was aware of the 2016-based modeling data and could have submitted an updated SIP based on that modeling to EPA at any time.[30] For example, EPA made this modeling data publicly available through a series of Federal Register notices beginning in the fall of 2020. *See* 88 Fed. Reg. at 9,366. And West Virginia commented on the 2016-based modeling during the remand of the CSAPR Update, asserting that "more robust modeling analysis" was necessary before EPA amended that regulation.[31]

West Virginia also errs in contending (Br. at 51) that EPA's delay in acting on West Virginia's SIP submission barred EPA from considering more accurate information that became available in the interim. There is nothing in the language or intent of the Act to compel such a result. Rather, the Act requires EPA's prompt action on SIP submissions but does not penalize the agency by limiting the data that may be considered in evaluating SIP submissions. In any event, any delay in EPA's issuance

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[30] Other States submitted revised SIPs based on the updated modeling. *E.g.*, 87 Fed. Reg. 64,412, 64,419-20 (Oct. 25, 2022) (Alabama).

[31] *See* Laura M. Crowder, WVDEP, Revised CSAPR Comments at 3 (Dec. 14, 2020).

of the Disapproval Rule did not harm West Virginia; it harmed the downwind States. Delay in disapproval simply postponed the issuance of a FIP that would give downwind States relief from transported ozone pollution. And delay in disapproval simultaneously forced downwind States to implement additional controls to meet the Act's fixed statutory deadlines. Indeed, it was several downwind Amici states—not West Virginia—that sued to end the delay and compel EPA to act on SIP submissions by the statutory deadline.[32] Indeed, West Virginia sources *benefitted* from the delay, which allowed them to continue emitting pollution in violation of the Good Neighbor Provision for years beyond the time when a SIP should have prohibited it. As a result, West Virginia "reap[ed] the benefits of the economic activity causing the pollution without bearing all the costs," while downwind States' were "hampered by the steady stream of infiltrating pollution." *EME Homer City*, 572 U.S. at 495, 496.

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[32] *See* Consent Decree, *New York v. Regan*, No. 1:21-cv-252 (S.D.N.Y. Nov. 15, 2021), ECF No. 38. Several nonprofit groups also sued to enforce EPA's statutory deadline. *See* Consent Decree, *Downwinders at Risk v. Regan*, No. 4:21-cv-3551 (N.D. Cal. Jan. 12, 2022), ECF No. 23.

CONCLUSION

This Court should deny the petition.

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May 6, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee 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 6,450 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and corresponding local rules.

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