Case No. 22-3026 (consolidated with No. 22-3039)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KEYSTONE-CONEMAUGH PROJECTS, LLC, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Action by the
United States Environmental Protection Agency
87 Fed. Reg. 53,381 (Aug. 31, 2022)

BRIEF OF AMICI CURIAE STATES OF MARYLAND, DELAWARE, AND NEW YORK IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE

Amici the States of Maryland, Delaware, and New York file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2), to explain why the Clean Air Act ("the Act") and core federalism principles support the decision of the U.S. Environmental Protection Agency ("EPA") to promulgate the federal plan at issue here, and why it is particularly important for that plan to include short-term emissions limits.

Amici are states with primary responsibility for assuring air quality within their own borders. 42 U.S.C. § 7407(a). Exercising that responsibility, Amici have implemented some of the strictest air quality control regulations in the country, including stringent standards on power plants, other stationary industrial sources, and motor vehicles. Those standards include daily limits on nitrogen oxides (NO_X)—a chemical precursor to ground-level ozone or "smog" pollution—emitted by certain power plants.[1]

Still, interstate pollution transported into Amici's borders from sources located in upwind states continues to hinder the efforts of Amici and other downwind states to attain and maintain the National Ambient Air Quality Standards

[1] *See* Code of Maryland Regulations 26.11.38.03; 26.11.38.04; 26.11.38.05; Title 6 New York Codes, Rules, and Regulations §§ 222.4, 227-2.4, and 227-3.4; Title 7 Code of Delaware Regulations § 1146-4.3.

("NAAQS") for ozone—federal air quality standards established by EPA that all states must meet. Amici are located downwind of sources, including those in Pennsylvania, that emit precursors to ozone and thus make it more difficult for Amici to attain and maintain the ozone NAAQS within their own jurisdictions.[2] Limiting emissions from such upwind sources, particularly from coal-fired power plants, is critical to public health and welfare in each of the Amici states, as well as our ability to meet the ozone standards.

Amici have strong interests in the federal plan at issue here, which establishes Reasonably Available Control Technology ("RACT") [3] emissions limits for four power plants in Pennsylvania, 87 Fed. Reg. 53,381 (Aug. 31, 2022). Amici and Pennsylvania are members of the Ozone Transport Region ("the Region"), a group of northeastern states where certain sources must be regulated in accordance with RACT, even if those states meet the ozone NAAQS. *See* 42 U.S.C. § 7511c. The emissions limits in the federal plan at issue here, which represent an application of RACT, are meant to provide relief to the other states in the Region, including Amici, from pollution that is emitted in upwind states and then travels downwind. *Id*.

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[2] *See, e.g.*, www.epa.gov/sites/default/files/2021-03/ozone_design_values_ contributions_ revised_csapr_update.xlsx.

[3] RACT is "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." 87 Fed. Reg. at 53,382.

Amici also have strong interests in limiting emissions from the specific sources regulated by the challenged federal plan. These sources' recent average annual emissions of NO_X are much higher than the level EPA has determined is appropriate for well-controlled sources—not to mention the levels emitted by sources in Amici's jurisdictions.[4] These elevated emissions are particularly damaging to Amici and our residents and ecosystems. Amici have repeatedly sought more stringent, short-term emissions limits on upwind sources, including the ones covered by the challenged plan. Amici have petitioned EPA for relief from these sources under Section 126(b) of the Act and have filed administrative comments seeking short-term limits on these and other sources.[5]

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[4] *See* Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 86 Fed. Reg. 23,054, 23,088 (Apr. 30, 2021) (finding that 0.08 pounds of NO_X per million British thermal units (lb/mmBtu) was a reasonable emissions rate for units with optimized selective catalytic reduction equipment); Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, EPA-HQ-OAR-2021-0668-0087 (signature version), at 233 (signed Mar. 15, 2023) (same), *available at* https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-0007; 2021 NO_X Rates for 234 SCR Coal Units, EPA-HQ-OAR-2021-0668-0081, *available at* https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-0081.

[5] *See, e.g.*, Comments of Attorneys General of New York, Connecticut, Delaware, the District of Columbia, Maryland, Massachusetts, and New Jersey and the Corporation Counsel of the City of New York on Proposed Rule: Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, Docket ID No. EPA-HQ-OAR-2021-0668-0367, at 22-23 (June 21, 2022), *available at* https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0668-0367.

More generally, Amici rely on other states—and, where necessary, EPA—to put in place emissions limits that help minimize the negative effects of upwind pollution that travels into downwind states, including negative effects on Amici's ability to attain and maintain the ozone NAAQS in their jurisdictions. When upwind states do not adequately control their own emissions, our residents and businesses must bear the costs of further limiting in-state sources of emissions to try to comply with the ozone NAAQs. Amici also have a strong interest in protecting our citizens' health by minimizing pollution transported into our jurisdictions from upwind states.

Further, Amici rely on necessary emissions reductions taking place in a timely fashion. To that end, Amici rely on EPA's timeliness in discharging its duties to review state plans and, where appropriate, to promulgate federal plans.

SUMMARY OF ARGUMENT

1. EPA had the authority and obligation to finalize a federal plan for Pennsylvania even while that state's revised state plan remained pending before the agency.[6] The Act's plain text requires and authorizes EPA to issue a federal plan within two years of disapproving a state plan unless, in the meantime, it has *approved* a compliant state plan revision. EPA's exercise of authority here was

[6] Section 110 of the Clean Air Act refers to the plans at issue as "state implementation plans" (often called SIPs) and "federal implementation plans" (often called FIPs).

also consistent with this Court's mandate in *Sierra Club v. EPA,* 972 F.3d 290 (3d Cir. 2020). Concluding that EPA actually lacked such authority would undermine the Act's carefully calibrated system of deadlines for putting in place necessary emissions limits, and could disincentivize EPA from collaborating with states seeking to cure deficiencies in disapproved state plans.

2. EPA's issuance of a federal plan while Pennsylvania's revised state plan remained pending was consistent with the principles of federalism embodied in the Act. Because air pollution does not respect state borders, the Act contains multiple mechanisms that target interstate pollution and thus protect the interests of downwind states. The Act also includes a series of deadlines by which states and EPA must act to set necessary emissions limits. Amici rely on other states and EPA to comply with their obligations within the timeframes set by the Act. Pennsylvania's position, if accepted, would create a loophole in the Act's system of deadlines, and thus would make it harder for downwind states to rely on timely emissions reductions upwind.

3. Short-term emissions limits, including those in the federal plan challenged here, are critical to addressing interstate ozone pollution. The ozone NAAQS are an eight-hour average, not a monthly or seasonal figure, reflecting the fact that ozone poses a particular problem on the hottest and sunniest days. Short-term ozone levels are important to public health and welfare and to downwind states'

compliance with the NAAQS. Therefore, EPA's promulgation of short-term limits on these upwind sources' ozone precursor emissions—such as the limits at issue here—is vital to protecting downwind areas.

ARGUMENT

I. THE CLEAN AIR ACT AND *SIERRA CLUB* MAKE CLEAR THAT EPA PROPERLY ISSUED THE FEDERAL PLAN BEFORE ACTING ON PENNSYLVANIA'S REVISED STATE PLAN.

Pennsylvania and Keystone-Conemaugh Projects, LLC ("Key-Con") argue that, because Pennsylvania had submitted a revised plan on which EPA had not yet acted, EPA was precluded from issuing the federal plan at issue here. Pa. Br. 19-22; Key-Con Br. 25-27. As explained below, that position contravenes both the Act and this Court's mandate in *Sierra Club v. EPA*, 972 F.3d 290 (3d Cir. 2020).

The Act establishes a regulatory structure in which EPA sets numeric emission standards for states to achieve (the NAAQS), states propose initial plans to achieve those standards, and EPA formulates replacement plans if state plans are inadequate. The Act first directs EPA to establish primary and secondary NAAQS for each designated "criteria pollutant," and to reevaluate the NAAQS every five years. 42 U.S.C. § 7409(a)-(b), (d)(1). It then requires states to submit, for EPA's review, state plans that "provide[] for implementation, maintenance, and enforcement" of each NAAQS. *Id*. § 7410(a)(1). EPA, in turn, must approve or

disapprove each state plan. *Id*. § 7410(k)(3). If EPA disapproves the state plan, in whole or in part, it must issue a federal plan. *Id*. § 7410(c)(1).

The statute sets firm deadlines for states and EPA to take the actions necessary to put a plan in place. States must submit their plans "within 3 years (or such shorter period as the Administrator may prescribe)" of promulgation of a new or revised NAAQS. *Id*. § 7410(a)(1). EPA must act on a state plan within twelve months of determining that the plan meets certain minimum criteria for completeness. *Id*. § 7410(k)(1)-(2). And EPA must promulgate a federal plan within two years of disapproving a state plan (or finding that a state has failed to submit a plan, or has submitted an incomplete plan), "unless the State corrects the deficiency and the Administrator approves the plan or plan revision, before the Administrator promulgates" the federal plan. *Id*. § 7410(c).

Against that background, Pennsylvania and Key-Con maintain that the submission or pendency of a revised state plan vitiates EPA's authority and obligation to issue a federal plan. Pa. Br. 19-22; Key-Con Br. 25-27. The Act's plain language refutes that contention. Section 110 of the Act provides that EPA "*shall promulgate*" a federal plan within two years after it "disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such [federal plan]." 42 U.S.C. § 7410(c) (emphasis

added). Thus, disapproval of a state plan triggers a requirement that EPA promulgate a federal plan within two years. That requirement is lifted only if both of two conditions are met: First, the state must have corrected the deficiency in a revised plan. Second, EPA must have approved the corrected plan or plan revision.

A state's submission of a revised plan may satisfy the first condition (correcting the deficiency), but it does not satisfy the second condition (approval by EPA). *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) (stressing that a "statute should be construed so that effect is given to all of its provisions"). Where a revised state plan has been submitted but not acted upon, EPA has *not* "approve[d] the plan or plan revision." 42 U.S.C. § 7410(c). Accordingly, EPA retains the authority and statutory obligation to issue a federal plan before the two-year deadline to do so expires.

Equally important is what the statute does *not* say. It includes no requirement that EPA act on a revised state plan *before* issuing a federal plan. *See id.* It also does not require, as a condition for promulgating a federal plan, that EPA act on any pending revised state plan. *See id.* Yet Petitioners ask this Court to read those requirements into the statute—an approach that this Court has consistently rejected. *See, e.g.*, *SIH Partners LLLP v. Commissioner of Internal Revenue*, 923 F.3d 296, 304, n.4 (3d Cir. 2019) ("We do not read absent words into a statute 'so that what is

omitted, presumably by inadvertence, may be included within its scope.'" (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004))).

Key-Con, for its part, focuses on the wrong state plan submission when it argues that the Act "did not authorize EPA to promulgate the Federal Plan because EPA had not taken any action to disapprove the pending Second State Plan proposed by PADEP." Key-Con Br. 26 (discussing 42 U.S.C. § 7410(c)). EPA's statutory duty and authority to issue a federal plan did not arise from its handling of Pennsylvania's *revised* state plan. Rather, it arose from EPA's disapproval of Pennsylvania's *original* state plan. *See* 42 U.S.C. § 7410(c) (federal plan obligation triggered when Administrator "disapproves a State implementation plan submission in whole or in part"). Nothing in the statute suggests that Pennsylvania could override that obligation simply by submitting a revised plan.[7]

Moreover, Congress's choice to require a federal plan unless EPA has *approved* a revised state plan was a sensible one. EPA frequently disapproves state plans, triggering its authority and obligation to issue a federal plan within two years unless it approves a compliant state plan. *See, e.g.*, 88 Fed. Reg. 9,336 (Feb. 13,

[7] To be sure, in this case EPA did not finalize its disapproval of Pennsylvania's original state plan until after Pennsylvania had submitted its revised plan. But no party has challenged that disapproval, which is the source of EPA's statutory authority and obligation to issue a federal plan. Pennsylvania's position here, if accepted, could not readily be cabined to circumstances where the state submits a revised plan before EPA finalizes disapproval of the state's original plan.

2023) (disapproving, in whole or in part, 21 states' plans relating to the 2015 ozone NAAQS). If, as petitioners argue, a revised state plan submission could cut off EPA's authority to issue a federal plan, a state whose plan has been disapproved (or appears likely to be disapproved) could simply submit any revised plan that meets minimum completeness requirements, *see* 42 U.S.C. § 7410(k)(1), and thus disable EPA from issuing a federal plan. Indeed, nothing would prevent the state from doing so even on the eve of EPA's issuance of a federal plan. EPA then could not issue a federal plan until first acting on the revised state plan. And if EPA were to disapprove *that* revised state plan, the state could restart the cycle by submitting yet another revision. It is implausible that Congress intended a state to be able to short-circuit the NAAQS implementation process in this way, and thus to delay the implementation of necessary emissions reductions beyond the NAAQS attainment dates. *See Wisconsin v. EPA*, 938 F.3d 303, 315 (D.C. Cir. 2019) (holding that plans issued under Section 110 of the Act require the elimination of upwind states' significant contribution to downwind states' pollution problems in accordance with the downwind states' attainment deadlines).

This common-sense reading of the statute is not unfair to Pennsylvania or other states that submit plans for EPA's approval. Every state has an opportunity to get it right the first time by submitting a state plan that complies with the state's NAAQS-related obligations. *See* 42 U.S.C. § 7410(k)(3) (EPA "shall approve" state

plan "if it meets all the applicable requirements of this chapter"). Pennsylvania is subject to the federal plan here only because its original state plan was inadequate. EPA's issuance of the federal plan, moreover, does not mean that the effort Pennsylvania has put into its revised plan is for naught, because EPA still has an obligation to review and act on that plan in the time prescribed by the statute. *See id.* § 7410(k)(1)-(2) (setting deadlines for EPA to determine whether state plan submission meets completeness criteria, and to approve or disapprove state plan that meets those criteria). And if EPA approves Pennsylvania's revised state plan, the state will no longer be subject to the federal plan.

Petitioners' arguments are also inconsistent with this Court's directive to EPA on remand in the *Sierra Club* decision. In *Sierra Club*, this Court vacated EPA's approval of Pennsylvania's original state plan seeking to implement the RACT requirements needed under the Act to meet EPA's 2008 ozone NAAQS. In doing so, the Court set a deadline for EPA to act on remand: "[T]he agency must either approve a revised, compliant [state plan] within two years or formulate a new federal implementation plan." *Id.* at 309.

This Court's *Sierra Club* decision thus gave EPA two choices, consistent with the Act's requirement that EPA promulgate a federal plan within two years unless EPA approves a compliant state plan. *See* 42 U.S.C. § 7410(c). Specifically, the Court directed EPA to either "approve a revised, compliant SIP within two years"

or "formulate a new federal implementation plan." *Sierra Club*, 972 F.3d at 309. The Court did not say that EPA could do the latter only if no revised state plan was pending for its review. *See id.* Nor did the Court offer EPA the option of letting two years pass without action (as Pennsylvania and Key-Con apparently believe EPA should have done), on the ground that a revised state plan was pending. *See id.*

Pennsylvania and Key-Con also err in arguing, apparently by way of a fallback position, that even if EPA can *sometimes* issue a federal plan without acting on a pending state plan revision, EPA was barred from doing so *here*. Pa. Br. 21-22; Key-Con Br. 27-31. That is so, they suggest, because EPA was initially working with Pennsylvania towards submission of a state plan revision, then stopped working with Pennsylvania or delayed Pennsylvania's state plan submission. *See* Pa. Br. 18; Key-Con Br. 30-31.

The Act admits of no such middle ground. The statutory text is clear: after disapproving a state plan, EPA "shall promulgate" a federal plan within two years unless it approves a revised state plan. *See* 42 U.S.C. § 7410(c). That authority and obligation includes no exception for circumstances where EPA initially works with a state on a revised plan, or where EPA is purportedly at fault for delays in the state's submission of a revised plan. Indeed, if EPA were to withhold a federal plan beyond two years on the ground that it is working with the state on a revised state plan, EPA's inaction would violate the Act.

Nor would it make sense for the Act to contain the exception that Pennsylvania and Key-Con seek. Such an exception would reduce certainty and increase litigation. For example, it is unclear how much cooperation with a state would preclude EPA from issuing a federal plan while a revised state plan is pending, or what other conduct might prevent EPA from issuing a federal plan. In addition, such an exception would create a disincentive for EPA to work with a state towards development of a revised state plan because any such cooperation would cast doubt on EPA's ability to issue a federal plan even when the statute requires it to do so. This Court should not disincentivize cooperation in this manner.

II. PROMPT ISSUANCE OF FEDERAL PLANS PROMOTES FEDERALISM.

Pennsylvania and Key-Con argue that federalism required EPA to decline to issue a federal plan while Pennsylvania's revised state plan was awaiting agency action. *See* Pa. Br. 19-22; Key-Con Br. 27-31. In fact, EPA's issuance of a federal plan was fully consistent with the principles of federalism effectuated by the Act.

Although the Act's cooperative federalism model gives states considerable flexibility in regulating in-state sources of pollution, it necessarily provides for federal oversight and limits on that flexibility, to protect downwind states from upwind pollution. Individual states generally can regulate sources of air pollution within their own borders, but they lack authority to directly regulate such sources in other states. *See, e.g.*, *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 306-07

(4th Cir. 2010) (citing *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)). Yet air pollution does not stop at state boundaries. As a result, weak regulations in one state can impair air quality in another. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 496 (2014) (describing how pollutants generated by upwind sources are often transported by air currents, sometimes over hundreds of miles, to downwind states). That is especially true with respect to NO_X, the pollutant regulated by the federal plan challenged here. NO_X reacts in the atmosphere to increase ambient levels of ozone in downwind states, sometimes hundreds of miles away from their originating source. *See, e.g.*, 84 Fed. Reg. 56,058, 56,061 (Oct. 18, 2019).

The Act addresses this problem in two ways, grounded in states' responsibility to control their pollution and EPA's responsibility to exercise oversight when state efforts are insufficient. First, the Act requires all states to attain and maintain NAAQS that apply nationwide. *See* 42 U.S.C. §§ 7409, 7410(a). Second, the Act includes multiple complementary mechanisms specifically targeting pollution that crosses state boundaries. Section 110 includes the "good neighbor" provision, which requires each state plan to "prohibit[] . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will" either "contribute significantly to [NAAQS] nonattainment in, or interfere with [NAAQS] maintenance by, any other State," or "interfere with measures required

to be included in the applicable implementation plan for any other State . . . to prevent significant deterioration of air quality or to protect visibility." *Id.* § 7410(a)(2)(D)(i). Section 126 provides, among other things, that a state may petition EPA "for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of" the good-neighbor provision, and limits the operation of such sources after such a finding has been made. *Id.* § 7426(b)-(c). Further, Section 176A authorizes EPA to establish interstate pollution transport regions where pollutants from one state significantly contribute to NAAQS violations in other states, and establishes procedures for mitigating such contribution. *See id.* § 7406a. And Section 184 creates an ozone transport region comprising several northeastern and mid-Atlantic states, including Pennsylvania and Amici. *Id.* § 7411c(a). States in that region must, among other things, implement RACT with respect to certain sources of volatile organic compounds and nitrogen oxides. *Id.* §§ 7411c(b)(1)(B); 7511a(b)(2); 7511a(f). Collectively, these mechanisms reflect a statutory recognition that states' interests in clean air are interconnected, and that pollution controls in upwind states are necessary to ensure that downwind states are appropriately protected. *See, e.g., Wisconsin*, 938 F.3d at 313.

In turn, states such as Amici rely on other states to comply with their Act obligations, and rely on EPA to step in when necessary to protect against cross-state

pollution. In particular, when other states do not do their part—for instance, by submitting state plans that do not adequately implement RACT, or that fail to comply with the good neighbor provision—downwind states such as Amici suffer. Our air quality may deteriorate. We may have increased difficulty attaining and maintaining the NAAQS in our jurisdictions. And we may have to regulate polluting sources within our borders more stringently—and at an economic disadvantage—to compensate for increased pollution entering our air from upwind sources.

Downwind states further rely on timely compliance by upwind states. The later states submit plans, the later EPA reviews those plans. The later EPA issues federal plans to remedy state plan deficiencies, the later emissions reductions occur. Recognizing the need for prompt action, the Act prioritizes timeliness for state and federal plans: as explained above, it sets deadlines for states to submit plans, 42 U.S.C. § 7410(a)(1), for EPA to act on those plans, *id.* § 7410(k)(1)-(2), and for EPA to promulgate a federal plan (or approve a revised state plan) in the event of a deficiency, *id.* § 7410(c)(1).[8]

Downwind states have repeatedly demonstrated reliance on timely action to address ozone transport by filing deadline enforcement actions when EPA has failed to act by the statutory deadlines. *See, e.g.*, *New York v. Wheeler*, No. 1:21-cv-252

[8] The Act also sets a 60-day deadline for EPA to rule on petitions filed under Section 126. 42 U.S.C. § 7426(b).

(S.D.N.Y. 2021) (challenging EPA's failure to approve or disapprove state plans by mandatory statutory deadline); *New Jersey v. Wheeler*, No. 20-cv-1425 (D.D.C. 2019) (challenging EPA's failure to make findings, by statutory deadline, that certain states had failed to submit state plans); *Maryland v. Pruitt*, No. 1:17-cv-2873 (D. Md. 2017) (challenging EPA's failure to act on Section 126 petition by statutory deadline); *Connecticut v. Pruitt*, No. 3:17-cv-796 (D. Conn. 2017) (same). Courts, in turn, have responded by ordering EPA to act promptly. *See, e.g.*, *Maryland v. Pruitt*, 320 F.Supp.3d 722 (D. Md. 2018).

Pennsylvania's position, if accepted, would unlawfully limit EPA's ability to provide a federal backstop for insufficient state plans and thus make it harder for downwind states to rely on timely emissions reductions by upwind states. Pennsylvania asks this Court to create a significant loophole in the Act's system of deadlines, by enabling a state that submits a deficient plan to indefinitely forestall issuance of a federal plan. That approach would improperly saddle downwind states with undue pollution burdens, curtail EPA's power to address those burdens, and thus harm the very state and federal interests that the Act is designed to protect. This approach would undermine, not promote, the balanced cooperative federalism principles that underlie the Act's interstate pollution transport provisions. The Court should therefore reject it.

III. SHORT-TERM EMISSIONS LIMITS ARE VITAL TO MINIMIZING CONTRIBUTIONS TO OZONE PROBLEMS.

Petitioners and Pennsylvania assail the challenged federal plan's daily emission limits, which cap the amount of NO_X that each plant may emit in a 24-hour period, on a variety of bases. *See* Pa. Br. 25-32; Key-Con Br, 31-52; Homer City Br. 27-50. None of those arguments has merit, as respondents explain. *See* EPA Br. 31-67. More broadly, those arguments ignore an important consideration: that robust short-term emission limits are a vital component of states' and EPA's efforts to address high ozone levels.

Ozone problems are particularly acute on the hottest days, when heat and sunlight are particularly conducive to the reactions that form ground-level ozone. 84 Fed. Reg. at 56,061. A given amount of emitted NO_X will lead to the formation of more ozone on a hot and sunny day than on a cool and cloudy one. *Id*. Moreover, the cardiovascular and respiratory effects of ozone exposure overlap with some of the effects of exposure to extreme heat. 80 Fed. Reg. 65,292, 65,305 (Oct. 26, 2015).

Accordingly, EPA has long expressed the ozone NAAQS with a "short-term" averaging time—currently 8 hours. *See id*. at 65,347. Whether an area attains the

current ozone standards depends on whether, and how often, its rolling 8-hour average ozone level exceeds 70 parts per billion (ppb).[9]

High short-term ozone levels thus affect a state in two ways. First, they degrade the state's air quality, with adverse consequences for public health and welfare (including ecosystem health) and visibility. Second, they can affect a state's NAAQS attainment status, with high short-term ozone levels resulting in an area's designation as nonattainment. That designation means that the state may have to undertake more stringent regulations on in-state sources, and may be subject to sanctions relating to the availability of federal funding and the approval of new sources. *See* 42 U.S.C. §§ 7509; 7511a.

These concerns are far from theoretical. Last year, EPA finalized a determination that "marginal nonattainment" areas encompassing parts of Maryland and Delaware had failed to attain the 2015 ozone standards by the applicable attainment date. 87 Fed. Reg. 60,897, 60,898, 60,903 (Oct. 7, 2022). EPA therefore reclassified those areas as "moderate nonattainment" for the 2015 ozone NAAQS—a status requiring Maryland and Delaware to revise and strengthen their state plans.

[9] More specifically, determining attainment requires (1) determining the year's fourth-highest daily maximum 8-hour average reading; and (2) averaging that figure with the corresponding figures for the prior two years. 80 Fed. Reg. at 65,292. If the resulting three-year average figure exceeds 70 ppb, the area is likely in nonattainment.

Id. at 60,917, 60,919.[10] Similarly, EPA reclassified the New York Metropolitan area as "severe nonattainment" for the 2008 ozone NAAQS because it had failed to attain that standard by the applicable attainment date. *Id*. at 60,926.

Because of the health, welfare, and regulatory consequences of elevated short-term ozone levels, short-term limits on NO_X emissions are necessary. A source's compliance with 30-day or seasonal average NO_X emissions limits does not prevent it from emitting high levels on particular days, which may contribute to spikes in downwind ozone levels. Indeed, operating solely under a long-term emission limit does not prevent a source from operating its controls on any given day in any manner it chooses—or not operating them at all—so long as, at the end of the averaging period, the calculated average is low enough.

Short-term emissions limits are necessary to address this persistent problem. These limits help ensure that a source operates its controls each day—or otherwise limits its emissions—and thus reduces its contributions to short-term ozone spikes. The federal plan here employs short-term limits in the form of daily mass limits. That timeframe—a single day, rather than 30 days or an entire ozone season—is reasonably commensurate with the 8-hour measurement period for the ozone

[10] EPA has subsequently proposed to determine, based on more recent monitoring data, that one of these areas is currently attaining the 2015 ozone standard. 88 Fed. Reg. 6,688 (Feb. 1, 2023).

NAAQS, and thus helps avoid a scenario where long-term averaging masks a source's significant contribution to an area's short-term ozone problems.

The interstate nature of ozone pollution makes it especially important for EPA to exercise its authority to ensure there are limits to NO_X emissions on each day of the ozone season. If a state encounters ozone attainment problems, it can impose short-term emission limits on in-state sources. But such limits will do nothing to address ozone pollution originating from upwind, out-of-state sources, which the downwind state cannot directly regulate. Unless EPA itself ensures that those sources are subject to short-term limits, those upwind sources can take advantage of long-term averaging to inequitably shift the health and economic burdens of their own pollution onto downwind states. *See EME Homer City Generation, L.P.*, 572 U.S. at 519 (noting equitable considerations of federal plan so that "[u]pwind states that have not yet implemented pollution controls of the same stringency as their neighbors will be stopped from free riding on their neighbors' efforts to reduce pollution.").[11]

[11] Pennsylvania's federal plan is not the only instance in which EPA has set short-term NO_X emissions limits recently. Beginning in 2024, a daily average NO_X emissions limit will apply to all large coal-fired power plant sources in 22 states covered by the agency's most recent regional ozone transport rulemaking. *See* Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, EPA-HQ-OAR-2021-0668-0087 (signature version), at 79-80 ("EPA in this rule seeks to better address the need for emissions reductions on each day of the ozone season, reflecting the daily, but unpredictably recurring, nature of the air

The arguments advanced against the federal plan's short-term limits quibble with the details of EPA's approach but ignore the importance of short-term emission limits. For instance, Homer City assails those limits because they do not "derive from source-specific data or 24-hour emissions rates" and instead were calculated from facility-wide 30-day rolling averages. Homer City Br. 45. But the short-term limits were derived using actual emissions data from each facility and the individual units it comprises, 87 Fed. Reg. at 53,388, and the statute places no limitation on the type of information EPA may consider in establishing RACT, *see, e.g.*, *Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) ("EPA typically has wide latitude in determining the extent of data-gathering necessary to solve a problem."). Here, EPA reasonably explained why the data on which it relied supported the emissions limits it adopted. *See* 87 Fed. Reg. at 53,396; EPA Br. 40-41. Nothing more was required. And while questions involving the environment are "particularly prone to uncertainty," the Clean Air Act and common sense "demand regulatory action to prevent harm, even if the regulator is less than certain." *Wisconsin*, 938 F.3d at 319 (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 24-25 (D.C. Cir. 1976) (en banc)). This Court should adhere to that principle in deciding this case.

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pollution problem, short-term health impacts, and the form of the 2015 ozone NAAQS, wherein nonattainment for downwind areas (and thus heightened regulatory requirements) could be based on ozone exceedances on just a few days of the year."); *see also id.* at 390-98.

CONCLUSION

For the reasons set forth above, the petitions for review should be denied.

Respectfully submitted,

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COMBINED CERTIFICATIONS

The undersigned attorney hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i). According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 5,342 words.

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3. Pursuant to Third Circuit Local Appellate Rule 28.3(d), undersigned counsel whose name appears on this brief is a member of the bar of this court.

4. Pursuant to Third Circuit Local Appellate Rule 31.1(c), the electronic version of this brief was scanned for viruses using Trellix, and no virus was detected.

5. On this 6th day of April, 2023, I electronically filed the foregoing Brief of Amici Curiae the States of Maryland, Delaware, and New York with the Clerk of the Court for the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, which will effect service upon counsel of record.

6. Pursuant to Third Circuit Local Appellate Rule 31.1(a) and (b), and the Court's Order to Reduce Copies, dated April 29, 2013, I certify that 7 copies of the

foregoing Brief of Amici Curiae the States of Maryland, Delaware, and New York were mailed to the Clerk of the Court for the United States Court of Appeals for the Third Circuit, along with one copy to each party. I further certify pursuant to Third Circuit Local Appellate Rule 31.1(c) that the text of the electronic brief is identical to the text in the paper copies.

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