Houston, We Have a Problem: The D.C. Circuit Closes Pathway to National Judicial Review in Sierra Club v. Environmental Protection Agency

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HOUSTON, WE HAVE A PROBLEM: THE D.C. CIRCUIT CLOSES PATHWAY TO NATIONAL JUDICIAL REVIEW IN SIERRA CLUB V. ENVIRONMENTAL PROTECTION AGENCY

I. Roger, What’s the Problem? An Introduction to Reducing Ozone Pollution With the Clean Air Act

Ground-level ozone, an invisible gas, is one of the most harmful and difficult-to-control air pollutants in the United States.\(^1\) Unlike typical air pollutants, ground-level ozone does not form directly from a pollutant-emitting source.\(^2\) Instead, this secondary pollutant results from chemical reactions among diverse volatile organic compounds (VOCs), nitrous oxides, and sunlight.\(^3\) The harm of breathing ozone-polluted air, commonly known as “smog,” includes damage to airways and lungs, increased coughing, and aggravation to pulmonary diseases and conditions like asthma.\(^4\)

To protect public health, the Environmental Protection Agency (the EPA or Agency) categorized ozone as a “criteria air pollutant” in the Clean Air Act (CAA).\(^5\) The EPA limits the concentration of criteria air pollutants in the air through National Air Quality Standards.

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1. *Ozone, Am. Lung Ass’n*, https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone#:~:text=It%20is%20currently%20one%20of%20the%20most%20harmful%20and%20difficult%20to%20control%20air%20pollutants%20in%20the%20United%20States.\(^1\) (listing pollutants that make outdoor air unhealthy); see also John Copeland Nagle, *Humility, Climate Change, and the Pursuit of Scientific Truth*, 97 Notre Dame L. Rev. 125, 140 (2022) (noting inability to know what “just right” ozone standard is due to lack of scientific evidence).


Every five years, the EPA must review each NAAQS and revise the standard if it determines that the current NAAQS inadequately protects public health from the air pollutant. When the EPA revises or revokes a NAAQS, it requires an area that has not yet attained the unrevised or previous NAAQS to still maintain that NAAQS’s requirements until the area’s ozone concentration decreases to meet the standard; this is called the CAA “anti-backsliding” provision.

By 2015, the EPA revoked two ozone NAAQS — the 1979 and 1997 NAAQS — because the most recent scientific evidence indicated that they were not adequate to protect the public’s health from ozone exposure. Five years later, in 2020, the EPA published final rules where it lifted anti-backsliding requirements associated with the revoked 1979 and 1997 ozone NAAQS for the Houston and Dallas areas because they had achieved attainment with these NAAQS.

The Sierra Club and fellow environmental advocacy groups challenged the EPA’s action in a petition for review filed in the United States Court of Appeals for the District of Columbia (D.C. Circuit).

In Sierra Club v. EPA (Sierra Club II), these environmental organizations claimed that the EPA unlawfully expanded its authority when it improperly removed the 1979 and 1997 ozone NAAQS’s

6. Id. (connecting purpose of criteria air pollutant to federal regulation).
8. See Clean Air Act, 42 U.S.C. § 7502(e) (instructing EPA how to handle modifications of NAAQS in nonattainment areas); see also Sierra Club v. EPA (Sierra Club II), 47 F.4th 738, 740 (D.C. Cir. 2022) (referring to § 7502(e) as “anti-backsliding” provision).
10. See Air Plan Approval; Texas; Houston-Galveston-Brazoria Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Section 185 Fee Program, 85 Fed. Reg. 8411, 8411 (Feb. 14, 2020) (to be codified at 40 C.F.R. pts. 52, 81) [hereinafter Houston Final Rule] (approving revisions to Texas’s State Implementation Plan pertaining to termination of anti-backsliding provisions for 1997 ozone NAAQS in Houston area); see also Air Plan Approval; Texas; Dallas-Fort Worth Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 19096, 19096 (Apr. 6, 2020) (to be codified at 40 C.F.R. pts. 52, 81) [hereinafter Dallas Final Rule] (greenlighting revisions to Texas’s State Implementation Plan pertaining to termination of anti-backsliding provisions for 1997 ozone NAAQS in Dallas area).
11. Sierra Club II, 47 F.4th at 740 (introducing case’s procedural posture).
12. 47 F.4th 738, 740 (D.C. Cir. 2022) (identifying subject of this Note).
anti-backsliding requirements in the Houston and Dallas areas. Moreover, Sierra Club posited that the D.C. Circuit held proper venue to evaluate the unlawfulness of the EPA’s final rules in the Houston and Dallas areas. The D.C. Circuit, however, found it did not have venue under the CAA to hear the case because the final rules were not “nationally applicable” and the EPA did not make and publish a finding that the rules were based on a “determination of nationwide scope or effect.” While analyzing whether it had venue, the D.C. Circuit created a new circuit precedent — it did not have judicial power to review the EPA’s determination to not “make and publish a finding of nationwide scope or effect.”

This Note examines the D.C. Circuit’s first impression ruling in Sierra Club II, which afforded the EPA greater discretion in final actions that may have nationwide practical effects. Part II presents the circumstances and facts of the case as well as the parties’ key arguments. Part III contextualizes ozone NAAQS history, the CAA venue provision, and judicial review of agency decision-making. With this background setting the stage, Part IV delves deeper into the Sierra Club II court’s reasoning. Then, Part V examines missed opportunities in the court’s reasoning that could weaken the court’s decision. Lastly, Part VI evaluates the D.C. Circuit holding’s impact on future interpretations of the CAA’s venue and how the EPA could take advantage of its increased discretion in regulating ozone pollution.


14. Id. at 70 (opposing EPA’s contention that Fifth Circuit, where Houston and Dallas are located, held proper venue).

15. Sierra Club II, 47 F.4th at 744-46 (rejecting Sierra Club’s arguments that D.C. Circuit held proper venue).

16. Id. at 745 (deciding for first time in D.C. Circuit whether judicial review is available for EPA’s decision to not publish a finding of nationwide scope or effect). For a further discussion of the court’s holding, see infra notes 164-75 and accompanying text.

17. For a discussion of the D.C. Circuit’s holding and its implications for future judicial deference to EPA’s interpretation of CAA provisions, see infra notes 203-10 and accompanying text.

18. For a layout of the facts and the parties’ disputes in Sierra Club II, see infra notes 23-46 and accompanying text.

19. For background on the CAA’s ozone NAAQS and anti-backsliding provision and judicial interpretation of them, see infra notes 51-91 and accompanying text.

20. For a narrative analysis of the court’s reasoning, see infra notes 125-85 and accompanying text.

21. For a critical analysis of the court’s reasoning and holding, see infra notes 186-202 and accompanying text.

22. For a discussion of Sierra Club II’s potential impact on agency discretion and ozone pollution, see infra notes 203-20 and accompanying text.
II. MEETING THE SPACE CREW: THE FACTS OF SIERRA CLUB II

After the Houston and Dallas areas were in nonattainment for decades, the EPA recognized in 2016 that these two areas finally reached attainment for the 1979 and 1997 ozone NAAQS. Accordingly, Texas’s environmental state agency, the Texas Commission on Environmental Quality (the Texas Commission), submitted redesignation requests and updated State Implementation Plans (SIPs) to the EPA. It formally requested that the EPA redesignate the Houston and Dallas areas to attainment for the 1979 and 1997 NAAQS and approve the maintenance SIP revisions that would ensure attainment of these NAAQS through 2032.

The EPA finalized its response to the Texas Commission’s submissions when it issued two final rules approving the SIP revisions for the Houston and Dallas areas. As for the redesignation request, however, the EPA did not believe it had the statutory authority to formally redesignate areas from nonattainment to attainment under a revoked standard and its associated designations. Thus, the EPA alleviated anti-backsliding measures associated with the revoked 1979 and 1997 ozone NAAQS.

23. See Air Plan Approval; Texas; Houston-Galveston-Brazoria Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards; Section 185 Fee Program, 84 Fed. Reg. 22093, 22094 (proposed May 16, 2019) (to be codified at 40 C.F.R. pts. 52, 81) [hereinafter Houston Proposed Rule] (supplying background information on Houston area’s status under ozone NAAQS); Air Plan Approval; Texas; Dallas-Fort Worth Area Redesignation and Maintenance Plan for Revoked Ozone National Ambient Air Quality Standards, 84 Fed. Reg. 29471, 29473 (proposed June 24, 2019) (to be codified at 40 C.F.R. pts. 52, 81) [hereinafter Dallas Proposed Rule] (briefing Dallas area’s status under ozone NAAQS). For a discussion of the Houston and Dallas areas’ history of nonattainment and attainment with ozone NAAQS, see infra notes 72-74 and accompanying text.

24. Houston Proposed Rule, supra note 23, at 22094 (recounting that Texas Commission submitted its request and updated plan for Houston in December 2018); Dallas Proposed Rule, supra note 23, at 29473 (stating that Texas Commission submitted its request and updated plan for Dallas in March 2019).

25. See Houston Proposed Rule, supra note 23, at 22094 (describing contents of Texas’s submission package); see also Dallas Proposed Rule, supra note 23, at 29473 (mirroring same request and SIP revisions for Dallas area).

26. Houston Final Rule, supra note 10, at 8411 (effectuating Texas’s revisions to its SIP); Dallas Final Rule, supra note 10, at 19096 (finalizing Texas’s updated SIP modifications).


28. See Houston Final Rule, supra note 10, at 8411 (terminating anti-backsliding measures for 1979 one-hour and 1997 eight-hour ozone NAAQS); see also Dallas Final Rule, supra note 10, at 19096 (replicating termination of 1979 one-hour and 1997 eight-hour ozone NAAQS anti-backsliding obligations in Dallas area).
The EPA explained that it had authority to remove these anti-backsliding requirements for the revoked NAAQS in the Houston and Dallas areas through two pathways. The Agency could either (1) redesignate a nonattainment area to attainment under a non-revoked standard, or (2) use a redesignation substitute for a revoked NAAQS. It deemed the first pathway as unavailable because neither the Houston nor the Dallas area achieved attainment under the active 2008 or 2015 ozone NAAQS. The EPA inferred that it could use the second pathway once an area satisfied the revoked standards and all additional conditions enumerated in Section 7407(d)(3)(E) — the “statutory redesignation” of a nonattainment area section — of the CAA.

In *Sierra Club II*, the EPA asserted that it properly exercised its authority to remove the anti-backsliding obligations through the redesignation substitute pathway because Houston and Dallas attained the 1979 and 1997 NAAQS and met all the Section 7407(d)(3)(E) conditions. The environmental groups Sierra Club, Downwinders At Risk, and Texas Environmental Justice Advocacy Services (TEJAS), collectively referred to as “Sierra Club,” challenged the EPA’s Texas final rules to revoke the anti-backsliding provisions. Sierra Club petitioned for review in the D.C. Circuit and Fifth Circuit.
Circuit; the Fifth Circuit, however, stayed the petition pending the D.C. Circuit’s decision.\textsuperscript{35}

Section 7607(b)(1) of the CAA provides the D.C. Circuit exclusive venue over nationally applicable Agency actions.\textsuperscript{36} Accordingly, Sierra Club argued that venue lay in the D.C. Circuit because the EPA’s final agency action of terminating anti-backsliding protections in the Houston and Dallas areas before redesignating them to attainment was nationally applicable.\textsuperscript{37} The petitioners characterized the EPA’s action as “nationally applicable” because the Agency expanded its authority to terminate the anti-backsliding obligations using the CAA’s “redesignation criteria.”\textsuperscript{38} Sierra Club explained that this new third path for abolishing anti-backsliding obligations from ozone nonattainment areas was statutorily unfounded.\textsuperscript{39} If the D.C. Circuit found the EPA’s claim of new authority not nationally applicable, petitioners argued in the alternative that review was still proper in the D.C. Circuit because the EPA’s actions were “based on a determination of nationwide scope or effect” and the EPA’s refusal to find and publish that determination was arbitrarily unexplained.\textsuperscript{40} Sierra Club also contended that the EPA’s decision to end the anti-backsliding requirements in the Houston and Dallas areas violated the CAA.\textsuperscript{41} In response, the EPA maintained that because its action was locally or regionally applicable, the Fifth Circuit held exclusive and proper venue to hear the case per Section 7607(b)(1) of the CAA.\textsuperscript{42}

After reviewing both sides’ arguments, the D.C. Circuit agreed with the EPA, finding that the EPA had “agency discretion by law” to choose whether to find and publish a finding of nationwide scope or effect.\textsuperscript{43} Thus, the EPA’s decision to not make and publish such a

\textsuperscript{35} Sierra Club II, 47 F.4th at 742 (acknowledging protective petition for review filed in Fifth Circuit).

\textsuperscript{36} Clean Air Act, 42 U.S.C. § 7607(b)(1) (specifying court venue for nationally applicable).

\textsuperscript{37} Petitioners’ Brief, supra note 13, at 21 (positing that D.C. Court of Appeals has sole power to review nationally applicable agency actions).

\textsuperscript{38} See id. at 39, 66 (articulating that EPA’s purported new authority to terminate anti-backsliding provisions was “geographically unbounded” and had national consequences for future interpretations of “nationally applicable” actions).

\textsuperscript{39} See id. at 24-25 (pointing out that EPA must follow its own binding regulations that establish only two methods for removing anti-backsliding provisions under revoked NAAQS in nonattainment areas).

\textsuperscript{40} Id. at 72 (purporting that EPA’s failure to provide rational reason for not making and publishing finding was arbitrary and unlawful).

\textsuperscript{41} Sierra Club II, 47 F.4th at 742 (summarizing petitioners’ main arguments).

\textsuperscript{42} Id. (stating EPA’s position on venue).

\textsuperscript{43} Id. at 746 (concurring with Fifth Circuit that EPA holds unreviewable discretion).
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fing could not undergo judicial review. Due to the challenged rules not meeting the CAA’s conditions for venue in the D.C. Circuit, the court granted Sierra Club’s alternative request to transfer the case to the Fifth Circuit. The D.C. Circuit did not address the remaining merits of the case due to its lack of venue.

III. Preparing for Takeoff: Discussing the Launch Pad of Sierra Club’s Petition for Review

On previous occasions, the D.C. Circuit had avoided deciding whether the EPA’s decision not to make and publish a finding of nationwide scope or effect could receive judicial review. Sierra Club’s challenge of the EPA’s final rules for the Houston and Dallas areas in Sierra Club II prompted the D.C. Circuit to resolve this reviewability issue. To contextualize the court’s decision and reasoning, this section provides necessary background on ozone NAAQS, ozone pollution in the Dallas and Texas areas, the CAA venue provision, and legislative and precedential case law of judicial review.

A. Ozone NAAQS

In 1971, the EPA established the first primary and secondary NAAQS for ozone. Primary standards limit the amount of pollutants in the air to protect public health, while secondary standards focus on protecting public welfare like preventing damage to

44. See id. at 745 (refusing to review EPA’s final agency action). For a narrative analysis of the court’s reasoning why it could not subject EPA’s decision to judicial review, see infra notes 125-85 and accompanying text.
45. Id. at 746 (granting Sierra Club’s unopposed alternative request to transfer case to Fifth Circuit).
46. Sierra Club II, 47 F.4th 738 at 740 (realizing inability to decide merits of case without proper venue).
47. Id. at 744 (noting D.C. Circuit faced two prior cases in which it assumed, without deciding, that review was available). For a critical analysis of the D.C. Circuit’s decision to withhold from deciding this issue in prior cases, see infra notes 198-202 and accompanying text.
48. For a narrative analysis of the court’s reasoning, see infra notes 125-85 and accompanying text.
49. For background information on the statutory and judicial framework behind the court’s analysis in Sierra Club II, see infra notes 47-124 and accompanying text.
When the EPA reviews a standard and finds it no longer adequately protects human health and the environment, the EPA can revoke the standard or supplement it - typically with a more stringent one. In 1979, however, the EPA promulgated a relaxed ozone standard when it increased the amount of ozone allowed by over fifty percent compared to the existing 1971 standard.

Nearly twenty years later, in 1997, the EPA required a new measurement of the average ozone concentration level over an eight-hour period, replacing the one-hour period required in the 1970s standards. The eight-hour period reflected mounting evidence that prolonged exposure to ground-level ozone decreased optimal lung function. Additionally, this standard maintained 1971’s more stringent ozone concentration allowance at 0.08 parts per million (ppm). The EPA revised the ozone NAAQS in 2008 when it decreased the acceptable amount of ground-level ozone in the ambient air.

More epidemiologic studies showing exacerbated respiratory issues and increased premature mortality due to ozone exposure spurred the EPA to continue this downward trend with
the most recent 2015 NAAQS.\textsuperscript{58} Currently, states must adhere to the 2008 and 2015 ozone NAAQS since the EPA has revoked all but these most recent, and stringent, standards.\textsuperscript{59}

B. State Responsibilities Under the CAA

After the EPA establishes NAAQS, states must develop and adopt their own individual SIP to assure compliance with the NAAQS.\textsuperscript{60} States have the primary authority to create their own SIP with detailed, feasible steps to attain the NAAQS within the state’s self-determined timeframe.\textsuperscript{61} Generally, most SIPs contain programs including air quality monitoring and emission control strategies.\textsuperscript{62} States must also offer recommendations to the EPA as to whether areas within their respective borders attained compliance with the NAAQS.\textsuperscript{63} Before sending its SIP to the EPA for review, the state must allow for public input through notices and hearings.\textsuperscript{64}

After reviewing the recommendations and corresponding air quality data, the EPA designates an area as nonattainment, attainment, or unclassifiable.\textsuperscript{65} An attainment area either meets the NAAQS or exceeds it.\textsuperscript{66} The EPA groups unclassifiable areas with

\textsuperscript{58} Id. (listing 2015 NAAQS decreased allowed amount of ozone to 0.070 ppm); see Reitze, supra note 9, at 428-29 (highlighting studies that influenced EPA’s decision to implement more stringent NAAQS); see, e.g., Jonathan I. Levy, Susan M. Chemerynski & Jeremy A. Sarnat, Ozone Exposure and Mortality: An Empiric Bayes Metaregression Analysis, 16 Epidemiology 458, 465-66 (2005) (finding correlation between increased ozone exposure and increased mortality rate).

\textsuperscript{59} See Reitze, supra note 9, at 433, 442, 456 (viewing higher-standard ozone NAAQS as opportunities to impose cost on ozone emission contributors). While the EPA reviewed the ozone NAAQS in 2020 as part of its five-year review, it did not implement any revisions or new standards. Review of the Ozone National Ambient Air Quality Standards, 85 Fed. Reg. 87256, 87256 (Dec. 31, 2020) (to be codified at 40 C.F.R. pt. 50) (retaining ozone NAAQS without revision).

\textsuperscript{60} See Clean Air Act, 42 U.S.C. § 7410(a)(1) (establishing cooperative federalism system where EPA and state governments partner together to achieve and maintain NAAQS).

\textsuperscript{61} See id. § 7410(a)(1)-(2)(A) (mandating each state develops collection of regulations in implementation plans to address CAA-regulated pollutants).


\textsuperscript{64} Applying or Implementing Ozone Standards, supra note 62 (summarizing steps state needs to take in developing its SIP).

\textsuperscript{65} NAAQS Designations Process, supra note 63 (listing available designation categories for areas under NAAQS).

\textsuperscript{66} Id. (specifying meaning of “attainment”).
attainment areas in its plan requirements for states. A nonattainment area does not meet the primary or secondary NAAQS for a pollutant, or it contributes to the ambient air quality of a nearby area that also does not meet the NAAQS. For a nonattainment area under an ozone NAAQS, the EPA must further classify and rank the area as “marginal,” “moderate,” “serious,” “severe,” or “extreme.” The classification corresponds to the severity of an area’s air pollution level. Accordingly, areas with higher severity classifications face more stringent air quality control requirements than those with lower classifications.

In Texas, the Houston and Dallas areas have long histories of nonattainment with ground-level ozone NAAQS. Prior to reaching attainment for the 1979 and 1997 ozone NAAQS, the Dallas area maintained a serious classification while the Houston area held a severe classification under both NAAQS. Currently, both areas are...

67. Reitze, supra note 9, at 424 (citing Clean Air Act, 42 U.S.C. § 7471) (expounding EPA “treats unclassifiable areas as if they are in attainment”). An area is unclassifiable when insufficient information exists to properly classify the area as nonattainment or attainment. 42 U.S.C. § 7407(d)(1)(A)(iii) (describing meaning of “unclassifiable” designation).

68. 42 U.S.C. § 7407(d)(1)(A)(iii) (defining “nonattainment” areas). EPA examines an area’s contribution to a neighboring county using five factors: “[1] air quality data; (2) emissions and emissions-related data; (3) meteorological data; (4) geography/topography; and (5) jurisdictional boundaries.” Texas v. EPA, 983 F.3d 826, 831-32 (5th Cir. 2020) (using five-factor “balancing test” to evaluate whether area contributed to neighboring nonattainment area’s ambient air).


71. See Nat. Res. Def. Council, Inc. v. EPA, 571 F.3d 1245, 1250 (D.C. Cir. 2009) (citing 42 U.S.C. § 7511(a)) (providing that while areas that exceed NAAQS have more time to meet standard, they are also subjected to “progressively more stringent emissions controls for ozone precursors”).


73. Houston Proposed Rule, supra note 23, at 22094 (showcasing Houston area’s history of noncompliance with 1979 and 1997 NAAQS). EPA designated the...
in severe nonattainment for the 2008 standard but in moderate non-attainment for the most recent 2015 NAAQS.\textsuperscript{74}

C. Anti-Backsliding Provision in the CAA

The challenged final rules in \textit{Sierra Club II} noted that the Houston and Dallas areas attained, and continued to attain, the revoked 1979 and 1997 ozone NAAQS.\textsuperscript{75} Additionally, the EPA found that both areas satisfied the CAA’s five redesignation criteria from Section 7407(d)(3)(E).\textsuperscript{76} Accordingly, the EPA determined it was appropriate to terminate anti-backsliding requirements for the 1979 and 1997 ozone NAAQS in the Houston and Dallas areas.\textsuperscript{77}

Pursuant to Section 7502(e), the CAA’s anti-backsliding provision, if the EPA relaxes or revokes a NAAQS, it must ensure that nonattainment areas are subject to “controls which are not less stringent” than the requirements under the former NAAQS.\textsuperscript{78} In maintaining states’ existing controls, the EPA has asserted that the


\textsuperscript{75} See \textit{Houston Final Rule}, \textit{supra} note 10, at 8411 (acknowledging Houston area met requirements for 1979 and 1997 NAAQS); see also Dallas Final Rule, \textit{supra} note 10, at 19097 (recognizing Dallas area satisfied 1979 and 1997 NAAQS requirements).

\textsuperscript{76} See \textit{Houston Final Rule}, \textit{supra} note 10, at 8411 (noting Houston area met CAA statutory requirements for redesignation); see also Dallas Final Rule, \textit{supra} note 10, at 19097 (announcing Dallas area met CAA statutory requirements for redesignation). The five \$ 7407(d)(3)(E) criteria are whether the EPA (1) determined the area attained the NAAQS; (2) fully approved the applicable implementation plan for the area under section 110(k); (3) ascertained that the improvement in air quality resulted from lasting and enforceable reductions in emissions due to SIP implementation and federal air pollutant control regulations; (4) fully approved a maintenance plan for the area in accordance with the section 175A requirements; and (5) found that the nonattainment area met all requirements applicable to the area under section 110 and part D. 42 U.S.C. \$ 7407(d)(3)(E) (mandating nonattainment area meets five criteria before EPA may redesignate it to attainment).

\textsuperscript{77} See \textit{Houston Final Rule}, \textit{supra} note 10, at 8413 (explaining that termination was appropriate because Houston area met air emission reduction “milestones” for 1979 and 1997 NAAQS); see also Dallas Final Rule, \textit{supra} note 10, at 19097 (providing reasons behind decision for terminations).

\textsuperscript{78} 42 U.S.C. \$ 7502(e) (laying out statutory function of anti-backsliding requirements in NAAQS).
anti-backsliding provision applies not only when it relaxes a NAAQS, but also when it strengthens one. The goal of these measures is for the nonattainment area to progress towards attainment with the new NAAQS and prevent the area’s air quality from “backsliding,” or degrading.

To shed anti-backsliding obligations under a revoked NAAQS, the EPA initially believed three permissible procedures existed: (1) a procedure only for “orphan nonattainment areas,” (2) the “formal redesignation” procedure, and (3) the “redesignation substitute” procedure. The “orphan nonattainment areas” procedure applied to areas in nonattainment under the revoked 1997 NAAQS but in attainment under the 2008 NAAQS. These areas would have had fewer obligations regarding their maintenance SIPs and fewer anti-backsliding requirements. The “formal redesignation” procedure allowed nonattainment areas under the revoked 1997 NAAQS to request formal redesignation to attainment under the 2008 NAAQS after meeting Section 7407(d)(3)(E) redesignation criteria. Lastly, the “redesignation substitute” procedure would have allowed states with nonattainment areas under both the 1997 and 2008 NAAQS to file a redesignation substitute request to the EPA for a revoked NAAQS; this procedure did not require these nonattainment areas to meet three of the five conditions in Section 7407(d)(3)(E).

In *South Coast Air Quality Management District v. EPA (South Coast)*, the D.C. Circuit allowed the EPA’s formal redesignation procedure, but vacated parts of the “orphan nonattainment area”

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82. Id. (defining “orphan nonattainment areas”).
83. Id. (stating implications for areas having orphan nonattainment status).
84. Id. at 1151 (describing application of “formal redesignation” procedure). For a discussion of the Section 7407(d)(3)(E) redesignation criteria, see supra notes 76-83 and accompanying text.
85. Id. at 1152 (acknowledging redesignation substitute contained fewer requirements than those listed in § 7407(d)(3)(E)). Specifically, the EPA did not require these nonattainment areas to satisfy the following Section 7407(d)(3)(E) conditions: “(1) the EPA has ‘fully approved’ the § 7410(k) implementation plan; (2) the area’s maintenance plan satisfies all the requirements under § 7505a; and (3) the state has met all relevant § 7410 requirements.” Id. (noting lack of three conditions in EPA’s redesignation substitute procedure).
86. 882 F.3d 1138, 1151 (D.C. Cir. 2018) (declaring two of EPA’s redesignation procedures in final agency rule violated CAA).
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Specifically, it vacated the part where the EPA had improperly waived the orphan nonattainment maintenance plan requirement that the area will maintain the NAAQS for the next ten years after the EPA grants the area redesignation. For the “redesignation substitute” procedure, however, the court completely rejected it because it failed to comply with all Section 7407(d)(3)(E) redesignation criteria. The D.C. Circuit held that the CAA unambiguously necessitated that nonattainment areas must first satisfy all five criteria to allow removal of anti-backsliding requirements attached to the nonattainment status. Due to the redesignation substitute procedure violating the CAA, the court vacated this procedure.

D. Venue in the D.C. Circuit

In response to the court’s decision in South Coast, the EPA used the Dallas and Houston final rules at issue in Sierra Club II as an opportunity to correct the redesignation substitute procedure. To correct it, the EPA required the Houston and Dallas areas to satisfy all five redesignation criteria for the revoked 1979 and 1997 NAAQS before it finalized removal of these areas’ anti-backsliding obligations. Sierra Club challenged the EPA’s decision to remove anti-backsliding requirements in Houston and Dallas, while the EPA argued that the D.C. Circuit did not have proper venue to evaluate the merits of Sierra Club’s argument.

Congress designed the CAA with three categories for establishing venue: (1) the regional circuit has exclusive venue for locally

87. Id. at 1150-51 (describing specific components of procedure that court waived).
88. Id. at 1150 (citing § 7505(a) of CAA, which requires orphan nonattainment areas that request redesignation to submit additional maintenance plans to ensure ten-year compliance period with NAAQS).
89. Id. at 1151 (citing 42 U.S.C. § 7407(d)(3)(E)(iv)) (highlighting statutory mandate that orphan nonattainment areas submit maintenance plan with measures of how it plans to attain NAAQS for next decade).
90. Id. at 1152 (emphasizing that redesignation substitute procedure violates CAA § 7407(d)(3)(E) even if only one condition is not met). Section 7407(d)(3)(E) prevents the EPA Administrator from redesignating a nonattainment area unless the five listed conditions are met. Clean Air Act, 42 U.S.C. § 7407(d)(3)(E) (enumerating required conditions for redesignation in nonattainment areas).
91. South Coast, 882 F.3d at 1152 (striking down redesignation procedure).
92. Sierra Club v. EPA (Sierra Club II), 47 F.4th 738, 742-43 (D.C. Cir. 2022) (characterizing that EPA conceived new redesignation substitute procedure in Texas final rules to replace vacated procedure in South Coast).
93. Id. at 742 (clarifying that for corrected redesignation substitute procedure, area does not need to achieve attainment under current 2008 or 2015 standard).
94. Id. (highlighting venue issue instead of addressing merits of Sierra Club’s arguments). For a discussion of Sierra Club and the EPA’s arguments, see supra notes 23-46 and accompanying text.
applicable actions based on local findings; (2) the D.C. Circuit has exclusive venue for nationally applicable actions; and (3) either the regional circuit or D.C. Circuit has exclusive venue for locally applicable actions that are based on a nationwide scope or effect. 95 Within this third category, the D.C. Circuit has proper venue when the Agency finds and publishes that an otherwise "locally or regionally applicable" action was based on a determination of nationwide scope or effect. 96 When the EPA does not make and publish its determination, then the appropriate regional circuit court of appeals holds exclusive venue. 97 Thus, the CAA creates two pathways to proper venue in the D.C. Circuit. 98

The D.C. Circuit had previously grappled with the venue provision in Sierra Club v. EPA (Sierra Club I) 99 and American Road & Transportation Builders Ass’n v. EPA (American Road). 100 In both cases, the court found that the EPA’s actions were locally or regionally applicable due to their localized effect on the areas at issue. 101 This finding left open the determination of nationwide scope or effect pathway for venue in the D.C. Circuit and foreclosed the nationally applicable regulation route. 102 The court, however, did not question whether it had the judicial power to review the EPA’s refusal to make and publish a finding of nationwide scope or effect in either case. 103

Instead, the court assumed reviewability, reasoning that the EPA’s decision to forego publication in both cases was not unreasonable. 104 In American Road, the court deemed the decision not

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96. Id. (describing second route for locally or regionally applicable actions to receive review in D.C. Circuit).
97. Id. (mandating satisfaction of both prongs for D.C. Circuit to have proper venue to review otherwise regionally or locally applicable action).
98. Sierra Club II, 47 F.4th at 742-43 (declaring statutory paths in CAA for venue to lie in D.C. Circuit).
99. 926 F.3d 844, 846 (D.C. Cir. 2019) (stating threshold question of whether venue lies in D.C. Circuit or other circuit court pursuant to CAA).
100. 705 F.3d 453, 454-56 (D.C. Cir. 2013) (articulating contention of whether venue lied in D.C. Circuit or Ninth Circuit).
101. Sierra Club I, 926 F.3d at 849 (reasoning EPA’s action of granting permit to single power plant was not nationally applicable); American Road, 705 F.3d at 453-56 (categorizing SIP approvals as inherently local in nature).
103. Sierra Club I, 926 F.3d at 850 (foregoing making decision on whether judicial review is available); American Road, 705 F.3d at 456 (deeming it unnecessary to “cross that bridge” of deciding availability of judicial review).
104. See Sierra Club I, 926 F.3d at 850 (adding that not only would EPA’s inaction not be unreasonable, it would certainly not be arbitrary and capricious); American Road, 705 F.3d at 456 (assuming reviewability of EPA’s refusal under arbitrary and capricious standard).
unreasonable because the EPA’s approval of California’s SIP did not
implicate any determinations of nationwide scope or effect; there
fore, the EPA’s approval was unequivocally locally applicable.105
Following similar reasoning, the court in Sierra Club I found the de
cision not unreasonable because the EPA’s renewal of an operating
permit for a particular power plant in Utah was locally limited and
specific in nature.106 Thus, since no route existed for proper venue
in the D.C. Circuit, the court dismissed both cases without deciding
the merits.107

E. Judicial Review Availability

The Sierra Club II court instead focused on whether it had the
judicial power to review the EPA’s decision to not make and publish
a finding of nationwide scope or effect when the Agency issued the
Dallas and Houston final rules.108 The D.C. Circuit considered the
Administrative Procedure Act (APA), which “embodies the basic pre
sumption of judicial review” when one suffers legal wrong or adverse
effects due to an agency’s action.109 To reflect this protective scheme,
the APA permits courts to vacate agency actions that are arbitrary,
capricious, abuses of discretion, or run counter to statutory and
regulatory law.110 The Supreme Court has historically followed the
APA’s lead in upholding the reviewability presumption because it
recognizes that administrative legal violations are more apt to occur
when agencies do not face consequences for their actions.111

At the same time, however, the APA provides that parties may
rebut the reviewability presumption when “statutes preclude judicial
review” or the administrative action falls within “agency discretion

105. American Road, 705 F.3d at 456 (rejecting petitioner’s claim that approval
did not only apply locally due to its potential precedential effect in subsequent SIP
approvals or revisions).

106. See Sierra Club I, 926 F.3d at 850 (implying EPA’s order was geographically
limited in its effects).

107. See Sierra Club I, 926 F.3d at 847 (acknowledging pending protective
appeal in Tenth Circuit); American Road, 705 F.3d at 456 (announcing petitioners
must bring petition for review in regional Ninth Circuit).

108. For a discussion of how the D.C. Circuit evaluated its judicial review power
in Sierra Club II, see supra notes 164-85 and accompanying text.

109. See Administrative Procedure Act, 5 U.S.C. § 701(a)(1)-(2) (contextualiz
ing judicial review of agency actions as rule rather than exception); see also Sierra
Club v. EPA (Sierra Club II), 47 F.4th 738, 745 (D.C. Cir. 2022) (citing Administra
tive Procedure Act, 5 U.S.C. § 701(a)(1)) (referencing statute that provides judicial
reviewability rule in administrative agency context).

110. 5 U.S.C. § 706 (commanding courts hold such actions as unlawful or set
them aside).

111. See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370
(2018) (quotation omitted) (asserting judicial review can prevent administrative
legal lapses).
by law.” 112 This “by law” exception to the reviewability presumption applies when courts cannot draw a judicially manageable standard from the statute to assess the agency’s use of discretion. 113 The Supreme Court first emphasized that courts must apply this exception narrowly in its 1985 Heckler v. Chaney 114 opinion. 115

While acknowledging the non-reviewability exception is narrow, the Heckler court posited that some agency actions, like decisions not to facilitate enforcement proceedings, bear a rebuttable presumption of non-reviewability. 116 The Court explained that agency decisions not to enforce sometimes involve evaluation of many factors within the agency’s expertise, such as the availability of resources and policy concerns. 117 Because the agency possesses the expertise to decide whether to refuse enforcement actions, the majority held that such actions are generally unsuitable for judicial review. 118 The Heckler holding embodies courts’ general tendencies to defer to agencies’ “technical expertise” when the challenged action or rule is based on scientific determinations or the agencies’ interpretations of statutes under which they operate. 119

In Sierra Club II, the D.C. Circuit continued this deferential tendency when it joined the Fifth Circuit in favoring the EPA’s discretion to make and publish a finding of nationwide scope or effect

112. 5 U.S.C. § 701(a)(1)-(2) (supplying two exceptions to general rule of agency action reviewability).
113. Heckler v. Chaney, 470 U.S. 821, 830 (1985) (concluding that without reference guidepost, courts can infer statute is committed to agency’s discretion and judgment exclusively).
115. Id. (highlighting APA’s purpose to favor judicial review in most situations). In his concurring opinion, Justice Marshall acknowledged that agency discretion may be necessary at times to accomplish administrative tasks, but he cautioned that discretion “can be a veil for laziness, corruption, incompetency, [and] lack of will . . . .” Id. at 848 (Marshall, J., concurring) (cautioning that presumption of non-reviewability should not forbid courts from entertaining claims of arbitrary use of discretion).
116. Id. at 832-33, 837-38 (upholding judicial review is unavailable under APA for agencies’ determinations to abstain from initiating enforcement proceedings).
117. Id. at 831-32 (listing factors agencies often consider and balance before making decisions).
118. Id. at 831 (implying agency enforcement actions and prosecutorial discretion are generally unsuitable for judicial review).
119. See Jonathan Skinner-Thompson, Procedural Environmental Justice, 97 Wash. L. Rev. 399, 411, 411 n.74 (2022) (explaining how courts’ deference to agency expertise can impact availability of judicial review); see generally Heckler v. Chaney, 470 U.S. 821, 831 (1985) (labeling agencies as typically “better equipped” to effectively consider different factors that influence their administrative decisions and actions).
under the CAA venue provision. The Fifth Circuit, in *Texas v. EPA*, rejected the petitioner’s contention that arbitrary and capricious review applied when a court considers whether the EPA should have published a finding of nationwide scope or effect. The court explained that if Congress wanted courts to have final adjudication of proper venue for a regionally applicable rule, the statute would have left out the requirement that the EPA publish its determination. The Fifth and D.C. Circuits’ decisions, therefore, followed the APA’s narrowed agency-discretion-by-law exception that renders agency action, like the EPA’s final rules in *Sierra Club II*, judicially unreviewable.

IV. **Leaving Earth’s Atmosphere: A Narrative Analysis of the D.C. Circuit’s Decision**

The D.C. Circuit followed the Fifth Circuit’s persuasive holding that it could not second guess the EPA’s decision to forego making and publishing a finding of nationwide scope of effect. The court arrived at its holding largely through statutory and legislative intent interpretations of the CAA’s venue provision. It noted that this statute supplies two routes to show that proper venue existed in the D.C. Circuit. The bulk of the D.C. Circuit’s analysis focused on the pathway wherein the D.C. Circuit has exclusive venue for nationally applicable actions; as such, the court first decided whether the challenged Houston and Dallas rules were nationally or locally applicable.

The D.C. Circuit did not examine the pathway wherein it has proper venue when the Agency based a locally applicable action on

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120. *Sierra Club v. EPA* (*Sierra Club II*), 47 F.4th 738, 745 (D.C. Cir. 2022) (concurring with only other court of appeals to decide this issue).

121. 983 F.3d 826, 834 (5th Cir. 2020) (committing EPA’s decision whether to make and publish finding of nationwide scope or effect to unreviewable agency discretion).

122. *Id.* (reasoning EPA has no legal requirement to publish such finding).

123. *Id.* (inferring plain language of venue provision favors agency discretion in venue selection).

124. See *Sierra Club II*, 47 F.4th at 745 (joining Fifth Circuit in vindicating EPA’s discretion whether to make and publish finding of nationwide scope or effect).

125. *Id.* at 746 (agreeing with Fifth Circuit as only other court to address judicial reviewability issue at hand).

126. See *id.* (interpreting CAA venue provision to determine whether venue is proper in D.C. circuit or regional court).

127. See *id.* (beginning analysis by establishing how D.C. Circuit can have venue in CAA-based dispute). For more discussion on the venue provision, see supra notes 92-107 and accompanying text.

128. For a further discussion of how the D.C. Circuit decided whether the challenged rules were nationally applicable, see *infra* notes 144-59 and accompanying text.
a determination of nationwide scope or effect.\textsuperscript{129} Instead, the court deemed it unnecessary to reach the merits of the second pathway to venue in the D.C. Circuit because it ruled that it could not review the EPA’s decision to make and publish a finding of such scope or effect.\textsuperscript{130} Since the challenged rules did not meet either pathway for proper venue in the D.C. Circuit, the court transferred the case to the Fifth Circuit.\textsuperscript{131}

A. Locally or Regionally Applicable Action

The EPA argued that proper venue for judicial review of the challenged Texas rules lied only in the Fifth Circuit.\textsuperscript{132} To support its claim, the EPA maintained that the rules were regionally applicable because their legal effects exclusively pertained to designated areas in a singular state.\textsuperscript{133} The court’s analysis closely mirrored the EPA’s chain of reasoning when it categorized the EPA’s promulgation of the challenged Texas rules as a locally or regionally applicable action.\textsuperscript{134}

The court began its reasoning by referencing existing circuit precedent that constrained its applicability determination to evaluating “the face of [the] agency action, not its practical effects.”\textsuperscript{135} For instance, a national ambient air quality standard on its face is nationally applicable simply because it is a national standard.\textsuperscript{136} The D.C. Circuit contrasted this nationally applicable example with the final Houston and Dallas rules; on their face, these rules only applied to

\textsuperscript{129} Sierra Club II, 47 F.4th at 746 (withholding from deciding whether challenged rules were based on EPA’s determination of nationwide scope or effect).

\textsuperscript{130} Id. (quoting Webster v. Doe, 486 U.S. 592, 600 (1988)) (upholding agency discretion due to lack of meaningful standard by which to assess Agency’s action).

\textsuperscript{131} Id. (declining to dismiss Sierra Club’s petition and instead transferring case).

\textsuperscript{132} Brief for Respondents, supra note 27, at 27-28 (countering against Sierra Club’s position that D.C. Circuit had exclusive venue).

\textsuperscript{133} Id. at 28 (categorizing final rules as regionally or locally applicable). The EPA stressed that only the direct legal effects of a rule determine regional or national applicability — not the rule’s practical effects. Id. (emphasis added) (citing cases where scope of rule’s legal effect were dispositive of regional applicability determination).

\textsuperscript{134} See Sierra Club II, 47 F.4th at 743-44 (echoing EPA’s reasoning why its final rules for Texas exemplified locally or regionally applicable actions).

\textsuperscript{135} Id. at 743 (quoting Sierra Club v. EPA (Sierra Club I), 926 F.3d 844, 849 (D.C. Cir. 2019)) (internal quotation marks omitted) (setting out basis for determining whether agency action is locally or regionally applicable).

\textsuperscript{136} See id. (explaining that NAAQS promulgation is “textbook example” of nationally applicable action while Houston and Dallas rules “on their face” are locally or regionally applicable); see also 42 U.S.C. § 7607(b)(1) (emphasis added) (allowing only D.C. Circuit to review EPA action of promulgating NAAQS).
two Texas areas. Without evaluating the substance of what the rules sought to do, the court focused on how each rule repetitiously noted that it pertained only to the Houston-Galveston-Brazoria (HGB) area in the Houston rule and the Dallas-Fort Worth area in the Dallas rule. Thus, the court characterized the EPA’s actions of approving maintenance SIPs and terminating anti-backsliding requirements solely for the Houston and Dallas areas as “hallmarks” of locally or regionally applicable action.

Moreover, the court further noted that the venue provision explicitly states that SIP approvals are locally or regionally applicable actions. In this case, the challenged rules were part of revisions to Texas’ SIP. The D.C. Circuit pointed out that due to a SIP’s inherent character of state application, approving a SIP, including approving revisions to one, is a “prototypical” locally or regionally applicable action. The court emphasized this point by highlighting how both challenged rules state at their outset that the EPA is approving revisions to the Texas SIP.

B. Nationally Applicable Action

Next, the D.C. Circuit addressed Sierra Club’s counterargument that the challenged rules were not locally or regionally applicable, but instead nationally applicable. Sierra Club held this position because it viewed that the rules rested on interpretations of the CAA

137. *Sierra Club II*, 47 F.4th at 743 (distinguishing locally or regionally applicable actions from nationally applicable actions).

138. See id. at 743-44 (listing Houston and Dallas rules as examples of agency actions using limiting geographic language). For example, the Houston rule stated that the “EPA is determining that the HGB area continues to attain the [revoked] ozone NAAQS . . . .” Id. at 744 (emphasis in original) (quoting 8 Fed. Reg. at 8,411) (noting how Houston rule describes EPA’s actions in HGB area only). The Dallas rule mirrors the Houston rule’s language: “EPA is determining that the DFW area continues to attain the [revoked] NAAQS . . . .” See Dallas Final Rule, supra note 10, at 19,096 (emphasis added) (focusing rule only on Dallas-Fort Worth area).

139. *Sierra Club II*, 47 F.4th at 744 (citing *Sierra Club v. EPA*, 926 F.3d 844, 849 (D.C. Cir. 2019)) (rejecting Sierra Club’s assertion that language of challenged Texas rules suggests nationally applicable action).

140. Id. (citing 42 U.S.C. § 7607(b)(1) (highlighting venue statute’s categorization of EPA’s approval of implementation plans as “locally or regionally applicable action”); 42 U.S.C. § 7607(b)(1) (defining EPA’s promulgation or approval of implementation plans as locally or regionally applicable action)).

141. *Sierra Club II*, 47 F.4th at 744 (emphasifying SIP as implementation plan).

142. Id. (quoting Am. Rd. & Transp. Builders Ass’n v. EPA, 705 F.3d 453, 455 (D.C. Cir. 2013)) (suggesting approving or promulgating SIPs is undisputedly locally or regionally applicable action).

143. Id. (stating that challenged rules being SIP revisions “reconfirms their fundamentally local or regional character”).

144. Id. (transitioning to second part of analysis — whether Texas final rules were locally or regionally applicable).
that were not limited to any geographic location. Specifically, Sierra Club argued that through the Texas rules, the EPA finalized a new interpretation of its authority to terminate anti-backsliding requirements. This new interpretation of authority, Sierra Club explained, would apply to all nonattainment areas under a revoked NAAQS upon a finding that the area meets the CAA Section 7407(d)(3)(E)’s criteria. Sierra Club concluded that a new interpretation of the EPA’s authority that applies regardless of geographic location renders the action nationally applicable.

In response, the D.C. Circuit highlighted recent circuit precedent where it held that a locally or regionally applicable rule that rests on an interpretation of the CAA does not necessarily recast the locally applicable rule into a nationally applicable one. Additionally, if the EPA uses the alleged new interpretation of its authority in challenged final actions, the court would subject the interpretation to judicial review. The court also held that simply because the EPA’s interpretation of the CAA has a potentially geographically boundless “precedential effect,” that cannot alone change an otherwise locally or regionally applicable rule into one of national applicability.

Sierra Club offered a second argument that the EPA’s method of allowing the Houston and Dallas areas to shed anti-backsliding obligations stemmed from a new idea of a permissible “redesignation substitute.” According to the Sierra Club, the idea was new because the CAA and implementing regulations did not include it as a mechanism for the EPA to terminate anti-backsliding requirements

145. *Id.* (summarizing Sierra Club’s first main argument that challenged rules were nationally applicable).

146. Petitioners’ Brief, *supra* note 13, at 21, 48 (arguing that EPA’s interpretation of its authority is “geographically unbounded”).

147. *Id.* at 48 (describing how new interpretation would apply nationally instead of solely to Houston and Dallas areas).

148. *Id.* at 66-68 (characterizing EPA’s approval of SIP revisions for Houston and Dallas areas as nationally applicable agency action).

149. See *Sierra Club II, 47 F.4th at 744* (quoting *Chevron U.S.A. Inc. v. EPA, 45 F.4th 380, 387* (D.C. Cir. 2022)) (rejecting idea that EPA transforms locally or regionally applicable action into nationally applicable one by broadly interpreting CAA).


151. See *Sierra Club II, 47 F.4th at 744* (quoting *Chevron U.S.A. Inc. v. EPA, 45 F.4th 380, 387* (D.C. Cir. 2022)) (criticizing Sierra Club’s attempt to change locally or regionally applicable rule into nationally applicable one).

152. *Id.* (outlining Sierra Club’s second argument why challenged final rules are nationally applicable).
in a nonattainment area under a revoked NAAQS. Thus, Sierra Club equated the EPA’s new idea of what qualifies as a permissible redesignation with the EPA amending its national implementation regulations. It therefore opined the EPA’s amendment of a national standard was a nationally applicable action.

Despite these arguments, the D.C. Circuit disagreed with Sierra’s Club contention that the Houston and Dallas final rules amended the implementing regulations. Ultimately, the court followed the same line of reasoning as when it dismissed the Sierra Club’s position that the EPA’s interpretations of the CAA were nationally applicable because they could lead to national precedential effects. Should the EPA apply the same redesignation substitute method it used in the challenged Texas rules to future actions, the respective court would review those actions if challenged. Moreover, the court emphasized that the challenged rules’ immediate effects only applied to the Houston and Dallas areas; this was dispositive for determining the EPA’s action was locally or regionally applicable.

C. Nationwide Scope or Effect

Finally, the D.C. Circuit articulated the two prongs that must be met for it to have proper venue to review an otherwise locally or regionally applicable rule: (1) whether the challenged final rules were based on a determination of nationwide scope or effect; and (2) whether the EPA made and published a finding that the final rules were based on a determination of nationwide scope or effect. For the first prong, Sierra Club posited that the EPA made the nationwide determination that it could develop a new third method

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153. Petitioners’ Brief, supra note 13, at 66-67 (stressing that two mechanisms provided in CAA and corresponding regulations are only permissible ways to terminate anti-backsliding protections).
154. See Sierra Club II, 47 F.4th at 744 (presenting Sierra Club’s chain of reasoning).
155. Id. (articulating Sierra Club’s conclusion that amending regulations fell under nationally applicable agency action).
156. Id. (countering that challenged rules did not amend any regulation).
157. See id. (mirroring rejection of Sierra Club’s first argument why challenged rules were nationally applicable instead of locally or regionally applicable).
158. See id. (quoting Sierra Club v. EPA (Sierra Club I), 926 F.3d 844, 849 (D.C. Cir. 2019)) (predicting future availability of judicial review for EPA’s statutory interpretation of ways Agency can terminate anti-backsliding measures).
159. See Sierra Club II, 47 F.4th at 743-44 (citing Sierra Club I, 926 F.3d at 849; Dalton Trucking, Inc. v. EPA, 808 F.3d 875, 880-81 (D.C. Cir. 2015)) (stressing that courts only consider agency actions’ immediate effects, not practical ones, when determining whether action is locally or nationally applicable).
160. Id. at 746 (recalling second pathway in venue statute for venue to lie in D.C. Circuit). For a further discussion of the two pathways under the CAA for the D.C. Circuit to have proper venue, see supra notes 92-107 and accompanying text.
of terminating anti-backsliding obligations.\textsuperscript{161} Sierra Club surmised that the EPA then terminated these obligations in the Houston and Dallas areas based on this alleged new interpretation that would have nationwide scope and effect.\textsuperscript{162} In response, the EPA relied on its previous argument that the challenged rules do not create a new interpretation of a CAA regulation or amend existing ones.\textsuperscript{163}

The court ultimately did not evaluate the merits of either party’s argument under the first prong for determining proper venue for a locally or regionally applicable agency action.\textsuperscript{164} Instead, it found the second prong alone was dispositive for determining venue.\textsuperscript{165} Turning to the second prong, the D.C. Circuit first acknowledged that all parties agreed that the EPA never made and published a nationwide scope or effect finding for the challenged rules.\textsuperscript{166} Sierra Club contended, however, the EPA’s failure to publish the finding was arbitrary and capricious.\textsuperscript{167} Thus, the court purported the issue was whether the EPA’s decision to not make and publish a finding of nationwide scope or effect was suitable for judicial review.\textsuperscript{168}

In holding that the EPA’s decision was unreviewable, the D.C. Circuit reasoned that the decision was solely in the agency’s discretion.\textsuperscript{169} The court first recognized that the Supreme Court has routinely maintained a “strong presumption” for agency actions

\begin{itemize}
\item \textsuperscript{161} Petitioners’ Brief, \textit{supra} note 13, at 70-71 (arguing that EPA made “nationally binding” interpretation in challenged rules that would have national implications outside of just Houston and Dallas areas).
\item \textsuperscript{162} \textit{See id.} at 39 (emphasizing how EPA’s actions in Texas rules amounted to determinations with nationwide scope and effect).
\item \textsuperscript{163} Brief for Respondents, \textit{supra} note 27, at 37 (refuting that Texas final rules contain new “nationally binding” interpretation of existing D.C. Circuit precedent or CAA regulation).
\item \textsuperscript{164} \textit{See Sierra Club II,} 47 F.4th at 744-46 (declining to analyze Sierra Club’s claims that challenged rules, if not nationally applicable, were based on EPA making determination of nationwide scope or effect).
\item \textsuperscript{165} \textit{Id. at} 745 (focusing on second prong to decide proper venue for locally or regionally applicable action).
\item \textsuperscript{166} \textit{Id.} (noting parties agreed that EPA did not publish finding of nationwide scope or effect). Courts of appeals, like the Fifth Circuit, have emphasized that when the EPA does publish its findings, such publication must be \textit{suitable}, or adequate. \textit{See Texas v. EPA,} 983 F.3d 833, 834 (5th Cir. 2020) (quoting Texas v. EPA, 829 F.3d 405, 420 n.17 (5th Cir. 2016)) (concluding that if circuit court deems publication inadequate, then exception to transfer venue to D.C. Circuit is inapplicable). A publication for purposes of venue under the CAA may be inadequate if the publication was private rather than public. \textit{See Lion Oil Co. v. EPA,} 792 F.3d 978, 981-82 (8th Cir. 2015) (finding EPA’s publication defective because EPA informed regulated party of publication privately instead of releasing it publicly).
\item \textsuperscript{167} \textit{Sierra Club II,} 47 F.4th at 745 (articulating Sierra Club’s argument relating to second prong).
\item \textsuperscript{168} \textit{See id.} (announcing issue at hand under second prong).
\item \textsuperscript{169} \textit{Id.} (citing Texas v. EPA, 983 F.3d 826, 834-35 (5th Cir. 2016)) (deferring to agency discretion).
\end{itemize}
to receive judicial review. In agreement with the EPA, however, the court referred to the APA, which provides an exception to the “strong presumption” - administrative action is unreviewable when it is “committed to agency discretion by law.”

To trigger this exception under the APA, no “meaningful standard” can exist for the court to evaluate the EPA’s discretion not to publish a finding of nationwide scope or effect. Without a baseline, meaningful standard to use to assess the agency action, the D.C. Circuit reasoned it had no “concrete limitations” in its review of the EPA’s use of discretion. Sierra Club pointed to the CAA and regulatory guidelines in an attempt to establish some type of standard for the court to evaluate the EPA’s exercise of discretion. The D.C. Circuit implicitly rejected Sierra Club’s suggestions for a meaningful standard, however, instead ruling that the CAA does not provide any standard or limitations for the EPA’s exercise of discretion to not publish a finding of nationwide scope or effect.

Furthermore, the court distinguished the two prongs for the D.C. Circuit to have proper venue to review a locally or regionally applicable rule. The first prong — that EPA based an action on a finding of nationwide scope or effect — cannot alone necessitate the EPA to satisfy the second prong of making and publish that finding. Moreover, the first prong, determining “whether the action is

170. Id. (quoting Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018)) (internal quotation marks omitted) (referencing Supreme Court’s historical tendency to prefer judicial review of administrative decisions).

171. See Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (defining exceptions where judicial review is not available); see also Sierra Club II, 47 F.4th at 745 (articulating how APA codified “traditional exception” where courts cannot review agency action). For a further discussion of the APA’s exception for reviewability of agency action, see supra notes 109-13 and accompanying text.

172. See Sierra Club II, 47 F.4th at 745 (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)) (internal quotation marks omitted) (pointing to statutes that provide no guidance, principles, or standards to determine whether agency arbitrarily and capriciously exercised discretion).

173. Id. (quoting Physicians for Soc. Resp. v. Wheeler, 956 F.3d 634, 643 (D.C. Cir. 2020)) (internal citation omitted) (necessitating availability of “legal norms” to consider agency actions).

174. Petitioners’ Brief, supra note 13, at 73-74 (arguing EPA did not overcome strong presumption of judicial review of agency actions). While Sierra Club recognized that exceptions exist for the strong presumption, it stressed that they are “narrow and rare” traditional exceptions, such as those for prosecutorial discretion. Id. at 74 (suggesting EPA’s actions did not fall within narrow and rare exception).

175. See Sierra Club II, 47 F.4th at 745 (quoting Dep’t of Com. v. New York, 139 S. Ct. 2551, 2568 (2019)) (failing to find any CAA provision constraining EPA’s authority to not publish finding of nationwide scope or effect).

176. Id. (identifying two prongs as separate and distinct).

177. Id. (focusing on CAA venue provision framework). The D.C. Circuit underscored that if the CAA venue provision read as mandating EPA to publish a finding whenever it was based on a decision of nationwide scope or effect, the two
based on a determination of nationwide scope of effect,” could not
serve as the meaningful standard to discern whether the EPA prop-
erly exercised its discretion whether to publish the nationwide scope
or effect finding.\textsuperscript{178}

The D.C. Circuit supported its strict distinguishment of the two
prongs by analyzing the statutory scheme of the venue provision.\textsuperscript{179}
It first noted that for nationally applicable actions, venue lies only in
the D.C. Circuit.\textsuperscript{180} Then, for locally or regionally applicable actions
based on local determinations, only the respective regional circuit
has venue.\textsuperscript{181} Finally, for locally or regionally applicable rules based
on a determination of nationwide scope or effect, the court recog-
nized that Congress gave the EPA the discretion to choose whether
to have venue in the D.C. circuit or in the appropriate regional cir-
cuit.\textsuperscript{182} The \textit{Sierra Club II} reasoned that Congress used a “different
approach” for this third venue category to grant the EPA the power
to exercise discretion of essentially selecting venue for an otherwise
locally or regionally applicable rule.\textsuperscript{183} The D.C. Circuit therefore
rejected Sierra Club’s contention that the EPA’s failure to publish
such a finding was judicially reviewable.\textsuperscript{184} With the court finding
the Texas rules regionally applicable and judicial review unavailable
for the second prong, the D.C. Circuit decided venue laid exclusively
in the regional Fifth Circuit.\textsuperscript{185}

\section{Leaky Airlock: D.C. Circuit Follows Precedent but Neglects to Tighten its Holding}

To arrive at its decision to transfer the case to the Fifth Cir-
cuit due to lack of proper venue, the D.C. Circuit relied heavily on

\begin{itemize}
  \item prongs would “collapse into one” and make the second prong’s existence meaning-
  less. \textit{Id.} (pointing that venue statute’s two prongs for D.C. Circuit to have venue to
  review locally or regionally applicable rules are separately distinguished by coordi-
  nating conjunction “and”).
  \item \textsuperscript{178.} See \textit{id.} (citing \textit{Heckler v. Chaney}, 470 U.S. 821, 830 (1985)) (showcasing
  how courts cannot review abuse of agency discretion claim without meaningful stan-
  dard).
  \item \textsuperscript{179.} See \textit{id.} at 745-46 (supporting D.C. Circuit’s venue analysis by referencing
  layout and wording of CAA’s venue provision).
  \item \textsuperscript{180.} \textit{Sierra Club II}, 47 F.4th at 745 (beginning with analyzing nationally applica-
  ble category of venue).
  \item \textsuperscript{181.} \textit{Id.} (detailing where venue lies for locally or regionally applicable actions
  based on local determinations).
  \item \textsuperscript{182.} \textit{Id.} at 746 (noting Congress expressly differentiated how to find venue for
  agency actions that fall into third category of venue).
  \item \textsuperscript{183.} See \textit{id.} (describing function and purpose of second prong).
  \item \textsuperscript{184.} See \textit{id.} (stating that EPA can consider number of factors when deciding
  proper venue).
  \item \textsuperscript{185.} \textit{Sierra Club II}, 47 F.4th at 746 (opting to transfer case to Fifth Circuit rather
  than dismiss case).
\end{itemize}
statutory interpretation of the CAA.  

The court first correctly characterized the SIP revisions in the challenged Texas rules as locally or regionally applicable actions.  Then, it appropriately emphasized that the two prongs to determine whether proper venue for a locally or regionally applicable action can lie in the D.C. Circuit are distinct.  Without the distinction, the second prong would likely violate the statutory interpretation canon where courts should construe a statute to avoid rendering a provision “superfluous.”  Additionally, the court strictly followed its existing precedent that it can only evaluate the “face” of an agency action to determine whether the action is nationally applicable.

The D.C. Circuit’s pattern of strict precedential adherence continued when the court rejected the environmental groups’ arguments that if an EPA action could have precedential effect in the EPA’s future proceedings, the action is therefore nationally applicable.  This pattern follows other circuit courts that have held that determining whether an action is nationally applicable depends on the specific location the action purports to regulate rather than “where the effects of the action are [or may be] felt.”

Further,

186. For a discussion of the D.C. Circuit’s statutory analysis, see supra notes 182-85 and accompanying text.

187. See 42 U.S.C. § 7607(b)(1) (indicating “approving or promulgating any implementation plan under section 7410” — like SIPs — is “locally or regionally applicable” action); see also Daniel P. Selmi, Jurisdiction to Review Agency Inaction Under Federal Environmental Law, 72 Ind. L. J. 65, 74-75 (1996) (recounting how 1977 amendments to CAA changed venue restrictions for D.C. Circuit and regional courts of appeals).

188. See, e.g., Wynnewood Ref. Co. v. EPA, 86 F.4th 1114, 1119 (5th Cir. 2023) (labeling two prongs required to overcome presumption that venue lies in regional circuit for locally applicable actions as “independent sub-conditions”); Texas v. EPA, 983 F.3d 826, 834 (5th Cir. 2020) (flagging that petitioner’s argument wrongly provides no separate meaning to second prong — whether EPA finds and publishes nationwide determination).  For a discussion of the two prongs’ separate functions, see supra notes 176-85 and accompanying text.


190. See Sierra Club v. EPA (Sierra Club II), 47 F.4th 738, 743 (D.C. Cir. 2022) (quoting Sierra Club v. EPA (Sierra Club I), 926 F.3d 844, 849 (D.C. Cir. 2019)) (declining to evaluate practical effects of agency action).

191. See Sierra Club I, 926 F.3d at 850 (declaring Sierra Club’s argument that EPA’s action could have precedential effect in future EPA proceedings is “typical of adjudicative orders”); Am. Rd. & Transp. Builders Ass’n v. EPA, 705 F.3d 453, 456 (D.C. Cir. 2013) (recognizing that SIP approvals could set precedent in future SIP proceedings but rejecting argument that this alone makes agency action nationally applicable).

192. New York v. EPA, 133 F.3d 987, 990 (7th Cir. 1998) (stressing that criteria to distinguish regional or local actions from national actions must be specific to avoid jurisdictional litigation taking over merits of claims).  The Seventh Circuit expressed that any action the EPA takes under the CAA would likely reach other
circuit courts have refused to consider whether an action is nationally applicable based on the petitioner’s grievance or challenge. Circuit courts base their narrowed analysis on the CAA venue statute that states “‘nationally applicable regulations . . . or final action taken . . . may be filed only in the [D.C. Circuit].’”

Thus, the D.C. Circuit in Sierra Club II merely expounded upon its own and other courts of appeals’ precedent rather than reconsidering it. It did not consider the practical effects of how the EPA’s new method of shedding anti-backsliding obligations under ozone NAAQS could apply in other heavily polluted areas. By not exploring the future impact and effects of the EPA’s action, the court evaded developing a future-looking perspective on whether EPA’s new method of removing anti-backsliding requirements could worsen ozone pollution.

regions, as “air currents do not respect state boundaries.” Id. (analyzing petition for review of final rule that granted four states exemption from some CAA limitations on nitrogen oxide emissions). The court further explained that equating nationally applicable actions with “major effects” and regionally applicable actions with “minor effects” would also result in vague standards for the CAA venue statute. Id. (recognizing that although distinguishing between major and minor effects of air pollution is possible, characterizing such distinction is “undesirable” way to determine jurisdiction).

193. See, e.g., RMS of Georgia, LLC v. EPA, 64 F.4th 1368, 1372 (11th Cir. 2023) (citing ATK Launch Sys., Inc. v. EPA, 651 F.3d 1194, 1199 (10th Cir. 2011)) (evaluating first impression issue of whether petition under CAA is nationally applicable and referencing sister circuit case law).

194. Id. at 1373 (quoting 42 U.S.C. § 7606(b)(1)) (emphasis added) (showcasing how statute centers on whether regulation or final agency action itself, not nature of petition or challenge, is nationally applicable).


196. See Petitioners’ Brief, *supra* note 13, at 21, 39 (characterizing EPA’s method of shedding anti-backsliding requirements as “nationally-binding interpretation” of South Coast decision).

197. See id. at 31-37 (claiming challenged final rules weaken ozone air quality protections in areas most in need of more stringent controls). For instance, Sierra Club argued that the removal of anti-backsliding obligations for the revoked 1997 NAAQS cancelled a mandatory classification increase to “severe” in Dallas for its delay in attaining the 1997 NAAQS. See id. at 62 (suggesting that while Dallas eventually reached attainment for 1997 NAAQS, it missed set attainment deadline). In *Calumet Shreveport Refining L.L.C. v. EPA*, the Fourth Circuit determined whether an action from EPA was nationally applicable based on the action’s future legal effect on entities or states affected by the action. See *Calumet Shreveport Refining, L.L.C. v. EPA*, 86 F.4th 1121, 1131 (5th Cir. 2023) (considering future legal impact of EPA’s action in its venue analysis). But see id. at 1142 (Higginbotham, J., dissenting) (questioning why majority focused on future legal effects of EPA’s action when CAA venue statute makes no mention of “effects”).
The D.C. Circuit also supported its lack of venue decision with its deferential view that Congress undisputedly “entrusted” the EPA with discretion for venue selection under the CAA.\textsuperscript{198} The court’s focus on congressional intent, however, may have led it to overlook its prior cases — \textit{American Road} and \textit{Sierra Club I} — where it assumed that review was available but found it was not unreasonable for the EPA to decline making a determination of nationwide scope or effect.\textsuperscript{199} In \textit{Sierra Club II}, the D.C. Circuit did not explain how it determined that the EPA’s failure to make a determination of nationwide scope or effect was not unreasonable in the two prior cases.\textsuperscript{200} Rather, the court simply rejected the existence of a meaningful standard to evaluate the EPA’s use of discretion to not make or publish such a finding.\textsuperscript{201} Given the prior not unreasonable determinations in \textit{Sierra Club I} and \textit{American Road}, the \textit{Sierra Club II} court’s rejection appears less concrete compared to a stronger stance had it explained whether it had indeed used a meaningful standard to conclude that the EPA’s declination to make a determination of nationwide scope or effect was not unreasonable.\textsuperscript{202}

\textsuperscript{198} Sierra Club v. EPA, 47 F.4th 738, 746 (D.C. Cir. 2022) (deferring to legislative intent for statutory interpretation). For a discussion of the D.C. Circuit’s statutory analysis and evaluation of Congress’s intent in the venue scheme’s design, see supra notes 179-83 and accompanying text.

\textsuperscript{199} See \textit{Sierra Club II}, 47 F.4th at 744-45 (referencing court’s assumptions in \textit{American Road} and \textit{Sierra Club I}, where it noted that EPA’s refusal to publish finding of nationwide scope or effect was not arbitrary or capricious). For a further discussion of \textit{American Road} and \textit{Sierra Club I}, see supra notes 100-07 and accompanying text.

\textsuperscript{200} See \textit{Sierra Club II}, 47 F.4th at 746 (omitting how court noted EPA’s inaction was not unreasonable in these two cases). The court merely mentioned its factual conclusions in \textit{Sierra Club I} and \textit{American Road} that EPA’s failure to make the nationwide scope or effect determination was not arbitrary and capricious. \textit{Id.} at 745 (briefing decisions in \textit{American Road} and \textit{Sierra Club I}).

\textsuperscript{201} For a discussion on the court’s analysis of whether a meaningful standard exists to judicially review agency discretion in the CAA’s venue provision, see supra notes 174-78 and accompanying text.

\textsuperscript{202} See generally \textit{Sierra Club II}, 47 F.4th at 745-46 (articulating thoroughly how CAA venue statute does not provide necessary meaningful standard for court to use to review Agency’s discretionary action). In \textit{Sierra Club I} and \textit{American Road}, it is unclear whether the D.C. Circuit needed to find it was not unreasonable for the EPA to decline to make a nationwide scope or effect determination for the court to hold venue was not proper in the D.C. Circuit. See \textit{Id.} at 744-45 (mentioning \textit{Sierra Club I} and \textit{American Road} without reviewing its not unreasonable findings in those cases); see also Judith M. Stinson, \textit{Why Dicta Becomes Holding and Why it Matters}, 76 Brook. L. Rev. 219, 221 (2010) (underscoring importance of distinguishing court’s previous dicta from its holding for purposes of “accuracy, judicial authority, and legitimacy”).
VI. The Final Frontier: D.C. Circuit’s Impact on Future CAA Venue Voyages

Despite not reaching the case’s merits, the D.C. Circuit established a precedent in Sierra Club II: it will not “second-guess” the EPA’s decision whether to make and publish a finding of nationwide scope or effect.203 This decision eliminated the likelihood that the EPA would automatically face centralized judicial review when a petitioner claims the EPA arbitrarily refused to find and publish that a locally or regionally applicable action was based on a nationwide scope or effect determination.204 Now, if the EPA declines to make and publish a finding determined on a nationwide scope or effect basis, centralized review is only available when the action is nationally applicable.205 Because courts regard SIPs as “prototypical” locally or regionally applicable actions, final actions stemming from SIPs would necessitate the EPA to make and publish a finding of nationwide scope or effect to allow for centralized review of such final actions.206

Equipped with this discretion within the D.C. Circuit, the EPA could potentially perform a limited version of forum shopping as a self-serving preventative measure; when it wishes to avoid the risk of national judicial review of a locally or regionally applicable rule, the EPA can abstain from making and publishing a finding of nationwide scope or effect.207 Overuse of this discretion may undermine the EPA’s credibility as the expert governmental agency in environmental matters because it suggests a tendency to forego making comprehensive

203. Sierra Club II, 47 F.4th at 746 (citing Texas v. EPA, 983 F. 3d 826, 834-35 (5th Cir. 2020)) (borrowing language from Fifth Circuit case that held EPA has discretion to choose venue for judicial review).

204. See id. at 745 (closing national review pathway in holding that D.C. Circuit cannot review EPA’s decision whether to make and publish nationwide determination). But see Heckler v. Chaney, 470 U.S. 821, 854 (1985) (Marshall, J., concurring) (expressing agency action and inaction is reviewable to evaluate whether agency acted arbitrarily, capriciously, or abused its discretion unless Congress indicated “clear and convincing intent” to block review).


206. See Sierra Club II, 47 F.4th at 744 (noting how SIPs are strictly classified as locally or regionally applicable actions). The court maintained that the EPA’s termination of the Houston and Dallas areas’ anti-backsliding obligations applied exclusively to the Houston and Dallas areas. See id. (concluding Houston and Dallas rules pertain only to these areas in Texas, regardless of whatever precedential effect they may have).

scientific findings depending on its litigation preferences. The EPA may not thoroughly analyze locally or regionally applicable rules pertaining to ozone pollution, for instance, to avoid making and publishing a finding of nationwide scope or effect.

Additionally, the D.C. Circuit’s decision to withhold judicial review availability for the EPA’s deference to not make and publishing a finding of nationwide scope or effect will likely set a persuasive precedent for regional circuit courts deciding this issue in the future.

In general, legal scholars and media outlets helm the D.C. Circuit as the “second most powerful court” — second only to the Supreme Court of the United States. The D.C. Circuit also has considerable administrative law expertise given the overwhelming ratio of agency action disputes it hears compared to other circuit courts. Likewise, numerous federal statutes outside of the CAA offer direct appeal opportunities of final agency actions to the D.C. Circuit.

Moreover, the Supreme Court has reversed D.C. Circuit decisions the second least out of the circuit courts, second only to the

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209. See Ray, supra note 198, at 785-86 (recommending EPA focus on providing clear reasoning behind its determinations of nationwide scope or effect for rules rather than making these determinations based on its “litigation preferences”). But see Nat’l Envt’l Dev. Ass’n’s Clean Air Project v. EPA, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring) (viewing EPA Administrator as “national regulator” who is thus well-suited to evaluate nationwide impacts of EPA’s rules and actions).

210. For a discussion of the D.C. Circuit’s influence on administrative law matters, see infra notes 210-17 and accompanying text.


large Ninth Circuit. The Supreme Court also shares a relationship with the D.C. Circuit in that four of the nine current justices previously served as D.C. Circuit judges. With the D.C. Circuit’s influence, particularly in administrative law, it seems unlikely that a regional court of appeals would create a circuit split against the D.C. Circuit’s decision that judicial review is unavailable for the EPA’s inaction to make and publish a finding of nationwide scope or effect. Thus, the D.C. Circuit likely established a national precedent that strengthens the EPA’s agency discretion to select the venue it so desires for locally or applicable actions that were based on a determination of nationwide scope or effect.

In return, this closed pathway to judicial review in the D.C. Circuit could weaken the public’s access to challenge an EPA action or inaction, especially should more regional courts follow the D.C. Circuit’s precedent. Reduced public accessibility may hasten environmental decay, as Congress is slow and reluctant to authorize new statutes for addressing global issues like ozone pollution. To successfully combat ozone pollution, we need a more forward-looking and collective judicial review that provides the necessary national forum.

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214. Feldman, supra note 212 (examining frequency of Supreme Court reversing decisions from 1986 to 2018).

215. Id. (showcasing that modern Supreme Court justices tend to have held more seats on D.C. Circuit than on other courts).


217. For more information on agency discretion, see supra notes 109-24 and accompanying text.

218. See Skinner-Thompson, supra note 119, at 410-11 (positing public’s “countervailing power” in administrative regulation lies in judicial review). For more information on the D.C. Circuit’s influence, see supra notes 210-17 and accompanying text.


220. For a discussion on how the D.C. Circuit continued to follow precedent rather than consider the merits of Sierra Club’s arguments, see supra notes 190-97.

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