No. 12-1484

In the Supreme Court of the United States

LUMINANT GENERATION COMPANY LLC, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in deferring to a determination, made by the United States Environmental Protection Agency pursuant to 42 U.S.C. 7410(*l*), that a State's proposed affirmative defense to monetary penalties for excess emissions caused by planned startup, shutdown, and maintenance activities at power plants would interfere with requirements of the Clean Air Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 714 F.3d 841. The final rule of the United States Environmental Protection Agency (Pet. App. 125a-180a) is published at 75 Fed. Reg. 68,989.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2013. A petition for rehearing was denied on April 1, 2013 (Pet. App. 111a-124a). The petition for a writ of certiorari was filed on June 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, the United States Environmental Protection Agency (EPA) has developed a list of pollutants that cause or

contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7408(a)(1)(A). The EPA promulgates "national ambient air quality standards" (NAAQS) that specify the maximum permissible concentrations of those pollutants. 42 U.S.C. 7408, 7409(b).

The CAA gives States the primary responsibility for "assur[ing]" attainment and maintenance of the NAAQS. 42 U.S.C. 7410(a)(2)(C); see *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 256 (1976). Each State must prepare a State Implementation Plan (SIP) that provides for the "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region in the State, including through use of "enforceable emission limitations and other control measures." 42 U.S.C. 7410(a)(1)-(2); see 42 U.S.C. 7407(a); 42 U.S.C. 7410(a)(2)(H) (providing that States must revise SIPs periodically to ensure continuing compliance with the NAAQS).

A SIP (or a revision to an existing SIP) does not become effective and 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 (1990). The EPA must ensure that a State's SIP is consistent with the CAA, and may not approve a SIP revision that "would interfere with any applicable requirement concerning attainment" of the NAAQS "or any other applicable requirement" of the statute. 42 U.S.C. 7410(*l*); see *Union Elec. Co.*, 427 U.S. at 250, 256-257 (explaining that, although States have "wide discretion" in formulating SIPs, the CAA "nonetheless subject[s] the States to strict minimum compliance requirements"); 42 U.S.C. 7410(k)(3) (stating that the EPA "shall approve [a] submittal as a whole" if it meets all requirements but may,

if necessary, "approve the plan revision in part and disapprove the plan revision in part").

Enforcement of emissions limitations, including through use of civil penalties, is critical to ensuring attainment and maintenance of the NAAQS. See 42 U.S.C. 7410(a)(2) (stating that a SIP must include a "program to provide for the enforcement" of measures in the plan). The efficacy of emissions limitations is evaluated through computer modeling that assumes that sources of emissions will continuously comply with those limitations. See, *e.g.*, 40 C.F.R. 51.112(a)(1); see also 42 U.S.C. 7410(a)(2)(A). The CAA authorizes both the EPA and citizens to bring enforcement actions when the limitations are exceeded. See 42 U.S.C. 7413, 7604. When assessing the amount of the civil penalty that should be imposed in a particular enforcement action, a court must consider various criteria, including compliance history, good-faith efforts to comply with the relevant emissions limitation, and the duration and seriousness of the violation. See 42 U.S.C. 7413(e).

The EPA has long recognized that in certain limited situations, excess emissions may be unavoidable. See, *e.g.*, 75 Fed. Reg. 68,992-68,993 (Nov. 10, 2010). The availability of civil penalties in an enforcement action cannot deter such unavoidable events. Accordingly, the EPA has consistently interpreted the CAA to permit a State to include in its SIP an affirmative defense to civil penalties for excess emissions, so long as that defense is "narrowly-tailored" to cover only circumstances in which such emissions could not be avoided through the use of best operating practices. *Id.* at 68,992. An affirmative defense of greater breadth that would sweep in avoidable excess emissions—for instance, those that occur during planned maintenance, during which operators

can use various technical means to limit emissions—would "interfere" with the CAA's attainment and enforceability requirements. See 42 U.S.C. 7410; 75 Fed. Reg. at 68,992; see also 1999 Guidance (C.A. J.A. 68-77); 1983 Guidance (C.A. J.A. 58-62); 1982 Guidance (C.A. J.A. 53-57).

2. On January 23, 2006, Texas submitted to the EPA the proposed SIP revision at issue in this case. See 75 Fed. Reg. 26,894 (May 13, 2010). The State proposed an affirmative defense to civil penalties for excess emissions that occur during a source's *unplanned* startup, shutdown, and maintenance (SSM) activities. See 30 Tex. Admin. Code § 101.222(c) (requiring the owner or operator to prove a number of factors in order to establish the affirmative defense, including that "the periods of unauthorized emissions from any unplanned * * * activity could not have been prevented through planning and design"); see also 75 Fed. Reg. at 68,997 (explaining that, for purposes of this proposed defense, unplanned activities are "functionally equivalent to a malfunction"). Texas also proposed an affirmative defense for excess emissions occurring during *planned* SSM activities. See 30 Tex. Admin. Code § 101.222(h) (requiring that the owner or operator "prove[] all of the criteria listed in subsection (c)(1)-(9) of this section for emissions"). As to power plants, the planned-activities defense was to expire no later than January 5, 2012. See 30 Tex. Admin. Code § 101.222(h) and (i).

On November 10, 2010, after notice and comment, the EPA issued a final rule approving the affirmative defense with respect to unplanned activities and disapproving the affirmative defense with respect to planned activities. See 75 Fed. Reg. at 68,989 (final rule effective

January 10, 2011).[1] In explaining that action, the agency acknowledged its limited role in reviewing the State's proposed SIP revision. See Pet. App. 152a-153a (stating that the EPA is "respectful of the Act and cognizant of the cooperative federalism principle contained therein," and that the agency's only "role is to ensure that the SIP submittal is consistent with the CAA"). The agency also set forth in detail the "interpretation of the CAA" that provided the "rationale" for its disapproval of the affirmative defense for planned activities. *Id.* at 136a.

The EPA explained that the CAA requires emissions to be limited on a "continuous" basis, see 42 U.S.C. 7602(k), and that "SIPs are used to demonstrate how an area will attain and maintain health-based standards." Pet. App. 136a; see 42 U.S.C. 7410(a). In light of those requirements, the EPA concluded that it is not appropriate for a SIP to "exempt periods of startup, shutdown, maintenance or malfunction from compliance with applicable emission limits." Pet. App. 136a; see *id.* at 137a ("For purposes of demonstrating attainment and maintenance, States assume source compliance with emission limitations at all times."). The agency recognized that an affirmative defense to penalties might be appropriate under certain circumstances in which excess emissions are beyond a source's control. *Id.* at 138a. It further observed that "[t]he criteria a source must prove when asserting" such a defense "are consistent with the criteria identified in section 113(e) of the CAA" (codified at 42 U.S.C. 7413) governing "whether to assess a penal-

[1] The issuance of the final rule followed more than a year of discussion with the State, see 75 Fed. Reg. at 26,894, as well as a preliminary proposal along the lines of the EPA's ultimate action, see *id.* at 26,892; *id.* at 68,989.

ty * * * in the context of an enforcement action." Pet. App. 139a.

Those criteria, the EPA explained, reflect the fact that sources must not be deterred from "mak[ing] best efforts to comply with emission limits that are intended to bring an area into attainment with and to maintain health-based air quality standards" pursuant to 42 U.S.C. 7410(a). Pet. App. 139a.[2] The EPA disapproved Texas's proposed affirmative defense for planned activities under Section 7410(*l*), which mandates disapproval of a proposed SIP revision that "would interfere with any applicable requirement concerning attainment * * * or any other applicable requirement of this chapter." 42 U.S.C. 7410(*l*); see Pet. App. 139a-141a. The agency also stated that approving the disputed provision relating to planned activities "would undermine the enforceability, as well as the attainment, requirements of the Act," and it noted that "interfere[nce]" within the meaning of Section 7410(*l*) can occur even in the absence of proof that "a violation of the NAAQS" will result from the provision in question. *Id.* at 146a; see 42 U.S.C. 7410(a), 7413.[3]

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[2] See also, *e.g.*, Pet. App. 140a ("An effective enforcement program must be able to collect penalties to deter avoidable violations. Thus, the SIP should only provide the defense for circumstances where it is infeasible to meet the appropriate limit and the criteria that the source must prove should ensure that the source has made all reasonable efforts to comply. Otherwise, such an approach could undermine the enforceability and attainment demonstration requirements of the Act."); *id.* at 146a, 149a (discussing whether "the State's regulatory choices are consistent with the [CAA], including the obligation to attain and maintain the NAAQS and the ability to adequately enforce the obligations in the approved SIP").

[3] The EPA's analysis focused on the proposed affirmative defense for planned activities as it related to maintenance. The agency also

3. Petitioners own and operate power plants in Texas. On December 7, 2010, petitioners filed a timely petition for review challenging the EPA's disapproval of the portion of the SIP revision providing an affirmative defense for excess emissions arising from planned activities. Pet'rs' C.A. Pet. for Review 1-14. Various environmental groups separately petitioned for review, challenging the EPA's approval of the affirmative defense for excess emissions arising from unplanned activities.

On March 25, 2013, the court of appeals affirmed the EPA's action in its entirety. Pet. App. 1a-34a.[4] The court explained that "[t]he Act confines the EPA to the ministerial function of reviewing SIPs for consistency with the Act's requirements," and it emphasized that "[t]he EPA shall disapprove a SIP revision only if 'the revision would interfere with any applicable requirement concerning attainment' of the NAAQS 'or any other applicable requirement'" of the Act. *Id.* at 3a-4a (quoting 42 U.S.C. 7410(*l*)); see *id.* at 12a-15a, 25a; *id.* at 30a-31a (stating that, "in disapproving a plan, the agency is required to provide reasoning supporting its conclusion that the disapproved provision would interfere with an applicable requirement of the Act"). Applying that standard, the court held that the EPA had reasonably construed the CAA to permit an affirmative defense

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explained that the affirmative defense for planned startup and shutdown—which was set forth in the same sentence as the maintenance-related defense—was drafted in such a way as to incorporate various preconditions that were relevant only to unplanned activities, and therefore failed to require elements "critical for ensuring that the defense will not be abused." Pet. App. 135a n.5, 141a-142a.

[4] That opinion modified prior opinions in the case that the court of appeals withdrew. See Pet. App. 35a, 72a.

under only limited circumstances, and it deferred to the agency's conclusion that the affirmative defense for planned activities was inconsistent with the CAA. *Id.* at 25a-28a; see *id.* at 19a-20a, 31a, 33a.

The court of appeals focused in particular on 42 U.S.C. 7413, the provision that governs the imposition of penalties in CAA enforcement actions. The court stated that "[S]ection 7413 does not discuss whether a state may include in its SIP the availability of an affirmative defense against civil penalties for planned SSM activities." Pet. App. 26a. Because Section 7413 did not speak directly to that question, the court "turn[ed] to step two of *Chevron* and ask[ed] whether the EPA's interpretation of section 7413, as not authorizing an affirmative defense against civil penalties for planned SSM activity, is entitled to deference." *Ibid.* The court upheld, as "a permissible interpretation of section 7413 of the Act, warranting deference," the agency's conclusion "that the affirmative defense for planned * * * activity is inconsistent with section 7413." *Id.* at 27a. The court of appeals also rejected a variety of arguments that the EPA's disapproval was arbitrary and capricious. *Id.* at 28a-32a.[5]

ARGUMENT

1. Petitioners' primary argument (Pet. 16-26) is that the court of appeals departed from existing precedent

[5] On April 1, 2013, the court of appeals denied petitioners' request for rehearing en banc and the environmental groups' petition for panel rehearing. Pet. App. 111a-112a. Three judges dissented from denial of rehearing en banc with respect to the EPA's disapproval of the Texas SIP provision that is at issue in this Court. See *id.* at 113a-124a. On April 11, 2013, the court denied petitioners' motion to recall the mandate. See *id.* at 109a-110a (explaining that the judges who voted on rehearing had reviewed the March 25, 2013 opinion).

by permitting the EPA to disapprove the proposed SIP revision on the basis of a mere policy preference. That characterization of the decision below is incorrect. In upholding the EPA's partial disapproval of Texas's proposed affirmative defense, the Fifth Circuit applied settled principles governing judicial review of agency action. The court found that the text of Section 7413 does not resolve the question whether a State may establish an affirmative defense to CAA civil penalties for excess emissions arising from planned activities. It accordingly asked whether the EPA's disapproval of that affirmative defense reflected a reasonable interpretation of Section 7413, and concluded that it did. Further review of this issue is not warranted.

a. Petitioners attack the EPA's decision as "lack[ing] any basis in an applicable provision of the Act." Pet. 16. Petitioners infer, from that purported lack of textual support, that the court of appeals must have allowed the EPA to enforce policy preferences untethered to the requirements of the CAA. Pet. 23-24. But petitioners fail to come to grips with the fact that both the agency and the court of appeals expressly (and forcefully) articulated the very legal principles that petitioners say were ignored. Both the agency and the court recognized that the CAA limits the EPA's role in reviewing States' choices as set forth in their SIPs, and that the EPA's disapproval of a proposed SIP revision must be based on some conflict between the proposal and a CAA requirement. See, *e.g.*, Pet. App. 3a-4a, 12a-15a, 25a, 30a-31a (Fifth Circuit decision); *id.* at 152a-153a (EPA decision).

The court of appeals thus confined the EPA to exactly the role that the statute says the agency should fulfill. Accordingly, there is no threat to cooperative federalism here, and no danger that the decision below will under-

mine the force of Section 7410(*l*) in future cases. At most, petitioners' complaint is that the court of appeals misapplied a correctly stated rule of law—a matter that does not warrant this Court's review. See Sup. Ct. R. 10.[6]

In any event, the court of appeals correctly applied the governing legal principles to the circumstances of this case. The court found Section 7413 ambiguous with respect to "whether a state may include in its SIP the availability of an affirmative defense against civil penalties for planned SSM activity." Pet. App. 26a. The court discussed the agency's rationales for finding that such an affirmative defense is not appropriate for excess emissions that could have been avoided, *id.* at 26a-27a, and it upheld the agency's conclusion as "a permissible interpretation of section 7413 of the Act, warranting deference," *id.* at 27a.

As the EPA explained (Pet. App. 136a-149a), the CAA requires that the NAAQS be attained and maintained, see 42 U.S.C. 7410(a); that emissions be limited on a "continuous" basis in order to ensure that attainment and maintenance, see 42 U.S.C. 7602(k); and that the emissions limitations and other obligations set forth in a SIP be enforceable, including by means of penalties intended to deter and punish violations, see 42 U.S.C. 7410(a)(2), 7413. The agency therefore determined that

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[6] Amici Utility Air Regulatory Group, et al., contend (Br. 12-16) that the disapproval of the disputed SIP revision is a denial of due process. They acknowledge, however, that "constitutional concerns * * * were not considered by the court below" (Br. 14), and petitioners do not advance any constitutional challenge. The issue is therefore not properly presented here. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005) ("[W]e are a court of review, not of first view.").

an affirmative defense that relieves a source of civil-penalty liability for a violation of an emissions limitation is not appropriate unless the excess emissions are beyond the source's control. Pet. App. 138a. The EPA further found that "[t]he criteria a source must prove when asserting" such a defense are reflected in "the criteria identified in section 113(e) of the CAA" (codified at 42 U.S.C. 7413) governing "whether to assess a penalty." Pet. App. 139a. The agency thus based its disapproval of the pertinent SIP provision on a careful parsing of the CAA to ensure that the State remained within the bounds of the statute's "strict minimum" requirements. *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 250, 256-257 (1976).

b. Petitioners' claim (Pet. 19-23) of conflicts between the decision below and other circuits' decisions—most of them several decades old—is premised on their mistaken view that the court of appeals in this case deferred to a mere EPA policy preference. Almost all of the decisions on which petitioners rely articulate the general principle that the EPA must approve a plan provision that meets the requirements of the CAA and must disapprove a plan provision that does not, see 42 U.S.C. 7410(k)(3) and (*l*)—the same principle that the court below explained and applied. Beyond that similarity, none of those decisions (save one that is in full agreement with the decision below, see pp. 11-12, *infra*) has any bearing on this case. The fact that the court below upheld the EPA's disapproval of the proposed affirmative defense for planned activities, while other courts have rejected different EPA actions taken in other contexts, does not mean that any circuit conflict exists.

The only decision that petitioners identify on a topic related to the one at issue in this case is *Michigan De-*

partment of Environmental Quality v. *Browner*, 230 F.3d 181 (6th Cir. 2000). In *Browner*, the Sixth Circuit upheld the EPA's disapproval of a SIP provision that permitted "an automatic exemption for a source that violates emissions standards if that violation results from startup, shutdown, or malfunction and meets certain other criteria." *Id.* at 183. The court of appeals acknowledged that "[t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of" the CAA. *Id.* at 185 (quoting *Train* v. *NRDC*, 421 U.S. 60, 79 (1975)). The court nevertheless affirmed the EPA's conclusion that, because the exemption at issue "excuse[d] compliance from applicable emission limitations and provide[d] no means for the state to enforce the NAAQS," it ran afoul of the CAA's "mandate that the NAAQS be attained and maintained." *Ibid.* Thus, the court in *Browner* upheld an EPA action that was based on the agency's interpretation of the CAA's requirements for SIPs—just as the court below did here.

All of the other decisions that petitioners cite are readily distinguishable. As petitioners note (Pet. 20), in *Bethlehem Steel Corp.* v. *EPA*, 638 F.2d 994 (7th Cir. 1980), the Seventh Circuit did not apply Section 7410(*l*), which was not enacted until 1990. See 42 U.S.C. 7410 note; see also *Bethlehem Steel*, 638 F.2d at 1003. Rather, the court of appeals ruled that the EPA had not adequately explained its disapproval of a State's order allowing a company extra time to comply with a SIP (known as a Delayed Compliance Order) when the agency had merely stated in a "summary" fashion that it was "not satisfied" that the Order was "sufficient." *Id.* at 1004-1005; see *id.* at 1005-1006 (noting that violations of

the Order gave rise to various penalties, and rejecting the EPA's view that the Order was unenforceable). That rationale has no bearing on this case, since petitioners have not contended that the EPA's reasoning was too terse, see Pet. App. 28a-32a, and the agency provided a detailed, multi-page explanation of the way in which the proposed affirmative defense for planned activities would interfere with applicable statutory requirements.[7]

Bethlehem Steel Corp. v. *Gorsuch*, 742 F.2d 1028 (7th Cir. 1984), has even less bearing on the case at hand. In that decision, the Seventh Circuit concluded that the EPA had exceeded its authority by "mak[ing] a particular regulation in the state's plan substantially tougher" in "the guise of partial approval" of the provision in question. *Id.* at 1035-1036. That act, the court explained, "did not give the state half a loaf; it converted the proposal into something completely unpalatable to the state." *Id.* at 1036.[8] No similar issue is presented here. The EPA's disapproval of Texas's affirmative defense for planned activities, along with its approval of the affirmative defense for unplanned activities, indeed gave the State "half a loaf," without transforming any "particular regulation" into a requirement of greater stringency than the State had intended. *Id.* at 1035-

[7] There is likewise no conflict between the decision below and *Bethlehem Steel Corp.* v. *EPA*, 651 F.2d 861 (3d Cir. 1981), which also addressed EPA disapproval of a Delayed Compliance Order and did not involve any discussion or application of Section 7410(*l*). In that case, the court held that the EPA's disapproval was improper because it was based on the State's failure to require a system of emissions reduction that apparently did not exist. See *id.* at 869.

[8] The court in *Riverside Cement Co.* v. *Thomas*, 843 F.2d 1246 (9th Cir. 1988), cited in Pet. 23, rejected an EPA action that would have had the same effect. See 843 F.2d at 1247-1248.

1036; see Pet. App. 29a-30a (reciting the principle that "the EPA may not exercise its power to partially approve and disapprove portions of a SIP to make it more stringent than intended by the state").

Finally, *Virginia* v. *EPA*, 108 F.3d 1397 (D.C. Cir. 1997), is similarly off point. In that case, the D.C. Circuit ruled that the CAA does not permit the EPA to mandate that States adopt specific control measures in their SIPs. See *id.* at 1410 (deeming impermissible the agency's regulation requiring States to adopt California's motor vehicle emissions standards).[9] The present case involves no such issue. The EPA did not attempt to impose a specific control measure on Texas, and did not base its disapproval of the disputed provision on the State's failure to include any particular measure in its SIP. Indeed, the court below observed that the EPA "may not require a state to add any provision to its proposal," Pet. App. 29a, but correctly recognized that the agency had not transgressed that limitation here, see *id.* at 29a-30a.

Accordingly, there is no conflict between the decision below and the decisions of other circuits. The Fifth Circuit did not suggest that the EPA was entitled to issue a summary decision lacking reasoning, or to use partial disapproval to create an unpalatable SIP provi-

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[9] Petitioners cite several other decisions along the same lines. See Pet. 22 (citing *North Carolina* v. *EPA*, 531 F.3d 896, 922 (D.C. Cir. 2008) (explaining that the "EPA cannot require non-trading states to have SIP provisions for retiring excess Title IV allowances"), and *Environmental Def.* v. *EPA*, 467 F.3d 1329, 1334-1336 (D.C. Cir. 2006) (ruling that the EPA cannot require interim tests not provided for in a SIP as a means of transitioning between an existing SIP and a new SIP)); see also Pet. 23 (citing *Vermont* v. *Thomas*, 850 F.2d 99, 104 (2d Cir. 1988) (upholding the EPA's "denial of Vermont's request to disapprove the SIPs of * * * eight upwind states")).

sion, or to force a State to adopt any specific control measure. There is no reason to believe that any other court of appeals would have overturned the EPA's partial disapproval of the affirmative defense at issue here.

c. Contrary to petitioners' contention (Pet. 26), this case is not one of special importance. The EPA processes hundreds of SIP submissions annually, approving or disapproving those submissions for a wide variety of reasons. This routine case involves a single portion of a single SIP that affects only a limited number of sources in a single State.

Petitioners assert (Pet. 26) that this case implicates a "crucial and recurring" legal issue: "whether EPA may reject a state's chosen means of controlling emissions * * * without determining that the state plan would interfere with an applicable statutory requirement." As explained above, however, both the agency and the court below agreed that the EPA should reject a proposed SIP revision only if it interferes with a CAA requirement. Although petitioners disagree with the EPA's application of that principle to the SIP provision at issue here, that case- and fact-specific challenge raises no legal issue of broad significance.

Petitioners also contend (Pet. 26) that the decision below is central to an ongoing rulemaking that relates to States' treatment of excess emissions during periods of startup, shutdown, or malfunction. See 78 Fed. Reg. 12,460 (Feb. 22, 2013) (proposed rule). Petitioners significantly overstate the relationship between this case and that rulemaking. Petitioners are correct that the EPA has proposed a "SIP call"—a procedure that notifies a State of inadequacies in a SIP and requests revisions, see 42 U.S.C. 7410(k)(5)—for 36 States. See Pet. 26; 78 Fed. Reg. at 12,460. Only as to three of those

States, however, does the SIP call relate to an affirmative defense for planned activities analogous to the defense at issue in this case.[10] And the rulemaking has not advanced beyond the proposal stage; the agency is still processing the many thousands of comments it has received, and has not yet decided what final action it will take. If the agency ultimately requests revisions to other States' affirmative-defense provisions, the agency's final action can be challenged in court at the appropriate time. But the possibility that the agency might in the future take such action provides no sound reason for further review here.

2. Finally, petitioners argue (Pet. 27-34) that the court of appeals departed from basic principles of administrative law by upholding the EPA's decision on a rationale that the agency itself did not articulate. Even if the court had made such an error, there would be no basis for further review, since the decision did not set forth any legal principle that conflicts with *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), or any other decision of this Court. In any event, the court below properly evaluated the EPA's decision on the basis of the agency's own reasoning.[11]

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[10] The three States with comparable affirmative-defense provisions are Arizona, Colorado, and New Mexico. See 78 Fed. Reg. at 12,529-12,530 (discussing Colorado), 12,533-12,534 (discussing Arizona), 12,522-12,523 (discussing New Mexico). Most of the provisions at issue in the proposed SIP call appear to be deficient for other reasons—for instance, because they contain automatic exemptions for certain excess emissions.

[11] As an alternative to plenary review, petitioners suggest in effect that the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Chenery*. See Pet. 34. As explained in the text, the court of appeals' decision is fully consistent with the principles announced in *Chenery*. Such a remedy

Petitioners primarily contend that, by analyzing the EPA's decision as an interpretation of Section 7413 (the CAA provision that deals with penalties), the court of appeals departed from the agency's own rationale for disapproving the pertinent SIP provision. That argument lacks merit. The EPA disapproved a provision that would have established an affirmative defense to penalties in certain situations; its conclusion that the defense was inconsistent with CAA requirements necessarily implicated Section 7413. The agency stated that an understanding of "[t]he criteria a source must prove when asserting an affirmative defense" is informed by "the criteria identified in [42 U.S.C. 7413(e)] * * * that the courts and EPA may consider in determining whether to assess a penalty (and, if so, what amount) in the context of an enforcement action." Pet. App. 139a. The court's decision therefore accurately described and assessed the agency's own reasoning. Compare *id.* at 16a-18a with *id.* at 136a-141a.

More generally, although petitioners claim that the agency was wholly focused on Section 7410 (the CAA provision requiring attainment and maintenance of the NAAQS), Section 7410 and Section 7413 are intertwined with each other. Section 7410 requires each SIP to include a "program to provide for the enforcement" of measures in the plan, 42 U.S.C. 7410(a)(2); Section 7413 sets forth various enforcement mechanisms and describes how penalties are to be assessed. Both provi-

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would be inappropriate, moreover, even if the court below had erred in its application of governing administrative-law principles. There has been no "intervening" or "recent development[]" since the court of appeals issued its decision, and the court's views are clear. See *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006) (per curiam); *Lawrence* v. *Chater*, 516 U.S. 163, 167-168 (1996) (per curiam).

sions, then, are targeted at "the enforceability, as well as the attainment, requirements of the Act." Pet. App. 146a; see *id.* at 140a, 146a, 149a. The agency's assessment of Texas's proposed affirmative defense focused on the extent to which penalties must be available with respect to avoidable excess emissions in order to meet those requirements.

Although this Court "may not supply a reasoned basis for the agency's action that the agency itself has not given," the Court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-286 (1974). Petitioners' argument suggests at most that the EPA might have explained more precisely the respective roles of Sections 7410 and 7413 in the agency's analysis of Texas's proposed affirmative defense. Petitioners offer no plausible basis for concluding that the court of appeals upheld the EPA's decision on a ground not articulated by the agency itself.

Petitioners also specifically attack the court of appeals' reasoning with respect to the disapproval of the affirmative defense for planned activities as it related to startup and shutdown. See Pet. 27-30. Petitioners' challenge lacks merit. In disapproving that aspect of the affirmative defense, the agency explained that "the portions of [the Texas SIP] that provide an affirmative defense for excess emissions during planned startup and shutdown are not severable from the provision for maintenance" that the agency was disapproving. Pet. App. 135a. The EPA also observed, however, that the defense for planned startup and shutdown violated the attainment and enforceability requirements of the CAA because it failed to require sources to prove elements

"critical for ensuring that the defense will not be abused." *Id.* at 135a n.5.

On judicial review, the court of appeals found it unnecessary to address the issue of severability "because, even if severed, the provisions [governing planned startup and shutdown] would not have been consistent with the agency's interpretation of section 7413." Pet. App. 33a (citing the relevant portion of the agency's decision). Contrary to petitioners' contention (Pet. 28), the court did not thereby depart from the agency's own reasoning. Rather, the court simply focused on one of the two objections the EPA had identified.

3. Even if petitioners had identified an issue of recurring importance that potentially warranted this Court's review, this case would be a poor vehicle for deciding it. With respect to the power plants owned or operated by petitioners, the affirmative defense for planned activities that the EPA disapproved, and that petitioners seek to revive, expired by its own terms more than a year ago.

Texas designed its affirmative defense for planned activities to expire at different times for various different kinds of facilities, with each period running a specified number of years from January 5, 2006 (the "effective date" of the proposed SIP revisions as a matter of state law). See 30 Tex. Admin. Code § 101.222(h)-(i) & note. "[F]or facilities in [Standard Industrial Classification] code 4911 (Electric Services)"—which includes petitioners' facilities—an owner or operator of a facility was required to "fil[e] an application to authorize the emissions or opacity by * * * five years after" January

5, 2006. 30 Tex. Admin. Code § 101.222(h)(1)(D).[12] Moreover, for such facilities the affirmative defense "expire[d]" altogether, even if a "permit application remain[ed] pending," no later than "one year after the application deadline"—that is, no later than January 5, 2012. 30 Tex. Admin. Code § 101.222(i).

Even if the EPA had approved the affirmative defense for planned activities in the final rule, the defense would have been available to petitioners in an enforcement action for a limited period of time (assuming that they had filed a timely application): from January 10, 2011, the effective date of the EPA's final rule, to January 5, 2012.[13] A decision on the merits by this Court could not change that expiration date and revive the defense so that petitioners could employ it in the future.

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[12] The most generous application deadline set forth in the provision was "seven years after the effective date of this section." 30 Tex. Admin. Code § 101.222(h)(1)(F).

[13] The EPA ordinarily approves or disapproves a proposed SIP revision within 18 months of submission. See 42 U.S.C. 7410(a)(2)(H). In this case, "[q]uestions related to EPA's delay in acting on the January 23, 2006 SIP submittal were resolved by settlement agreement filed with the court in *BCCA Appeal Group et al. v. EPA* (Case No. 3-08CV1491-G, N.D. Tex.)." Pet. App. 163a-164a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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