No. 02-

IN THE

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in upholding the EPA's assertion of authority to second-guess a permitting decision made by the State of Alaska—which had been delegated permitting authority under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq*.—in conflict with decisions of this Court and other federal courts of appeals establishing the division of federal-state jurisdiction under the Act and similar statutory programs.

PARTIES TO THE PROCEEDING

The State of Alaska, Department of Environmental Conservation, and Teck Cominco Alaska, Inc. were petitioners in the Ninth Circuit below. The United States Environmental Protection Agency ("EPA"), and Carol M. Browner and Chuck Clarke in their official capacities as Administrator of the EPA and Regional Administrator of the EPA's Region 10, respectively, were originally named as respondents below. Ms. Browner and Mr. Clarke have since been succeeded by Christie Whitman and L. John Iani, respectively.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner State of Alaska, Department of Environmental Conservation ("ADEC") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 298 F.3d 814 and reproduced in the appendix hereto ("App.") at 1a. The Ninth Circuit's prior opinion concluding that it had jurisdiction over this case is reported at 244 F.3d 748 and

reproduced at App. 17a. The Ninth Circuit's order requesting supplemental briefing is reproduced at App. 24a. The orders of the United States Environmental Protection Agency ("EPA") are reproduced at App. 26a, 38a, and 51a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 30, 2002. App. 1a. The jurisdiction of the Ninth Circuit was based on 42 U.S.C. § 7607(b)(1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 165(a)(4) of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*., provides, in pertinent part:

> (a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—
>
> (4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility * * *. [42 U.S.C. § 7475(a)(4).]

Section 169(3) of the CAA provides, in pertinent part:

> (3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [42 U.S.C. § 7479(3).]

INTRODUCTION

This case raises important and recurring issues concerning the ability of the States to exercise their statutory authority under the Clean Air Act ("CAA")—one of the Nation's most significant and far-reaching environmental statutes. Described as an "experiment in federalism," *Michigan* v. *EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (quotation omitted), the CAA assigns to the States an important—indeed *primary*—role in air pollution prevention and control. One of the States' principal responsibilities under the Act is to prevent the degradation of air quality in those areas where national clean air standards have been attained. To this end, the CAA prohibits the construction or modification of a "major emitting facility" in any "clean air" area unless the facility is subject to the "best available control technology," or "BACT." 42 U.S.C. § 7475(a)(4). BACT is defined in the CAA as "an emission limitation * * * which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *." *Id.* § 7479(3) (emphasis added). The "permitting authority" in this case—and in most cases arising under this provision—is the State. *See* App. 3a.

The CAA thus by its terms gives the States the authority to determine BACT for a particular source, and allows the States broad discretion in making that determination. This is confirmed by the Act's legislative history: "The decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility *with the State*, to be determined in a case-by-case judgment. It is recognized that the phrase has *broad flexibility* in how it should and can be interpreted, depending on site." S. Rep. No. 95-127, at 31 (1977) (emphases added).

In 1999, the State of Alaska issued a permit for the construction of a new electric generator at the Red Dog Mine in

Northwest Alaska, 100 miles north of the Arctic Circle. In accordance with the CAA and the State's own regulations, the State determined that a particular technology—"Low NOx"—was BACT to control nitrogen oxide emissions from the new generator. In making that determination, the State expressly took into consideration "energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3).

Under the guise of exercising its enforcement authority under the CAA, the EPA issued a series of orders prohibiting the construction of the generator because the federal agency disagreed with the State's determination that Low NOx was BACT for the new generator. In seeking to override the State's BACT determination in this manner, the EPA usurped authority that the CAA clearly delegates to the States, upsetting the balance of power that Congress carefully sought to create under the Act. In conflict with decisions of this Court and other federal courts of appeals, the Ninth Circuit sanctioned that result.

The Ninth Circuit's decision poses a grave threat to the ability of the States to exercise the statutory authority vested in them by Congress to make BACT and other important discretionary decisions under the Act. The question presented is a recurring one of national importance, arising not only under the CAA but a broad range of other federal statutes with similar shared authority between the States and federal government. This Court should grant certiorari to resolve the conflict engendered by the Ninth Circuit's decision, and to preserve the delicate balance of power that Congress established under the CAA and similar statutes.

STATEMENT OF THE CASE

Statutory and Regulatory Background. The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *United*

States, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that "air pollution prevention * * * and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added); *see also id*. § 7407 ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State"). Thus, while the CAA assigns to the EPA the responsibility for establishing national ambient air quality standards ("NAAQS"), *see id*. § 7409, the Act gives the States the responsibility for implementing those standards. *See id*. §§ 7407, 7410.

To this end, the CAA requires the States to adopt and submit for the EPA's approval a state implementation plan ("SIP") that provides for attainment and maintenance of the NAAQS. *See id*. § 7410. If a State does not have an approved SIP in place, the Act requires the EPA to adopt and implement a federal implementation plan. *See id*. § 7410(c). The EPA may delegate to a State the authority to implement and enforce any part of such a plan. *Id*. § 7410(c)(3).

The CAA requires that each SIP contain emission limitations and such other provisions as may be necessary "to prevent significant deterioration of air quality" in "attainment" areas. *Id*. § 7471. An "attainment"—or "clean air"—area is one "that meets the [NAAQS] for [a given] pollutant." *Id*. § 7407(d)(1)(A)(ii). The Act establishes maximum allowable increases (or increments) of certain pollutants in clean air areas. *Id*. § 7473. To ensure that such increments are not exceeded, the Act also establishes a preconstruction review process that must be followed before the construction or modification of a "major emitting facility" in a clean air area. *Id*. § 7475. As part of that process, the Act requires that each SIP contain a Prevention of Significant Deterioration ("PSD") permit program, and provides that no major emitting facility may be constructed in a clean air area without a PSD permit. *Id*. §§ 7410(a)(2)(C), 7475(a).

The Act also provides that no major emitting facility may be constructed or modified unless "the proposed facility is subject to the best available control technology [or "BACT"] for each pollutant subject to regulation under [the Act] emitted from, or which results from, such facility." *Id*. § 7475(a)(4). BACT is defined as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which *the permitting authority, on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility * * *. [*Id*. § 7479(3) (emphasis added).]

Factual Background. The State of Alaska is a clean air area with respect to nitrogen dioxide, a regulated pollutant under the Act. Under Alaska's SIP, approved by the EPA in 1983, the State operates a PSD permit program through its Department of Environmental Conservation ("ADEC"). Before a PSD permit will be issued for the construction of a new source within the State, the Alaska SIP requires "a demonstration that [a] proposed limitation represents the best available control technology for each air contaminant and for [the] source." 18 Alaska Admin. Code § 50.310(d)(3).

The Red Dog Mine, the world's largest source of zinc concentrate, is located in the harsh landscape of Northwest Alaska, about 100 miles north of the Arctic Circle. The mine is operated by Teck Cominco Alaska, Inc. ("Cominco") in partnership with the Northwest Arctic Native Association ("NANA")[1] on lands owned by NANA. Operating 365 days

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[1] NANA is a regional corporation established by Congress pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*. NANA is the regional corporation organized for the benefit of the Inupiat Eskimos residing in Northwest Alaska.

a year, the mine is the largest private employer in the Northwest Arctic Borough, a vast and isolated area with an historically high unemployment rate. Due to its remote location, the mine requires an independent, on-site power source. The mine is currently powered by six diesel-fired electric generators, designated "MG-1" through "MG-6," which were constructed pursuant to PSD permits issued by ADEC in 1988 and 1994.

In April 1996, Cominco initiated a project to boost the mine's output—and in the process create nearly 100 new jobs. Because the project required the use of more electricity, Cominco in June 1998 submitted an application to ADEC for a new PSD permit, requesting permission to increase the amount of nitrogen oxide ("NOx"), a precursor to nitrogen dioxide, from its MG-5 generator. Cominco's application proposed the use of "Low NOx"—a process that reduces the amount of NOx that would otherwise be released into the environment—as BACT for the MG-5 generator. In April 1999, Cominco amended its application, proposing to install Low NOx on all six of its existing generators—including the five not subject to a new BACT determination—as well as on a proposed new generator, "MG-17," which—like MG-5—was also subject to BACT.

In May 1999, ADEC issued a draft PSD Permit and a preliminary Technical Analysis Report ("TAR") in which it accepted Cominco's amended proposal because it would reduce *total* NOx emissions from the Red Dog Mine to a level comparable to or lower than that which would result were another control alternative evaluated during ADEC's review process—Selective Catalytic Reduction ("SCR")—installed on only the MG-5 and MG-17 generators. *See* App. 4a. ADEC published the draft PSD Permit and preliminary TAR for public comment and review.

In July 1999, after the close of the public comment period, the EPA commented on Cominco's application for the first

time, expressing its view that SCR was BACT for the MG-5 and MG-17 generators—even though SCR had never before been determined to be BACT to reduce NOx emissions from a similar diesel-fired electric generator. In September 1999, after considering all public comment—including the EPA's belated input—ADEC issued a final draft permit and a final draft TAR concluding that Low NOx was BACT for the MG-5 and MG-17 generators. In response to the EPA's continuing objections, ADEC worked with the federal agency in an effort to resolve their differences. Although the dispute over BACT for the MG-5 generator was resolved when Cominco decided to restrict emission increases from the generator to avoid BACT review, the parties could not agree on BACT for the proposed new generator, MG-17.

After a period of unsuccessful negotiations, ADEC on December 10, 1999 issued the PSD Permit and a final TAR, in which ADEC spent nearly ten pages explaining the basis of its carefully considered determination that Low NOx was BACT for the MG-17 generator. *See* PER 044-053.[2] In making that determination, ADEC considered the "energy, environmental, and economic impacts and other costs" associated with other technologies, including SCR. 42 U.S.C. § 7479(3). Moreover, although not required to do so, ADEC followed the EPA's "top-down" approach—used by the EPA when it acts as the PSD permitting authority in those circumstances where a State does not have a PSD program—in determining BACT.[3] Under that approach, ADEC (1) identified all NOx control technologies; (2) identified which technologies were technically feasible; (3) ranked the feasible control technologies in order of effectiveness; (4) considered the energy, environmental, and economic impacts of the feasible technologies and determined which to elimi-

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[2] Petitioners' Combined Excerpts of Record below are cited as "PER."

[3] As the EPA acknowledges, "top-down analysis is not a mandatory methodology." EPA 9th Cir. Br. 12 (quotation omitted).

nate based on such impacts; and (5) selected Low NOx as the most effective technology not eliminated.

In considering the "energy, environmental, and economic impacts and other costs" associated with SCR, ADEC discounted Cominco's contention that requiring SCR would have adverse environmental and energy impacts. ADEC concluded, however, that SCR would have an adverse economic impact because, among other things, the "excessive economic cost" of SCR—$2.9 million in capital costs and annual operating costs approaching $635,000—could adversely affect the mine's "world competitiveness," with attendant adverse consequences for the precarious economy of the Northwest Arctic Borough. PER 051. Accordingly, ADEC determined that SCR was not economically feasible. Yet because Cominco had agreed to install Low NOx on *all* its generators—not just the MG-17 generator subject to ADEC's BACT determination—ADEC's permit decision was expected to reduce NOx emissions to a level comparable to or *lower* than that which would result if SCR were installed on only the MG-17 generator. *See* App. 4a.

The EPA's Orders. In an attempt to prevent ADEC from issuing the PSD Permit to Cominco, the EPA on December 10, 1999 issued a Finding of Noncompliance and Order to ADEC. App. 26a. According to the EPA, ADEC's issuance of the final draft permit would not be in compliance with the requirements of the CAA or Alaska's SIP relating to the construction or modification of new or existing sources. App. 36a. The EPA thus ordered ADEC to withhold issuance of Cominco's permit designating Low NOx as BACT until ADEC demonstrated to the EPA's satisfaction that SCR was not BACT for the MG-17 generator or that the issuance of the permit was otherwise in compliance with the CAA and Alaska's SIP. *Id*.

The EPA purported to issue its Finding and Order under Section 113(a)(5) of the CAA, which provides that whenever

the Administrator "finds that a State is not acting in compliance with any requirement or prohibition of the [Act] relating to the construction of new sources or the modification of existing sources," the Administrator "may issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies." 42 U.S.C. § 7413(a)(5). The EPA also relied on Section 167 of the CAA, which provides that the Administrator "shall * * * take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of [the CAA's PSD program]." *Id*. § 7477. The Finding and Order did not identify the specific "requirement" of the Act with which ADEC supposedly had failed to comply, and the Act itself specifies that "the permitting authority, on a case-by-case basis," is to determine what constitutes BACT for a particular facility. *Id*. § 7479(3).

Because ADEC had already issued Cominco's permit, the EPA—on February 8, 2000—issued an Administrative Order to Cominco prohibiting the construction of the MG-17 generator until Cominco "demonstrated to the EPA's satisfaction compliance with [the CAA]" and obtained a "valid" PSD permit from ADEC for the MG-17 generator that complied with the CAA and the EPA's December 10, 1999 Finding and Order. App. 49a. Subsequently, on March 7, 2000, the EPA amended its February 8, 2000 order to allow Cominco to perform certain construction activities during the short Alaska summer. App. 62a-63a. The Amended Administrative Order reiterated that Cominco was otherwise prohibited from commencing construction of the MG-17 generator. App. 62a.

Proceedings Below. ADEC and Cominco subsequently filed petitions for review in the Ninth Circuit challenging the EPA's authority to issue the December 10, 1999 Finding of Noncompliance and Order, the February 8, 2000 Administra-

tive Order, and the March 7, 2000 Amended Administrative Order. App. 1a. ADEC and Cominco argued that the EPA had no authority to issue the orders under either Section 113(a)(5) or Section 167 because ADEC had not failed to comply with a "requirement" of the Act. To the contrary, they explained, ADEC had properly exercised its authority under the Act to make BACT determinations on a "case-by-case basis." 42 U.S.C. § 7479(3).

Before issuing its decision, the Ninth Circuit twice sought supplemental briefing from the parties. Shortly after oral argument, after initially rejecting the EPA's contention that the court lacked jurisdiction to consider the petitions because the EPA's orders did not constitute "final agency action," the Ninth Circuit requested further briefing "assessing the impact, if any," of this Court's recent decision in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001). App. 23a. Later, the court requested additional briefing on "whether it is the state of Alaska (through ADEC) or the EPA that bears the ultimate legal authority and responsibility under the Clean Air Act to determine whether an individual [PSD] permit issued by Alaska pursuant to its State Implementation Plan (SIP) meets the requirements of the Clean Air Act or the SIP." App. 25a.

In the end, the Ninth Circuit upheld the EPA's orders. The court observed that applicants for PSD permits "must fulfill the 'preconstruction requirement' that a 'proposed facility [be] subject to the best available control technology for each pollutant subject to regulation.' " App. 8a (quoting 42 U.S.C. § 7475(a)(4)) (alteration in original). Thus, the court concluded, "subjecting a facility to BACT is both a 'requirement * * * of the chapter relating to the construction of new sources or the modification of existing sources,' under Section 113(a)(5), and a 'requirement[] of this part' under Section 167." *Id*. (alterations in original). "Because the EPA based its orders on the finding that ADEC had not complied with the BACT requirement," the court held, "the orders

were authorized by the plain language of Section 113(a)(5), as 'order[s] prohibiting the construction or modification of any major stationary source in any area to which such requirement applies,' and of Section 167, as orders 'necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." App. 9a.

The Ninth Circuit further held that the CAA's legislative history also compelled the conclusion that "the EPA has the ultimate authority to decide whether the state has complied with the BACT requirements of the Act and the state SIP." App. 10a-11a. As support for that conclusion, the court cited the 1970 amendment of the Act authorizing the EPA to publish NAAQs and delegating to the States the responsibility for implementing those standards; the 1977 amendment of the Act adding the Act's PSD provisions; and the 1990 amendment of Section 113(a)(5) allowing the EPA to take action when a State fails to comply with "any requirement or prohibition" relating to new or modified sources. *See* App. 9a-10a. The Ninth Circuit did not address the legislative history most directly on point—that making clear that "[t]he decision regarding the actual implementation of best available technology is a key one, and the committee places this responsibility with *the State*, to be determined in a case-by-case judgment." S. Rep. No. 95-127, at 31 (1977) (emphasis added). *See* ADEC 9th Cir Br. 34 (citing legislative history).

Addressing ADEC and Cominco's contention that the EPA lacked the authority to veto ADEC's discretionary judgment based on its difference of opinion as to which technology was BACT, the Ninth Circuit stated that "neither Section 113(a)(5) nor Section 167 contains any exemption for requirements that involve the state's exercise of discretion," and that "[n]othing in the BACT definition of Section 169(3) limits the EPA's authority." App. 11a. The court then went on to hold that the EPA's issuance of the orders was not arbitrary or capricious.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS ON THE ALLOCATION OF FEDERAL-STATE AUTHORITY.

The Ninth Circuit held in this case that "the EPA has the ultimate authority to decide whether [a] state has complied with the BACT requirements of the Act." App. 10a-11a. The CAA, however, squarely places the responsibility for determining BACT with the States, and gives them broad discretion to do so. *See* 42 U.S.C. § 7479(3) (defining BACT as "an emission limitation * * * which *the permitting authority*, *on a case-by-case basis*, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility") (emphasis added); *see also* S. Rep. No. 95-127, at 31 ("The weight assigned to such factors is to be determined by the State."). Because a BACT determination is a discretionary judgment, involving the case-by-case weighing of a variety of factors, there is no single, objectively "correct" BACT determination for any particular source. The fact that a State weighs the pertinent factors differently than the EPA in any particular case does not mean that the State has in any sense violated a requirement of the Act, authorizing the EPA to intervene and overturn the State's judgment.

The CAA does provide that a facility's emissions may not exceed the NAAQS or PSD allowable increments, *see* 42 U.S.C. § 7475(a)(3), and that the application of BACT may not result in emissions that exceed other standards established under the Act, *see id.* § 7479(3). As long as a State observes those statutory parameters—and it is undisputed that Alaska did so here—the only BACT "requirement" imposed by the Act is that a State take into account "energy, environmental, and economic impacts and other costs" in

determining BACT. If a State takes such factors into consideration—as Alaska plainly did here—the EPA has no authority to override a BACT determination with which it may disagree.[4] The Ninth Circuit's holding to the contrary is thus not only deeply flawed, but fails to square with decisions of this Court and other federal courts of appeals that have recognized and respected the balance of power between the States and the federal government that Congress established under the Act.

1. More than twenty-five years ago, this Court recognized the CAA's "division of responsibilities" between the States and the federal government in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). In *Train*, the Court observed that the EPA "is plainly charged by the Act with the responsibility for setting the national ambient air standards." But "[j]ust as plainly," the Court emphasized, the EPA "is relegated by the Act to a *secondary* role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id*. (emphasis added). As the Court explained, "[t]he Act gives the [EPA]

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[4] The only circumstance—not applicable here—in which the EPA's approval of BACT is required is "in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title [42 U.S.C. § 7411] has been promulgated subsequent to August 7, 1977, for such source category." 42 U.S.C. § 7475(a)(8). This narrow exception proves the rule—that Congress otherwise did not intend the EPA to be the "ultimate authority" with respect to a State's BACT determination. App. 11a. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) (where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [Act's] standards." *Id*. (emphasis added). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id*. *See also Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent").

2. Unlike the Ninth Circuit below, other federal courts of appeals have respected the "division of responsibilities" set out in the CAA and have firmly rebuffed attempts by the EPA to usurp authority that Congress has clearly reserved for the States. Not surprisingly, the Ninth Circuit's decision conflicts in this regard with numerous decisions of the D.C. Circuit—the court vested with exclusive jurisdiction over petitions for review of the EPA's promulgation of national standards, rules, and regulations under the CAA. *See* 42 U.S.C. § 7607(b)(1).

For instance, the Ninth Circuit's decision conflicts with the D.C. Circuit's recent decision in *American Corn Growers Ass'n* v. *EPA*, 291 F.3d 1 (D.C. Cir. 2002), a case involving the States' authority to make determinations very much like the BACT determination at issue here. *American Corn Growers* involved the States' authority to determine the best available retrofit technology ("BART") for certain stationary sources under the Act. The Act requires the States to determine BART for particular sources and provides that in determining BART each State "shall" take into consideration five enumerated statutory factors. *See* 42 U.S.C. §§ 7491(b)(2)(A), (g)(2). The EPA promulgated a rule requiring the States to consider one of the factors on a regional, rather than source-by-source, basis. *See* 291 F.3d at 6. The D.C. Circuit invalidated the rule, holding that it was

"inconsistent with the Act's provisions giving the states broad authority over BART determinations." *Id*. at 8. By dictating that the States make BART determinations in a particular manner, the EPA had impermissibly "constrain[ed] authority Congress conferred on the states." *Id*. at 9.

Just so here. The CAA gives the States broad authority to make BACT determinations for particular sources. By substituting its judgment for the State of Alaska's in this case, the EPA plainly "infringe[d] on [the State's] authority under the Act." *Id*. at 9. The Ninth Circuit's decision sanctioning that result cannot be reconciled with *American Corn Growers*.

The Ninth Circuit's decision also conflicts with the D.C. Circuit's decision in *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1980), the seminal case addressing the CAA's PSD provisions. Amid various challenges to the EPA's initial regulations implementing those provisions, the court addressed the contention that the EPA should be required to promulgate guidelines "detailing the manner in which States may permit consumption of the available increments" of certain pollutants in clean air areas. *Id*. at 363-364. The court made clear that although the EPA may prevent or correct violations of the increment limitations under the Act, "the agency is without authority to dictate to the States their policy for management of the consumption of allowable increments." *Id*. at 361. Those limitations must be observed, the Court held, "but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id*. at 364.

In the same vein is the D.C. Circuit's more recent decision in *Virginia* v. *EPA*, 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (1997). There, the D.C. Circuit invalidated an EPA regulation requiring certain States to adopt particular motor vehicle emissions standards. Relying on this Court's decision in *Train*, the D.C. Circuit held that

"Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans." *Id*. at 1410. In sharp contrast to the D.C. Circuit's decisions in *Alabama Power* and *Virginia* v. *EPA*, the Ninth Circuit's decision permits the EPA to "dictate to the States" a matter plainly within their discretion—what constitutes BACT with respect to a particular facility.

3. The conflict between the decision below and the decisions of the D.C. Circuit alone provides a compelling basis for review. But the conflict created by the decision below is by no means limited to the D.C. Circuit. For instance, in *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579 (1981), the Fifth Circuit rebuffed the EPA's attempt to require the State of Florida to include a particular provision in its SIP. Florida had submitted a proposed SIP revision to the EPA to allow a particular source to increase its emissions limitations beyond those in Florida's EPA-approved SIP. The EPA approved the SIP revision, but imposed a two-year limit on the increase. Relying on *Train*, the Fifth Circuit held that the EPA's action was clearly "beyond the Congressional mandate." *Id*. at 589. Under the CAA, the court explained, States " 'may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.' " *Id*. at 587 (quoting *Train*, 421 U.S. at 80). "The great flexibility accorded the states," the court went on, "is further illustrated by the sharply contrasting, narrow role to be played by EPA." *Id*. So long as a proposed SIP revision meets the criteria set out in the Act, the EPA has no authority to " 'assume control of a State's emission limitations mix once its initial plan is approved.' " *Id*. (quoting *Train*, 421 U.S. at 80). By attempting to do just that, the EPA had "usurp[ed] state initiative in the environmental realm," thereby "disrupt[ing] the balance of state and federal responsibilities that undergird the efficacy of the Clean Air Act." *Id.* at 589.

The Seventh Circuit's decision in *Bethlehem Steel Corp.* v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984) (Posner, J.), is to the same effect. There, too, the court refused to allow the EPA to tread upon the States' authority under the CAA and upset the Act's "division of responsibilities." *Train*, 421 U.S. at 79. The EPA had issued an order partially approving a proposed SIP revision submitted by the State of Michigan. The effect of the "partial approval," however, was to render the proposed SIP revision more stringent than it was as submitted. The Seventh Circuit held that the EPA could not, "in the guise of partial approval," make Michigan's SIP stricter than the State intended. *Id*. at 1036. If the EPA wished to impose tougher standards, it was required to follow the Act's procedures for doing so—namely by promulgating its own regulation in accordance with the Act's criteria. *See id*. at 1035. Under the CAA, the court explained, "[t]he federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends." *Id*. at 1036. In short, the CAA "creates a partnership between the states and the federal government," and the EPA "may not run roughshod over the procedural prerogatives that the Act has reserved to the states." *Id*.

The Ninth Circuit's decision allowing the EPA to "usurp state initiative in the environmental realm," *Florida Power & Light Co.*, 650 F.2d at 589, is squarely at odds with these decisions. Moreover, as the Seventh Circuit's decision in *Bethlehem Steel* makes clear, when the EPA prefers that a State take a particular action, the EPA must follow proper procedures. As ADEC explained below, the proper recourse for the EPA in this case was not to veto the State's discretionary judgment by regulatory fiat, but rather to participate in the public comment process on Cominco's draft permit and then, if it still disagreed with the State's action after that process, challenge ADEC's BACT determination through the

State's administrative review process. *See* ADEC 9th Cir. Br. 53-56; PER 390-391. *See also* 42 U.S.C. § 7475(a)(2) (requiring opportunity for interested persons "including representatives of the Administrator" to submit comments on "control technology requirements" before PSD permit may be issued). Alaska's laws and SIP permit any party that participated in the public comment process to pursue an administrative appeal of a permit decision, followed by judicial review. *See* 18 Alaska Admin. Code § 50.315; Alaska Stat. § 46.14.200.

Contrary to *Bethlehem Steel*, the Ninth Circuit permitted the EPA to bypass those channels and "run roughshod" over the State's prerogatives under the Act. 742 F.2d at 1036. The Ninth Circuit's decision is particularly intolerable as it essentially gives the EPA free rein to invalidate a BACT determination at any time—months, even years, after a permit has been issued and a source has invested in the technology approved by the State. *Cf. United States* v. *AM General Corp.*, 34 F.3d 472, 474-475 (7th Cir. 1994) (holding that the EPA could not "mount a collateral attack" on a permit as many as five years after it was issued where the EPA had the "alternative remedy" of a state administrative appeal followed by judicial review). The conflict between the decision below and *Bethlehem Steel* in this regard further underscores the need for this Court's review.

II. THE CONFLICT OVER FEDERAL-STATE AUTHORITY IS A RECURRING ISSUE OF NATIONAL IMPORTANCE.

Although the conflict engendered by the Ninth Circuit's decision alone warrants certiorari, the need for this Court's review is heightened by the important and recurring nature of the question presented. Congress gave the States "great flexibility" to achieve the goals of the CAA, *Florida Power & Light*, 650 F.2d at 587, including the preservation of air quality in clean air areas. As the D.C. Circuit explained in

Alabama Power, "[i]n the allocation of responsibilities made by Congress" with respect to preventing the significant deterioration of air quality, "maximum limitations have been set." 636 F.2d 364. "These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id*.

A State's authority to determine BACT for a particular source is "key" to its ability to "manage [its] allowed internal growth" under the CAA. *Id*. at 364. The "flexible approach" chosen by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as *anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis added). Congress's decision to make BACT "strictly a State and local decision," *id*., makes sense, as it is the States—not the EPA—that are most sensitive to particular local needs and concerns.

The Act's requirement that BACT be determined on a "case-by-case," facility-specific basis, 42 U.S.C. § 7479(3), highlights the importance of such local considerations. In this case, for instance, the State of Alaska, taking into account the requisite statutory factors, made a permitting decision that would not only result in cleaner air, but more jobs for a struggling community situated 100 miles north of the Arctic Circle, where geography and the harsh environment pose unique employment challenges and offer few employment alternatives. In reaching its decision, the State considered various site-specific conditions, as well as "the importance of the mine to the regional economy of the Northwest Arctic Borough." PER 387. *See id*. 386-387.

The Ninth Circuit, based more than 2000 miles away in California, was "uncomfortabl[e]" with the State's consideration of the mine's importance to the local economy. App. 16a. But the statute specifically directs that the States

consider "economic impacts" in determining BACT. 42 U.S.C. § 7479(3). *See* S. Rep. No. 95-127, at 31. Allowing the EPA to dictate BACT to the States means allowing the EPA to "assume control" of the States' "developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level consistent with" the limitations set out in the Act. *Train*, 421 U.S. at 80. It also means longer delays in the permitting process while the EPA wrangles with the States over their decisions. That is plainly not what Congress intended. *See* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

The Ninth Circuit's decision not only vitiates the States' authority to determine BACT under the CAA, but also threatens the ability of the States to make numerous similar kinds of discretionary decisions under the Act. As noted above, for instance, the Act authorizes the States to determine the best available retrofit technology ("BART") for particular sources by weighing various statutory factors. *See* 42 U.S.C. § 7491(b)(2)(A); *id*. § 7491(g)(2). The Act also authorizes the States, in consultation with the EPA, to exclude from the definition of "small business stationary sources" under the Act's operating permit provisions any category of sources that "the State determines to have sufficient technical and financial capabilities to meet the requirements of [the] Act." *Id*. § 7661f(c)(3)(B). In non-attainment areas, the Act authorizes the States to determine the lowest achievable emissions rate ("LAER") for new and modified major stationary sources. *See id*. §§ 7501(3), 7503(a)(2). Under the Ninth Circuit's holding, the EPA would be free to override these sorts of determinations any time it disagrees with a State's decision.

The potential effect of the Ninth Circuit decision is even more far-reaching. In addition to the CAA, numerous other statutes embody the principle of "cooperative federalism."

See, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 167-168 (1992) (noting "numerous federal statutory schemes" of this nature, including the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*., the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq*., and the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq*.). Those statutes also establish regulatory regimes based on shared federal-state responsibility, whereby the federal government sets standards and the States—if they opt to undertake the responsibility—are given broad flexibility in implementing those standards. Such programs "offer States the choice of regulating * * * activity according to federal standards," which promotes underlying values of federalism because "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *New York* v. *United States*, 505 U.S. at 167-168. The Ninth Circuit decision, by transferring from the State to the EPA core discretionary authority under one of the leading "cooperative federalism" statutory regimes, threatens to undermine the balance of power struck by Congress and accepted by the States when they assumed the responsibilities offered under the Act. This Court should not allow such a troubling decision to stand unreviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment reversed.

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