No. 98-1330

In the Supreme Court of the United States

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitions for review of the Environmental Protection Agency's "credible evidence" regulations as not ripe for judicial review.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 150 F.3d 1200.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1998. A petition for rehearing was denied on November 20, 1998 (Pet. App. 17a-20a). The petition for a writ of certiorari was filed on February 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Environmental Protection Agency (EPA) administers the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* EPA has amended its CAA regulations to clarify that EPA and the States may evaluate whether regulated

entities are in compliance with those regulations through the use of any credible evidence bearing on compliance, rather than through the use of only those specific tests that are identified in EPA or state regulatory standards. See 40 C.F.R. 51.212(c), 52.12(c), 60.11(a), (f) and (g) (the credible evidence provisions). Petitioners, which are industrial entities subject to the CAA regulations, filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit to challenge the credible evidence provisions. The court of appeals dismissed those petitions for review on ripeness grounds, holding that the validity of petitioners' claims could not be evaluated in the absence of a specific enforcement action. Pet. App. 1a-16a.

1. The CAA directs EPA to promulgate three primary types of nationally applicable standards relevant to stationary sources of air pollution: National Ambient Air Quality Standards (NAAQS); New Source Performance Standards (NSPS); and National Emission Standards for Hazardous Air Pollutants (NESHAP). The NAAQS regulations specify the maximum permissible concentrations of six "criteria" pollutants (ozone, sulfur dioxide, lead, particulate matter, carbon monoxide, and nitrogen dioxide), which are attained primarily through state-designed control strategies set out in State Implementation Plans (SIPs). See CAA §§ 109-110, 42 U.S.C. 7409-7410; see also 40 C.F.R. Pts. 50-51. The NSPS regulations establish numerical emission standards for specific categories of stationary sources. See CAA § 111, 42 U.S.C. 7411; 40 C.F.R. Pt. 60. The NESHAP regulations establish emission standards for stationary sources of certain hazardous air pollutants for which there are no ambient air quality standards. See CAA § 112, 42 U.S.C. 7412; 40 C.F.R. Pt. 61. The emission

standards are enforced through administrative, civil, or criminal sanctions. *E.g.*, CAA § 113, 42 U.S.C. 7413. See Pet. App. 2a-3a.

When EPA first promulgated its SIP, NSPS, and NESHAP regulations, it specified not only the numerical value of the particular standards, but also specific performance or reference tests to be used for determining compliance with each standard. See Pet. App. 3a. In 1997, EPA adopted the credible evidence provisions at issue here, which state (in virtually identical language) that nothing in the SIP, NSPS, and NESHAP regulations "shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed." 40 C.F.R. 60.11(g); see 40 C.F.R. 51.212(c), 52.12(c), 60.11(a) and (f). See 62 Fed. Reg. 8314 (1997); Pet. App. 3a-4a.

EPA adopted the credible evidence provisions to address the practicalities of environmental enforcement. EPA has determined, as a matter of experience and technological developments, that various tests and techniques can yield the same measurement of environmental compliance as the performance or reference tests set out in EPA's regulations. As an example, a "continuous opacity monitor" containing a calibrated light source can provide compliance data with at least the same level of reliability as an EPA reference test known as "Method 9," which requires that "a trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume in order to properly illuminate it." See 62 Fed. Reg. at 8319. Under the credible evidence provisions, EPA can, in appropriate circumstances, employ continuous opacity

monitoring, instead of Method 9, to evaluate compliance. See Pet. App. 4a-5a.

The credible evidence provisions give EPA greater flexibility to use substitute methodology, in light of practical considerations and technological advances, to evaluate environmental compliance. Nevertheless, the specific reference test set forth in the applicable SIP, NSPS, or NESHAP regulation remains the benchmark for measuring compliance. EPA's "credible evidence" must relate to what the reference test would have shown if it had been performed. Specifically, the substitute methodology must reliably measure the pollutant in the same concentration or mass over the same time period. See 62 Fed. Reg. at 8314-8315.

2. Petitioners challenged the credible evidence provisions by filing petitions for review in the United States Court of Appeals for the District of Columbia Circuit in accordance with Section 307(b) of the CAA, 42 U.S.C. 7607(b), which provides for pre-enforcement review of final agency actions in the appropriate court of appeals. Section 307(b)(1) states:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation * * * appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. 7607(b)(1). Section 307(b)(2) further provides:

> Action of [EPA] with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. 7607(b)(2).

Petitioners contended in their petitions for review that EPA lacked statutory authority to adopt regulations that allow use of credible evidence in lieu of the performance or reference tests. Pet. App. 5a. They further argued that EPA was obligated to conduct a rulemaking on each of the NSPS and NESHAPS standards that would be affected by the credible evidence provisions. See *ibid.* As the court of appeals explained, "[t]he heart of the argument is that the credible evidence rule, by altering the means of determining compliance for the [NSPS and NESHAP regulations], increases the stringency of the underlying standards." *Ibid.* As the court also explained, "EPA's short answer is that there was no need for such proceedings [to revise the NSPS and NAAQS standards] because the standards have not been changed." *Ibid.* The court of appeals did not resolve that dispute. Applying this Court's decisions in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); and *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), the court of appeals ruled that petitioners' challenges are not ripe for judicial determination and dismissed the petitions for review. Pet. App. 7a-16a.

The court of appeals concluded that petitioners' contentions "have raised issues that are not purely legal, issues that are not suitable for decision in the abstract." Pet. App. 8a-9a. The court explained that petitioners' contentions present "too many imponderables" because "application of EPA's credible evidence rule in the place of a reference test may potentially affect some standards but not others." *Id.* at 9a-10a. The court stated that "credible evidence is not a closed set" and that, "[g]iven the universe[] of all possible evidence

that might be considered 'credible,' it is impossible for us to decide now what impact the rule will have." *Id.* at 10a. "An enforcement action brought on the basis of credible evidence would, we believe, provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved." *Ibid.*

In addition, the court of appeals found that petitioners "cannot point to any great hardship" from deferral of judicial review, particularly since the "rule does not require [petitioners] 'to engage in, or to refrain from, any conduct.'" Pet. App. 10a (quoting *Texas* v. *United States*, 523 U.S. 296, 301 (1998)). The court compared the situation here to that in *Toilet Goods Ass'n*, 387 U.S. at 164, where this Court concluded that the agency action was unripe for review. The court noted that the petitioners "need not change their behavior or risk costly sanctions." Pet. App. 10a. "Source owners and operators are already under an obligation to comply with EPA's emission standards." *Ibid.* "If the credible evidence rule has in fact altered these standards, petitioners can raise that as a defense in an enforcement action." *Ibid.*

The court of appeals also found unripe petitioners' additional challenge that the credible evidence provisions improperly convert "'periodic' standards to 'continuous' ones." Pet. App. 11a. The court concluded that the effect of the credible evidence provisions on compliance obligations "is difficult to assess without any information or experience showing how the rule operates in particular settings." *Ibid.* The court similarly rejected petitioners' claims that the credible evidence provisions improperly modify SIPs. The court noted at the outset that "[i]t is not at all apparent that use of credible evidence alters the emissions standards gov-

erning petitioners' activities." *Id.* at 14a. It further stated that "the effect of the credible evidence rule on petitioners—that is, the effect of language in state plans specifying that use of credible evidence is not precluded—is highly uncertain for reasons already mentioned." *Ibid.* The court also observed that an amicus brief submitted by state air pollution authorities indicates that States already employ credible evidence in enforcement actions. *Id.* at 14a-15a. In light of those considerations, the court concluded that "our judicial appraisal 'is likely to stand on a much surer footing in the context of a specific application of the regulation.'" *Id.* at 15a (quoting *Toilet Goods Ass'n*, 387 U.S. at 164).

ARGUMENT

The court of appeals reasonably concluded that petitioners' challenges to EPA's credible evidence provisions are not ripe for judicial review. The court of appeals' decision, which simply applies familiar legal principles to a narrow and fact-bound regulatory context, does not conflict with any decision of this Court or another court of appeals. Indeed, the court of appeals' decision merely postpones judicial review until the time when the credible evidence provisions can be applied to a concrete enforcement setting.

1. This Court's decisions in *Abbott Laboratories* v. *Gardner*, *Toilet Goods Ass'n* v. *Gardner*, and *Gardner* v. *Toilet Goods Ass'n*, *supra*, articulate the fundamental principle that courts shall not review agency action if that action is not ripe for judicial review. The Court has adopted that principle in light of the proper institutional role of the Judicial Branch. Although ripeness doctrine "is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno* v. *Catholic Soc.*

Servs., Inc., 509 U.S. 43, 57 n.18 (1993), the dispute in this case focuses on the prudential aspects of the doctrine.

The "basic rationale" of the prudential ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-149. The ripeness doctrine requires courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149; accord *Toilet Goods Ass'n*, 387 U.S. at 162; *Gardner*, 387 U.S. at 170. See *Ohio Forestry Ass'n* v. *Sierra Club*, 118 S. Ct. 1665, 1690 (1998); *Texas* v. *United States*, 523 U.S. at 300-301.

Petitioners do not contend that the court of appeals erred in applying the two-part test that this Court articulated in *Abbott Laboratories* and has applied in *Toilet Goods Ass'n*, *Gardner*, and numerous other cases. Indeed, the court of appeals' decision rests on a routine application of the two-part test. The court explained that it found petitioners' challenges to the credible evidence provisions to be not currently fit for judicial review because the court would need to evaluate whether, as petitioners assert, the use of "credible evidence" in place of a specific performance test actually modifies the various regulatory standards that may be affected by those provisions. The court of appeals concluded that a court cannot make that judgment in the abstract, but must instead evaluate the effect of using substitute methodology in the context of a specific enforcement action. See Pet. App. 8a-11a, 14a-

15a. Furthermore, postponing review until the agency actually uses the substitute methodology in a specific case does not impose any meaningful hardship on the parties because, as the court of appeals also explained, the credible evidence provisions do not purport to change the underlying regulatory standards. If they have "in fact altered these standards, petitioners can raise that as a defense in an enforcement action." *Id.* at 10a. See also *id.* at 13a-14a. The court of appeals' reasonable application of well established ripeness doctrine to the regulations at issue here plainly does not warrant this Court's review. See Sup. Ct. R. 10.

2. Petitioners argue that this Court's review is nevertheless warranted because, in their view, Section 307 of the CAA, 42 U.S.C. 7607, which provides for pre-enforcement review of final EPA action under the CAA, absolutely precludes the court of appeals from applying the ripeness doctrine. Pet. 16. According to petitioners, Congress's creation of a mechanism for pre-enforcement judicial review should be treated as categorically prohibiting the courts from considering ripeness principles. Pet. 16-23. Petitioners' contention is unpersuasive and does not present an issue warranting this Court's review.

a. Congress can require a federal court to resolve Article III "Cases" or "Controversies" (U.S. Const. Art. III, §2) without regard to the court's self-imposed "prudential" limitations on the court's own powers, including limitations arising from the prudential doctrine of ripeness. See *Department of Commerce* v. *United States House of Representatives*, 119 S. Ct. 765, 772 (1999); *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997); *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 894 (1990). The question here, however, is not one of congressional power, but rather one of congressional

intent. Petitioners contend that, when Congress authorized pre-enforcement review of CAA regulations through Section 307 of the CAA, it must have intended, sub silentio, entirely to preclude courts from applying the pre-existing prudential doctrine of ripeness. Neither the text nor the purpose of Section 307, however, supports that extreme construction.

Section 307 of the CAA does not expressly address the application of ripeness principles. Rather, Section 307(b)(1) directs that "[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation * * * appears in the Federal Register." 42 U.S.C. 7607(b)(1). Significantly, Section 307 does not state that the court of appeals must decide the petition on the merits without any regard whatsoever to prudential principles governing judicial review. To the contrary, Section 307 recognizes that not every regulatory action will be susceptible to immediate judicial review. Section 307(b)(2) states that agency actions "with respect to which review *could have been obtained* under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2) (emphasis added). Congress clearly understood that immediate judicial review would not be available in some situations and that judicial review in those circumstances would take place, as it traditionally does, when the agency undertakes specific enforcement action. See *Texas*, 523 U.S. at 302; *Toilet Goods Ass'n*, 387 U.S. at 164.

The court of appeals' conclusion that Congress preserved the court's authority to apply ripeness principles when reviewing EPA regulations is consistent with the objectives of Section 307. Section 307's pre-enforcement review provisions allow regulated entities to test

the validity of CAA regulations, within a strictly limited time period, before those entities must conform their conduct to new regulatory requirements. When properly applied, the ripeness doctrine does not interfere with Section 307's core objective of providing an avenue for judicial review of a regulation before it affects primary conduct. That doctrine postpones judicial review only if review is impractical and postponing review would not impose a significant hardship on the parties. See *Abbott Labs.*, 387 U.S. at 148-149. As so applied, the ripeness doctrine actually complements the Section 307's function. In granting the courts of appeals jurisdiction to conduct pre-enforcement review, Congress had good reason to preserve adequate discretion in those courts to postpone review if the reviewing court determined that it could not resolve the pre-enforcement challenge in the abstract and that postponing review until the agency takes enforcement action would not harm the affected parties.

We recognize that the courts should fully take into account Congress's decision to authorize pre-enforcement review as an important factor bearing on the question of ripeness. See *Ohio Forestry Ass'n*, 118 S. Ct. at 1672; *National Wildlife Federation*, 497 U.S. at 891. When conducting a ripeness analysis under *Abbott Laboratories*, a court should give weight to Congress's general judgment that a particular regulatory program would benefit from immediate review of agency regulations. Congress's conception of how a regulatory program should operate is clearly relevant in assessing whether a specific regulatory dispute is fit for judicial review and whether postponing judicial review would cause undue hardship to the parties. See, *e.g.*, *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905, 916-918 (D.C. Cir. 1985). Indeed, lack of such hardship alone would

not ordinarily warrant postponement of congressionally-favored pre-enforcement review if the issues are fit for adjudication at that stage. See, *e.g.*, *George E. Warren Corp.* v. *EPA*, 159 F.2d 616, 622 (1998), amended, 164 F.3d 676 (D.C. Cir. 1999).

There is no reason to believe, however, that Congress meant to deprive a reviewing court of any latitude to make a judgment about ripeness in light of the specific nature of the dispute before the court. This case illustrates why that is so. The core dispute among the parties is whether the credible evidence provisions will or will not have *any* substantive effect on existing standards and regulatory obligations. The court of appeals reasonably concluded that this issue, which the court found to depend on the nature of the particular evidence at issue, cannot be evaluated in the abstract and should be postponed until the agency attempts to apply specific credible evidence in a concrete enforcement setting. If Congress had intended the extraordinary result that courts must conduct a pre-enforcement review, even when the court reasonably concludes that it cannot effectively do so and that no harm would come from postponing review, then Congress presumably would have said so in express terms.

b. Even if there were greater force to petitioners' arguments, this case would not warrant review by this Court. The question whether Section 307 entirely precludes a court from considering ripeness principles presents a question of statutory construction, and this Court does not ordinarily review such questions in the absence of a conflict among the courts of appeals. Petitioners can point to no such conflict on the question presented here. A conflict is possible, because Section 307 provides for judicial review of agency actions in courts of appeals other than the D.C. Circuit. See 42

U.S.C. 7607(b)(1). Nevertheless, no square conflict has emerged.

The absence of a conflict is not surprising because, as a general matter of administrative law, the issue of ripeness of final agency rules under pre-enforcement review statutes does not appear to arise with great frequency. When the issue has arisen in other statutory contexts, the D.C. Circuit has consistently applied the *Abbott Laboratories* framework in the course of conducting pre-enforcement review. Pet. App. 7a-8a. See, *e.g.*, *Association of Am. Railroads* v. *Surface Transp. Bd.*, 146 F.3d 942 (1998); *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 999 (1997); *Baltimore Gas & Elec. Co.* v. *ICC*, 672 F.2d 146 (1982). The only court of appeals decision that petitioners cite as contrary authority is the Second Circuit's decision in *Ciba-Geigy Corp.* v. *Sidamon-Eristoff*, 3 F.3d 40, 46 (1993), which addressed an EPA permitting decision under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* The excerpt of dictum that petitioners quote (Pet. 22), however, does not fairly reflect the court's ruling. The court responded to EPA's contention that the dispute was not ripe as follows:

> Arguably, decisions like *Abbott Laboratories* have limited relevance to Ciba's challenges, since RCRA specifically authorizes review in the Court of Appeals of the "Administrator's action (1) in issuing, denying, modifying or revoking any permit under section 6925 . . ., or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926." 42 U.S.C. § 6976(b). Thus, this may be a situation in which "Congress explicitly provides for our correction of the administra-

> tive process at a higher level of generality," *see Lujan v. National Wildlife Federation*, 497 871, 894 (1990), than the usual ripeness test demands. *But see W.R. Grace & Co.— Conn. v. U.S. E.P.A.*, 959 F.2d 360, 364-67 (1st Cir. 1992) (applying general test of ripeness to permit dispute reviewable under 42 U.S.C. § 6976(b)(1)).
>
> Even under the general test, however, we believe that the original permitting decision reviewed by [EPA's Environmental Appeals Board] is ripe for review.

3 F.3d at 46 (parallel citations omitted). As the full excerpt makes clear, the Second Circuit merely observed that, "[a]rguably," the general ripeness test set out in *Abbott Laboratories* has "limited relevance" in light of Congress's provision of pre-enforcement review provisions. The court nevertheless applied the "general test" in that case. The Second Circuit did not hold, or even suggest, what petitioners argue here—that pre-enforcement review provisions bar the court from considering ripeness principles.

Finally, there is no pressing need for this Court's review because the matter has not only failed to arise frequently or to give rise to a circuit conflict, but the effect of the court of appeals' decision is merely to postpone review in the context where the court of appeals has explicitly concluded, after examining the character of the specific dispute, that delaying review until the agency undertakes enforcement action will not impose substantial hardship on the parties. See, *e.g.*, Pet. App. 10a-11a. Petitioners' contrary hyperbole that the court of appeals' decision creates "a dangerous precedent" that "creates havoc for regulatory agencies,

regulated entities, and the public at large" (Pet. 23) is without support.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[1] Petitioners have also brought related challenges in the court of appeals seeking to set aside numerous individual NSPS and NESHAP regulations on the basis that the credible evidence provisions changed those standards without appropriate rulemaking. *Appalachian Power Co.* v. *EPA*, No. 97-1121 (D.C. Cir.). On April 29, 1999, relying on its decision in this case, the court of appeals dismissed those petitions as not ripe for review.