No. 13-940

In the Supreme Court of the United States

STATE OF NORTH DAKOTA, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly deferred to the Environmental Protection Agency's determination that a portion of petitioner's plan to implement the Clean Air Act, 42 U.S.C. 7401 *et seq.*, was not in accordance with federal law, see 42 U.S.C. 7410, because petitioner had justified its rejection of cost-effective pollution control technology for one particular generating facility by using a visibility-modeling approach that would tend to maintain currently degraded visibility conditions, in contravention of the Act's stated goal of restoring natural visibility conditions, 42 U.S.C. 7491(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-46) is reported at 730 F.3d 750. The final rule of the Environmental Protection Agency (Pet. App. 47-303) is published at 77 Fed. Reg. 20,894.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2013. On December 6, 2013, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 5, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Among Congress's central national goals for the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, is "the prevention of any future, and the remedying of any

existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution." 42 U.S.C. 7491(a)(1). The "class I Federal areas" protected by the Act's visibility program include certain national parks and wilderness areas. See 42 U.S.C. 7472(a). To assure "reasonable progress" toward meeting the national goal of natural visibility conditions and compliance with Section 7491, Congress directed the Environmental Protection Agency (EPA) to promulgate implementing regulations. See 42 U.S.C. 7491(a)(4); 40 C.F.R. 51.300-.309. Under the Act and the EPA's regulations, the several States are responsible in the first instance for developing programs within their jurisdictions to assure reasonable progress toward the national goal and compliance with Section 7491. Those programs take the form of state implementation plans (SIPs) administered by state authorities. See 42 U.S.C. 7410(a)(2)(J), 7491(b)(2); see also 40 C.F.R. 51.300(a).

One measure the Act prescribes is that certain older, often uncontrolled, stationary sources "shall procure, install, and operate * * * the best available retrofit technology [BART] * * * for controlling emissions from such source for the purpose of eliminating or reducing [visibility] impairment [in class I Federal areas]." 42 U.S.C. 7491(b)(2)(A).

At the most general level, BART is "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility." 40 C.F.R. 51.301. The BART requirement does not command a source to use any particular technology. Rather, a source complies with the requirement by retrofitting technologies or by taking operational measures of its choosing to meet the

emission limitation found to be BART. The CAA and the EPA's regulations provide that BART should be determined on a case-by-case basis, considering five statutory factors: "the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." 42 U.S.C. 7491(g)(2); see 40 C.F.R. 51.308(e)(1)(ii)(A). A State's SIP must include the State's determination of what constitutes BART for existing sources subject to that requirement. See 42 U.S.C. 7491(b)(2)(A); 40 C.F.R. 51.308(e).

In addition to satisfying the BART requirement, SIPs must also contain "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national [visibility] goal." 42 U.S.C. 7491(b)(2); see 40 C.F.R. 51.308(d)(3)(v)(C). The Act's visibility program requires that States consider four factors (similar to four of the five BART factors) in making such "reasonable-progress determinations" for facilities generally not subject to the BART requirement: (1) the costs of compliance; (2) the time necessary for compliance; (3) the energy and nonair quality environmental impacts of compliance; and (4) the remaining useful life of any potentially affected sources. 42 U.S.C. 7491(g)(1). Like BART determinations, reasonable-progress determinations do not require a source to use any particular technology.

b. To implement the foregoing provisions, the EPA promulgated the "Regional Haze Rule" in 1999 as a comprehensive visibility-protection program for class I Federal areas. 64 Fed. Reg. 35,714 (July 1, 1999). Re-

gional haze is a form of visibility impairment caused by a number of sources and activities that emit fine particles and their precursors (including, of relevance here, oxides of nitrogen (NO_X)). Fine particles impair visibility by scattering and absorbing light. See 76 Fed. Reg. 16,168, 16,170-16,171 (Mar. 22, 2011). The EPA revised the Regional Haze Rule in 2005, and in the same formal notice-and-comment rulemaking, the agency issued the BART Guidelines required by 42 U.S.C. 7491(b)(2). See 70 Fed. Reg. 39,104, 39,156-39,172 (July 6, 2005); 40 C.F.R. Pt. 51, App. Y (BART Guidelines). Those Guidelines assist States in determining which sources are subject to the BART requirement and in establishing the appropriate emission limits for covered sources.

Part of a State's process for determining "reasonable progress" and tracking visibility changes over time is a calculation of the degree of existing visibility impairment at each class I Federal area at the time a SIP addressing regional haze is submitted. For purposes of a particular State's first regional-haze SIP (like the SIP at issue here), the EPA's regulations require determination of (1) actual "[b]aseline visibility conditions" and (2) estimated "[n]atural visibility conditions" for each class I Federal area in the State. 40 C.F.R. 51.308(d)(2)(i), (iii) and (iv)(A). The comparison of baseline visibility conditions to natural visibility conditions indicates the amount of improvement that will be necessary to attain the CAA's goal of natural visibility conditions in class I Federal areas. See 40 C.F.R. 51.308(d)(1)(i).

Like the statutory provisions establishing the visibility program, the Regional Haze Rule does not mandate specific milestones or rates of progress, but instead calls on each State to establish goals that provide for "reasonable progress" toward achieving natural visibility condi-

tions. In setting reasonable-progress goals, a SIP must provide for an improvement in visibility for the most impaired days over the ten-year period covered by the SIP and ensure no degradation in visibility for the least impaired days over the same period. 40 C.F.R. 51.308(d) and (f). A SIP must also show how the State considered the four statutory reasonable-progress factors in selecting those reasonable-progress goals. 40 C.F.R. 51.308(d)(1)(i)(A). Although the reasonable-progress goals are not themselves legally enforceable, the SIP must include the State's reasonable-progress determinations in the form of enforceable emission limitations, compliance schedules, and other measures. 40 C.F.R. 51.308(d)(3); 51.308(d)(1)(v).

In formulating a regional-haze SIP every ten years (see 40 C.F.R. 51.308(f)), a State must consider the overall rate of progress needed to reach natural visibility conditions by 2064. 40 C.F.R. 51.308(d)(1)(i)(B). If a State establishes, for the time being, a reasonable-progress goal that reflects a rate of improvement in visibility that is slower than the linear rate of improvement needed to attain natural visibility conditions by 2064, the State must show (under the four statutory reasonable-progress factors) that the linear rate of progress needed to attain natural conditions by 2064 is not reasonable, and that the more modest interim goal in the State's SIP is reasonable. 40 C.F.R. 51.308(d)(1)(ii). The Regional Haze Rule requires the EPA to evaluate "the demonstrations developed by the State," including the State's analysis of the four statutory reasonable-progress factors and any resulting control determinations, in deciding whether a SIP's goal for visibility improvement conforms to the CAA's reasonable-progress requirement. 40 C.F.R. 51.308(d)(1)(iii).

c. A SIP does not fulfill a State's responsibilities under the CAA or become federally enforceable until it is approved by the EPA. 40 C.F.R. 51.104-.105; see *General Motors Corp.* v. *United States*, 496 U.S. 530, 540-541 (1990). As relevant here, the CAA gives the EPA two conceptually distinct roles in granting or denying approval of a SIP. First, under 42 U.S.C. 7410(k)(1), the EPA must determine whether a SIP submission is complete—that is, whether the submission satisfies certain EPA-established "minimum criteria" by providing the EPA "the information necessary to enable the [EPA] to determine whether the plan submission complies with the provisions of [the CAA]." 42 U.S.C. 7410(k)(1)(A) and (B); see *NRDC, Inc.* v. *Browner*, 57 F.3d 1122, 1126 (D.C. Cir. 1995) ("Under the two-stage procedure established in [Section 7410(k)], EPA first makes an essentially ministerial finding of completeness, a process taking at most six months.").

Second, if the submitted SIP is complete, the EPA must conduct a detailed substantive review and decide whether to approve the SIP. See *NRDC* v. *Browner*, 57 F.3d at 1126 ("[T]he plan approval process may take up to twelve months due to the more extensive technical analyses necessary to ensure that the SIP meets the Act's substantive requirements."). In particular, the EPA must determine whether the SIP—which, as relevant here, reflects a State's reasonable-progress goals and the State's BART determinations—is consistent with the CAA's requirements. The Act directs that the EPA "shall not approve" a SIP revision that "would interfere with any applicable requirement" of the statute. 42 U.S.C. 7410(*l*); see 42 U.S.C. 7410(a)(2) and (J) (requiring that a SIP "shall * * * meet the applicable requirements * * * relating to * * * visibility protec-

tion"), 7410(k)(3) (directing the EPA to approve a SIP "as a whole if it meets all of the applicable requirements of [the CAA]" and authorizing the EPA to approve any "portion of [a SIP] revision [that] meets all the applicable requirements of [the CAA]"); *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 250, 256-257 (1976) (explaining that, although States have "wide discretion" in formulating SIPs, the CAA "nonetheless subject[s] the States to strict minimum compliance requirements").

Accordingly, if the EPA determines that a SIP does not meet the Act's requirements—because, for example, it was not made in conformance with the relevant provisions of the Act and the EPA's implementing regulations—the EPA must disapprove the SIP in relevant part. See 42 U.S.C. 7410(k)(3) (approval of SIPs, including partial approval and partial disapproval), 7410(*l*) (approval of SIP revisions). To ensure that the statutory requirements are met in the absence of a SIP, the EPA must then promulgate a Federal implementation plan (FIP) for the State within two years of the disapproval. 42 U.S.C. 7410(c). Notwithstanding disapproval of its SIP or promulgation of a FIP, a State retains authority to prepare a SIP and submit it for the EPA's approval. If the EPA has disapproved a SIP but has not yet promulgated a FIP, the State may "correct[] the deficiency" in its SIP. 42 U.S.C. 7410(c)(1). And even after a FIP is in place, a State may displace it at any time with a newly submitted SIP that obtains the EPA's approval in the normal course. See generally 42 U.S.C. 7410(k)-(*l*).

2. Under the EPA's implementation of the Act's visibility program, States were required to submit SIPs addressing regional haze in class I Federal areas by late 2007. See 40 C.F.R. 51.308(b); 42 U.S.C. 7407(d)(7)(A). In early 2009, the EPA published its finding that peti-

tioner and most other States and territories had missed the 2007 deadline for submitting SIPs that addressed regional haze. 74 Fed. Reg. 2392 (Jan. 15, 2009). The agency further recognized that the Act obligated the EPA to promulgate a FIP for those States and territories within two years, unless the agency subsequently received and approved regional-haze SIPs for those States and territories. See *id.* at 2393.

In early 2010, petitioner submitted to the EPA its regional-haze SIP. See 76 Fed. Reg. 58,574 (Sept. 21, 2011). The SIP addressed regional haze at two class I Federal areas in North Dakota (Theodore Roosevelt National Park and Lostwood National Wildlife Refuge Wilderness Area). See Pet. App. 364, 368. The EPA reviewed the SIP for compliance with the Act, the Regional Haze Rule, and the BART Guidelines. See 76 Fed. Reg. at 58,579-58,619. After reviewing the SIP, issuing a proposed rule, and considering public comments, the EPA approved the bulk of petitioner's SIP, and partially disapproved the SIP. Pet. App. 47-303.

The EPA explained the division of authority between States and the federal government under the CAA. "Congress crafted the CAA to provide for [S]tates to take the lead in developing implementation plans, but balanced that decision by requiring EPA to review the plans to determine whether a SIP meets the requirements of the CAA." Pet. App. 83. While recognizing that it could "not 'usurp' the [S]tate's authority," the EPA observed that it was obliged to "ensure[] that such authority is reasonably exercised." *Ibid.* In conducting that review of a State's SIP, the EPA explained, its role was "not limited to a ministerial type of automatic approval of a [S]tate's decisions." *Ibid.*

Applying those principles, the EPA disapproved two features of petitioner's SIP that are relevant here. Pet. App. 77-79. First, the EPA disapproved the State's BART determination for NO_X emissions from the two electric generating units at Coal Creek Station because the State had based its analysis on admittedly incorrect information about the costs that certain NO_X emission controls would impose on the facility. The State had estimated a cost of $8551 per ton of NO_X emission reduction; using correct cost figures yielded a figure of $2318 per ton. *Id.* at 77; 76 Fed. Reg. at 58,603.[1]

Second, the EPA disapproved petitioner's reasonable-progress determination for NO_X emissions from two electric generating units at Antelope Valley Station. Pet. App. 77-78. "During its analysis, [petitioner] concluded that the rate of progress necessary for the implementation plan to attain natural conditions by 2064 was not reasonable," thus "allow[ing] [petitioner] to implement a slower rate of progress," provided it "demonstrate[d] that its reasonable progress goals were reasonable." *Id.* at 25 (internal quotation marks, citation, and brackets omitted). Petitioner's SIP proposed that no additional NO_X controls were needed at the Antelope Valley facility to meet the reasonable-progress requirement. A control technology for reducing NO_X emissions—so-called "low-NO_X burners," which are in wide use—would be very cost-effective at Antelope Valley; they would cost approximately $600 per ton of NO_X eliminated, 76 Fed. Reg. at 58,630, which compares quite favorably to the cost of similar controls that petitioner

[1] Petitioner appears to no longer take issue with the EPA's partial disapproval related to proper cost estimates for the Coal Creek units, focusing instead on the partial disapproval related to visibility modeling for the Antelope Valley units discussed below.

had found reasonable in making some of its BART determinations, see *id.* at 58,588, 58,593, 58,596-58,598, 58,630.

Petitioner had nonetheless rejected those controls by relying on a visibility-modeling approach that concluded that the visibility benefits of additional NO_X emission controls at the Antelope Valley units would be so slight that even the modest cost could not be justified. 76 Fed. Reg. at 58,629. The EPA noted that considering the degree of visibility improvement was not in itself problematic; although the degree of visibility improvement attributable to a control technology is not one of the four statutory factors the Act requires a State to consider in determining what constitutes reasonable progress, the EPA interpreted the Act to give a State latitude to consider the degree of visibility improvement in that exercise. See *ibid.*; Pet. App. 143. But a State must consider the degree of visibility improvement in a manner consistent with the Act, and the EPA concluded that petitioner's visibility-modeling approach (and hence the SIP's reliance on it) failed in that regard.

In particular, petitioner's visibility-modeling approach assessed the visibility improvement associated with a source's emission reductions against the backdrop of currently degraded conditions, rather than against natural background conditions. See 76 Fed. Reg. at 58,629. The EPA had previously explained (in the preamble to its 2005 BART Guidelines) that, as a scientific matter, the more polluted an area is, the less each individual source contributes to the total visibility impairment and the less control would seem to be needed from an individual source. Pet. App. 119-120. As a result, assessing emissions reductions against existing degraded conditions in visibility modeling tends to undervalue

those reductions. In such an approach, "the dirtier the existing air, the less likely it would be that any control is required." *Id.* at 119 (quoting 70 Fed. Reg. at 39,124).

The EPA determined that this effect is so pronounced that a modeling approach that uses existing degraded conditions would never justify enough emission control to significantly improve visibility—rendering the Act's visibility provisions meaningless. Pet. App. 119-120. In that light, the EPA concluded that the State's modeling approach was not consistent with the Act because the ultimate goal of the visibility program is to achieve natural visibility conditions, not to preserve degraded conditions. *Id.* at 146; see 76 Fed. Reg. at 58,629. Accordingly, the EPA disapproved the SIP's rejection of additional emission controls at Antelope Valley as not meeting federal law's requirement to make reasonable progress toward natural visibility conditions. Pet. App. 141-142.[2]

3. As relevant here, the court of appeals denied consolidated petitions for review of the EPA's partial disapproval of petitioner's SIP. Petitioner contended that the EPA's disapproval of petitioner's BART determinations for NO_X emissions from the Coal Creek units inappropriately intruded on state authority, "notwithstanding that the cost of compliance factor [petitioner had used] was based upon admittedly erroneous data." Pet. App. 16. In petitioner's view, the Act limits EPA's role to ensuring that minimal consideration is given to each statutory factor and does not permit the EPA to examine the State's reasoning. *Ibid.*

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[2] Because the EPA partially disapproved North Dakota's SIP, it proceeded to promulgate a FIP to establish NO_X emission limits for Coal Creek and Antelope Valley. The particulars of that FIP are not at issue in this Court.

The court of appeals disagreed. Pet. App. 15-18. The court noted the primary role States play in determining the appropriate pollution controls for sources within their borders, but recognized that the EPA "is left with more than the ministerial task of routinely approving SIP submissions." *Id.* at 16-17. The court of appeals noted that this Court's decision in *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461 (2004)—a case arising under a separate but analogous CAA program—established that the EPA is not limited to merely verifying that a State has made an emission-control determination. Pet. App. 17. Rather, the court explained, the EPA may examine the substance of a State's determination to ensure that it is "reasonably moored to the Act's provisions" and based on "reasoned analysis." *Ibid.* (quoting *Alaska*, 540 U.S. at 485, 490).

The court of appeals added (Pet. App. 17-18) that its understanding of the EPA's authority to review a SIP for compliance with federal law accorded with the Tenth Circuit's decision upholding the EPA's partial disapproval of a regional-haze SIP in *Oklahoma* v. *EPA*, 723 F.3d 1201 (2013), petition for cert. pending, No. 13-921 (filed Jan. 29, 2014). Because of the erroneous cost information underlying petitioner's BART determinations for the Coal Creek units, the court of appeals concluded that the EPA's disapproval of those determinations was not arbitrary, capricious, or an abuse of discretion. Pet. App. 18.

The court of appeals likewise upheld the EPA's disapproval of petitioner's reasonable-progress determinations for NO_X emissions from the Antelope Valley units. Pet. App. 25-31. The court recognized that, as in the BART context, the "EPA's review of a SIP extends not only to whether the state considered the necessary fac-

tors in its [reasonable-progress] determination, but also to whether the determination is one that is reasonably moored to the CAA's provisions." *Id.* at 28-29. The court of appeals found that federal role especially appropriate where, as here, a State has determined that emission controls are not necessary even though the State does not anticipate achieving natural visibility conditions by 2064. *Id.* at 29; see 40 C.F.R. 51.308(d)(1)(ii).

The court of appeals reviewed and upheld the EPA's technical evaluation of petitioner's visibility-modeling approach and the EPA's finding that reliance on that approach would tend to maintain current degraded conditions. Pet. App. 29-31. The court found it appropriate to defer to the EPA's determinations insofar as they involved technical matters within the federal agency's area of expertise. *Id.* at 29. The court concluded that, because the goal of the visibility program is to attain natural visibility, and the EPA had demonstrated that petitioner's visibility-modeling approach would contravene that statutory goal, the EPA's disapproval of petitioner's SIP with respect to the reasonable-progress determinations for the Antelope Valley units' NO_X emissions was not arbitrary, capricious, or an abuse of discretion. *Id.* at 30.

ARGUMENT

Petitioner complains alternately that the EPA's review of its SIP was insufficiently deferential (*e.g.*, Pet. 5, 19-21, 24, 27), or that the court of appeals was overly deferential to the EPA's determination that part of petitioner's SIP was inconsistent with the CAA (*e.g.*, Pet. i, 5, 24-25, 28). The decision below is correct, and neither contention warrants further review. The CAA assigns the EPA a substantive role in reviewing and approving SIPs for conformity with federal law, and the agency

partially disapproved petitioner's SIP in its discharge of that responsibility. The court of appeals applied ordinary principles of judicial review of agency action to uphold the EPA's application of federal law.

Petitioner's true quarrel (Pet. 4-5, 14-17) is not with the framework for SIP review but with the particulars of its application to petitioner's visibility-modeling approach for one pollutant for two units in the State. Petitioner invites this Court to take a third look at whether petitioner's particular technical modeling approach is consistent with the federal law defining the visibility program. Petitioner does not explain, however, what unsettled principle of wide application and significant importance would be clarified by such a case-specific exercise. Further review is not warranted.

1. Petitioner contends that the "EPA has improperly overridden [petitioner's] authority and discretion in developing a visibility modeling protocol" and thereby "destroy[ed] the States' primary decision-making authority" under the CAA. Pet. 20. That is incorrect. Both the agency and the court of appeals correctly articulated and applied the key principles governing federal and state roles under the CAA.

a. In partially disapproving petitioner's SIP, the EPA explained that "Congress crafted the CAA to provide for [S]tates to take the lead in developing implementation plans, but balanced that decision by requiring EPA to review the plans to determine whether a SIP meets the requirements of the CAA." Pet. App. 83. The EPA made clear that, although it could "not 'usurp' the [S]tate's authority" in reviewing a SIP, it was obliged to "ensure[] that such authority is reasonably exercised." *Ibid.* The court of appeals likewise recognized that "the CAA grants [S]tates the primary role of determining the

appropriate pollution controls within their borders," while still giving the EPA "more than the ministerial task of routinely approving SIP submissions." *Id.* at 16-17. Thus, "[a]lthough [petitioner] was free to employ its own visibility model and to consider visibility improvement in its reasonable progress determinations, it was not free to do so in a manner that was inconsistent with the CAA." *Id.* at 30.

Those statements accurately capture the CAA's division of responsibility. Of relevance here, the Act unmistakably places on the EPA the responsibility to review the substance of a SIP for conformity with federal law before approving it. For example, 42 U.S.C. 7410(a)(2)(J) requires SIPs to "meet the applicable requirements of" the part of the CAA that includes the visibility program. In turn, 42 U.S.C. 7410(*l*) prohibits the EPA from approving any SIP revision "if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress * * * or any other applicable requirement of [the CAA]." Conversely, 42 U.S.C. 7410(k)(3) directs the EPA to approve a SIP "as a whole if it meets all of the applicable requirements of [the CAA]" and authorizes the EPA to approve any "portion of [a SIP] revision [that] meets all the applicable requirements of [the CAA]."

The EPA has reasonably interpreted those statutory provisions to authorize it to evaluate whether the State's determination is itself reasonable. See, *e.g.*, Pet. App. 83-85. The EPA's role in confirming that a SIP complies with federal law regarding reasonable progress is affirmed in the Regional Haze Rule, which specifically provides that any State that does not intend to attain natural conditions by 2064 must demonstrate to the EPA

that its rate of progress is reasonable. 40 C.F.R. 51.308(d)(1)(ii). To be sure, the EPA cannot disapprove a SIP that does not interfere with the Act, even if the SIP reflects choices that the EPA would not have made if the decision were entrusted to the federal agency in the first instance. In this case, however, the EPA reasonably determined that petitioner's reliance on a flawed visibility-modeling approach had produced unreasoned control determinations that would interfere with the Act's visibility program's goal of restoring natural visibility conditions. The court of appeals accordingly sustained the EPA's decision under applicable principles of administrative law.

b. That understanding of the allocation of interlocking and complementary state and federal authority emerges naturally from this Court's cases. In *Train* v. *NRDC, Inc.*, 421 U.S. 60 (1975), for example, the Court explained that, following amendments to the CAA in 1970, the general "division of responsibilities" between the States and the federal government now reflects "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," including the authority to "devise and promulgate a specific plan of [the EPA's] own only if a State fails to submit an implementation plan which satisfies [the standards of Section 7410(a)(2)]." *Id.* at 64, 79. In *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976), the Court similarly recognized that this division of responsibilities lies at "[t]he heart of the [1970 CAA] Amendments." *Id.* at 249. The Court explained that "each State [must] formulate, *subject to EPA approval*, an implementation plan[.] * * * [T]he Act provides that the [EPA] 'shall approve' the proposed plan if it has been adopted after public notice and hear-

ing and *if it meets eight specified criteria*." *Id.* at 249-250 (emphases added; citation omitted).[3]

c. Petitioner complains repeatedly that the EPA was insufficiently deferential to the visibility-modeling approach underlying its reasonable-progress determinations for the Antelope Valley units. That is in substance no more than a claim that the EPA crossed the line that separates permissible review of a SIP for conformity with federal law from impermissible second-guessing. Such a claim of case-specific error does not warrant this Court's review. See pp. 29-31 & note 4, *infra*. To the extent petitioner instead contends that the EPA acted *ultra vires* in reviewing petitioner's visibility-modeling approach for substantive consistency with federal law, its position clashes with two basic features of the Act's design.

First, the CAA assigns the EPA, not the States, the primary role in interpreting and applying federal law. The apparent thrust of petitioner's position is that the EPA must defer to petitioner's interpretation of federal law—and, in particular, to a State's view that federal law will not be frustrated by use of a visibility-modeling approach that the EPA has shown will undermine the Act's stated objective of attaining natural visibility conditions. Petitioner identifies nothing in the CAA that suggests such a division of responsibilities, and it identifies no comparable federal administrative scheme that

[3] *Train* and *Union Electric* predate Congress's 1977 addition of the visibility program to the CAA, but the provisions of that program confirm the pre-existing statutory division of responsibilities and the requirement of meaningful EPA review. See 42 U.S.C. 7491(b) (requiring that BART determinations be made pursuant to the EPA's regulations and Guidelines), 7492(e)(2) (requiring States to submit SIPs to the EPA for review "under [S]ection 7410").

subordinates the federal Executive's interpretation of federal law to the interpretation given to it by a State. Cf. *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 492 (2004) ("It would be unusual, to say the least, for Congress to remit a federal agency enforcing federal law solely to state court."). Petitioner's claim of state primacy reflects an unusually high degree of indifference to federal law here, where the parties' dispute concerns whether petitioner's plan relies on analytical tools that disserve the Act's reasonable-progress requirement, when that very plan (as petitioner acknowledges, see Pet. App. 25) already puts petitioner behind pace in meeting the Regional Haze Rule's 2064 natural-conditions goal. See *id.* at 29.

Second, if the framework petitioner advocates were adopted, the EPA would be relegated to an essentially ministerial role in approving SIPs. But the Act is structured otherwise. "Under the two-stage procedure established [for SIP review], EPA first makes an essentially ministerial finding of completeness." *NRDC, Inc.* v. *Browner*, 57 F.3d 1122, 1126 (D.C. Cir. 1995); see 42 U.S.C. 7410(k)(1)(B). That completeness inquiry ensures that, when the EPA undertakes "the more extensive technical analyses necessary to ensure that the SIP meets the Act's substantive requirements," *NRDC* v. *Browner*, 57 F.3d at 1126, it has before it "the information necessary to enable [it] to determine whether the plan submission complies with the provisions of [the CAA]." 42 U.S.C. 7410(k)(1)(A). Under petitioner's approach, by contrast, the EPA's role would essentially be limited to the first step of that inquiry.

2. Petitioner contends (Pet. 25-29) that the court of appeals' decision conflicts with this Court's decision in *Alaska*, *supra*. That is incorrect. In fact, the framework

applied below is a natural application of the principles announced in *Alaska*.

a. *Alaska* involved the CAA's Prevention of Significant Deterioration (PSD) program, which is designed to protect air quality by regulating, *inter alia*, the construction of new sources in areas that have attained certain national air-quality standards. 540 U.S. at 470-471; see 42 U.S.C. 7470(1), 7471. Under the substantive requirements of the PSD program and the general enforcement provisions of the CAA, the EPA can take measures to stop construction of sources that do not conform to PSD requirements. *Alaska*, 540 U.S. at 484-485 (citing 42 U.S.C. 7413(a)(5), 7477).

A central requirement of the PSD program is that a covered source's permit must include emission limitations based on "the best available control technology [BACT] for each pollutant subject to regulation under [the Act]." 42 U.S.C. 7475(a)(4); see *Alaska*, 540 U.S. at 472-473 (discussing Section 7475(a)(4)). Like BART and reasonable-progress determinations, BACT determinations are ordinarily made by a State. See 42 U.S.C. 7471. Unlike BART and reasonable-progress determinations, BACT determinations are made in the context of issuing an individual permit (42 U.S.C. 7475(a)(1) and (4)), rather than as part of a SIP submitted for federal approval.

The parties in *Alaska* disputed whether the EPA may issue an order stopping construction when it finds that a state-issued permit contains "a determination of BACT [un]faithful to the statute's definition." 540 U.S. at 485. The state permitting authority argued that the federal agency's superintendence was limited, and extended to "inquir[ing] whether a BACT determination appears in a PSD permit, but not [to] whether that BACT determination was made on reasonable grounds properly support-

ed on the record." *Id.* at 489-490 (internal quotation marks and citations omitted).

The Court rejected that contention, holding that the EPA's authority "extends to ensuring that a state permitting authority's BACT determination is reasonable in light of the statutory guides." *Alaska*, 540 U.S. at 484. The Court recognized that, in making that BACT determination in the course of performing its permitting responsibilities, "the [state] permitting authority * * * exercises primary or initial responsibility for identifying BACT in line with the Act's definition of that term." *Ibid.* The Court held, however, that "when a state agency's BACT determination is 'not based on a reasoned analysis,'" the EPA may "step in to ensure that the statutory requirements are honored." *Id.* at 490 (citation omitted). The Court explained that the EPA's "limited but vital [federal] role in enforcing BACT is consistent with a scheme that places primary responsibilities and authority with the States, backed by the Federal Government." *Id.* at 491 (internal quotation marks and citation omitted).

b. *Alaska* firmly supports the decision below because the federal and state roles in the BART and reasonable-progress context are in many respects analogous to the roles this Court recognized in the BACT context. Taking its cue from this Court's "[PSD program] analysis in *Alaska*," the court below "reject[ed] the argument that EPA is required * * * to approve a BART determination that is based upon an analysis that is neither reasoned nor moored to the CAA's provisions." Pet. App. 18. In upholding the EPA's disapproval of petitioner's reasonable-progress determinations for the Antelope Valley units' NO_X emissions, the court of appeals accordingly recognized that the EPA was authorized to decide

"whether the [State's] determination is one that is reasonably moored to the CAA's provisions." *Id.* at 29.

If Congress expected "meaningful EPA oversight" in the context of a discretionary enforcement action, *Alaska*, 540 U.S. at 489, then *a fortiori* it expected such agency oversight when it *required* the EPA to review and approve petitioner's SIP before it could take effect as a federally enforceable implementation of the Act. See 42 U.S.C. 7410(c), (k) and (*l*), 7492(e)(2); 40 C.F.R. 51.105. The EPA's approach gives meaningful purpose to that required review. Petitioner implies that the EPA's review would still be meaningful (and petitioner's SIP would survive) if federal review were confined to deciding whether a State's reasonable-progress determination is wholly "arbitrary." *E.g.*, Pet. 27, 28 (quoting *Alaska*, 540 U.S. at 491). Petitioner's approach ignores the EPA's basis for partially disapproving petitioner's SIP (Pet. App. 146), *viz.*, the even more fundamental problem that petitioner's approach to visibility modeling would thwart the Act's purpose of restoring natural visibility conditions. A determination based on such a modeling approach is not, in *Alaska*'s terms, "moored to the Act's provisions." 540 U.S. at 485; accord Pet. App. 29.

c. Petitioner (Pet. 26) and the amici States (Amicus Br. 10-11) contend that the EPA owes States more deference under the visibility program than under the PSD program because the former focuses on what petitioner and its amici characterize as aesthetic goals, while the latter addresses health-related concerns. That argument lacks merit.

Even accepting those characterizations of the programs, it is not evident why a State's decisions under a program addressing aesthetics would warrant greater deference than decisions under a program addressing

health. To the contrary, the Act recognizes that both emissions regulated under the PSD program and emissions regulated under the visibility program have the potential to affect States other than the one in which they originate. See, *e.g.*, 42 U.S.C. 7470(4) (PSD program), 7492(c) (visibility program). In addition, the PSD program's goals are broader than the amici States acknowledge. The PSD program serves not only to protect public health and welfare, but also "to preserve, protect, and enhance the air quality in national parks [and] national wilderness areas," including visibility. 42 U.S.C. 7470(2); see 42 U.S.C. 7475(d).

Finally, petitioner and its amici inappropriately minimize Congress's concern with visibility impairment in national parks and wilderness areas, as if that concern were merely a matter of local aesthetic preferences. Congress regarded remedying visibility impairment in class I Federal areas as an indispensable part of the Nation's deep and longstanding commitment to preserving national parks and wilderness areas for all. See, *e.g.*, 123 Cong. Rec. 16,203 (1977) (statement of Rep. Waxman) ("We have also provided a new program to protect visibility in the national parks and other areas which have been specifically set aside from the ravages of heavy industrial growth. Visibility is the most precious air quality value in such places as the Grand Canyon. * * * It is, therefore, essential that, wherever possible, steps be undertaken to control pollution from sources which would diminish visibility."). Indeed, given the visibility program's particular focus on preventing impairment of designated *federal* areas, a regulatory approach that would deprive the EPA of any meaningful oversight role would be especially anomalous.

3. Petitioner asserts that the decision below conflicts with "numerous decisions of the D.C. Circuit" (Pet. 29) and with decisions of other courts of appeals. Pet. 29-32. That contention is baseless. No circuit conflict exists, and the decision below accords with the only other decision addressing the EPA's role in reviewing control determinations in regional-haze SIPs.

a. The only other decision directly addressing the EPA's authority to review States' regional-haze SIPs for compliance with federal law is *Oklahoma* v. *EPA*, 723 F.3d 1201 (10th Cir. 2013), petition for cert. pending, No. 13-921 (filed Jan. 29, 2014). The Tenth Circuit in that case applied the same principles as did the court below.

In *Oklahoma*, the EPA disapproved certain BART determinations because they were reached using a methodology that was inconsistent with federal law (in particular, the BART Guidelines that the Act requires the EPA to promulgate and that the Act requires the States to follow in certain circumstances). The *Oklahoma* court explained that States are authorized to adopt SIPs "with federal oversight," 723 F.3d at 1204, and that the "EPA may not approve any plan that 'would interfere with any applicable requirement'" of the CAA, including the CAA's visibility provisions. *Ibid.* (quoting 42 U.S.C. 7410*(l)*); see *id.* at 1207-1208. The court further agreed with the EPA that the CAA's visibility program required the State to comply with the Guidelines in making the BART determinations at issue. *Id.* at 1208. The Tenth Circuit concluded that "the [CAA] provides the [EPA] with the power to review [the State's] BART determination[s]" for the units at issue "for compliance with the [G]uidelines." *Id.* at 1207, 1208. Applying the familiar arbitrary-and-capricious standard of judicial review to the particulars of the EPA's decision to partial-

ly disapprove Oklahoma's SIP, the Tenth Circuit concluded that the EPA had acted within its authority in disapproving the SIP. *Id.* at 1210-1215.

Oklahoma and the decision below are in keeping with other courts' descriptions in analogous contexts of the respective roles of the federal and state governments under the CAA. See, *e.g.*, *Montana Sulphur & Chem. Co.* v. *EPA*, 666 F.3d 1174, 1181 (9th Cir.) ("The [CAA] gives the EPA significant national oversight power over air quality standards * * * . A [S]tate must develop implementation plans that will satisfy national standards[,] * * * [b]ut when the state plan is inadequate to attain and maintain [those standards], then the EPA is empowered to step in."), cert. denied, 133 S. Ct. 409 (2012); *Michigan Dep't of Envtl. Quality* v. *Browner*, 230 F.3d 181, 183 (6th Cir. 2000) (recognizing that, although States have broad authority to design programs, the EPA has the final authority to determine whether a SIP meets the requirements of the Act); *Virginia* v. *EPA*, 108 F.3d 1397, 1406-1408 (D.C. Cir.) (explaining the EPA's oversight role), decision modified on reh'g, 116 F.3d 499 (1997); *Connecticut Fund for the Env't, Inc.* v. *EPA,* 696 F.2d 169, 173 (2d Cir. 1982) (emphasizing that the EPA has "considerable discretion" in deciding whether to approve a SIP or SIP revision); *Mountain States Legal Found.* v. *Costle,* 630 F.2d 754, 757 (10th Cir. 1980) ("Congress clearly intended the final decision [on SIPs] to be that of the EPA."), cert. denied, 450 U.S. 1050 (1981).

b. Petitioner principally contends (Pet. 29-30) that the decision below conflicts with the D.C. Circuit's decision in *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (2002) (per curiam) (*Corn Growers*). No conflict exists. The decision in *Corn Growers* does not address the

EPA's authority to review SIPs for compliance with federal law, and no analytical tension otherwise exists between *Corn Growers* and the decision below.

Corn Growers concerned the EPA's 1999 regional-haze regulation, which the agency had promulgated to comply with a 1990 congressional requirement that the agency "carry out [its] regulatory responsibilities under [42 U.S.C. 7491]" within a specified time frame. 291 F.3d at 22 (internal quotation marks and citation omitted; first pair of brackets in original); see 42 U.S.C. 7492(e). That EPA regulation directed States to decide whether a source was subject to the BART requirement based on its location ("*within a geographic area* from which pollutants can be emitted and transported downwind to a Class I area"), rather than based on the source's actual emissions. 291 F.3d at 5. As a result, a source could be determined "BART-eligible" "even absent empirical evidence of that source's individual contribution to visibility impairment in a Class I area so long as the source is located within a region that may contribute to visibility impairment." *Ibid.* The EPA's regulation further required States, in determining what constitutes BART for such sources, to assess one of the five statutory BART factors (visibility improvement) based on the improvement that would be achieved by imposing BART limitations on *all* sources in the region. *Id.* at 6.

The D.C. Circuit vacated the rule in relevant part. First, it held that the rule did not reflect a permissible construction of the BART provisions because it treated one statutory BART factor in "dramatically different fashion" from the others without a justification in the statute. *Corn Growers*, 291 F.3d at 6. The court also found the EPA's rule problematic because it would create serious difficulties in conducting the BART analysis

and possibly require considerable expenditures for no actual benefit in haze reduction. *Id.* at 6-7. Finally, the court found the rule inconsistent with the CAA for the additional reason that it "tie[d] the [S]tates' hands and force[d] them to require BART controls at sources without any empirical evidence of the particular source's contribution to visibility impairment." *Id.* at 8. The D.C. Circuit explained that this "impermissibly constrain[ed] state authority" granted by the CAA. *Ibid.*

Nothing about *Corn Growers*' recognition of state authority casts doubt on the EPA's invocation of federal power to partially disapprove petitioner's SIP here. The dispute in *Corn Growers* concerned the EPA's latitude in interpreting particular statutory provisions addressing how States must make BART determinations, not (as here) the EPA's authority to *review* a State's reasonable-progress determinations for compliance with federal law. Indeed, in a separate part of *Corn Growers*, the D.C. Circuit contemplated that the EPA would have authority to review the reasonableness of States' reasonable-progress determinations and that the EPA's action would be subject to ordinary arbitrary-and-capricious review. 291 F.3d at 13.

To be sure, the EPA could abuse its review authority by disapproving SIPs based on the same sort of erroneous construction of the Act that the D.C. Circuit forbade it from imposing on the States by rule. But such an action by the EPA would properly be set aside on judicial review as in conflict with the CAA. Petitioner cannot plausibly claim, however, that such a conflict exists between the EPA's action here and the Act's substantive provisions. The Act identifies as one of its goals "the remedying of any existing[] impairment of visibility * * * result[ing] from manmade air pollution," 42

U.S.C. 7491(a)(1), and the EPA partially disapproved petitioner's SIP on the ground that the visibility program seeks to restore natural visibility conditions rather than to maintain degraded conditions.

c. Petitioner also suggests in passing that the decision below conflicts with *Luminant Generation Co.* v. *EPA*, 675 F.3d 917 (5th Cir. 2012), and certain earlier decisions. Pet. 2, 30-32. No such conflict exists. Those cases did not involve the Act's regional-haze provisions, and their outcomes are readily explained by their distinctive facts. In *Luminant*, for example, the court vacated the EPA's SIP disapproval because the court concluded that the agency had failed to tie its disapproval to any requirement of the Act. So far as legal principles of general application are concerned, *Luminant* accords with the decision below in recognizing the EPA's authority under Section 7410 to review SIPs for compliance with federal law. See 675 F.3d at 921.

4. Claiming to find support in *Alaska*, petitioner also contends that the "standard of review that the Eighth Circuit should have applied was whether, granting due deference to [petitioner's] exercise of its authority and discretion, EPA could meet its burden of showing that [petitioner's] judgments were unreasonable." Pet. 24. Petitioner's approach reflects an unjustified departure from ordinary principles of judicial review of agency action, as well as a misreading of *Alaska*.

a. The standard for judicial review of agency action is well settled. By statute, the EPA's promulgation of a FIP must be upheld unless petitioner demonstrates that the EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. 7607(d)(1)(B) and (9)(A). There is no express statutory standard of review governing the EPA's disap-

proval of a SIP. This Court in *Alaska* held, however, that where the CAA does not specify a standard for judicial review, courts are to "apply the familiar default standard of the Administrative Procedure Act * * * and ask whether the [a]gency's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 540 U.S. at 496-497 (internal quotation marks and citation omitted); see *Montana Sulphur*, 666 F.3d at 1182.

b. *Alaska* did not change this familiar standard of review. The enforcement provisions at issue in *Alaska* authorized the EPA to, *inter alia*, issue a stop-construction order or commence a civil action in federal court. See 42 U.S.C. 7413(a)(5), 7477. Petitioner relies (Pet. 27) on a passage in *Alaska* addressing the concern that the EPA might gain a "proof-related tactical advantage" by opting for a stop-construction order rather than a civil enforcement action. 540 U.S. at 493. That passage clarified that "in either an EPA-initiated civil action or a challenge to an EPA stop-construction order filed in state or federal court, the production and persuasion burdens remain with EPA." *Id.* at 494.

Here, the EPA was acting not in an enforcement capacity, but in the discharge of its obligation to review and approve or disapprove a SIP under 42 U.S.C. 7410. Action on a SIP is reviewed under the arbitrary-and-capricious standard, with the burden resting on the party seeking judicial review to demonstrate that the agency's action does not satisfy that standard. Petitioner cites no decision applying any other standard. In that posture, *Alaska* is relevant insofar as the administrative record the EPA compiled in reviewing petitioner's SIP must "demonstrate that the State's determination was not reasonable." Pet. 20. If the EPA's administrative

record does not support that characterization of the State's reasonable-progress determination, the EPA's action should be set aside. But that does not affect the standard of review that the court of appeals should apply. And, as the court of appeals explained, Pet. App. 25-31, the EPA's decision to partially disapprove petitioner's SIP was supported by the administrative record and the federal agency's interpretation of federal law.

5. a. The parties essentially agree on the legal standard relevant to the EPA's review of a SIP. In petitioner's words, "EPA may only reject a State's determinations when EPA demonstrates that the determination is not supported by data or analysis or that it fails to comply with the CAA." Pet. 19. At bottom, petitioner simply seeks a third round of review of whether petitioner's reasonable-progress determinations were unlawful because they relied on a visibility-modeling approach that "fails to comply with" the visibility program's stated goal. Petitioner itself suggests as much in claiming that the EPA purported to act "[u]nder the guise of enforcing [the EPA's] review authority" (Pet. 5) when in truth (petitioner asserts) the EPA simply "did not like how [petitioner] decided to conduct its visibility modeling" (Pet. 28). Even if that characterization were accurate, it would be nothing more than a call for this Court to correct the misapplication of a settled legal framework to a single facility's emissions of a particular pollutant. That is not this Court's usual office. See Sup. Ct. R. 10.

b. In any event, the EPA had sound reasons for partially disapproving petitioner's SIP with respect to the Antelope Valley units' NO_X emissions, and the agency's explanation is well supported by the record. Petitioner based its rejection of low-NO_X burners on, *inter alia*, its assessment of a lack of visibility improvement; that

assessment in turn derived from visibility modeling that used current degraded conditions as a baseline. Pet. App. 30.[4] The Act's visibility program, however, seeks to attain natural visibility conditions in class I Federal areas, and all agree that petitioner's reasonable-progress determinations do not put it on pace to attain natural visibility by the Regional Haze Rule's 2064 goal. *Id.* at 26-27, 29.

The only plausible dispute, therefore, is whether the EPA reasonably concluded that the particular visibility-modeling approach that petitioner used would indeed thwart the visibility program's goal of achieving natural visibility conditions. The EPA clearly explained its conclusion: In a modeling approach like petitioner's, "the dirtier the existing air, the less likely it w[ill] be that any control is required." Pet. App. 119 (quoting 70 Fed. Reg. at 39,124). Indeed, the agency determined, that effect is so pronounced that a modeling approach that uses existing degraded conditions would never justify enough emission control to significantly improve visibility—rendering the visibility provisions meaningless. *Id.* at 119-120. This Court has consistently recognized that special deference is warranted to an expert agency's conclusions on such highly technical, scientific issues that

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[4] Petitioner claims (Pet. 4, 17) a cost of $2 billion per unit of visibility improvement (employing its visibility modeling, its cost metric, and a type of emission controls that are more expensive than low-NO_X burners). See Pet. App. 404. But using the more widely comparable cost metric of dollars per ton of NO_X removed, petitioner estimated the cost of low-NO_X burners at the Antelope Valley units to be approximately $600 per ton of NO_X removed. That cost is not unreasonably burdensome; it is less than half the cost (on a per-ton-of-NO_X-removed basis) of the technologies selected by petitioner in its SIP for facilities subject to BART. See pp. 9-10, *supra*.

lie squarely within the agency's area of expertise. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *NRDC, Inc.*, 462 U.S. 87, 103 (1983); *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377-378 (1989); see also 42 U.S.C. 7491(a)(3)(B) (directing the EPA to study "modeling techniques" relating to visibility impairment); 42 U.S.C. 7491(b)(1) (directing the EPA to "provide guidelines to the States, taking into account [its study of] appropriate techniques and methods for implementing [the visibility program]"). And the EPA's conclusion deserves more deference still because the agency had publicly noted—even before petitioner prepared its SIP—the underlying problem with modeling approaches like petitioner's. See pp. 10-11, *supra*. Accordingly, the court of appeals correctly deferred to the EPA's technical judgment in upholding its ultimate determination. Pet. App. 30.

6. Petitioner and its amici portray this case as the bellwether of a coming stampede of EPA SIP disapprovals. See, *e.g.*, Pet. 6 n.5, 34-35 & nn.13-15 The EPA's disapprovals under the CAA's visibility program, however, have all been *partial* disapprovals under which the great bulk of affected States' SIPs have been approved. The instant petition, for example, concerns reasonable-progress determinations that affect only two units at a single facility in a single State.

Moreover, the issues relevant to the EPA's partial disapproval of petitioner's SIP are essentially unique to this case. The heart of the EPA's partial disapproval is petitioner's inappropriate reliance on visibility modeling using degraded background conditions, yet none of the several pending petitions for review of regional-haze SIP disapprovals that petitioner cites raises this visibility-modeling issue. Indeed, the EPA did not even reject in all instances the reasonable-progress determinations

petitioner had made using its modeling approach; the EPA approved petitioner's reasonable-progress determinations for four other sources because petitioner's bottom-line result was reasonable. See 76 Fed. Reg. at 58,630; Pet. App. 64-65.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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