Nos. 13-921 & 13-940

IN THE
Supreme Court of the United States

STATE OF OKLAHOMA, *et al.*,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATE OF NORTH DAKOTA,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth and Eighth Circuits

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BRIEF OF AMERICAN IRON AND STEEL INSTITUTE, INDUSTRIAL ENERGY CONSUMERS OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, AND PORTLAND CEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PIERRE H. BERGERON
SQUIRE SANDERS (US) LLP
1200 19th Street, NW
Suite 300
Washington, D.C. 20036
(202) 626-6600
pierre.bergeron@squiresanders.com

ALLEN A. KACENJAR
Counsel of Record
KATY M. FRANZ
SQUIRE SANDERS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
(216) 479-8500
allen.kacenjar@squiresanders.com

QUESTION PRESENTED

Whether the United States Environmental Protection Agency exceeded its limited authority under the Clean Air Act to review regional haze state implementation plans where it has supplanted state determinations with direct federal standards that reflect EPA's own preferences in contravention of the cooperative federalism regime created by Congress.

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The American Iron and Steel Institute ("AISI"), Industrial Energy Consumers of America ("IECA"), National Association of Manufacturers ("NAM"), National Mining Association ("NMA"), and Portland Cement Association ("PCA") respectfully submit this brief as *amici curiae* in support of Petitioners State of Oklahoma, Oklahoma Industrial Energy Consumers, and Oklahoma Gas and Electric in Case No. 13-921, and Petitioner State of North Dakota in Case No. 13-940.[1]

INTEREST OF THE *AMICI*

AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. AISI also plays a lead role in the development and application of new steels and steelmaking technology. AISI is comprised of 23 member companies, including integrated and electric furnace steelmakers, and approximately 125 associate members who are suppliers to or customers of the steel industry. AISI's member companies represent over three

[1] Pursuant to Rule 37.2 of this Court, counsel of record for all parties were provided with timely notice of the intention to file this brief. All parties have consented to the filing of this brief and written consents are being lodged herewith. In accordance with Rule 37.6, the *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than the *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

quarters of both U.S. and North American steel capacity. Members include companies operating taconite processing plants in Minnesota and Michigan that are currently challenging EPA's regional haze rules in those states before the Court of Appeals for the Eighth Circuit. The *Oklahoma* and *North Dakota* cases raise fundamental issues of EPA's authority to review state implementation plans ("SIPs") that impact AISI members across the nation.

IECA is an association of manufacturing companies with $1.0 trillion in annual sales, over 1,500 facilities nationwide, and with more than 1.4 million employees worldwide. Membership represents a diverse set of industries including: chemical, plastics, steel, iron ore, aluminum, paper, food processing, fertilizer, insulation, glass, industrial gases, pharmaceutical, building products, brewing, independent oil refining, and cement.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that

helps manufacturers compete in the global economy and create jobs across the United States.

NMA is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources. NMA members own and operate sources that are regulated under state implementation plans in various states. NMA and its members have been involved in similar litigation regarding EPA's failure to comply with the cooperative federalism mandates embedded in the Clean Air Act. As such, NMA and its members are keenly interested in ensuring that the EPA does not exceed its Clean Air Act authority in disapproving validly issued state plans to the detriment of NMA's members.

PCA represents 26 U.S. cement companies operating 79 manufacturing plants in 34 states, with distribution centers in all 50 states, servicing nearly every Congressional district. PCA members account for approximately 78% of domestic cement-making capacity.

SUMMARY OF THE ARGUMENT

The decisions below raise critical issues of national significance because they erode Congress' fundamental allocation of power under the Clean Air Act. As confirmed by this Court's precedent, Congress purposely limited EPA's authority by ensuring that air pollution concerns are "the primary responsibility of states and local governments." 42 U.S.C. § 7401(a)(3). Thus, the Clean Air Act grants States the primary responsibility for making air quality decisions and limits EPA to the secondary function of determining whether those state plans are "based on a reasoned analysis." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 490 (2004). EPA's obligation to defer to state policy decisions is at its apex in the regional haze context, which involves aesthetic concerns Congress expressly decided should be addressed "as determined by the State[s]" after weighing economic and other factors. 42 U.S.C. § 7491(b)(2).

The *Oklahoma* and *North Dakota* cases reflect a growing pattern of disregard for the statutory limits on EPA's review authority. Indeed, EPA recently supplanted thirteen state regional haze plans with direct federal rules imposing its own preferences. Such actions undermine the federal-state balance of power struck by Congress. Given the looming prospect of hundreds of state regional haze submissions over the next half-century, this Court's immediate intervention is

warranted to avoid a permanent expansion of federal power at the expense of the states.

Enabling EPA to second-guess state rules with impunity also has serious practical implications – particularly for industry who must ultimately comply. Based on years of hands-on effort, states have an unparalleled understanding of the sources they regulate. As a result, states are better suited to craft requirements that will further environmental goals while minimizing harmful business impacts. As Congress recognized, states are also uniquely situated to choose among competing options as needed to balance local environmental, economic and other interests.

If EPA can override years of state-led efforts reflecting local knowledge and insight, then its federal power will become self-effectuating. Rather than engaging with states to help craft workable standards that EPA can overturn as it prefers, interested parties will have little practical choice but to wait for EPA's mandates. That is the polar opposite of what Congress intended – a system where states make local decisions and EPA must defer to them absent an unambiguous statutory problem. These cases present an excellent vehicle to reinforce the federal-state balance struck by Congress and endorsed by this Court's precedent in a way that will avert decades of further litigation.

ARGUMENT

I. This Court's Review Is Necessary to Prevent EPA from Usurping the Primary Role the Clean Air Act Assigns to States.

A. The Clean Air Act Limits EPA's Authority, Particularly Regarding State Regional Haze Decisions.

Congress purposely limited EPA's authority under the Clean Air Act by creating a statute in which "air pollution prevention . . . and air pollution control . . . is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see also* 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . ."). The Clean Air Act adopts a "cooperative federalism" approach, in which EPA sets broad standards at the federal level, and each state devises a unique state implementation plan ("SIP") to meet those standards in the way that is best for its citizens. *See* 42 U.S.C. § 7410(a)(2).

Once a state submits a plan, EPA's role is limited to determining whether the plan satisfies the applicable statutory and regulatory criteria. 42 U.S.C. § 7410(k)(3). If a SIP satisfies these requirements, the Clean Air Act mandates EPA approval. *Id.* ("[T]he Administrator *shall approve* such submittal as a whole if it meets all of the applicable requirements of this chapter." (emphasis

added)); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). EPA has "no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). Rather, EPA must defer to the State's findings so long as they are "based on a reasoned analysis." *Alaska*, 540 U.S. at 490.

EPA's obligation to defer to the states is particularly pronounced in the regional haze context, where Congress placed extra emphasis on the primary role of states. Congress directed EPA to "provide guidelines *to the States*" so that states, not EPA, could develop SIPs to implement the program. 42 U.S.C. § 7491(b)(1) (emphasis added). Congress also made clear that states, not EPA, were responsible for deciding which sources contributed to visibility impairment and identifying the best available retrofit technology ("BART") for each of those sources. *See* 42 U.S.C. § 7491(b)(2) (repeatedly using the phrase "as determined by the State[s]"). EPA's role in the regional haze program is limited to reviewing plans to ensure they contain measures deemed "necessary to make reasonable progress toward meeting" the national visibility goal. *Id.*

The legislative history confirms that this emphasis on state primacy was intentional:

> Mr. McClure: Under the conference agreement, does the State retain sole

> authority for identification of sources for the purpose of visibility issues under this section?
>
> Mr. Muskie: Yes; *the State, not the Administrator*, identifies a source that may impair visibility . . . .
>
> Mr. McClure: And does this also hold true for determination of "Best Available Retrofit Technology"?
>
> Mr. Muskie: Yes; *here again it is the State* which determines what constitutes "Best Available Retrofit Technology" . . . .

3 S. COMM. ON ENVT'L AND PUBLIC WORKS, 95TH CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 374–75 (Comm. Print 1979) (emphasis added); *see also* H.R. REP. NO. 95-564, at 155 (1977).

That focus on retaining state control is unsurprising since the regional haze program is purely aesthetic. Unlike other Clean Air Act provisions that aim to protect health, the regional haze program aims to improve scenic views. As such, states are required to balance costs and other factors when deciding which industries to regulate and what steps facilities must take to reduce emissions. *See* 42 U.S.C. § 7491(g)(2). This balancing requires policy judgments best made by state governments that are closer to the issues and

accountable to the local electorate. *Accord New York v. United States*, 505 U.S. 144, 167–68 (1992).

Oklahoma and *North Dakota* squarely conflict with the D.C. Circuit's decision in *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). In striking down EPA regulations that would have forced states to balance statutory factors in a certain manner, the D.C. Circuit concluded that the regional haze rule "calls for *states* to play the lead role in designing and implementing regional haze programs" and that "Congress intended the *states* to decide which sources impair visibility and what BART controls should apply to those sources." 291 F.3d at 2, 8 (emphasis added). Both decisions below contradict those instructions by allowing EPA to second-guess state regional haze determinations which the D.C. Circuit expressly concluded were meant for "the states to decide. . . ." 291 F.3d at 8.

The decisions below also deviate from this Court's decisions in *Train* and *Alaska*, which both uphold the primacy of state emissions limitations. *See Train*, 421 U.S. at 79; *Alaska*, 540 U.S. at 490. The inconsistency with this Court's holding on the selection of best available control technology ("BACT") in the state-led permitting efforts at issue in *Alaska* is particularly stark. In that case, this Court held 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. If EPA must meet that standard in the BACT permitting context addressed in *Alaska*, then at least as much is required where the statute expressly instructs that regional haze decisions are to be "determined by the State[s]." 42 U.S.C. § 7491(b)(2).

Accordingly, review by this Court is warranted to resolve the conflicts created by the decisions below.

B. EPA's Disregard of the Statutory Limits on Its Regional Haze SIP Review Authority Creates Substantial Uncertainty.

The *Oklahoma* and *North Dakota* decisions are just two examples of EPA overstepping its limited regional haze SIP review authority. EPA has now supplanted regional haze determinations in thirteen states with direct federal requirements.[2] Eleven of these actions have been challenged in

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[2] 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 and Michigan); 77 Fed. Reg. 40,150 (July 6, 2012) (Nebraska); 77 Fed. Reg. 50,936 (Aug. 23, 2012) (Nevada); 76 Fed. Reg. 52,388 (Aug. 22, 2011) (New Mexico); 77 Fed. Reg. 51,915 (Aug. 28, 2012) (New York); 77 Fed. Reg. 20,894 (Apr. 6, 2012) (North Dakota); 76 Fed. Reg. 81,728 (Dec. 28, 2011) (Oklahoma); 77 Fed. Reg. 74,355 (Dec. 14, 2012) (Utah); 79 Fed. Reg. 5,032 (Jan. 30, 2014) (Wyoming).

federal court already, with at least eight cases currently pending in four different Circuits.[3]

Oklahoma and *North Dakota* exemplify how EPA has substituted its preferences for state judgment under the guise of "reviewing" state regional haze determinations for conformance with the statute. In *Oklahoma*, the state rejected EPA's preferred control technology largely because of cost. *See* Okla. Pet. at 11–12. In performing this analysis, Oklahoma used its technical expertise and knowledge of the sources to determine that vendor-specific quotes provided the most accurate cost estimate. Instead of simply assessing whether Oklahoma's judgment was reasonable under the statute, EPA conducted its own preferred cost analysis, rebalanced the statutory factors itself and disapproved the SIP.

Similarly, North Dakota spent nine years developing its SIP and considered unique local factors when it evaluated the real-world visibility impacts of proposed control options. N.D. Pet. at

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[3] *Arizona v. EPA*, No. 13-70366 (9th Cir., filed Jan. 31, 2013); *Louisiana Dep't of Envtl. 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); *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., closed Dec. 4, 2013); *Martinez, et al. v. EPA*, No. 11-9567 (10th Cir., filed Oct. 21, 2011); *Utah v. EPA*, No. 13-9535 (10th Cir., filed Mar. 21, 2013).

18–19. Rather than decide whether that analysis was reasonable, EPA conducted a different visibility analysis that was not mandated by the Clean Air Act, and used its own work to justify issuing a FIP.

These actions illustrate EPA's fundamental misunderstanding of its limited role in the regional haze process. As this Court has confirmed, the Clean Air Act requires EPA to defer to state decisions as long as they are based on a reasoned analysis. *Alaska*, 540 U.S. at 490. It does not permit EPA to conduct *de novo* reviews and reject state plans with different technical and policy decisions than EPA would have made.

Nor may EPA compound that mistake (as it has in Oklahoma, North Dakota and many other states) by issuing FIPs that reflect EPA's preferred choices. EPA is only entitled to disapprove a complete SIP that fails to conform to Clean Air Act requirements and is thus unreasonable. 42 U.S.C. § 7410(c). Each time EPA fails to apply this standard, and instead mandates its own preferences through a FIP, EPA falls short of the statutory criteria.

EPA has gone even further in attempting to impose its will in subsequent regional haze rulemakings. For example, in 2013, EPA issued FIPs supplanting Minnesota's and Michigan's regional haze requirements for the taconite industry before EPA identified a single flaw in either SIP. *See* 78 Fed. Reg. 8,478 (Feb. 6, 2013).

Minnesota and Michigan each submitted SIPs that reflected years of effort with land managers, industry, and environmental groups. Those submissions contained thousands of pages of supporting analysis and reflected both states' best technical judgment.[4]

EPA disregarded both submissions for years, and then abruptly proposed FIPs in August 2012, only generically stating that "Michigan and Minnesota failed to adequately establish BART limits for its subject taconite ore processing facilities." 77 Fed. Reg. 49,308, 49,310 (Aug. 15, 2012). EPA identified no flaws in the states' analyses and offered no explanation for rejecting the states' conclusions.[5] Such actions flaunt EPA's obligation to defer to state regional haze determinations and exceed the statutory limits on EPA's FIP authority, which exists to fill identified "gaps" in SIP submissions. *See* 42 U.S.C. § 7410(c); 42 U.S.C. § 7602(y). This is not what Congress envisioned and contradicts the principles of cooperative federalism established in the Clean Air Act.

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[4] These state submissions can be viewed at http://www.regulations.gov, EPA-R05-OAR-2010-0037-0002 and EPA-R05-OAR-2010-0954-0002.

[5] Only after EPA finalized the FIPs for both states did EPA propose, for the first time, the reasons it believed the SIPs were inadequate. *See* 78 Fed. Reg. 8,478 (Feb. 6, 2013) (finalizing the FIPs); 78 Fed. Reg. 8,706 (Feb. 6, 2013) (proposing disapproval of the SIPs).

EPA's intrusion into more than a dozen regional haze SIPs and its insistence on imposing its own preferences before it even identified flaws in some of those state plans demonstrate that EPA will continue to push its review authority beyond what the Clean Air Act allows to the detriment of states and industry alike absent guidance from this Court.

II. EPA's Pattern of Exceeding Its Clean Air Act Review Authority Is a Recurring Issue of National Significance.

A. The Scope of EPA's Review Authority Will Impact Hundreds of Clean Air Act Determinations Nationwide.

EPA's efforts to override Congress' grant of primary regional haze authority to states has repercussions that extend far beyond the two cases currently on petition before this Court, and the eight similar appeals now being litigated in the Circuit courts. The regional haze program does not establish a one-time requirement. Rather, it requires states to revise their SIPs "by July 31, 2018 and every ten years thereafter" through 2064. 40 C.F.R. § 51.308(f); 40 C.F.R. § 51.300(b)(3). This means that EPA will "review" hundreds of SIP revisions over the next five decades under the regional haze program alone. EPA's pattern of side-stepping state authority in the first round of regional haze submissions demonstrates why guidance is needed now. Absent a decision that

protects state-led rulemaking efforts, EPA will continue to impose its own preferences for decades.

While the regional haze implications alone are sufficient to merit review, the issues presented in *Oklahoma* and *North Dakota* resonate much more broadly. At their core, both cases raise the fundamental question of how much deference EPA owes to state decisions. That dynamic impacts many other Clean Air Act programs where Congress gave states primary authority. For example, while Congress granted EPA authority to set and revise national ambient air quality standards ("NAAQS"), 42 U.S.C. §§ 7409(a), (d), states are empowered with developing plans that "provide[] for implementation, maintenance, and enforcement" of the standards within the state. 42 U.S.C. § 7410(a).

As part of those efforts, states identify which areas are meeting the standards, how areas that are meeting the standards will maintain compliance, and how to bring areas that are not meeting the standards into compliance. 42 U.S.C. § 7410(a). As with the regional haze program, Congress gave states significant latitude by allowing them to choose the mix of sources that must install controls to attain the national standards. 42 U.S.C. § 7410(a)(2); *see also Union Elec. Co.*, 427 U.S. at 250 ("each State is given wide discretion in formulating its plan . . ."). While EPA can review those state choices to ensure that they comply with the Clean Air Act, the Agency cannot simply impose its own preferences. 42 U.S.C.

§ 7410(k)(3); *see also Luminant Generation Co., L.L.C. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) ("The Act confines EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements.").

If left to stand, the *Oklahoma* and *North Dakota* decisions will threaten the dozens of state rules that follow every NAAQS revision. EPA has already demonstrated its inclination to override these rules with its own policy choices and was recently reprimanded by the Fifth Circuit for disapproving a SIP "based on its purported nonconformity with three extra-statutory standards that the EPA created out of whole cloth." *Luminant Generation Co., L.L.C.*, 675 F.3d at 932. Litigation over NAAQS disapprovals is not uncommon[6] and will only become more prevalent if *Oklahoma* and *North Dakota* are left in place to encourage EPA to continue exceeding the limits of its authority.

EPA's aggressive second-guessing of state decisions also has troublesome implications in the permitting context. Sources that modify their facilities in a way that increases emissions beyond certain thresholds must first obtain permits under the new source review program. 42 U.S.C. § 7475(a). For sources located in areas that meet all NAAQS, the permits must require installation of

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[6] *See, e.g.*, *ArcelorMittal Burns Harbor LLC v. EPA*, No. 14-1412 (7th Cir., filed Feb. 25, 2014); *Texas v. EPA*, No. 12-60128 (5th Cir., filed Feb. 23, 2012); *Ohio v. EPA*, No. 11-3988 (6th Cir., filed Sept. 9, 2011).

the best available control technology. 42 U.S.C. § 7475(a)(4). The BACT analysis requires a case-by-case technology review that EPA admits is similar to the BART analysis. 77 Fed. Reg. 20,894, 20,897 (Apr. 6, 2012).

EPA has granted many states authority to implement this permitting program but retains authority to block a permit if it does not satisfy Clean Air Act requirements. *See* 42 U.S.C. § 7413(a); 42 U.S.C. § 7477. As in the regional haze program, EPA owes deference to the states and can interfere with a state BACT determination only if the state's decision is "arbitrary" and "not based on a reasoned analysis." *Alaska*, 540 U.S. at 490–91; *see also U.S. v. Minnkota Power Coop., Inc.*, 831 F. Supp. 2d 1109 (D.N.D. 2011).

EPA's attempts to side-step *Alaska* in the regional haze context are deeply troubling to industry given EPA's views on the similarity of the BART and BACT review processes. States process hundreds if not thousands of permit applications each year that include BACT determinations. The applications often involve multi-million (and sometimes billion) dollar investments in plant upgrades and expansions. Facilities invest significant time working with state permitting authorities to ensure they satisfy all permitting requirements. EPA's attempts to second-guess state BART determinations foreshadow similar efforts to erode the limits on its authority to review permitting determinations, which would endanger

substantial projects and disrupt years of careful business planning.

The implications of EPA's position on its regional haze review authority are wide-ranging.[7] Review by this Court is necessary to provide prompt guidance in order to ensure that the Clean Air Act is implemented as Congress intended.

B. Allowing States to Play Their Intended Primary Role Is Critical to Successful Implementation of the Clean Air Act.

1. Congress Understood That States Are Uniquely Situated to Make Local Policy Decisions.

State regulators are responsible for the day-to-day work of issuing air permits, reviewing emissions inventories and compliance reports, and addressing identified concerns in their jurisdictions. As a result, state regulators have an unparalleled understanding of the sources that operate within their borders. This is particularly

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[7] In addition to the examples provided above, EPA review authority extends to thousands of state regulations that have been adopted into SIPs to implement a variety of Clean Air Act programs. For example, EPA's anticipated rule requiring dozens of states to revise their startup, shutdown, and malfunction defenses for Clean Air Act violations will impact how states implement their air pollution control programs. *See* 78 Fed. Reg. 12,460 (Feb. 22, 2013). It is imperative for EPA to proceed under the correct standard of review when evaluating such SIP revisions.

important for industries with unique and highly complex operations, like iron and steel making, and taconite processing. The dynamics of such complex operations often take years to understand, which is a critical prerequisite to developing effective regulations. For this reason, regulated industries make concerted efforts to help state regulators comprehend their facilities. If the Clean Air Act is allowed to work as Congress intended, that educational process results in regulations that achieve environmental goals without unintended business consequences.

In addition to having superior knowledge of the regulated community, state regulators are uniquely situated to make the policy decisions inherent in air quality planning. Many different approaches typically exist to achieve regional haze and other air quality goals. As Congress recognized, states are best positioned to choose among competing options to advance state environmental, economic and other priorities. Ensuring such policy choices are made by state regulators is critically important to the regulated community for one simple reason: we must live with the outcome of those policy decisions. Congress plainly respected these dynamics when it gave EPA "no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Train*, 421 U.S. at 79.

In contrast, the federal rules increasingly written to supplant state decisions often contain inaccurate assumptions or "one-size-fits-all"

requirements that ignore critical on-the-ground realities. EPA's recent regional haze FIPs are a prime example. In the Oklahoma FIP, EPA based an entire analysis on controls that were too small for the units they were supposed to address. *See* Okla. Pet. at 13. Similarly, in its Minnesota and Michigan FIPs, EPA erroneously assumed that its preferred technology could be installed at every taconite furnace regardless of fundamental design differences and that, once installed, every furnace would achieve the exact same reductions at the exact same cost without unintended environmental consequences or business impacts. The states of Minnesota and Michigan knew better based on years of experience with the industry.

EPA's inferior understanding of the individual facilities involved and its inability to balance the competing policy concerns that states know best illustrate why Congress limited EPA to a secondary role in air quality planning. These concerns equally show why this Court should take action to preserve that division of authority.

2. EPA's Interference with State Regulatory Efforts Has Grave Real-World Consequences.

As *Oklahoma* and *North Dakota* exemplify, regional haze and other air quality planning rules have enormous operational and financial impacts on those who must comply. While the direct impact of such "bet the company" decisions cannot be overstated, EPA's refusal to defer to state air policy

determinations also raises widespread programmatic concerns. State air quality plans are the culmination of years of effort by state regulators, industry, citizens, environmental groups and other interested parties. When EPA steps in at (and sometimes well after) the eleventh hour to impose its own will, it obviates those efforts. Such federal second-guessing shakes the foundation of state rulemaking efforts by creating strong disincentives to undertake that work in the first place. Rather than investing limited resources in developing state plans that EPA may overturn simply because it prefers something different, interested parties will be encouraged to bypass the state process entirely and wait for a FIP from EPA. That loss of confidence threatens the viability of state rulemaking authority in a way that Congress never envisioned.

Allowing EPA to side-step the Clean Air Act's cooperative federalism structure also creates unworkable uncertainty, unnecessary delay and unintended environmental consequences. After investing years of effort in developing well-conceived state rules, all involved need confidence those decisions will stand absent an unambiguous statutory problem. From industry's perspective, that certainty is particularly critical. A stable regulatory environment where well-reasoned state decisions receive deference is essential to the business planning cycle. Financial planning, engineering and other preparations must occur years in advance at complex facilities. When EPA

abruptly supplants a state plan or permit because it prefers a different approach, facilities suddenly find themselves grappling with unanticipated, multi-million dollar compliance concerns that wreak havoc. Such instability inhibits investment in U.S. plants and encourages companies to invest limited resources elsewhere. EPA's aggressive pursuit of broad authority to rewrite state regional haze SIPs and the inconsistent court rulings to date are exacerbating this uncertainty. *See* Okla. Pet. at 23-32.

EPA's policy takeovers also delay measures designed to achieve environmental goals. Once facilities begin down a compliance path, it is often impossible to recoup sunk costs when EPA steps in and imposes new requirements. As a result, facilities are forced to delay planning and investments in controls until EPA, and in many cases the courts, have had their say. It often takes years for EPA to even consider state plans, despite a Clean Air Act mandate to do so within a specified period of plan submission. *See* 42 U.S.C. § 7410(k)(2). Legal battles over the propriety of EPA's actions can then take years more. These unnecessary delays inhibit changes that would advance the Clean Air Act's environmental goals. When EPA initiates a power struggle that the statutory language clearly forbids, emissions controls are put on hold and businesses cannot expand.

The instant petitions allow this Court to issue a clear directive establishing the limits of

EPA's authority to disapprove state plans under the Clean Air Act's cooperative federalism mandate. This issue arises again and again across several air programs, from NAAQS implementation to permitting to regional haze. Without action by this Court, the pattern of unworkable uncertainty and needless delay will continue indefinitely at the expense of the environment and the economy.

CONCLUSION

For these reasons, *amici* respectfully request that the petitions for writ of certiorari be granted and the judgments below reversed.

Respectfully submitted,

ALLEN A. KACENJAR
Counsel of Record
KATY M. FRANZ
SQUIRE SANDERS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
(216) 479-8500
allen.kacenjar@
squiresanders.com

PIERRE H. BERGERON
SQUIRE SANDERS (US) LLP
1200 19th Street, NW, Suite 300
Washington, D.C. 20036
(202) 626-6600
pierre.bergeron@
squiresanders.com

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