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VIA CM/ECF

Mr. Lyle W. Cayce, Clerk
Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: No. 16-60118; *State of Texas, et al. v. EPA, et al.*

Dear Mr. Cayce:

Petitioners the State of Texas, Public Utility Commission of Texas, and Texas Commission on Environmental Quality ("Texas") submit this letter in response to the Court's request for letter briefs addressing the motion to dismiss or transfer, and, if necessary, the motion for stay. These two motions are currently pending before the Court and scheduled for argument on June 22.

This Court has jurisdiction and is the proper venue to decide this case because it involves an EPA rulemaking that is "locally or regionally applicable" and that has a "scope" and "effect" focused in Texas and, to a much lesser extent, Oklahoma—a far cry from "nationwide." *See* Clean Air Act (CAA) § 307(b)(1), 42 U.S.C. § 7607(b)(1).

EPA's assertion that the rule has "nationwide scope or effect" is inconsonant with the actual determinations that form the basis for the actions taken in the Rule: the partial approval and partial disapproval of the Texas State Implementation Plan (SIP) revision and disapproval of a single portion of Oklahoma's SIP revision having to do with Oklahoma's consultation with Texas. Those actions addressing two *State* implementation plans under the *regional* haze program in no way resemble the type of *nationwide* rulemaking Congress intended to be directed to the D.C. Circuit. EPA's publication of a finding to the

contrary is not dispositive: Section 307(b)(1) directs venue in the D.C. Circuit only if a rule *is* of nationwide scope or effect *and* EPA publishes a finding of nationwide scope or effect. To Petitioners' knowledge, no court has found a regional haze rule regulating sources in only one State to be based on a determination of nationwide scope or effect.

The Rule is the epitome of a local or regional rulemaking, which the CAA directs to the "appropriate circuit." While Texas and Oklahoma are located in different circuits, the locus of the Rule's applicability is Texas. The Rule requires action to reduce emissions only in Texas (costing Texas facilities an estimated $2 billion), and found Oklahoma's SIP deficient only to the extent that its consultation with Texas did not result in enough emissions reductions by Texas. As a result, the Fifth Circuit is clearly the "appropriate circuit" to hear this case.

Even before deciding the motion to dismiss or transfer, the Court has the power to grant the Petitioners' motions for stay of the Rule. Doing so is well within the Court's authority to preserve the status quo pending litigation, and would prevent irreparable harm to Petitioners.

I. The Rule Is a Local or Regional Rulemaking and Does Not Have "Nationwide Scope or Effect."

Section 307(b)(1) of the CAA provides that judicial review of EPA actions that are "locally or regionally applicable" must be filed in the United States Court of Appeals "for the appropriate circuit," unless "such action is based on a determination of nationwide scope or effect *and* if in taking such action the Administrator finds and publishes that such action is based on such a determination." 42 U.S.C. § 7607(b)(1) (emphasis added). EPA has conceded that its Rule is "locally or regionally applicable"—as opposed to "nationally applicable"—but contends that the Rule nevertheless has "nationwide scope or effect." *See* 81 Fed. Reg. 296, 345-46 (Jan. 5, 2016) ("[W]e did not assert at proposal, nor do we assert now, that our FIP for Texas and Oklahoma is a 'nationally applicable' regulation").

To interpret Section 307(b)(1), "[this Court] begins, as we must, with the ordinary meaning of the statute's text." *Texas v. EPA*, No. 10-

60961, 2011 WL 710598 at *3 (5th Cir. Feb. 24, 2011). When the statutory text is clear and unambiguous, this is the end of the inquiry. *See, e.g., CleanCOALition v. TXU Power*, 536 F.3d 469, 473-74 (5th Cir. 2008). The "nationwide scope or effect" sentence of Section 307(b)(1) contains two clauses. The first clause is satisfied only when the "action" taken in the rulemaking is based on a "determination" of "nationwide scope or effect." When each of these terms is evaluated and paired with the corresponding elements of EPA's Rule, it is clear that the Rule is not based on a determination of nationwide scope or effect. The second clause of Section 307(b)(1) requires an additional inquiry into whether EPA has made a published finding that its action meets the criteria of the first clause; the use of the conjunctive "and" in Section 307(b)(1) makes clear that this is a separate inquiry additional to, and not determinative of, the inquiries contained in the first clause.

A. EPA's "Action" Is the Promulgation of the Rule That Partially Disapproves the Texas and Oklahoma SIPs and Creates Separate FIPs for the Two States.

The "action" that EPA has taken is the promulgation of a final rule "partially approving and partially disapproving a revision to the Texas State Implementation Plan," "finalizing its proposed partial disapproval of a revision to the Oklahoma SIP," and promulgating separate federal implementation plans (FIPs) for the two States. *See* 81 Fed. Reg. at 296 ("ACTION: Final rule.").

Case law demonstrates that it is the "action" taken by EPA that is relevant to the "nationwide applicability" analysis, with the relevant questions being: who are the entities directly regulated by the action, and where are those entities located. *See, e.g., New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998) (the issue germane to whether a rule is "nationally applicable" is the location of regulated entities); *Texas v. EPA*, 2011 WL 710598 at *3 ("Determining whether an action by the EPA is regional or local on the one hand or national on the other should depend on the location of the persons or enterprises that the action regulates rather than on where the effects of the action are felt."). The actions in the Rule are "applicable" only at the local or regional level, as

EPA has acknowledged. *See* 81 Fed. Reg. at 345-46, 348 (finding Rule "is not a rule of general applicability because its requirements apply and are tailored to only eight individually identified facilities" in Texas). Even though "applicability" is not contested here, it is important to properly situate the "applicability" analysis, as the motions briefing thus far has highlighted considerable confusion and overlap between the "nationwide applicability" and "nationwide scope or effect" inquiries.

B. The Relevant "Determinations" Are Those Identified by EPA in the Rule as Justifying the Final Action.

In the Rule, EPA puts forward a basis for its approval or disapproval of each element of the Texas SIP, and for its disapproval of Oklahoma's consultation with Texas. Those are the "determinations" to which Section 307(b)(1) refers.

Tellingly, EPA repeatedly uses the term "determination" to refer to the basis upon which each element of the SIP is being accepted or rejected. *See, e.g. id.* at 298 ("We have determined that Texas has not demonstrated that its reasonable progress goals provide for reasonable progress towards meeting the national visibility goal."); *id.* at 299 ("We are finalizing our determination that Texas'[s] analysis was deficient and not approvable . . ."); *id.* ("[W]e have determined that Texas' four-factor analysis and the analysis of emission measures needed to meet the uniform rate of progress does not meet the requirements of the Regional Haze Rule."); *id.* at 300 ("We are finalizing our determination that Texas has not adequately demonstrated that all coarse mass and fine soil measured in the baseline period can be attributed to 100% natural sources."); *id.* ("We are finalizing our determination that Texas did not develop an adequate technical basis to inform consultations with Oklahoma . . . .").

EPA attempts to obscure the relevant determinations in two ways. First, EPA urges that "at the core of this rulemaking is our interpretation of the requirements of sections 110(a)(2)(D)(i)(II) and 169A(b)(2) of the CAA and multiple complex provisions of the Regional Haze Rule." *Id.* at 346. But EPA does not point to any place in the Rule

where such a "determination" is actually put forward. In the proposed rule, EPA devoted one section to discussing its interpretation of two of its regulatory provisions (40 C.F.R. 51.308(d)(1) and (d)(3)), *see* 79 Fed. Reg. 74818, 74828 (Dec. 16, 2014), but none of that language was finalized in the Rule, nor was it put forward as a general "determination." The only mention of this "clarification" in the Rule was in the response-to-comments section, where EPA deflected comments critical of the proposed clarification by noting that, in this case, Texas itself had conducted a four-factor analysis. *See* 81 Fed. Reg. at 308-09 ("Texas itself conducted a four-factor analysis for downwind Class I areas (albeit a flawed one) and stated in its own response-to-comments document that it was required to do so."). This response by EPA, which expressly relied on facts specific to Texas's submission, belies EPA's argument that it had made a more generalized determination here.

In any event, this kind of EPA interpretation of its regulations is common to all SIP actions, and indeed is necessary for EPA to apply its regulations to individualized circumstances—yet the CAA includes a Congressional preference that SIP actions generally be heard in the appropriate local or regional circuit. *See* 42 U.S.C. § 7607(b)(1).

Second, EPA elsewhere appears to take the position that the relevant "determination" is not any of these substantive determinations at all, but that it instead circularly refers to EPA's own finding that the rule has nationwide scope and effect—the finding referenced in the second clause of the sentence in Section 307(b)(1). *See, e.g.*, EPA Reply 1. But this reflects a fundamental misreading of the statute that would render the first clause of the conjunctive sentence surplusage. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted). Further, the plain text of Section 307(b)(1) requires that the relevant determination be one that the action is "based on." A finding of nationwide scope and effect cannot form the basis for a rule partially approving and partially disapproving a SIP. The "determinations" upon

which EPA's action is based are those listed above that relate specifically to the circumstances of the Texas and Oklahoma's SIPs.

C. The "Scope" and "Effect" of the Relevant Determinations Are Specific to Texas and, Secondarily, Oklahoma.

1. The ordinary meanings of "scope" and "effect" show that EPA's determinations are local or regional.

The ordinary meaning of the term "scope" is the "area covered by a given activity or subject." *Scope*, American Heritage Dictionary (4th ed. 2000). The coverage of the determinations set out in the Rule extends to Texas and Oklahoma only, and is focused mainly in Texas. For example, regarding the four-factor analysis, the Rule provides that EPA "determined that Texas'[s] four-factor analysis and the analysis of emission measures needed to meet the uniform rate of progress does not meet the requirements of the Regional Haze Rule." 81 Fed. Reg. at 300. Such a determination is limited to Texas's analysis and individualized facts, and therefore cannot be said to have nationwide coverage.

The ordinary meaning of the term "effect" is "[s]omething brought about by a cause or agent; a result." *Effect*, American Heritage Dictionary (4th ed. 2000). The vast majority of the effects brought about by EPA's determinations will be felt in Texas. First, the direct effect of the Rule will be to impose approximately $2 billion in costs on Texas generating facilities. There will also be extensive effects on grid reliability, all of which will be felt within Texas since its ERCOT electric grid is located fully within the State. *See* Tex. Mot. to Stay 8-9. A recent ERCOT study estimates that if the Rule remains in place, "most of the coal units affected . . . are likely to retire across the scenarios studied." *See* ERCOT, 2016 Long-Term System Assessment Update.[1] As detailed in Texas's briefing on the motion to stay, these retirements will cause local reliability problems. *See. e.g.,* Tex. Mot. to

[1] *Available at* http://www.ercot.com/content/wcm/key_documents_lists/77730/2016_LTSA_Update_6_21_2016.pptx.

Stay 17; Tex. Reply on Mot. to Stay 8-9. In sum, Texas is the only State that will be subject to the harmful effects of the determinations made in the Rule. As described further in Petitioners' stay motions, there are no beneficial effects that flow from the Rule during the period EPA was authorized to review (ending in 2018). Tex. Mot. To Stay 10-11. But in any event, the Rule does not point to visibility effects beyond Texas and Oklahoma—falling far short of a "nationwide" effect.

2. Contrasting the Rule with rulemakings that do have nationwide scope or effect highlights the local or regional nature of this Rule.

EPA attempts to broaden the scope and effect of its Rule by stating that the Rule "articulates EPA's interpretation of certain sections of the Act and multiple complex provisions of the Regional Haze Rule" and that "these interpretations apply to every state." EPA Mot. 18. But the nationwide relevance of these general pronouncements is belied by the fact that EPA did not even propose action on Texas's SIP revision until after it had "acted on all of the states' regional haze SIPs for the first planning period[.]" 79 Fed. Reg. at 74,820. Further, all EPA actions on SIPs will have some precedential effect since EPA's own regulations require that agency actions must be "consistent" with each other, 40 C.F.R. § 56.5(a)(2). *See also Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (explaining that a "SIP approval [that] applies a broad regulation to a specific context and that [] may set a precedent for future SIP proceedings" is not thereby "of nationwide scope or effect" because that does not "distinguish[] [the] action from most other approvals of SIPs or SIP revisions").[2] Allowing EPA's "interpretation of certain sections of the Act," EPA Mot. 18, to qualify as determinations having nationwide scope or effect would allow

[2] EPA points to its April 25, 2016, Notice of Proposed Rulemaking to revise the Regional Haze Rule by codifying this "clarified interpretation" as evidence that the Rule is based on a determination of nationwide scope or effect. *See* EPA Reply 8 n.6. But this notice of proposed rulemaking—released *after* this litigation had been filed—cannot retroactively create nationwide scope or effect for the Rule, which interpreted the regulations as applied to Texas and Oklahoma.

the exception (review in the D.C. Circuit) to swallow the rule (review in the "appropriate circuit"). *See Crandon v. United States*, 494 U.S. 152, 158 (1990) ("In determining the meaning of a statute," the Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.").

EPA's reliance here on vague references to its "interpretation of . . . multiple complex provisions," EPA Mot. 18, stands in stark contrast to examples of determinations that do have nationwide scope or effect. For example, in a rulemaking addressed in *NRDC v. EPA*, after evaluating States' individual SIPs pertaining to air quality standards for transportation-related pollutants, EPA released a rule that not only addressed certain elements of the individual plans but also granted a blanket two-year extension to any air control region that would not reach attainment by the initial deadline. *See NRDC v. EPA*, 475 F. 2d 968, 969-70 (D.C. Cir. 1973); *see also NRDC v. EPA*, 465 F. 2d 492, 494 (1st Cir. 1972) (per curiam) (same). There, the D.C. Circuit held that cases filed across the country by NRDC all raised identical legal issues and none of the issues involved facts or laws particular to any one jurisdiction; rather, "all concern uniform determinations of nationwide effect made by the Administrator." 475 F.2d at 970.

And, in the rulemaking at issue in *Dayton Power & Light Co. v. EPA*, EPA promulgated generic regulations that required prevention of significant deterioration of air quality, and the court of appeals found that the rule was "national in scope" as well as "apply[ing] uniformly throughout the country." 520 F. 2d 703, 708 (6th Cir. 1975) ("[W]e perceive in this case no questions of law or fact that will vary from one jurisdiction to another. If these regulations were to be reviewed in the Court of Appeals for each circuit there would be a substantial risk of seriously inconsistent results and an inevitable delay in the effectuation of the important national policies underlying the Clean Air Act.").

These two sets of cases were referenced by the Administrative Conference of the United States (ACUS) in its recommendation upon which the CAA revisions (expressly adding the "nationwide scope and

effect" and "nationally applicable" terms) were based.[3] The ACUS authors contrasted situations where EPA's action on a SIP involved "issues peculiar to the affected states" with those that "involve generic determinations of nationwide scope or effect." *See* ACUS, Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act 7 (Recommendation No. 76-4) (1976).[4] The ACUS further described the "nationwide scope or effect" inquiry as asking whether the rulemaking was "virtually identical to promulgation of 'national standards.'" *Id.* "As with national standards, such actions typically involve establishment or application of uniform principles for all States, are taken on a single administrative record, and do not involve factual questions unique to particular geographical areas." *Id.* at 7 n.2. None of these criteria are met by the determinations in the Rule, which are instead specific to Texas and Oklahoma. The Rule here bears no resemblance to the "national standards" that EPA has previously promulgated for the regional haze program: namely, the 1999 and 2005 programmatic rulemakings. 64 Fed. Reg. 35,714 (July 1, 1999); 70 Fed. Reg. 39,104 (July 6, 2005).

Another example of a type of rulemaking that may have nationwide scope and effect even if it lacks nationwide applicability was presented—but not resolved—in *Texas Municipal Power Agency v. EPA*, 89 F.3d 858, 866 (D.C. Cir. 1996). The D.C. Circuit suggested that a cap and trade scheme might present such an issue because, when there is a national cap on allowances, a change for one or more units, even though appearing local or regional, could affect the entire allocation. *See id.* The court suggested that if such facts were presented in a non-

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[3] The House Committee noted that in suggesting these particular amendments, it was "in large measure approving the portion of the Administrative Conference of the United States recommendation section 305.76-4(a), that deals with venue" and further "concurs . . , with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick, which accompanied the Administrative Conference's views." H.R. Rep. No. 95-294, at 324 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1403.

[4] *Available at* https://www.acus.gov/sites/default/files/documents/76-4-ss.pdf.

speculative way, such rulemaking might be considered "nationally applicable, or at minimum have nationwide scope and effect." *Id.*

To Petitioners' knowledge, no court has found a regional haze rule regulating sources in only one State to be a rule based on a determination of nationwide scope or effect. This is consistent both with Congress's general preference for SIP actions to be adjudicated in the regional circuits and with the structure of EPA's regional haze program—set up so that States may address regional haze at the *regional* level. *See* 64 Fed. Reg. at 35,720 ("Regional planning efforts should be a product of State . . . leadership and, thus, should be led by States . . . not EPA.").

3. Texas and Oklahoma's location in different judicial circuits does not create nationwide scope or effect.

Finally, EPA argues that the fact that the rule "extends across two judicial circuits should be dispositive" of nationwide scope or effect. EPA Mot. 19. But the mere fact that the Rule touches two States in adjacent Circuits is not enough on its own, especially when, as here, one of these circuits—the Fifth Circuit—is clearly the most "appropriate circuit."

Tellingly, in other regional haze SIP and FIP rulemakings involving two States in different circuits, EPA did not make a finding of "nationwide scope or effect." For example, in addressing a SIP action spanning Michigan and Minnesota (the Sixth and Eighth Circuits, respectively), EPA did not find that rule to be "nationwide," and supported transfer of the Sixth Circuit petitions to the Eighth Circuit—not to the D.C. Circuit—pursuant to 28 U.S.C. § 2112(a)(5). *See* 78 Fed. Reg. 8,706 (Feb. 6, 2013) (single rule establishing regional haze FIPs for facilities in both Minnesota and Michigan).

Likewise here, proper venue as between the Fifth and Tenth Circuits should be determined by applying 28 U.S.C. § 2112 and transferring the case to the circuit in which the petitions were first filed—the Fifth Circuit. Further, returning to the text of Section 307(b)(1), the Fifth Circuit is also the most "appropriate circuit" to

adjudicate this matter because the Rule regulates emission sources only in Texas and addresses only one aspect of Oklahoma's SIP—the consultation with Texas. The Fifth Circuit is familiar with Texas's SIP process and Texas's unique ERCOT electric market—experience that is not available in either the Tenth Circuit or the D.C. Circuit.

The only support EPA provides for its position that a rule has nationwide scope or effect whenever it touches more than one judicial circuit is the legislative history for the CAA amendments. *See* H.R. Rep. No. 95-294, at 324 (1977) (stating that where action based on "determination of nationwide scope or effect (including a determination which has scope or effect beyond a single judicial circuit), then exclusive venue for review is in the U.S. Court of Appeals for the District of Columbia."). But the parenthetical language in the legislative history is not found in the text of the statute. And given the legislative history's expressed reliance on the ACUS report, it is clear that the concern being addressed here is for situations like the one arising in *NRDC v. EPA*, 475 F.2d 968, where cases raising identical issues were being filed all across the country. That underlying concern not implicated here.

D. Although EPA Has Published a Finding of Nationwide Scope and Effect, EPA Cannot by Fiat Direct Venue to the D.C. Circuit When Contrary to the Statutory Text.

Texas does not dispute that EPA made and published a finding that the determinations in the Rule have nationwide scope and effect. But publication by EPA of a statement that "this rule has nationwide scope or effect" cannot simply erase the contrary conclusions of the statutory analysis conducted above.

EPA would have this Court hold that it may pluck *any* suit out of the regional circuit and place it in the D.C. Circuit simply by publishing those words, and that no court has authority to even review this finding. EPA Mot. 1; EPA Reply 1. Such an approach would violate the canon of statutory interpretation avoiding absurd results. *See Atchison v. Collins*, 288 F.3d 177, 181 (5th Cir. 2002) (affirming "common mandate of statutory construction to avoid absurd results").

This approach is also in tension with the principle that all final agency action is presumptively subject to judicial review. *See Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[T]his Court applies a 'strong presumption' favoring judicial review of administrative action.") (citation omitted). Agency action is unreviewable in only two "rare instances": (1) "when Congress has expressed an intent to preclude judicial review"; or (2) when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). As to the first instance, EPA has it backwards when it argues that the onus is on Petitioners "to show that Congress intended courts to second-guess EPA's determination that one of its actions is of 'nationwide scope or effect.'" EPA Reply 1. Second, the statute provides a "meaningful standard" because its terms are clear and unambiguous. *See Mach Mining*, 135 S. Ct. at 1652 (holding that the plain meaning of statutory terms provides "concrete standards" for court review).

EPA's approach also would require this Court to condense the two clauses of the "nationwide scope or effect" sentence in Section 307(b)(1) into a single inquiry. But the statutory language requires *both* that the rule "is" in fact based on a determination that is "of nationwide scope or effect" "*and*" a published EPA finding. 42 U.S.C. § 7607(b)(1) (emphasis added); *see also Tex. Mun. Power Agency*, 89 F.3d 858 at 866 n.6 ("[T]he proviso [in section 307(b)(1)] would raise additional issues—it seems to require both a court determination of scope and effect, *and* a similar published determination by the [EPA] Administrator[.]").

Further, to the extent that the choice of forum inquiry implicates the Court's jurisdiction—as EPA has urged, *see, e.g.*, EPA Mot. 3—the Court would determine its own jurisdiction and give no deference to EPA's view. *See, e.g.*, *Ramey v. Bowsher*, 9 F.3d 133, 136 n.7 (D.C. Cir. 1993) ("Interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts."). And even under an administrative deference framework, EPA would be due no deference because the plain text of the statute is clear and unambiguous. *See, e.g., United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (if

EPA's finding is contrary to the plain language of the statute, the Court will enforce the terms of the statute); *cf. Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984). Finally, because the plain language of the statute is clear, legislative history does not inform the analysis, and in any event is silent on whether EPA's finding is reviewable. *See* H.R. Rep. No. 95-294, at 324 (1977) (indicating that EPA will make a finding but not stating whether that finding is reviewable).

EPA alternatively argues that, if its finding is reviewable at all, such review is available only in the D.C. Circuit. But the directive to file in the D.C. Circuit only applies if the conditions of Section 307(b)(1)—nationwide scope or effect—are met in the first instance.

II. The Choice of Forum Provision in Section 307(b)(1) Directs Venue, Not Jurisdiction.

Section 307(b)(1) generally vests all the Courts of Appeals with jurisdiction over petitions for review of all EPA final actions that are filed within the 60-day deadline. The choice of forum provisions in Section 307(b)(1) delineate only venue. *See Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) ("Lest there be any confusion going forward, we reiterate what the Supreme Court made clear thirty-five years ago: Section 307(b)(1) is a 'conferral of jurisdiction upon the courts of appeals.'") (quoting *Harrison v. PPG Indus.*, 446 U.S. 578 (1980)); *Tex. Mun. Power Agency*, 89 F.3d at 867 ("Given the less than clear language, the structure of the section—dividing cases among the circuits—and the legislative history indicate that [§ 7607(b)(1)] is framed more as a venue provision."); *see also New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998) ("Provisions specifying where a suit shall be filed, as distinct from specifying what kind of court or other tribunal it shall be filed in are generally considered to be specifying venue rather than jurisdiction.").

EPA takes the position that the choice of forum provision is jurisdictional, yet cites no authority and has even acknowledged that "the D.C. Circuit has treated section 7607(b)(1) as delineating venue, as opposed to subject-matter jurisdiction." EPA Reply 2. The Supreme

Court has warned against characterizing rules as jurisdictional "unless it governs a court's adjudicatory capacity." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011). The D.C. Circuit's characterization (in *Dalton Trucking* and *Texas Municipal Power Agency*) of Section 307(b)(1)'s choice of forum provision as implicating venue rather than jurisdiction is consistent with the Supreme Court's admonition, and this Court should reach the same conclusion.

III. The Court Should Stay the Rule Pending Litigation.

The Court has authority to consider Petitioners' stay motions prior to ruling on EPA's motion to dismiss or transfer. A stay is an "exercise of judicial discretion" that preserves the status quo pending proceedings. *Nken v. Holder*, 556 U.S. 418, 429, 433 (2009). Courts have the authority "to make orders to preserve the existing conditions and the subject of the petition[s]" even prior to making jurisdictional determinations. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 291 (1947); *see also* Order, *Texas v. EPA*, No. 10-60961 (5th Cir. Dec. 29, 2010) (Exh. C to Tex. Reply on Mot. To Stay) (ruling on stay motion prior to considering EPA motion to transfer); Order, State of Ohio, et al. v. U.S. Army Corps of Eng'rs, et al., Nos. 15-3799/3822/3853/3887 (Exh. D to Tex. Reply on Mot. To Stay) (6th Cir. Oct. 9, 2015) (granting stay of EPA waters rule pending jurisdictional determination).

As described in detail in Texas's stay briefing, a stay is critical to the State of Texas to avoid irreparable harms, including serious grid reliability consequences that are expected to flow from the Rule's $2 billion price tag. On the other side of the scale, there is no identified benefit from the Rule during the limited planning period—ending in 2018—that EPA was authorized to address. The imposition of this level of cost and harm, without corresponding public benefit, is the hallmark of irrational agency action, and dooms the Rule on the merits as well. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("One would not say that it is even rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."). EPA has overreached its statutory authority by imposing a FIP that reaches

beyond the time period subject to review, and by installing its own preferred policies in place of compliant and well-reasoned State judgments. For these reasons, this Court should grant the Petitioners' motions for stay.

* * *

For the reasons discussed above, the Court can and should act on the stay motions first, to preserve the status quo pending litigation and prevent irreparable harm to Petitioners. The Court also should deny the EPA's motion to dismiss or transfer because the Fifth Circuit has jurisdiction and is the proper venue—the "appropriate circuit"—to decide this case.

Respectfully submitted.

/s/ Lisa A. Bennett
Lisa A. Bennett
Assistant Solicitor General

CERTIFICATE OF SERVICE

On June 1, 2016, the foregoing was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Lisa A. Bennett
Lisa A. Bennett