IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-60961

STATE OF TEXAS, et al.,

Petitioners.

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

Petition for Review of an Order of the Environmental Protection Agency

Order Transferring Case to United States Court of Appeals for the District of Columbia Circuit

Before HIGGINBOTHAM, BENAVIDES, and ELROD, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:

The state of Texas petitions this Court for review of EPA's call for revisions to various state implementation plans promulgated under the Clean Air Act ("the SIP Call"). EPA moves to transfer this action to the United States Court of Appeals for the District of Columbia Circuit. The relevant venue provision of the Clean Air Act provides that challenges to nationally applicable regulations promulgated under the Act must be filed in the D.C. Circuit. We conclude that the SIP Call is a nationally applicable regulation and grant the motion to transfer.

I.

The Clean Air Act creates a comprehensive scheme for controlling the nation's air quality through both federal and state regulation. Congress and EPA set national minimum air-quality standards, but "primary responsibility for assuring air quality" rests with the states.[1] The states accomplish this task by promulgating regulations, known as state implementation plans ("SIPs").[2] Each state's SIP must set air-quality standards that are least as stringent as those established by the Act and its implementing regulations.[3]

One part of the Act that works through the SIPs is the prevention-of-significant-deterioration ("PSD") program, which seeks to "prevent significant deterioration of air quality" in certain areas.[4] The PSD program forbids construction or modification of "major emitting facilities" without a preconstruction permit.[5] A series of requirements associated with these permits help ensure that permitted facilities will not cause significant deterioration of air quality. For instance, proposed permitted facilities must use the best available control technology for regulated pollutants.[6] As with other components

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[1] 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.").

[2] *Id.*

[3] *See* 42 U.S.C. § 7410(k)(1)(A) ("[T]he Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection.").

[4] The PSD program applies to regions designated "attainment or unclassifiable," 42 U.S.C. § 7471, designations that relate to whether the region meets national ambient air quality standards under the Act for a given pollutant. 42 U.S.C. § 7407(d)(1)(A).

[5] 42 U.S.C. § 7475(a)(1).

[6] *Id.* § 7475(a)(4).

of the Act, Congress and EPA establish national PSD standards, which the individual states may in turn manage through their SIPs.[7] If a state refuses to use its SIP to implement the national PSD standards in the first instance, EPA implements them *for* the state by issuing a federal implementation plan ("FIP") for that state.[8] A FIP gives EPA the sole authority to issue PSD preconstruction permits required by the Act. Most states' SIPs include EPA-approved PSD programs, so most states act as the authority to issue PSD permits under the Act.[9]

From time to time, EPA may determine that an existing SIP is inadequate to comply with the Act, and it may call for a state to revise its SIP, a procedure known as a "SIP Call."[10] This is the situation before us today. EPA notified Texas and twelve other states that their SIPs were inadequate because their PSD provisions do not purport to control greenhouse gases ("GHGs"). Greenhouse gases have not always been part of the PSD program, and states' SIPS thus have not always been required to regulate them. But after EPA determined that greenhouse gases *were* part of the PSD program, it found that any SIPs that fail to regulate them were inadequate.

A brief background on the process by which greenhouse gases became part of the PSD program is useful to understanding this case. Our starting point is in 2007, with *Massachusetts v. EPA*, where the Supreme Court held that

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[7] *See* 42 U.S.C. §§ 7410, 7471; 40 C.F.R. § 51.166 (criteria for EPA approval of a State PSD program).

[8] 42 U.S.C. § 7410(c).

[9] *See* Action To Ensure Authority To Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call, 75 Fed. Reg. 77698, 77699–700 (Dec. 13, 2010) (to be codified at 40 C.F.R. pt. 52) [hereinafter "GHG SIP Call"].

[10] 42 U.S.C. § 7410(k)(5).

greenhouse gases are "air pollutants" under the Clean Air Act.[11] In response, EPA made efforts to regulate greenhouse gases under the Act. EPA's first action was the so-called "Endangerment Finding," in which it determined that greenhouse-gas emissions from motor vehicles "contribute to the greenhouse gas air pollution that endangers public health and welfare under CAA section 202(a)."[12] In short, the Endangerment Finding brought greenhouse gases within the ambit of the Act's vehicle program.[13] Thus, as required by the Act, EPA next issued the "Vehicle Rule," which established greenhouse-gas emission standards for new-model cars and trucks beginning with model-year 2012.[14]

Once EPA determined that greenhouse gases would be regulated under the Act's vehicle program, it sought to bring them into the PSD program as well. EPA's position is that this happened by operation of law: the Act's PSD provisions apply to "any air pollutant" that is "subject to regulation under the CAA."[15] This includes "newly regulated NSR pollutants." Thus, once greenhouse gases became subject to regulation under the Act's vehicle program, they automatically became subject to the PSD program as well. To that end, EPA

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[11] 549 U.S. 497, 528–29 (2007).

[12] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

[13] Section 202(a) of the Act requires that the EPA Administrator "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles or new motor vehicle engines . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1).

[14] Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, and 600; 49 C.F.R. pts. 531, 533, 536, 537, and 538).

[15] *See, e.g.*, Prevention of Significant Air Quality Deterioration, 43 Fed. Reg. 26,380, 26,382–83 (June 19, 1978).

issued a third greenhouse-gas regulation, the "Timing Decision."[16] That rule makes greenhouse gases subject to the PSD program (along with Title V of the Act, another permitting program) on January 2, 2011.[17] The fourth greenhouse-gas rule, the "Tailoring Rule," purports to relieve the burdens associated with "greatly increasing the number of required permits" associated with the greenhouse-gas regulations.[18]

The combined effect of these four rules was to make greenhouse gases newly subject to regulation under the PSD program. This, in turn, directed EPA's attention to individual states' SIPs. On December 13, 2010, it issued a rule—pursuant to § 110(k)(5) of the Clean Air Act[19]—calling for revisions of the SIPs of any state whose PSD provisions "do not apply the PSD program to GHG-emitting sources."[20] Many states' SIPs already applied the PSD program to greenhouse-gas-emitting sources, so those states were not affected by the rule. However, EPA found that thirteen states' SIPs were inadequate: Arizona, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, Texas, and Wyoming.[21] EPA thus called on those states to

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[16] Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, and 71).

[17] *Id.* at 17,007.

[18] Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, and 71). The rule in particular adopts a "phase-in approach for PSD and title V applicability." *Id.* at 31,516.

[19] 42 U.S.C. § 7410(k)(5).

[20] *See* GHG SIP Call, 75 Fed. Reg. at 77,698 ("In this rule, EPA finds that *any state's* SIP-approved PSD applicability provisions that do not apply the PSD program to GHG-emitting sources are substantially inadequate to meet CAA requirements, under CAA section 110(k)(5), and *such states will be affected by this rule.*" (emphasis added)).

[21] *Id.* at 77,700.

"submit a corrective SIP revision to assure that their PSD programs will apply to GHG-emitting sources" and set deadlines for revisions.[22]

The individual states' revision deadlines varied. All of the states—save for Texas—cooperated with EPA to set SIP revision deadlines so as to minimize permitting disruptions. EPA offered all of the states an expedited deadline of December 22, 2010. For the states choosing the December deadline, EPA vowed to put in place a federal implementation plan, which would allow EPA to assume permitting authority until the revised SIPs became final. Seven states elected this option.[23] Five states chose somewhat later deadlines but informed EPA that they did not expect any sources to seek permits before their SIPs were finalized. Thus, no FIP was needed for these states. Texas, the only state that declined to identify its preferred submittal deadline, became subject to the default deadline of December 11, 2011.

Texas's refusal to cooperate with EPA and the resulting default SIP revision deadline of December 2011 meant that the State faced a loss of competent PSD permitting authority effective January 2, 2011. To address this concern, EPA indicated that it was "planning additional actions to ensure that GHG sources in Texas can be issued permits as of January 2, 2011."[24] This "additional action" took the form of an another rule, a FIP specific to Texas.[25]

The greenhouse-gas regulations, the SIP Call, and the Texas-specific FIP have all been the subject of legal challenges. Many states and private entities

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[22] *Id.*

[23] *Id.* at 77,705, 77,712.

[24] *Id.* at 77,000.

[25] Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program, 75 Fed. Reg. 82,430 (Dec. 30, 2010) (to be codified at 40 C.F.R. pt. 52).

have challenged the four greenhouse-gas regulations: the Endangerment Finding, the Vehicle Rule, the Timing Rule, and the Tailoring Rule. The challenges are currently pending before the United States Court of Appeals for the District of Columbia Circuit in several consolidated actions called *Coalition for Responsible Regulation, Inc. v. EPA*.[26] Texas is one of the petitioners in the D.C. challenges.

Texas's challenge to the SIP Call, of course, was filed in this Court. Texas filed this petition for review on December 15, 2010 and the next day moved to stay the SIP Call. We ultimately denied the motion for stay. On December 17, 2010, EPA filed the instant motion to dismiss this case or, in the alternative, to transfer it to the D.C. Circuit. Texas properly challenged the Texas-specific FIP in the D.C. Circuit.[27]

This case thus represents one small piece of a large swath of related litigation. For the reasons that follow, we hold that this case—along with the challenges to the greenhouse-gas regulations and the Texas-specific FIP—should also have been brought in the D.C. Circuit.

II.

The Clean Air Act's venue provision sorts petitions for review of EPA actions into three types, based on whether the challenged regulation is:

(1) "nationally applicable";

(2) "locally or regionally applicable"; or

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[26] No. 09-1322 (D.C. Cir. filed Dec. 23, 2009); No. 10-1073 (D.C. Cir. filed Apr. 2, 2010); No. 10-1092 (D.C. Cir. filed May 7, 2010). Nothing in this opinion should be construed as expressing any view on the merits of these challenges.

[27] *State of Texas v. EPA*, No. 10-1425 (D.C. Cir. filed Dec. 30, 2010).

> (3) locally or regionally applicable but "based on a determination of nationwide scope or effect," provided that "the Administrator finds and publishes that such action is based on such a determination."[28]

A petition for review of regulations of type (1) or (3) may be brought only in the D.C. Circuit. Petitions for review of type (2) regulations must be brought in the relevant regional circuit. In other words, the Act lays exclusive venue in the D.C. Circuit for review of regulations that either apply nationally or apply locally but have nationwide scope or effect. The statute thus contemplates a two-step inquiry. First, we must ask whether a given regulation applies nationally or locally. If the regulation in question applies nationally, our inquiry ends there. But where a regulation applies locally or regionally, we must also ask whether EPA has made and published a finding that the regulation is based on a determination of nationwide scope and effect.

A.

Here, our venue inquiry ends at step one because the SIP Call is a nationally applicable regulation.[29] We begin, as we must, with the ordinary meaning of the statute's text,[30] which classifies all relevant EPA actions as

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[28] *See* 42 U.S.C. § 7607(b)(1). Section 7607(b)(1) does not specify whether it is a venue provision or a jurisdictional provision. The parties have proceeded on the assumption that it is a venue provision. We need not determine whether that assumption is correct, as we have authority to transfer the case either way. *See* 28 U.S.C. § 1631 ("Whenever . . . an appeal, including a petition for review of administrative action, is noticed for or filed with [a court of appeals] and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such . . . appeal to any other such court in which the . . . appeal could have been brought . . . ."); *Dornbusch v. Comm'r*, 860 F.2d 611, 612–13 (5th Cir. 1988) (per curiam) ("[W]here a circuit court has jurisdiction but not venue it has 'the inherent power to transfer a petition for review of an agency ruling to a circuit with proper venue.'" (quoting *Georgia-Pacific Corp. v. Fed. Power Comm'n*, 512 F.2d 782, 783 (5th Cir. 1975))).

[29] Accordingly, we do not reach the question of whether EPA's published statement that all challenges to the SIP Call must be brought in the D.C. Circuit constituted a finding that the SIP Call was based on a determination of nationwide scope and effect.

[30] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528–32 (2007); *CleanCOALition v. TXU Power*, 536 F.3d 469, 473–74 (5th Cir. 2008).

either "nationally applicable" or "locally or regionally applicable." "Determining whether an action by the EPA is regional or local on the one hand or national on the other should depend on the location of the persons or enterprises that the action regulates rather than on where the effects of the action are felt."[31] The SIP Call makes its national reach clear: it avowedly applies to *all states* whose implementation plans do not apply the Act's PSD program to greenhouse-gas-emitting sources.[32] Here, the thirteen states affected by the SIP Call—Arizona, Arkansas, California, Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, Texas, and Wyoming[33]—span seven different EPA regions,[34] seven different federal circuits,[35] and four different time zones.[36] This far-flung collection of states comprises no "region" of which we are aware. Thus, the SIP Call is not "regional" under the most plain of definitions: "affecting a *particular* region."[37]

Texas argues that the SIP Call falls within § 307(b)(1), which makes reviewable in the regional circuits an "action in approving or promulgating any [SIP]."[38] This argument is unsupported by the plain terms of the Act, which

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[31] *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998).

[32] *See* GHG SIP Call, 75 Fed. Reg. at 77,698 ("In this rule, EPA finds that *any state's* SIP-approved PSD applicability provisions that do not apply the PSD program to GHG-emitting sources are substantially inadequate to meet CAA requirements, under CAA section 110(k)(5), and *such states will be affected by this rule*." (emphasis added)).

[33] *See id.* at 77,705.

[34] *See* 40 C.F.R. § 1.7(b); *id.* § 52.02(d)(2).

[35] *See* 28 U.S.C. § 41.

[36] *See The Official U.S. Time (NST & USNO)*, TIME.GOV, http://www.time.gov.

[37] MERRIAM-WEBSTER'S DICTIONARY, www.merriam-webster.com.

[38] *See* 42 U.S.C. § 7607(b)(1) ("A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit.").

provides separately for EPA actions *approving* a SIP and an EPA action *calling for revisions* of an existing SIP.[39] Further, even if a SIP Call were the same as an "action in approving or promulgating a SIP," the legislative history of the Act indicates that this phrase was intended to apply only to "review of the approval or promulgation of implementation plans *which run only to one air quality control region*."[40]

B.

Although our decision rests on the ordinary meaning of the statute's text, our conclusion that venue for this action lies in the D.C. Circuit is also consistent with the legislative history of the Clean Air Act, which evinces a clear congressional intent to "centralize review of 'national' SIP issues in the D.C. Circuit."[41] In other words, Congress intended the D.C. Circuit to review "'matters on which national uniformity is desirable.'"[42] This scheme "take[s] advantage of [the D.C. Circuit's] administrative law expertise and facilitat[es] the orderly development of the basic law under the Act."[43] Centralized review of national issues is preferable to piecemeal review of national issues in the regional circuits, which risks potentially inconsistent results. Moreover, the regional circuits do not have a special interest in national SIP issues, in contrast

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[39] *Compare* 42 U.S.C. § 7410(k)(3), (4) (provisions governing EPA approval of state implentation plans), *with* 42 U.S.C. § 7410(k)(5) (provision governing EPA actions calling for plan revisions).

[40] S. REP. NO. 91-1196, at 41 (1970) (emphasis added).

[41] ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS ON JUDICIAL REVIEW UNDER THE CLEAN AIR ACT, 41 Fed. Reg. 56767, 56769 (Dec. 30, 1976) (Comments of G. William Frick). The House Report accompanying the 1977 Clean Air Act Amendments specifically "concurs . . . with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick." H.R. REP. NO. 95-294, 324, *reprinted in* 1977 U.S.C.C.A.N. 1077, 1403.

[42] *Id.*

[43] *Id.*

to their interest in local or regional SIP issues. Indeed, "the validity of a nationally applicable regulation will not turn on the particulars of its impacts within a given Circuit."[44]

Texas argues that its challenge to the SIP Call implicates a local, rather than a national, aspect of the rule.[45] However, Texas's merits arguments in its motion to stay the SIP call challenge only national features of the rulemaking. There, Texas argued: (1) that the SIP Call was procedurally unlawful under the Clean Air Act; (2) that the underlying greenhouse-gas regulations (i.e., the Endangerment Finding, the Vehicle Rule, the Timing Rule, and the Tailoring Rule) are unlawful ; and (3) that regulation of greenhouse gases is beyond the Clean Air Act's statutory mandate. None of these issues turn on the particulars of the SIP Call's impact within this Circuit. And all of these issues are "matters on which national uniformity is desirable," and are thus the kinds of issues Congress intended for the D.C. Circuit to decide. This is especially true of issues (2) and (3), which implicate not only the lawfulness of the SIP Call, but also the entire scheme of greenhouse-gas regulation.

Texas's challenge implicates EPA's greenhouse-gas regulation scheme, a scheme that is currently the subject of numerous challenges now pending before the D.C. Circuit in *Coalition for Responsible Regulation.* In the interests of judicial economy, and to eliminate risk of conflicting rulings between this Circuit and the D.C. Circuit, transfer to the D.C. Circuit is appropriate. In addition, because the D.C. action has been pending for a longer time than this one, many

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[44] *Id.*

[45] Some courts have contemplated the possibility that even nationally applicable rules may reviewable in the local circuits where the petition challenges a local feature of the rule. *See, e.g., Madison Gas & Elec. Co. v. EPA*, 4 F.3d 529, 530–31 (7th Cir. 1993). Because Texas here plainly challenges only national aspects of the SIP Call, we need not consider whether we agree that challenges to local features of nationally applicable rules are reviewable in the local circuits.

of Texas's merits arguments may be precluded by the time this Court has an opportunity to pass on them.

C.

Our conclusion today—that an EPA action involving the SIPs of numerous far-flung states is "nationally applicable" and thus reviewable only in the D.C. Circuit—is consistent with the holdings of our sister circuits to have considered the question. As EPA notes, the last major multistate SIP Call presented a similar issue to this one.[46] In *West Virginia Chamber of Commerce v. Browner*,[47] petitioners challenged a SIP Call pertaining to "somewhat less than one-half the states." The Fourth Circuit had no problem finding that this rule's reach was national, not regional.[48] The court rested its "nationally applicable" determination on a number of considerations, all of which are present in this case: "the large number of states, spanning most of the country, being regulated, the common core of knowledge and analysis involved in formulating the rule, and the common legal interpretation advanced of section 110 of the Clean Air Act."[49] It did not matter that the SIP Call did not apply to every single state in the union; "[a]n EPA rule need not span from 'sea to shining sea' to be nationally applicable."[50]

Like the Fourth Circuit, the First Circuit has also held that a SIP action involving a number of states is "nationally applicable." In *Puerto Rican Cement*

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[46] *See* Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (Oct. 27, 1998) (codified at 40 C.F.R. pts. 51, 72, 75, and 96).

[47] 1998 WL 827315, at *6 (4th Cir. 1998).

[48] *Id.* at *7–8.

[49] *Id.* at *7.

[50] *Id.*

Co. v. EPA,[51] the petitioner challenged in the First Circuit regulations applying to "any State implementation plan" that conformed with certain criteria.[52] The list of affected states changed "as implementation plans [we]re approved and disapproved,"[53] but the version of the regulations reviewed by the First Circuit encompassed some twenty states' SIPs.[54] Writing for the First Circuit, then-Judge Breyer held that the regulations in question in *Puerto Rican Cement* were nationally applicable. Thus, the Act required the petitioner "to challenge their lawfulness in the Court of Appeals for the District of Columbia";[55] it could not proceed in the regional circuit.[56]

In sum, we agree with our sister circuits that have held that EPA actions involving the SIPs of numerous far-flung states are "nationally applicable" and reviewable only in the D.C. Circuit.

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[51] 889 F.2d 292 (1st Cir. 1989).

[52] *Id.* at 299–300.

[53] *Id.*

[54] *Id.* at 300.

[55] *Id.*

[56] Texas's argument that we should follow the Seventh Circuit's analysis in *New York v. EPA*,133 F.3d 987 (7th Cir. 1998), is not persuasive. The instant case is clearly distinguishable. That case concerned an EPA action involving four Great Lakes states—Illinois, Indiana, Michigan, and Wisconsin. Three out of the four states affected by the EPA action were in the Seventh Circuit; the other was adjacent in the Sixth Circuit. All four states are part of the same EPA region. *See* 40 C.F.R. § 1.7(b); *id.* § 52.02(d)(2). Texas quotes out of context Judge Posner's comment that the action in that case was "regional in a literal sense" because its application was "limited to a cluster of states." *New York*, 133 F.3d at 990. But Texas neglects that this "limited cluster" language refers not only to the small number of states involved, but also to the fact that the affected states formed a literal cluster: they were contiguous, in the same region, and all except one were in the same circuit. That much cannot be said here. EPA's call for SIP revisions impacts thirteen far-flung states spanning seven EPA regions.

III.

Because this case involves a challenge to a nationally applicable regulation under the Clean Air Act, venue is improper in this Court. Accordingly, we grant respondent EPA's motion to transfer this case, together with any pending motions and documents of record, to the United States Court of Appeals for the District of Columbia Circuit. The clerk of this Court is ordered to transfer this case in accordance with this order.