No. 16-1369

In the Supreme Court of the United States

STATE OF ARIZONA,
Petitioner,

v.

SANDRA L. BAHR AND DAVID MATUSOW,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Federal Respondents' Brief in Opposition is puzzling. It argues against the very positions EPA espoused earlier in this same case. The question Arizona presents for review is whether the Ninth Circuit erred in holding—in acknowledged conflict with the Fifth Circuit—that EPA's time-honored and reasoned interpretation of the Clean Air Act's contingency measures provision, 42 U.S.C. § 7502(c)(9), was unlawful. Based on EPA's agreement with the Fifth Circuit's approach, the Agency approved Arizona's implementation plan, defended that plan before the Ninth Circuit, and even sought rehearing en banc because the panel's decision disallowing Arizona's early-implemented contingency measures "substantially affects the construction of a statutory provision of national application in which there is an overriding need for national uniformity." Respondents' Petition for Rehearing En Banc at 1, Reply App. at 3, 14.

For the reader seeking an explanation, the Federal Respondents have perfected the art of burying the lede. The federal government reveals its true reason for opposing certiorari on the final page of its Brief in Opposition: EPA hopes to "limit the immediate effect of the decision below to the Ninth Circuit." Br. in Opp. 11. Enabled by a 2016 change in its regional-consistency regulations, EPA proposes to sacrifice the nine States and tens of millions of Americans living in the Ninth Circuit in a gambit aimed at avoiding this Court's review (and possible affirmance), despite a universally acknowledged split with the Fifth Circuit, the Agency's own recognition of an incorrect decision

below, and the resulting perverse incentive to delay implementation of pollution-control measures in the western United States. For the sake of Arizona and the California regulators supporting the Petition as amici, this Court should not so readily write off the residents of America's largest circuit.

A. EPA Acknowledges the Error Below and the Split with the Fifth Circuit.

EPA agrees with Arizona on the merits of this case, the Ninth Circuit's error, and that error's creation of a circuit split. Even in its Brief in Opposition, EPA admits it "has often approved SIP [state implementation plan] contingency measures whose implementation had already begun at the time of SIP approval" and concedes that the Fifth and Ninth Circuits disagree "concerning the range of contingency measures that are permissible under 42 U.S.C. 7502(c)(9)." Br. in Opp. 6–7.

The Ninth Circuit simply misconstrued Section 7502(c)(9) as prohibiting States from taking additional steps that will improve air quality. As explained in the Petition, the Act does not impose a timing requirement on contingency measures. Instead, it defines these measures in two ways. First, they must be separate from pollution controls necessary to achieve the National Ambient Air Quality Standard (NAAQS). *See* Pet. 12. Importantly, the private Respondents have not contested EPA's determination that Arizona did not rely on such measures for achieving the NAAQS. The second defining trait of contingency measures under Section 7502(c)(9) is that they are ready to take effect without further analysis or development by state regulators. Again, no one disputes that Arizona's

measures meet this criterion. The only question is whether the word "contingency" carries an implicit ban on States voluntarily implementing those measures prior to nonattainment.

The Fifth Circuit rejected this timing requirement, concluding instead that the early implementation of measures that improve air quality is consistent with the purposes of the Clean Air Act. *La. Envtl. Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004) (*LEAN*). Additionally, the Fifth Circuit relied on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the Agency's interpretation of "contingency." *LEAN*, 382 F.3d at 583-84.

The Federal Respondents do not dispute the former split and offer only a feeble argument to downplay the latter. Specifically, EPA asserts that the split over *Chevron* "does not implicate any methodological conflict about application of the interpretive framework set forth" therein. Br. in Opp. 7. But the Ninth Circuit disagreed, explicitly rejecting the Fifth Circuit's application of the *Chevron* framework. App. 35-37. Moreover, the Federal Respondents' contention—that the Ninth Circuit has elsewhere purported to consider a statute's structure and purpose, while nonetheless finding no ambiguity and therefore according EPA no deference, Br. in Opp.7—does not demonstrate that the division in the lower courts does not exist. *See* Pet. 15 (tracing division among the circuit courts over when to find ambiguity based on statutory structure).

That the Fifth and Ninth Circuits have reached opposite conclusions regarding *Chevron*'s applicability to the identical question of statutory interpretation belies the Federal Respondents' assurances that there

is nothing to see here. Even if the Fifth and Ninth Circuits would apply *Chevron* in the same way *if* they agree that it applies, that hypothetical congruity is irrelevant if they diverge on when *Chevron* attaches. This case presents the important issue of when statutory ambiguity exists such that *Chevron* deference is appropriate. This Court should grant certiorari to confirm that the Ninth Circuit's reading of "contingency"—a reading that creates a conflict between the dictionary definition of that term and its meaning in the broader context of a statutory scheme—triggers *Chevron* deference. Pet. 16.[1]

EPA itself made this point in its petition for rehearing en banc. Reply App. 7–13. Nothing has changed to alleviate that split; all that has changed is the Agency's decision on whether or not to sacrifice the States governed by the Ninth Circuit.

B. As EPA Argued Below, the Split Is Not Manageable.

The Federal Respondents tell this Court that the split between the Ninth and Fifth Circuits "does not create any unmanageable practical difficulties." Br. in Opp. 6. They also assert that "[c]ompliance with the Ninth Circuit's decision will not present any unsurmountable obstacles for either the EPA or States." *Id.* at 10. These assurances are irreconcilable with Federal Respondents' own petition for rehearing

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[1] Arizona believes that the Clean Air Act's structure unambiguously rules out a timing requirement based on the word "contingency." Pet. 16. At the very least, however, the structure and purpose of the law are sufficient to create an ambiguity warranting agency deference under *Chevron*.

en banc and the grave difficulties identified by Arizona and by the California regulator amici.

EPA was correct when it told the en banc Ninth Circuit that the panel decision "substantially affects the construction of a statutory provision of national application in which there is an overriding need for national uniformity." Reply App. 3, 14. The "national" scope of the issue presented in this case is evident from EPA's repeated approval, over two decades and across 18 States and the District of Columbia, of state implementation plans that included early-implemented contingency measures. App. 94–98.

Not only is the issue one of national proportions, but, as EPA argued in its petition to the Ninth Circuit, different standards based on circuit geography would sow "significant uncertainty within other Circuits in the country regarding which contingency measures are permissible." Reply App. 14. Of particular concern for national uniformity were areas that straddle jurisdictional lines. The Logan, Utah nonattainment area, for example, "includes portions of both Utah (within the Tenth Circuit) and Idaho (within the Ninth Circuit), and thus the single nonattainment area could be subject to potentially different legal standards." Reply App. 14. It is difficult to imagine a more perfect example to illustrate EPA's point about the "need for national uniformity". Those concerns remain true now, even as EPA pivots to a position of risk-avoidance.

In a final inconsistency, EPA attempts to downplay the circuit split by asserting that one common contingency measure is already standardized across the nation: pollution-control improvements for new cars and trucks. Br. in Opp. 10. Although EPA now

pretends that these standards mitigate the impact of the Ninth Circuit's ruling, it previously explained how the panel's holding unintentionally endangered these measures:

> While EPA does not believe the panel majority intended to preclude the use of mobile source emission standards as contingency measures, the ambiguity of the statutory language "to be undertaken" and "to take effect" is highlighted in the context of these practical emission reduction measures that are in force prior to the attainment date, and continue to have increasing beneficial effects after the attainment date as a result of continual implementation through consumer activity.

Reply App. 12 n.2. Despite identifying this significant uncertainty created by the panel decision, EPA has now become more sanguine, reasoning that the decision "does not *clearly preclude* certain common contingency measures such as the future application of more stringent emission standards to mobile sources like cars and trucks." Br. in Op. at 10 (emphasis added). Despite EPA's effort to look on the bright side, the uncertainty identified in the en banc petition remains. For state regulators, there remains a strong possibility that the Ninth Circuit's decision will preclude States from treating mobile source emission improvements as contingency measures for Section 7502(c)(9). That these standards apply nationwide is meaningless if their qualification as contingency measures varies by circuit.

Amici South Coast Air Quality Management District, which regulates emissions in the Los Angeles

area, and San Joaquin Valley Unified Air Pollution Control District, which regulates California's Central Valley, strongly disagree with the Federal Respondents' contention that the Ninth Circuit's decision is free from "unmanageable difficulties." If the decision stands, many of the amici's SIPs—both current and future—will be rendered ineligible for approval. Amicus Br. 2. Moreover, both South Coast and San Joaquin already have the most stringent measures in the nation for stationary, mobile, and area sources. *See* 77 Fed. Reg. 12,674, 12,686 (Mar. 1, 2012); 77 Fed. Reg. 12,652, 12,664 (Mar. 1. 2012). Neither district can feasibly develop yet more stringent measures to serve as contingency measures. Tellingly, the Federal Respondents do not engage with the arguments offered by the regulators from Los Angeles and California's Central Valley.

Further, the Federal Respondents do not explain why an issue with "far-reaching, nationwide implications" can now be safely ignored by this Court. The only "solution" the Federal Respondents offer is a rulemaking to conform this case to the "paradigmatic situation" in which EPA has adopted a formal rule that is the subject of a lawsuit. Br. in Opp. 8. This proposal makes no sense. As explained below, the Agency's approval of Arizona's implementation plan is itself a formal rulemaking. Moreover, the delay caused by ignoring the circuit split while EPA engages in a years-long rulemaking process will harm air quality in any region where regulators are considering early implementation of a pollution-control measure identified under Section 7502(c)(9).

The Federal Respondents plainly worry that this Court might affirm the Ninth Circuit. But abandoning a major portion of the country to a mistaken decision that creates practical and environmental problems is not a solution. The matter of early-implemented contingency measures under Section 7502(c)(9) needs this Court's attention.

C. This Case Is an Ideal Vehicle to Resolve the Circuit Split over Contingency Measures.

EPA attempts to muddy the waters by focusing on a possible factual distinction among Arizona's early-adopted contingency measures. It is trivially true that some of the contingency measures at issue have been fully implemented (for instance, roads that have been resurfaced) while street sweeping "require[s] continuing state conduct" after SIP approval. Br. in Opp. 8. EPA argues that because neither side put any weight on this distinction below, "this case would be an unsuitable vehicle for defining the range of contingency measures that are permissible under the Act." *Id.* at 10. EPA also asks this Court to deny Arizona's Petition because it might choose to develop regulations articulating this distinction. *Id.* at 8. Neither of these asserted vehicle problems—*i.e.*, the presence of various types of early-implemented contingency measures and EPA's unnecessary rulemaking[2]—is a reason to deny the Petition.

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[2] The EPA did not deem rulemaking necessary in the 26 SIPs that it approved with early-implemented contingency measures. App. 94–98.

Federal Respondents do not explain why the distinction between contingency measures that are wholly implemented (like road resurfacing) and those that include continuing operations (like deploying street sweepers a State has already purchased) has any legal significance. In the entire history of this case, not one party has considered this distinction worthy of even passing mention. After all, the fact that Arizona's SIP included contingency measures that are wholly complete means that EPA approval depends on the permissibility of that form of early implementation. Even if the ongoing work of sweeping streets with PM-10-certified sweepers would satisfy the Ninth Circuit (and it did not), Arizona's SIP would not have included adequate contingency measures without road resurfacing. Nor does EPA's trivial distinction shed any light on the split between the Ninth and the Fifth Circuits. In both cases, the contested SIPs included measures that were fully implemented with no "continuing state conduct" at the time of EPA approval. App. 33; *LEAN*, 382 F.3d at 582-83. The issue is therefore alive and well for this Court's review.

If there is a meaningful distinction between contingency measures already completed and those requiring "continuing state conduct," this case only becomes a better vehicle for this Court's review. Both species of early-implemented contingency measures were approved as part of Arizona's SIP, and both were appealed. If the Court believes that "contingency" includes a ban on full implementation but permits measures that entail some continuing conduct by the State, then this case allows that guidance to issue in a single opinion. If necessary, this circumstance would enable States to take appropriate steps and spare the

Court from revisiting the issue in a later case. In sum, EPA's eleventh-hour distinction is meaningless, but even if it mattered, it would only enhance the case for certiorari.

Finally, Federal Respondents offer no explanation for how a "more complete agency explanation and administrative record for review," Br. in Opp. 8, could possibly be necessary. The permissibility of a State implementing contingency measures before nonattainment is not new. EPA has approved 26 SIPs under precisely these circumstances. App. 94–98. EPA has also successfully litigated the issue in *LEAN* and unsuccessfully pursued it in the present case. This is not a novel question on which EPA needs time to develop its position. EPA knows its position. That position is as plain in the approval of Arizona's SIP as it is in two decades of EPA precedent approving similar plans. *See, e.g.,* 79 Fed Reg 33,107, 33,114 (June 10, 2014). EPA does not need additional time to promulgate additional rules. It has simply decided to write off the States in the Ninth Circuit in order to avoid the risk of an adverse decision. That is no basis for denying certiorari.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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SEPTEMBER 2017

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-72327

[Filed October 27, 2016]

SANDRA L. BAHR AND DAVID MATUSOW,
Petitioners,

v.

GINA McCARTHY, Administrator,
United States Environmental Protection Agency,
JARED BLUMENFELD, Regional Administrator,
United States Environmental Protection Agency,
and U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

On Petition for Review of Final Action of the
United States Environmental Protection Agency

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[*** Tables omitted ***]

Respondents Gina McCarthy, Jared Blumenthal, and the United States Environmental Protection Agency (collectively, "EPA") seek rehearing *en banc* on one of the three issues decided by this Court in its opinion issued September 12, 2016. A divided panel held that EPA's interpretation of the statutory requirement under the Clean Air Act for contingency measures in state implementation plans is contrary to the plain language of the Act. Slip opinion ("Slip. op."), Appendix A, at 33-36. This decision is of exceptional importance because, as acknowledged by the panel majority, it directly conflicts with the decision of the Fifth Circuit in *Louisiana Envtl. Action Network v.*

EPA, 382 F.3d 575 (5th Cir. 2004) ("*LEAN*"), which addressed the same issue of statutory interpretation, and this Court's opinion substantially affects the construction of a statutory provision of national application in which there is an overriding need for national uniformity. *See* Fed. R. App. P. 35(b)(1)(B); Circuit Rule 35-1.

BACKGROUND

This case involves a challenge under the Clean Air Act to EPA's approval of the State of Arizona's revised implementation plan for the Maricopa County nonattainment area (the "Maricopa Area") for particulate matter with a diameter of 10 micrometers or less ("PM-10").

During the past two decades, EPA and the State of Arizona have collaborated under the Clean Air Act's regulatory structure to address compliance with the PM-10 standards in the Maricopa Area, which includes the Phoenix metropolitan area. The Maricopa Area has faced challenges achieving the particulate matter standard due to a combination of the area's fine, highly erosive soils that easily generate dust when disturbed, the relatively large amounts of dust generated from travelling on paved and unpaved roads, a substantial level of construction activities, and weather conditions, including high wind events.

States have the primary responsibility for formulating pollution control strategies and ensuring that their ambient air meets air quality standards. Each State must adopt a comprehensive approach for attaining air quality standards in its State Implementation Plan ("SIP"). 42 U.S.C. § 7410(a). A

State must submit revisions to its existing SIP to EPA for approval. 42 U.S.C. § 7410(a)(1), (k).

SIPs are generally required to include enforceable emission limitations and other control mechanisms to meet the requirements of the Act. *See* 42 U.S.C. § 7410(a)(2)(A). Of relevance to this petition, the Act requires that a nonattainment area plan for the PM-10 standards contain "contingency measures," *i.e.*, specific measures to be undertaken if the area fails to meet reasonable further progress requirements or to attain the air quality standard by the attainment date. 42 U.S.C. § 7502(c)(9).[1] Such measures must take effect without further action by the State or EPA. *Id.* Contingency measures ensure continued emission reductions, in addition to those reductions determined necessary to reach attainment, while the state is revising its existing SIP to address its failure to achieve attainment.

In 2014, EPA approved Arizona's most recent SIP revision to achieve attainment of the PM-10 air quality standards in the Maricopa Area. 79 Fed. Reg. 33,107 (Jun. 10, 2014). This particular SIP revision includes, as required by the Act, a demonstration that the area will attain the standard, and a variety of pollution control measures that provide for the annual reduction in PM-10 or PM-10 precursor emissions of not less than five percent per year, from submission of the plan until attainment (a "Five Percent Plan"). *See* 42 U.S.C. § 7513a(d). The SIP revision also included contingency

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[1] For ease of discussion, EPA refers in this brief to contingency measures only in the context of failure to attain air quality standards by the attainment date.

measures designed to provide emission reductions above and beyond the measures deemed necessary for the State's attainment demonstration. The SIP's contingency measures included street paving, lowered speed limits on dirt roads, and street sweeping measures that the State had already implemented. EPA's approval of contingency measures implemented in advance of being triggered by a finding of failure to achieve attainment is consistent with EPA's policy and practice for over 20 years. The construction of the statute reflected in EPA's approval is the same as previously upheld as reasonable by the Fifth Circuit in its 2004 decision in *LEAN*.

Petitioners raised, as one of three issues, a challenge to EPA's approval of already-implemented emission control measures as contingency measures.

PANEL DECISION

Judge Ikuta, writing for the panel majority, granted the petition for review on the challenge to EPA's approval of the contingency measures in Arizona's revised SIP. The panel majority did not defer to EPA's interpretation of this statutory requirement because it found, under a *Chevron* step 1 analysis, *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984), that the plain language of 42 U.S.C. § 7502(c)(9) provides that contingency measures are measures to take effect in the future, and cannot be measures that have already been implemented. Slip op. at 33. The majority expressly disagreed with the Fifth Circuit's interpretative approach in *LEAN*, in which that court found section 7502(c)(9) ambiguous because the section neither affirms nor prohibits the use of contingency measures that provide continuing emissions reductions

and are implemented prior to a triggering event, such as a failure to attain. Slip op. at 34-35; *LEAN*, 382 F.3d at 583. The panel majority further disagreed with the Fifth Circuit's determination that the lack of any discussion in Section 7502(c)(9) regarding the treatment of continuing emission reductions makes the statute ambiguous. Slip op. at 35.

Judge Clifton, in dissent, found the relevant statutory language ambiguous and would have deferred to EPA's reasonable interpretation that allows implementation of contingency measures in advance if they will result in additional and continuing emission reductions. Slip op. at 37-41. Judge Clifton did not believe the language or intent of the statute prohibits implementing in advance additional measures that yield continuing reductions, because the reductions from early-implemented measures "take effect" and are "undertaken" not only at the time they are first implemented but also thereafter if needed due to nonattainment. Slip op. at 38.

Judge Clifton also found that EPA's interpretation comports well with the purpose and context of the Clean Air Act. Slip op. at 39. Agreeing with the Fifth Circuit, he found it illogical to penalize nonattainment areas that are taking extra steps to implement measures as a way to ensure compliance and thereby avoid the need for the contingency measures requirement to be triggered. Slip op. at 39; *LEAN*, 382 F.3d at 584. Judge Clifton concluded that EPA did not make an unreasonable judgment by determining that implementing the emission reduction measures right away is more valuable than advance identification of

measures that will only be triggered in the future, if necessary. Slip op. at 41.

ARGUMENT

The panel majority's opinion, by rejecting EPA's approval of Arizona's already-implemented contingency measures, overturns EPA's longstanding interpretation of an ambiguous provision of the Clean Air Act that allows States to implement contingency measures early, and creates a circuit split with the Fifth Circuit, which upheld EPA's reasonable interpretation. In *LEAN*, the Fifth Circuit found EPA's interpretation aligned with the general purpose and structure of the Act, and that disallowing early implementation measures would counterproductively cut against the purpose of the Act by delaying emissions control implementation. As Judge Clifton observed in dissent, the statutory provision governing contingency measures does not contain a prohibition on early implementation of contingency measures and it is not this Court's role to read one into the statute. Slip. op. at 39.

I. The Majority Opinion Incorrectly Held that the Plain Meaning of 42 U.S.C. § 7502(c)(9) Precludes EPA's Interpretation, Contrary to the Decision of the Fifth Circuit.

The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997). When a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's

answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. EPA's interpretation of the statutory requirement for contingency measures – to include emission reduction measures implemented before a determination that an area has failed to attain air quality standards – reasonably addresses an issue not resolved by the statutory language and should be upheld, consistent with the holding in *LEAN*.

The statutory language does not resolve whether states are prohibited from putting contingency measures in effect in advance of a statutory triggering event. The Act provides that nonattainment plans shall:

> provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

42 U.S.C. § 7502(c)(9).

The relevant phrases in this section – "to be undertaken" and "to take effect" – are ambiguous regarding contingency measures that have been implemented in advance of the failure to attain air quality standards but provide continuous emission reductions past an attainment deadline. Emission reduction measures that a State implemented before an area fails to attain by the attainment date may continue "to be undertaken" and continue "to take

effect" in the event the area subsequently does not achieve attainment by the applicable deadline. Although both the Fifth Circuit and Judge Clifton recognized that these two phrases imply a "prospective, forward looking orientation," *LEAN*, 382 F.3d at 583; slip op. at 37, both correctly concluded that nothing in the statutory language precludes EPA's approval of an emission reduction measure that provides continuing reductions as a contingency measure solely because it was implemented prior to the area failing to meet attainment. *LEAN*, 382 F.3d at 582-83; slip op. at 39. The Act neither affirms not prohibits continuing emission reductions that are implemented early from being utilized as contingency measures. *LEAN*, 382 F.3d at 583. Congress's silence on this specific issue creates an ambiguity. *Id.*

The specific context in which the language is used supports the finding of ambiguity. The language of the statute in its prospective form is not surplusage; it prohibits states from designating as "contingency measures" the same reductions they relied upon in their proposed SIP to achieve compliance with air quality standards. *See* 59 Fed. Reg. 41,998, 42,015 (Aug. 16, 1994) ("Contingency measures should consist of other available control measures not contained in the applicable core control strategy."). The statute requires that additional measures beyond those identified to achieve attainment must go into effect without further action by the state or EPA if attainment of an air quality standard is not met by the attainment date. 42 U.S.C. § 7502(c)(9). Slip op. at 37-38. However, nothing in the statutory language requires that the measures be new or not previously implemented.

The ambiguity of section 7502(c)(9) is also illustrated by "the broader context of the statute as a whole." *Robinson v. Shell Oil Co*., 519 U.S. at 341. The Clean Air Act requires that serious nonattainment areas such as the Maricopa Area reach attainment "as expeditiously as practicable," and they were required to do so no later than December 31, 2001. 42 U.S.C. § 7513(c)(2). Areas that obtained extensions of this deadline had to include a demonstration of attainment by the most "expeditious alternative date practicable." *Id.* §7513(e). The context of the Clean Air Act, and specifically Part D of the Act, which addresses plans for nonattainment areas, demonstrates the program's overarching goal to attain compliance as quickly as possible. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (words of a statute must be read in context and with a view to their place in the overall statutory scheme).

Early implementation of contingency measures serves this broader context. Allowing early implementation of contingency measures furthers congressional intent that contingency measures provide additional emission control reductions as efficiently and timely as possible. Slip op. at 39; *LEAN*, 382 F.3d at 583–84. Dissuading a State from early implementation of measures undercuts the Act's fundamental purpose of enhancing air quality so as to promote the public health and welfare. 42 U.S.C. § 7401(b)(1). As Judge Clifton observed, neither the language nor the intent of the Clean Air Act requires leaving contingency measures undone, sitting on the sidelines in reserve. Slip op. at 38.

Holding contingency measures in reserve so that "something more" is available to be implemented if there is a future determination of nonattainment will not yield the benefits the panel majority and Petitioners anticipate and does not further the purposes of the Clean Air Act. As part of the SIP revision process, the State was required to demonstrate that control measures *other* than those designated as "contingency measures" would, by themselves, be sufficient to bring the area into attainment. If this projection turns out to have been inaccurate, then early implementation of contingency measures may achieve emission reductions that compensate for the inadequacy of the SIP's baseline control measures to fully live up to expectations. In other words, if the contingency measures are the "something more" that allows the area to achieve attainment, then early implementation allows the State to stay on the intended path toward attainment from the beginning, thereby averting both a future finding of nonattainment and burdening the State's residents with relatively worse air quality in the interim. The majority panel's interpretation thus cuts against "a primary purpose of the [Act]— the aim of ensuring that nonattainment areas reach . . . compliance in an efficient manner." *LEAN*, 382 F.3d at 583.

The contingency measures identified by Arizona in its Five Percent Plan demonstrate the ambiguity in the statute. Arizona implemented several road paving projects and purchased PM-10 certified street sweepers to minimize the generation of dust. Petitioners' Excerpts of Record at 343. The emission reductions associated with these measures continue after implementation (*e.g.*, ongoing street sweeping provides

continuing dust reduction). *Id.* The language of Section 7502(c)(9) provides that these measures are "to be undertaken" and "take effect" at the time an area fails to achieve the attainment to be achieved by the SIP. Yet, street sweeping measures will be undertaken and will take effect both before and after that future event occurs. As both *LEAN* and the dissent concluded, the language of the statute contains no prohibition on early implementation of the emission reduction controls.[2]

Under *Chevron*, the panel majority had to find that Congress "directly spoke to the precise question at issue," Slip op. 33-34, but its analysis is not persuasive. The majority opinion relies on the prospective tense of the key phrases, but fails to explain why a measure that provides continuing emission reductions cannot be

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[2] Another type of contingency measure frequently approved by EPA relies on the continuous turnover of older mobile sources, such as cars and trucks, with cleaner models manufactured to meet increasingly stringent EPA or California mobile source emission standards. *See, e.g.,* 78 Fed. Reg. 37,741, 37,745 (Jun. 24, 2013). States often rely on these mobile source emission standards as contingency measures because they result in a downward trend in emissions that extends past the attainment date as newer, cleaner vehicles replace older, dirtier vehicles in the overall vehicle fleet. The result is an increment of emission reduction that was not "in the air" during the attainment year and that improves air quality after the attainment date. While EPA does not believe the panel majority intended to preclude the use of mobile source emission standards as contingency measures, the ambiguity of the statutory language "to be undertaken" and "to take effect" is highlighted in the context of these practical emission reduction measures that are in force prior to the attainment date, and continue to have increasing beneficial effects after the attainment date as a result of continual implementation through consumer activity.

a measure "to be undertaken" or "to take effect" in the event the area fails to meet attainment by the deadline. *See* slip op. at 33. The panel majority also relies on a dictionary definition of "contingency" – "a possible future event or condition or an unforeseen occurrence that may necessitate special measures." Slip op. at 33-34. The majority asserts that this definition makes clear that contingency measures are control measures "that will be implemented in the future," slip op. at 34, but it does not convincingly explain why, for example, continued street sweeping using the special equipment purchased by Maricopa County cannot be a special measure necessitated by a possible future event or condition, *e.g.*, a future failure to attain air quality standards, even though it may also have been implemented prior to that possible future event.

In addition, the panel majority's opinion may have misinterpreted the analysis of the Fifth Circuit in *LEAN*. The panel majority characterized the Fifth Circuit's decision as having found that a plain reading of the statute indicates a forward-looking approach. Slip op. at 35. However, the Fifth Circuit found an ambiguity by juxtaposing two alternate readings. It first remarked that "[o]n one hand, a plain reading of the terms 'to take effect' and 'to be undertaken' *imply* a prospective, forward looking orientation." *LEAN*, 382 F.3d at 583 (emphasis added). It proceeded to find, "on the other hand," that "the Act neither affirms nor prohibits *continuing* emissions reductions." *Id.* at 583 (emphasis in original). The panel majority incorrectly ignored this ambiguity in the statute with respect to early implementation of contingency measures.

II. The Case Involves a Question of Exceptional Importance Because It Substantially Affects the Construction of a Statutory Provision of National Application in Which There Is an Overriding Need for National Uniformity.

Although the particular dispute that gave rise to this petition involved only a single state plan involving a single pollutant, Section 7502(c)(9) applies to all nonattainment plans submitted by States nationwide to achieve compliance with all national ambient air quality standards. This Court's decision thus has potentially far-reaching, nationwide implications. Since 1993, EPA has nationally applied its interpretation of Section 7502(c)(9) to allow States to implement contingency measures before an area fails to attain, thereby encouraging States with nonattainment areas throughout the country to achieve air quality standards as expeditiously as practicable. *See* Appendix B (listing approved SIP submissions in eight different circuits). In addition, numerous SIP submissions currently awaiting EPA action include already-implemented contingency measures. As a result of this Court's decision, different standards will apply to different geographic areas based on their location within either the Ninth or Fifth Circuits. The decision also raises significant uncertainty within other Circuits in the country regarding which contingency measures are permissible. For example, the Logan, Utah nonattainment area for the PM-2.5 standards includes portions of both Utah (within the Tenth Circuit) and Idaho (within the Ninth Circuit), and thus the single nonattainment area could be subject to potentially different legal standards for contingency measures if

the Tenth Circuit follows the Fifth Circuit, and not this Court.

The decision also affects two of the most challenging nonattainment areas in the nation with respect to the ozone and particulate matter air quality standards, both found within the Ninth Circuit: the Los Angeles - South Coast Air Basin and the San Joaquin Valley. Both of these areas have EPA-approved attainment plans that contain already-implemented contingency measures. EPA actions on SIP submissions for these districts have been the subject of numerous opinions of this Court,[3] but prior petitions for review of these plans did not challenge the approval of already-implemented contingency measures. If the panel's decision stands, however, EPA may need to consider whether to exercise its discretion to revisit some of these settled approvals. *See* 42 U.S.C. § 7410(k)(5), (6) (EPA authority to revise substantially inadequate SIPs or correct erroneously approved SIP revisions).

Because the Act is silent on the question of early implementation of contingency measures, this Court, like the Fifth Circuit, should defer under *Chevron* to EPA's reasonable interpretation of Section 7502(c)(9) and enable uniform national application of this significant Clean Air Act provision. EPA's interpretation is "persuasive" and "the early activation of continuing contingency measures is consistent with

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[3] *See, e.g., Committee for a Better Arvin v. EPA*, 786 F.3d 1169 (9th Cir. 2015); *Sierra Club v. EPA*, 671 F.3d 955 (9th Cir. 2012); *Natural Resources Defense Council v. EPA*, 779 F.3d 1119 (9th Cir. 2015); *Ass'n of Irritated Residents v. EPA*, 686 F.3d 668 (9th Cir. 2011).

the purpose and requirements of the [Act]." *LEAN*, 382 F.3d at 583–84. This Court should grant rehearing *en banc* to avoid an unnecessary split among the courts of appeals.

CONCLUSION

For all the foregoing reasons, the Court should grant EPA's petition for rehearing *en banc*.[4]

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[4] Should the full court grant rehearing, EPA requests the opportunity to submit supplemental briefing given the importance of the statutory issue.

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Dated: October 27, 2016