Nos. 12-9526, 12-9527

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, et al.,

Petitioners,

SIERRA CLUB,

Intervenor,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of Decision by the U. S. Environmental Protection Agency

AMICUS CURIAE BRIEF OF STATES OF ALABAMA, ALASKA, ARIZONA, KANSAS, MICHIGAN, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, UTAH, WEST VIRGINIA, WYOMING AND THE LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY IN SUPPORT OF STATE OF OKLAHOMA PETITION FOR PANEL OR EN BANC REHEARING

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Glossary

BACT	Best Available Control Technology
BART	Best Available Retrofit Technology
CAA	Clean Air Act
EPA	Environmental Protection Agency
PSD	Prevention of Significant Deterioration
SIP	State Implementation Plan

IDENTITY AND INTEREST OF AMICUS CURIAE

Like the State of Oklahoma, Amici States Arizona, Michigan, Montana, Nebraska, North Dakota, Utah, Wyoming and the Louisiana Department of Environmental Quality have submitted regional haze plans to the U.S. Environmental Protection Agency ("EPA") that contain determinations of Best Available Retrofit Technology ("BART") for certain large industrial facilities. As was the case with Oklahoma's plan, EPA disapproved BART determinations that these Amici States made and for one State has a pending proposed disapproval. These Amici States or entities within the State have either filed Petitions for Review of EPA's disapprovals in this Court or other Circuits or may do so if EPA finalizes its proposed disapproval.[1]

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

[1] *See* citations at 11, n. 6 *infra*.

INTRODUCTION

The Panel's 2-1 decision, *Oklahoma v. EPA*, Nos. 12-9526, 12-9527, 2013 U.S. App. Lexis 14634 (10th Cir., July 19, 2013) ("*Oklahoma*"), suffers from a central flaw which if uncorrected will upset the balance of Federal and State authority that Congress established in the Clean Air Act's regional haze program. That program places primary responsibility in the States to ensure that the program's goals are met. 42 U.S.C. § 7491; *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002) ("*Corn Growers*"). EPA's rejections of the policy and technical decisions of Oklahoma and other States, however, crossed the bright line separating Federal and State authority under that program.

In affirming EPA, the Panel misapprehended the proper standard of review and granted deference to EPA's technical and policy judgments when it should have granted deference to Oklahoma's judgments. The Panel's analysis of the standard of review therefore directly conflicts with *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) ("*ADEC*"). That the Panel recognized that this was a "close case" suggests that the erroneous standard of review was likely a deciding factor in the outcome. *Oklahoma,* 2013 U.S. App. LEXIS 14634 at *43. In contrast, the dissent correctly formulated the standard of review, and would have reversed EPA. *Id.* at *65-71. The Panel or the Court en banc should reconsider the Panel's decision to ensure the right result is achieved in

this case and that the proper standard of review is applied in other pending and future cases.

The Panel's decision is the first of multiple expected judicial decisions reviewing EPA disapprovals of State BART determinations under the regional haze program both in this Court and in other Circuits. At least eleven other similar cases are now pending involving eight other State plans, including two in this Court, and more may be filed.[2] Thus, the Panel's decision, if not reconsidered, will have an immediate and important effect. Moreover, the regional haze plans at issue are only first-phase plans that will be followed by multiple additional rounds of State plans nationwide over at least the next fifty years. Setting the correct legal rules-of-the-road at the outset of this long-term program is critically important.

These issues are more than academic. EPA's actions in just the pending cases will impose billions of dollars in costs on the citizens of our States. Yet EPA's actions will not result in meaningful environmental benefits.

BACKGROUND

Congress first enacted a visibility-protection program in the comprehensive 1977 CAA Amendments. 42 U.S.C. § 7491; *see also Corn Growers*, 291 F.3d at 8-9. The program's goal is to eliminate manmade visibility impairment in national parks and wilderness areas, termed "Class I areas." 42 U.S.C. § 7491(a).

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[2] *See* citations at 11, n. 6 *infra*.

Congress did not specifically mandate that this goal be achieved by any particular date, but instead required that EPA promulgate regulations requiring States to submit state implementation plans ("SIPs") that include such measures "as may be necessary to make reasonable progress toward meeting the national goal." *Id.* § 7491(b)(2). Congress also required that as a part of making "reasonable progress," States should determine BART emissions limits for large industrial facilities that were constructed between 1962 and 1977 and that emit air pollutants that the State determines may reasonably be anticipated to cause or contribute to Class I area visibility impairment. *Id.* § 7491(b)(2)(A).

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

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

every ten years thereafter. *Id.* § 51.308(f). The States' long-term strategies must include enforceable emission limitations, including determinations of BART. *Id.* § 51.308(d)(3), (e).

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

For the program's first phase, in the Midwest and West, including in Oklahoma and some of the Amici States, EPA has again failed to defer to State authority, aggressively disapproving many State first-phase BART determinations and replacing them with its own much more costly BART requirements. EPA allowed most eastern states to rely on a stringent EPA regional pollution transport program instead of having to make BART determinations for electric generators.[3] This exemption, however, is under judicial review,[4] and if the D.C. Circuit overturns this exemption, some eastern States could be required to make BART determinations as well.

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[3] 77 Fed. Reg. 33,642 (June 7, 2012).

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

ARGUMENT

I. The Panel Misapprehended the Standard of Review.

The Panel determined that the proper standard was the arbitrary and capricious test, *Oklahoma,* 2013 U.S. App. LEXIS 14634 at *23-*25, under which the court is required to defer to the EPA's expert judgments rather than to the State's, *id.* at *42. As the Panel said, "[l]eft to evaluate the arguments of the parties' experts, we must give deference to the EPA." *Id.* The Panel's grant of deference to EPA's judgments in contravention of Oklahoma's judgments was legal error. Although the standard of review for EPA decisions would normally be deferential to EPA judgments within its area of expertise, *see* 42 U.S.C. § 7607(d)(9), 5 U.S.C. § 706(2), that is not so here. Where, as here, the statute grants specific decision-making authority to *the States*, the Court must defer to *the State's* expert judgments, not to EPA's, and EPA bears the burden of showing that the State's judgments were unreasonable. *ADEC*, 540 U.S. at 494. Although the Panel cited *ADEC* on a different point, *Oklahoma,* 2013 U.S. App. LEXIS 14634 at *24, it failed to come to grips with that decision's essential holding on standard of review. The panel also did not recognize that both the degree of deference EPA owes a State and EPA's burden on judicial review to show that the State acted unreasonably is even higher than under *ADEC* where, as here, EPA has disapproved a regional haze SIP.

A. In Reviewing an EPA Disapproval of a State's Exercise of Discretion, Courts Must Defer to State Judgments, and EPA Bears the Burden of Establishing that Those Judgments Were Unreasonable.

In *ADEC*, the Supreme Court examined the standard of review where EPA disapproved a State's findings of "Best Available Control Technology" ("BACT") for an electric powerplant as part of the state's Prevention of Significant Deterioration ("PSD") permit program incorporated into the State's SIP. It held that EPA's supervisory authority over State BACT determinations was limited "to ensur[ing] that a State's BACT determination is reasonably moored to the Act's provisions." *ADEC*, 540 U.S. at 484-89.

The Court, however, did not endorse a standard of review that would defer to EPA's judgments. Instead, it held that both EPA, in reviewing Alaska's BACT determinations, and a court in reviewing EPA's disapproval of those BACT determinations, must defer to the State's expertise. According to the Court, because the statute gives States "considerable leeway" and "'places primary responsibilities and authority with the States,'" EPA was required to give "'appropriate deference'" to Alaska's decisions. *Id.* at 490-91. EPA may step in "[o]nly when a state agency's BACT determination is 'not based on a reasoned analysis'" and is "'arbitrary.'" *Id.* at 490-91.

Thus, when a Court reviews an EPA disapproval of a State BACT determination, *ADEC* directs that "*the production and persuasion burdens remain*

with EPA and the underlying question a reviewing court resolves remains the same: *Whether the state agency's BACT determination was reasonable*, in light of the statutory guides and the state administrative record." *Id.* at 494 (emphasis added). In *ADEC*, the Supreme Court affirmed EPA's disapproval of the State's BACT determination, but *only* after finding that the State had entirely failed to provide *any* information to support its determination that the controls that EPA sought would bankrupt the permittee at issue in the case. *Id.* at 488.

In sum, under *ADEC*, contrary to the Panel decision, *EPA* bears the burden of showing that Oklahoma's judgments were arbitrary, and this Court must defer to *Oklahoma's* judgments, not EPA's. *See also United States v. Minnkota Power Coop.*, 831 F. Supp. 2d 1109, 1121 (D.N.D. 2011) (applying *ADEC* to reverse EPA's disapproval of a State BACT determination and holding that "North Dakota's conclusions regarding such highly technical matters are entitled to deference unless the EPA proves them to be unreasonable, arbitrary, or capricious.").

B. The State Is Due Even Greater Deference Under Section 7491 than Under *ADEC*.

The Supreme Court's decision in *ADEC*, however, does not capture the full degree of deference that EPA owes States under § 7491. The *ADEC* decision was limited to construing the CAA's provisions governing enforcement of a different CAA program that gives EPA "notably capacious" authority over State permitting

decisions. *ADEC*, 540 U.S. at 484. Unlike the PSD program reviewed in *ADEC*, however, the § 7491 regional haze program does not address the National Ambient Air Quality Standards or health-based concerns, nor does it grant EPA "notably capacious" authority. To the contrary, § 7491 is highly deferential to State authority. *Corn Growers*, 291 F.3d at 8 (States have "broad authority over BART determinations").

As set forth in *Corn Growers*, the Conference Committee that authored the final version of § 7491 inserted the phrase "as determined by the State" in two places in the text specifically to clarify that States have overarching authority to make BART determinations. *Corn Growers*, 271 F.3d at 8. This language was inserted as part of "an agreement to reject the House bill's provisions giving EPA the power to determine whether a source contributes to visibility impairment and, if so, what BART controls should be applied to that source." *Id.* At least immediately following *Corn Growers*, EPA got the point. As EPA explained in its remand regulations, "how *[S]tates* make BART determinations or how they determine which sources are subject to BART" are among the issues "where the Act and legislative history indicate that *Congress evinced a special concern with insuring that States would be the decision makers*." 70 Fed. Reg. at 39,137 (emphasis added).

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However, now that it has begun the process of reviewing State BART determinations, EPA has reversed course. Indeed, although EPA must be even more deferential to State BART determinations than it is to State BACT determinations, it has intruded more aggressively on State BART authority than it has on State BACT authority. In affirming EPA's disapproval of Alaska's BACT determinations, the Supreme Court in *ADEC* took comfort in EPA's representations that "'[i]t has proven to be relatively rare that a state agency has put EPA in the position of having to exercise [its] authority,' noting that only two other reported judicial decisions concern EPA orders occasioned by States' faulty BACT determinations." *ADEC,* 540 U.S. at 491 n.14 (citing EPA's brief). States do not normally act arbitrarily, and so the Court emphasized that only in an "unusual case" could a State be expected to make a BACT determination that was sufficiently arbitrary to necessitate EPA intervention. *Id.* at 491. Yet in just the first phase of EPA's long-term regional haze program – where EPA has not required eastern State BART determinations for electric generators given the stringency of EPA's other eastern regulations – it has disapproved State BART determinations or taken similar action in twelve states and has a pending disapproval in another State,[5] leading to lawsuits in many of the cases.[6]

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

C. The Dissent's Formulation of the Standard of Review Was Correct.

As Oklahoma's rehearing petition states, the dissent's formulation of the standard of review conforms to *ADEC*, and this Court should follow it.

II. The Court Should Grant Rehearing Because of the Important Effect the Decision Could Have.

The Panel's decision is the first decision issued on review of EPA's actions on State first-phase regional haze SIPs and BART determinations. It could therefore influence other judicial reviews of EPA action on first-phase and future BART determinations. For example, this Court is currently reviewing EPA's disapproval of certain BART determinations by the State of Utah, and likely will soon be reviewing EPA's disapprovals of certain BART determinations made by

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77 Fed. Reg. 57,864 (Sept. 18, 2012) (Montana); 77 Fed. Reg. 40,150 (July 6, 2012) (Nebraska); 77 Fed. Reg. 50,936 (Aug. 23, 2012) (Nevada); 76 Fed. Reg. 52,388 (Aug. 22, 2011) (New Mexico); 77 Fed. Reg. 20,894 (Apr. 6, 2012) (North Dakota); 76 Fed. Reg. 81,728 (Dec. 28, 2011) (Oklahoma); 77 Fed. Reg. 74,355 (Dec. 14, 2012) (Utah); 77 Fed. Reg. 33,022 (June 4, 2012) (Wyoming) (proposed).

[6] *Arizona v. EPA*, No. 13-70366 (9th Cir., filed Jan. 31, 2013); *Louisiana Dep't of Env. Quality v. EPA*, No. 12-60672 (5th Cir., filed Sept. 4, 2012); *Michigan v. EPA*, No. 13-2130 (8th Cir., filed May 21, 2013); *Cliffs Natural Res., Inc. v. EPA*, No. 13-1758 (8th Cir., filed Apr. 4, 2013) (Michigan and Minnesota); *PPL Montana, LLC v. EPA*, No. 12-73757 (9th Cir., filed Nov. 16, 2012); *Nebraska v. EPA*, No. 12-3084 (8th Cir., filed Sept. 4, 2012); *Nevada Power Co. v. EPA*, No. 12-73411 (9th Cir., filed Oct. 22, 2012); *Martinez et al v. EPA*, No. 11-9567 (10th Cir., filed Oct. 21, 2011) (New Mexico); *North Dakota v. EPA*, No. 12-1844 (8th Cir., filed Apr. 9, 2012); *Oklahoma v. EPA* (the instant case); *Utah v. EPA*, No. 13-9535 (10th Cir., filed Mar. 21, 2013).

the State of Wyoming.[7] The Panel decision will also serve as important authority in judicial reviews of EPA action on BART determinations made by States in other Circuits. For instance, EPA filed Rule 28(j) letters in a number of the pending cases in which EPA argued that the decision supported its position.[8] As EPA issues other first-phase decisions, and as EPA issues decisions on review of future-phase regional haze plans across the country, the Panel decision will be cited as important authority on the respective roles of EPA and the States in the regional haze program.

Getting the proper division of EPA and State authority right as this process unfolds is particularly important given the significant impacts that EPA's BART actions have on the public. For instance, Oklahoma estimated that the costs of the BART installations that EPA required at electric utility facilities would exceed $1.2 billion. Oklahoma's Opening Brief at 7. Arizona estimated that EPA's BART requirements would impose hundreds of millions of dollars of pollution-control costs above the approximately $800 million in pollution-control costs that Arizona utilities have either recently invested or are currently investing. Arizona Opening Brief at 3, *Arizona v. EPA*, No. 13-70366 (9th Cir., Aug. 5, 2013). These costs will be passed on directly to consumers in the form of higher electric rates.

[7] New Mexico's appeal, which is pending in this Court, No. 11-9567, has been referred to mediation.
[8] *See, e.g.,*Citation of Supplemental Authorities, *Arizona v. EPA,* No. 13-70366 (9th Cir., July 24, 2013), ECF No. 29.

Yet in both cases, the record shows that EPA's added costs will improve visibility only imperceptibly or, in one BART determination, nearly imperceptibly. *Id.* at 19, Oklahoma Opening Brief at 36.

It goes without saying that the monetary resources of Amici States' citizens are not unlimited. Electric rate increases are like a regressive tax that disproportionately affects lower-income households and people living on fixed incomes. Congress delegated authority to the States – not EPA – under § 7491 to make the essentially legislative choices of how much of their citizens' money should be spent to improve visibility. Here, Oklahoma reasonably decided that the virtually meaningless environmental benefits that would result from the huge expenditure of money that EPA would have the State's citizens bear was not justified by the cost. The Panel should not have affirmed EPA's intrusion into that decision.

CONCLUSION

In light of the important effect the Panel decision could have in pending and future cases, and in light of the high importance this case has to the public at large, this Court should grant Oklahoma's Petition for Panel or En Banc Rehearing.

Dated: September 10, 2013

Respectfully submitted,

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1. This brief complies with the requirements of Circuit Rule 29.1 and Fed. R. App. P. 32(a)(7)(B) because it contains 2,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on September 10, 2013.

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