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IN THE

Supreme Court of the United States

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION, *et al.*,
Petitioners,
v.
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
Respondents.

THE CHAMBER OF GREATER BATON ROUGE, *et al.*,
Petitioners,
v.
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION FOR STATE AND ENVIRONMENTAL RESPONDENTS

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Counter-Statement of Questions Presented

Section 172(e) of the Clean Air Act, the "anti-backsliding" statute, provides that if the EPA Administrator relaxes a National Ambient Air Quality Standard (NAAQS), the Administrator must require areas then in nonattainment to implement "controls which are not less stringent than the controls" that were applicable to such areas under the superseded NAAQS.

In 1997, the Administrator adopted a strengthened NAAQS for ozone. In 2004, the Administrator promulgated rules for implementing the new NAAQS, under which, paradoxically, most areas in nonattainment of the old NAAQS were assigned to a lower nonattainment classification, thereby subjecting them to a more relaxed regime of mandatory controls under Part D, Subpart 2 of the Act, CAA §§181-185B (Subpart 2).

The questions presented by the petitions are:

1. Did the Administrator reasonably find that the Act's anti-backsliding rule applied under a strengthened NAAQS, where reclassification under the new NAAQS would otherwise relax mandatory pollution control requirements?

2. Did the Court of Appeals correctly hold that the Administrator violated the plain language and purpose of the statute by selectively dispensing with pollution controls mandated by Subpart 2, based on the agency's opinion as to the convenience and utility of those controls?

Rule 29.6 Disclosure Statement

American Lung Association. American Lung Assn has no parent companies, and no publicly held company has a 10% or greater ownership interest in American Lung Assn.

American Lung Assn, a nonprofit corporation organized and existing under the laws of the State of Maine, is a national organization dedicated to the conquest of lung disease and the promotion of lung health.

Conservation Law Foundation. Conservation Law Foundation has no parent companies, and no publicly held company has a 10% or greater ownership interest in Conservation Law Foundation.

Conservation Law Foundation, a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts, works to solve the environmental problems that threaten the people, natural resources, and communities of New England, on behalf of its members who live throughout the New England region.

Environmental Defense. Environmental Defense has no parent companies, and no publicly held company has a 10% or greater ownership interest in Environmental Defense.

Environmental Defense, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems.

Louisiana Environmental Action Network. Louisiana Environmental Action Network ("LEAN") has no parent companies, and no publicly held company has a 10% or greater ownership interest in LEAN.

LEAN, an organization existing under the laws of Louisiana, is a non-profit, public interest, grassroots environmental organization.

Natural Resources Defense Council. Natural Resources Defense Council ("NRDC") has no parent companies, and no publicly held company has a 10% or greater ownership interest in NRDC.

NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Sierra Club. Sierra Club has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Southern Alliance for Clean Energy. Southern Alliance for Clean Energy has no parent companies, and no publicly held company has a 10% or greater ownership interest in Southern Alliance for Clean Energy.

Southern Alliance for Clean Energy, a nonprofit corporation organized and existing under the laws of the State of Tennessee, is a regional organization working in eight southeastern states on energy issues, and dedicated to finding positive solutions to the negative impacts of power production by working for clean air policies and promoting the use of renewable energy and implementation of energy efficiency practices.

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BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

Introduction

Two petitions seek review of a December 22, 2006, decision of the United States Court of Appeals for the District of Columbia. That decision partly upheld and partly vacated EPA's 2004 regulations for implementing a new (in 1997) NAAQS for ozone. In issue here are two rulings about whether pollution controls in effect in nonattainment areas under the old NAAQS must remain in effect in the same areas under the new NAAQS. First, the Court ruled that EPA had reasonably construed the CAA's anti-backsliding provision to apply when the agency strengthens the NAAQS – meaning that existing controls must generally remain in effect. Pet. App. 30a-31a. Second, the Court ruled that EPA had flouted the Act's language and Congress's purpose by selectively dispensing with statutorily mandated pollution controls that EPA deemed undesirable in implementing the new NAAQS. Pet. App. 32a-40a.[1]

The petitions join in attacking the Court of Appeals' decision, but diverge in their accounts of the Court's alleged errors. Thus, the Petition of National Petrochemical & Refiners Ass'n, et al. (collectively "NPRA") asserts (incorrectly) that the Court of Appeals *required* EPA to apply the anti-backsliding rule, implying that it overruled the agency on this point. NPRA Petition at 15-18. The Petition of The Chamber of Greater Baton Rouge, et al. (collectively "Chamber") recognizes that

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[1] References are to the Petition Appendix filed by the National Petrochemical & Refiners Association.

EPA itself construed the anti-backsliding rule to apply here, and attacks that decision. Chamber Petition at 14-15. Similarly, NPRA and the Chamber argue that the Court of Appeals' second ruling conflicts with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). NPRA Petition at 25-30. The Chamber also asserts that the decision violates Separation of Powers principles. Chamber Petition at 20-22.

Respondents[2] respectfully submit that this case does not warrant review by this Court. The Court of Appeals' decision is a routine review of an agency rulemaking, and the court's analysis comfortably follows *Chevron* principles. In particular, in rejecting the agency's exception of selected mandatory controls, the Court found – after carefully reviewing the statutory text and using traditional tools of construction – that the statutory bar to relaxing "controls" unambiguously extends to control measures like new source review, emission fees, and contingency measures. There is here no conflict with this Court's decisions, or those of other circuits, but only a disagreement on the part of these petitioners with EPA and the Court of Appeals with respect to the details of implementing provisions unique to the Clean Air Act. Still less does the Court of Appeals' exercise of its

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[2] The Respondents, Petitioners below, include the Commonwealth of Massachusetts, the Commonwealth of Pennsylvania Department of Environmental Protection, the States of Connecticut, Delaware, Maine and New York, the District of Columbia, the South Coast (California) Air Quality Management District, and the following environmental groups: American Lung Assn.,Environmental Defense, NRDC, Sierra Club, Conservation Law Foundation, Southern Alliance for Clean Energy, and Louisiana Environmental Action Network.

authority to interpret the Clean Air Act present an issue under Separation of Powers principles.

In sum, the decision meets none of this Court's criteria for certiorari review.

Supplemental Statement of the Case

The Court of Appeals' opinion recounts the relevant history of this matter, including Congress' 1990 adoption of the detailed "Subpart 2" provisions requiring increasingly stringent controls through 2010 and beyond; EPA's subsequent adoption of a strengthened ozone NAAQS in 1997; the agency's decision at that time to implement the new standard under the Act's less prescriptive Subpart 1 provisions rather than Subpart 2; and this Court's rejection of that approach in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). Pet. App. 3a-9a.

On remand from *Whitman*, EPA determined to revoke the pre-existing standard once the new, strengthened standard took effect, without regard to whether particular areas had attained the old standard. This was a change from EPA's original plan,[3] and it required EPA to address whether nonattainment areas making the transition to the new standard would be required to continue implementation of control measures already in place or applicable, particularly those that Congress had expressly mandated in Subpart 2 "by operation of law." Notice of Proposed Rulemaking, 68 Fed. Reg. 32802, 32821/3 (June 2, 2003). Pet. App. 137a (NPR). In addressing this question, EPA considered the Act's

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[3] Under the 1997 proposal, the old ozone NAAQS would remain in effect in an area, until the area had attained the standard.

express anti-backsliding provisions, clear Congressional intent to maintain progress toward attainment, and this Court's admonition in *Whitman* that EPA manage the transition in a way that would not render Subpart 2 provisions "abruptly obsolete." Pet. App. 128a.

EPA's review of the Act led it to conclude preliminarily (in the NPR) that "although Congress gave EPA the power to revise the existing ozone standard, Congress did not open the door for States to remove SIP-approved measures or to avoid control obligations with which they have not yet complied." Pet. App. 127a. Focusing on § 172(e), EPA reasoned that:

> Because Congress specifically mandated that such control measures need to be adopted or retained even when EPA relaxes a standard, we believe that Congress did not intend to permit States to remove control measures when EPA revises a standard to make it more stringent, as in the case of the 8-hour standard.

Pet. App. 128a. With that in mind, EPA proposed a rule that would require areas in nonattainment with the old standard to continue in effect all applicable control measures under the old standard after the transition to the new standard, permitting replacement only of optional measures, *i.e.*, measures that were not expressly mandated by the Act, and then only upon a demonstration that the change would not interfere with attainment. Pet. App. 132a-157a.

EPA's proposal originally did not distinguish among mandatory control measures that would continue in

effect. Rather, EPA concluded that "the mandated obligations in subpart 2 for purposes of an area's 1-hour ozone classification . . . remain applicable to such areas by virtue of the area's classification 'as a matter of law' in 1990." Pet. App. 133a. For example, with regard to New Source Review (NSR) requirements, EPA said, "[w]e see no rationale under the CAA – given the Congressional intent for areas 'classified by operation of law' – why the existing NSR requirements should not remain 'applicable requirements' . . . ." Pet. App. 137a.

In the Final Rule, EPA reaffirmed its preliminary conclusion that anti-backsliding principles apply whenever the NAAQS is revised, whether by relaxing or by strengthening the standard. Notice of Final Rule (NFR), 69 Fed. Reg. 23951, 23972/3 (April 30, 2004) ("We adopt in full the analysis provided at 68 FR 32819, 1st and 2nd columns. [*i.e.*, Pet. App. 127a-128a]"), Pet. App. 423a.

However, while the NPR had concluded that all mandatory control measures should continue in effect, the Final Rule excepted certain control measures. These included NSR requirements, requirements for contingency planning, and requirements for assessment of emissions fees against sources in severe and extreme nonattainment areas that missed the attainment deadline. Pet. App. 470a-473a. EPA did not offer a single explanation to cover all these exclusions. For example, EPA reasoned that some requirements such as contingency planning and emissions fees would be inapplicable because EPA could avoid triggering them by opting not to make findings of failure to attain the old standard. Pet. App. at 473a-474a. With regard to NSR, EPA asserted that NSR (which specifies pollution controls for

new sources) is a "growth" measure, not a "control" measure covered by the anti-backsliding rule, and asserted that it would be "inappropriate" to maintain the NSR requirements at existing levels of stringency after revision of the standard. Pet. App. at 475a-480a.

On petitions for review, the Court of Appeals unanimously upheld EPA's determination that nonattainment areas must retain mandatory control measures applicable in each area by virtue of its classification. The court accepted as a permissible reading of the Act EPA's reasoning that "'if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed, they also intended that such controls not be weakened where the NAAQS is made more stringent.'" Pet. App. 30a, *quoting* NFR at 23972 (Pet. App. 423a). The court also agreed with EPA's conclusion that mandatory control measures were "applicable" to a nonattainment area even if the area had not yet incorporated them into its implementation plan. Pet. App. 31a.[4]

For their part, Respondent States and Environmental Groups challenged EPA's determination that some control measures mandated by the Act for nonattainment areas need not be continued in effect after repeal of the standard. The court unanimously agreed with the Respondents on this set of issues.

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[4] The Baton Rouge area had recently been "bumped up" to the Severe classification, but had not yet revised its plan to reflect the additional control measures applicable to a Severe nonattainment classification.

Because EPA's rationale for dispensing with mandatory control measures varied with each measure, the court addressed each argument separately, but the decision made the overarching point that, granting the applicability of the anti-backsliding rule, there is no basis in the statute for excepting control measures if doing so reduces the stringency of controls in a nonattainment area. "Considered as a whole, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter. . . . The Act placed states onto a one-way street whose only outlet is attainment." Pet. App. 30a-31a. In this regard, the court found that the anti-backsliding rule's reference to controls plainly extended beyond those controls whose impact on emissions levels was quantifiable *a priori*, and that EPA's analysis was in conflict with references in the Act itself as well as the agency's past practice. The court accordingly rejected EPA's contention that ambiguity in the anti-backsliding rule allowed it discretion to carve out a subset of mandatory control measures to continue in effect. Pet. App. at 33a-35a.

Thus, the court rejected EPA's arguments: that NSR should be excepted as a measure to control growth rather than reduce base emissions, Pet. App. at 32a-35a; that emissions fees for sources in Severe nonattainment areas that miss the attainment deadline should be excepted because the old NAAQS was revoked before the deadline had passed, Pet. App. at 35a-37a; and that contingency planning should be excepted because revocation of the old NAAQS meant that plans to address a nonattainment area's failure to make progress in

cutting emissions, or to attain the NAAQS on deadline, could not be triggered. Pet. App. at 38a-40a. The court reasoned that dispensing with these control measures would unquestionably relax the control regime in an area, and thus would constitute "backsliding." In no case did EPA offer a defense demonstrating consistency with Congressional intent– as distinguished from the agency's own interest in flexibility and convenient administration.

In petitions for rehearing, the Chamber and NPRA petitioners argued that because the anti-backsliding rule in terms only applies when EPA relaxes a NAAQS, the Court should have overruled EPA's conclusion that the rule should apply equally in either situation.[5] Denying the petitions, the Court noted that by its terms §172(e) "does not specify how to proceed when the NAAQS is strengthened," and the petitioners' negative inference would have the absurd consequence that EPA could avoid ever enforcing mandatory control measures by periodically adopting a marginally strengthened standard. Since EPA's interpretation was reasonable and petitioners could adduce no evidence of legislative support for their reading, the Court rejected petitioners' contention.

The NPRA and Chamber of Commerce petitioners, as well as EPA, also sought rehearing with respect to the Court's ruling that EPA could not pick and choose which mandatory control measures would continue after

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[5] The Respondent Environmental Groups also petitioned for rehearing focused on the issue whether the Court should have vacated the entire rule.

revocation of the old NAAQS. However, none of the petitions contested the Court's textual analysis of the anti-backsliding rule in context of the Act (otherwise than by insisting that "controls" is ambiguous *per se*), or its point that EPA itself had regularly referred to various measures excepted under the regulation as control measures in the past. Accordingly, the Court rejected the petitions on this issue.

No judge on the D.C. Circuit having voted in favor, petitions for rehearing en banc were denied.

Reasons for Rejecting the Petitions

I. THE DECISION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WARRANTING THIS COURT'S REVIEW.

The Court of Appeals' decision here does not present a question of great importance to the development of the law or to the administration of justice. The case instead involves a routine issue of statutory construction, involving application of the Clean Air Act's anti-backsliding rule to the Act's ozone-specific provisions. The Court of Appeals' ruling is narrowly crafted to address the unique issues at hand, carefully follows precedents of this Court, and does not break new ground on broader legal principles. Nor is there anything remarkable in the court's finding that EPA acted permissibly in reading the Act to preclude relaxation of controls where the ozone NAAQS was strengthened. EPA's conclusion – that if Congress meant to require maintenance of effort when a NAAQS is relaxed, it would intend the same when the quirks of classification under a strengthened

NAAQS chance to permit the relaxation of state efforts – is surely reasonable, even without according the deference that is due EPA on this question. EPA's conclusion indeed took guidance from *Whitman's* explication of Congress's intent in enacting Subpart 2 in 1990. *Whitman*, 531 U.S. at 484-86.[6] Pet. App. 128a. The petitions offer no argu-ment beyond one based upon the negative implications of silence, why Congress would permit relaxation of effort by the States precisely when the agency has determined (through revision of the NAAQS) that even *more* must be done to achieve healthful air.

The Court of Appeals' ruling that EPA erred in exempting selected mandatory controls from the anti-backsliding rule dives even more deeply into implementation details unique to the ozone provisions of the Clean

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[6] *Whitman* said this:

> The principal distinction between Subpart 1 and Subpart 2 is that the latter eliminates regulatory discretion that the former allowed. . . . Whereas Subpart 1 gives the EPA considerable discretion to shape nonattainment programs, Subpart 2 prescribes large parts of them by law.
>
> The EPA's interpretation making Subpart 2 abruptly obsolete is all the more astonishing because Subpart 2 was obviously written to govern implementation for some time. . . . A plan reaching so far into the future was not enacted to be abandoned the next time the EPA reviewed the ozone standard–which Congress knew could happen at any time, since the technical staff papers had already been completed in late 1989.

Id. at 484-85.

Air Act. The Court of Appeals' unremarkable decision on this score simply requires the continuation of controls already applicable to ozone nonattainment areas by operation of law – controls that Congress thought so important to limiting ozone pollution that it mandated them in the text of the statute itself. Having already determined that Congress intended it to mandate the continuation of control measures upon a strengthening of the standard, EPA's attempt to then dispense with some of the very controls Congress had mandated found no support in the statute's text, and indeed conflicted with the agency's own prior reading of the Act. Pet. App. 32a-34a.

II. THE DECISION DOES NOT DEPART FROM CHEVRON'S ANALYTICAL FRAMEWORK.

There is no merit to the petitioners' assertion that the decision below departs from *Chevron's* analytical framework. Indeed, the decision conscientiously sets out Chevron's text at the start of its analysis, Pet. App. 13a, and molds its analysis to that framework. *Chevron* does not purport to decide the substantive question presented, and so the petitioners' mere disagreement with the Court of Appeals' interpretation of the anti-backsliding provision does not demonstrate that the decision departed from *Chevron.*

The D.C. Circuit's application of *Chevron* principles here was straightforward and conventional. The court's holding that EPA permissibly read the Act's anti-backsliding requirements to apply where a NAAQS is strengthened was both proper and sensible, particularly

given that a contrary reading would have produced the odd result of allowing weaker controls when EPA has determined that stronger protections are needed. Likewise, the court was well justified in finding clear Congressional intent to include new source review, emission fees, and contingency measures among the controls of concern in the anti-backsliding statute, given the plain meaning of "controls," EPA's own historic use of that term, and the Congressionally mandated role of these requirements in controlling ozone.

The Chamber's additional argument that, by overruling EPA's interpretation of the Act the Court of Appeals trespassed on the Legislative or Executive powers misreads *Chevron,* 467 U.S. at 842-43 – not to mention *Marbury v. Madison,* 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

III. THE DECISION DOES NOT CONFLICT WITH A DECISION IN ANOTHER CIRCUIT ON THE SAME SUBJECT.

NPRA also alleges that review is appropriate because the decision allegedly conflicts with the decision of a court of appeals in another circuit, namely *Greenbaum v. EPA*, 370 F.3d 527 (6th Cir. 2004).[7]

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[7] The Chamber does not make this argument, because it relates only to the question whether NSR is one of the controls covered by the anti-backsliding rule. The Chamber's petition is concerned with emission fees.

There is no conflict. The D.C. Circuit correctly observed that *Greenbaum* was concerned with the interpretation of a different statutory term ("measures" rather than "controls") under a different provision of the Act (§175A, governing maintenance plans for attainment areas, rather than §172(e), governing relaxation of controls for nonattainment areas), and with respect to a different pollutant (particulates rather than ozone). Pet. App. 34a. The Sixth Circuit found textual grounds to question the claim that "measures" in §175A include NSR. 370 F.3d at 536-38. The D. C. Circuit found no such grounds in the context of §172(e).[8] On the contrary, the D.C. Circuit found "abundant other evidence" supporting its conclusion that "controls" in §172(e) unambiguously includes NSR. Pet. App. 34a. Likewise, the court looked to Subpart 2, a provision not at all in issue in *Greenbaum,* in determining that the requirements at issue here (all mandated by Subpart 2) were covered by §172(e). Accordingly, the Court properly declined to extend *Greenbaum*'s holding to this very different context.

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[8] It is noteworthy that the Sixth Circuit deferred to EPA in light of an apparent conflict that it discerned between the plaintiffs' contention that attainment areas must continue to implement nonattainment NSR and the Act's requirement that attainment areas implement a more relaxed form of NSR under the Prevention of Significant Deterioration (PSD) program. 370 F.3d at 536-37. In contrast, the very purpose of the anti-backsliding statute is to require ongoing implementation of controls even when a change in the NAAQS or in a nonattainment area's classification might otherwise permit relaxation of controls. Thus, there is no conflict in this context similar to the one found by the Sixth Circuit in the attainment context.

Conclusion.

The petitions for writ of certiorari should be denied.

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