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No.

IN THE

Supreme Court of the United States

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE AND UTILITY AIR REGULATORY GROUP,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Air Act requires the Environmental Protection Agency (EPA) to review and revise, as appropriate, national ambient air quality standards (NAAQS) every five years. 42 U.S.C. § 7409(d). States must adopt plans to implement revised standards, including control measures as necessary or appropriate to attain them. *Id.* §§ 7410(a)(1), (2)(A). Section 172(e) directs EPA, if it "relaxes" a NAAQS, to require controls that are "not less stringent than the controls applicable" before the relaxation. *Id.* § 7502(e).

EPA revised the ozone NAAQS, making it more stringent, and revoked the prior standard after finding it unnecessary to protect health. Although no NAAQS "relaxation" occurred -- and Section 172(e) thus did not apply -- EPA found it had authority to require retention of controls not needed to implement the new standard. EPA, however, decided not to require imposition of fees under Section 185 of the Act (*id.* § 7511d), contingency measures, or retention of the new source review program designed for the prior, less stringent standard, because those provisions were not "applicable" "controls" when the new standard replaced the revoked one. The D.C. Circuit vacated that determination. The questions presented are:

1. Whether the lower court correctly held that Section 172(e) applies to require retention of measures related to a revoked NAAQS that EPA replaced with a more stringent standard.

2. Even if Section 172(e) applies when EPA tightens a NAAQS, whether the lower court correctly held that EPA violated the terms of Section 172(e), leaving no room for EPA's reasonable exercise of discretion.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b), the following is a list of all parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit:

The proceeding before the United States Court of Appeals for the District of Columbia Circuit involved review of an informal rulemaking before an administrative agency, the United States Environmental Protection Agency (EPA), and the Administrator of EPA and EPA's reconsideration of that rulemaking.

The National Petrochemical & Refiners Association is a petitioner in this Court and was a petitioner and an intervenor in support of EPA and the Administrator of EPA in the court of appeals.

The American Chemistry Council, the American Petroleum Institute, and the Utility Air Regulatory Group are petitioners in this Court and were intervenors in support of EPA and the Administrator of EPA in the court of appeals.

EPA and the Administrator of EPA are respondents in this Court and were respondents in the court of appeals.

The following parties are respondents in this Court and were petitioners in the court of appeals: South Coast Air Quality Management District; State of Ohio; Louisiana Environmental Action Network; The Chamber of Greater Baton Rouge; The West Baton Rouge Chamber of Commerce; The Iberville Parish Chamber of Commerce; Louisiana Oil Marketers and Convenience Store Association; Couhig Southern Environmental Services of Baton Rouge, Inc.; Lovie Robinson Hamett; The American Lung Association; Environmental Defense; Natural Resources Defense Council; The Sierra Club; Conservation Law

Foundation; Southern Alliance for Clean Energy; Commonwealth of Massachusetts; State of Connecticut; State of Delaware; State of Maine; State of New York; Commonwealth of Pennsylvania; and District of Columbia.

The following parties are respondents in this Court and were intervenors in the court of appeals: National Environmental Development Association's Clean Air Project; American Lung Association; Environmental Defense; Natural Resources Defense Council; Sierra Club; American Forest & Paper Association Inc.; National Association of Manufacturers; and Renewable Fuels Association.

RULE 29.6 DISCLOSURE STATEMENT

The National Petrochemical & Refiners Association (NPRA) is a nonprofit, unincorporated organization of more than 450 companies, including virtually all U.S. refiners and petrochemical manufacturers. NPRA has no outstanding shares or debt securities in the hands of the public; has no parent company; and no company owns 10 percent or more of NPRA's stock.

The American Chemistry Council (ACC) is a nonprofit trade association that represents the leading companies engaged in the business of chemistry. ACC has no outstanding shares or debt securities in the hands of the public; ACC has no parent company; and no company owns 10 percent or more of ACC's stock.

The American Petroleum Institute (API) is a nonprofit, nationwide trade association representing nearly 400 companies that are involved in all aspects of the oil and natural gas industry, including exploration and production, refining, marketing, pipeline, marine, and associated industries. API has no outstanding shares or debt securities in the hands of the public; API has no parent company; and no company owns 10 percent or more of API's stock.

The Utility Air Regulatory Group (UARG) is a nonprofit, unincorporated organization of individual electric utilities and national trade associations. UARG has no outstanding shares or debt securities in the hands of the public; UARG has no parent company; and no company owns 10 percent or more of UARG's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

TABLE OF AUTHORITIES—Continued

FEDERAL STATUTES

TABLE OF AUTHORITIES—Continued

ADMINISTRATIVE MATERIALS

MISCELLANEOUS

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NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE AND UTILITY AIR REGULATORY GROUP,
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SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

The National Petrochemical & Refiners Association, the American Chemistry Council, the American Petroleum Institute, and the Utility Air Regulatory Group respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 472 F.3d 882 (D.C. Cir. 2006) (Pet. App. 1a-41a). The opinion of the court of appeals denying rehearing is reported at 489 F.3d 1245 (D.C. Cir. 2007) (Pet. App. 42a-49a). The order of the Environmental Protection Agency (EPA or Agency) is reported at 69 Fed. Reg. 23,951 (Apr. 30, 2004) (Pet. App. 335a-541a). EPA's final actions on reconsideration are published at 70 Fed. Reg. 30,592 (May 26, 2005) (Pet. App.

582a-633a) and 70 Fed. Reg. 39,413 (July 8, 2005) (Pet. App. 634a-684a).

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2006. Petitions for rehearing were denied on June 8, 2007. Pursuant to Supreme Court Rule 13, the instant petition is filed within 90 days of the court of appeals' denial of petitions for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 172(e) of the Clean Air Act (the Act), 42 U.S.C. § 7502(e), reads as follows:

> (e) Future modification of standard. If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

STATEMENT OF THE CASE

1. The Clean Air Act requires EPA to review NAAQS every five years and make revisions or promulgate new standards as appropriate. 42 U.S.C. § 7409(d). The Act requires each State to adopt a plan to implement any

NAAQS, or any revision, and the plan must include such control measures as may be necessary or appropriate to meet the applicable requirements of the Act, including the requirement to attain the revised standard by the statutorily required attainment date, or sooner if practicable. 42 U.S.C. §§ 7410(a)(1), (2)(A).

Section 172(e) of the Act, referred to by some as the "anti-backsliding" provision (although that term does not appear in the statute), states that if EPA "relaxes" a NAAQS it shall promulgate requirements for all areas that have not attained the NAAQS as of the date of such "relaxation," providing for controls which are "not less stringent than the *controls applicable* to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e) (emphasis added). Where Section 172(e) applies, controls at least as stringent as applicable controls under the previous standard must be retained regardless of whether they are needed to attain the new standard.

2. In 1979, EPA promulgated a NAAQS for ozone of 0.12 parts per million (ppm), averaged over one hour (1-hour standard). 44 Fed. Reg. 8202 (Feb. 8, 1979). This 1979 standard was a relaxation of the previously applicable standard of 0.08 ppm, also averaged over one hour. *Id.* In 1997, EPA concluded that the 0.12 ppm 1-hour NAAQS was inadequate to protect public health, based on evidence linking adverse health effects to prolonged ozone exposure (6 to 8 hours). Accordingly, EPA promulgated a NAAQS of 0.08 ppm, averaged over eight hours (8-hour standard). 62 Fed. Reg. 38,856, 38,859 (July 18, 1997). As the court of appeals explained, the new 0.08 NAAQS "both changed the measuring scheme and was marginally more stringent, as EPA recognized that an eight-hour level of 0.09 ppm would have 'generally represent[ed] the continuation of the present level of protection.'" *S. Coast Air Quality Mgmt. Dist. v.*

EPA, 472 F.3d 882, 888 (D.C. Cir. 2006) (*South Coast I*) (quoting 62 Fed. Reg. at 38,858) (Pet. App. 7a), *reh'g denied*, 489 F.3d 1245 (D.C. Cir. 2007).[1] EPA issued the 8-hour standard as a revision of the 1-hour standard, rather than as a separate, additional standard, because it concluded that the 1-hour standard was not needed to protect public health given the more stringent 8-hour standard. 62 Fed. Reg. at 38,859, 38,861. Accordingly, EPA revoked the 1-hour NAAQS as it was "superseded" by the more stringent 8-hour NAAQS. 69 Fed. Reg. 23,951, 23,954 (Apr. 30, 2004).[2]

3. One of the issues EPA addressed in its rulemaking was whether provisions in the State implementation plans for the 1-hour NAAQS had to be retained, even if not needed for attainment of the new standard.

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[1] Regardless of the degree by which the new standard was more stringent than the old standard, Section 172(e) would not apply because there was no relaxation of the NAAQS. Nonetheless, the court of appeals' characterization of the increased stringency as "marginal[]" is surprising, because EPA estimated the annual increased cost of complying with the new standard at approximately $9.6 billion a year. EPA, *Regulatory Impact Analysis for the Revised Ozone and PM NAAQS and Proposed Regional Haze Rule*, at ES-12 (July 1997), *available at* http://www.epa.gov/ttn/oarpg/naaqsfin/ria.html (last visited Sept. 3, 2007).

[2] This Court reviewed certain aspects of EPA's revision of the 1-hour ozone standard, and its policy for implementing the more stringent 8-hour standard, in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

EPA found that "section 172(e) does not apply to the requirements for the 8-hour ozone standard" because that standard strengthened the previous 1-hour standard. 70 Fed. Reg. 39,413, 39,417/1, 39,418/2 (July 8, 2005) (Pet. App. 648a). The Agency also concluded that "the Act does not specifically address what requirements apply when we strengthen a NAAQS." *Id.* at 39,417/1 (Pet. App. 648a). Nevertheless, EPA concluded that Congressional silence on that issue supports the Agency's view of "the provisions in section 172(e) as an expression of Congressional intent that States may not remove control measures in areas which are not attaining a NAAQS when EPA revises that standard to make it more stringent." *Id.* (Pet. App. 648a).

Based on its perception of Congressional intent derived from a section of the statute that, by its terms, did not apply, EPA concluded that it could adopt an "anti-backsliding policy" for cases where it made a NAAQS more stringent. 70 Fed. Reg. 17,018, 17,021/3 (Apr. 4, 2005) (Pet. App. 556a-557a). In formulating that non-statutory policy, EPA exercised discretion it believed it had to define what prior State implementation plan provisions should and should not be retained. In this respect, EPA determined that, under its policy, the following measures need not be retained upon replacement of the 1-hour with the 8-hour standard unless their retention was needed for implementation of the new 8-hour standard: (1) Section 185 fees tied to the 1-hour NAAQS implementation schedule; (2) certain contingency measures designed for the less stringent 1-hour NAAQS; and (3) new source review (NSR) programs based on nonattainment areas' classifications under the less stringent 1-hour NAAQS. 69 Fed. Reg. at 23,956/1-2 (Pet. App. 356a-357a).

(a) Section 185 Fees. Section 185 of the Act imposes fees on major stationary sources in "severe" and "extreme"

ozone nonattainment areas that fail to attain the NAAQS by the applicable statutory attainment date. 42 U.S.C. § 7511d(a). These fees are assessed even on sources that have complied with their permits and all provisions of the State implementation plan that EPA approved as adequate to attain the applicable ozone standard by the applicable attainment date.[3] The fees are levied on the basis of emissions exceeding 80 percent of a "baseline" calculated with reference to the source's allowable or actual emissions.[4] *Id.* § 7511d(b).

EPA explained that Section 185 fees *for the 1-hour standard* were not among the applicable requirements that apply after that standard's revocation because they had not yet been imposed in any area under the 1-hour standard and could not have been triggered before November 15, 2005 (the earliest applicable attainment date for "severe" or "extreme" areas), by which date the more stringent 8-hour standard would be the applicable NAAQS. 70 Fed. Reg. 30,592, 30,594, 30,596 (May 26, 2005) (Pet. App. 590a, 600a-601a). EPA concluded that it made no sense to apply its new anti-backsliding policy for more stringent NAAQS to "all

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[3] *See* 42 U.S.C. § 7410(k)(3) (EPA must approve any State implementation plan or plan revision for it to become effective).

[4] Section 185 fees are assessed at $5,000 per ton for emissions over 80 percent of the lower of the allowable or actual level during the baseline year, adjusted for inflation as of 1990 (presently equaling about $8,000 per ton). 42 U.S.C. § 7511d(b). Petitioner National Petrochemical & Refiners Association estimates that this would amount to about $100 million annually in the Houston area alone, and hundreds of millions more nationwide.

requirements that could ever be triggered [if the previous] standard [had] remain[ed] permanently in place," because that would be "tantamount to saying that by this provision Congress intended to retain the standard itself." *Id.* at 30,596/3 (Pet. App. 601a).

EPA also concluded that retention of the fees applicable under the less stringent, superseded standard would be "counterproductive," because "[i]f fees were to be triggered" under that standard, "States would have to devote resources to the further development of plans focused on meeting the 1-hour standard based on a determination that an area had failed to achieve a non-existent NAAQS." 70 Fed. Reg. at 30,594/3-30,595/1 (Pet. App. 594a). EPA determined that this would be an "unwise use of resources" that would "detract from efforts to plan for and implement the new health-based standard," which EPA found to be requisite to protect human health. *Id.* at 30,595/1 (Pet. App. 594a).

Nevertheless, EPA explained that Section 185 fee provisions remain fully effective for the currently applicable 8-hour standard. As EPA observed, "[t]he section 185 fee provisions remain in place for purposes of the 8-hour standard, and thus sources will have an incentive to reduce emissions to ensure areas meet the 8-hour standard," which it had determined to be more stringent. 70 Fed. Reg. at 30,595/2-3 (Pet. App. 596a-597a).

(b) Contingency measures. Section 172(c)(9) of the Act requires, for the currently applicable NAAQS, each State implementation plan to include "specific measures to be undertaken if the area fails to make reasonable further progress, or to attain [that standard] by the attainment date." 42 U.S.C. § 7502(c)(9). EPA concluded that, where contingency measures have not already been triggered, it would allow the States "to remove those measures (or to

modify the trigger for such measures to reflect the 8-hour standard)." 70 Fed. Reg. at 30,599 (Pet. App. 611a). EPA explained that "[o]nce plans are adopted and approved for purposes of the 8-hour standard, including 8-hour contingency measures, those plans by definition will be what is necessary to protect public health and the environment ..." -- and *not* the plans developed for the less stringent 1-hour NAAQS. *Id.* (Pet. App. 613a). In addition, EPA concluded, "this approach is consistent with our goal of shifting our focus to the 8-hour standard and not continuing efforts to monitor compliance with the pre-existing 1-hour standard." *Id.* at 30,599-600 (Pet. App. 613a).

(c) New source review. The Clean Air Act requires a "new source review," or NSR, program for major stationary sources in areas that are not attaining an applicable NAAQS, including the applicable ozone NAAQS. Some aspects of the program for ozone vary according to the area's nonattainment classification under the applicable NAAQS.[5]

EPA concluded that the contours of an area's NSR program for ozone should be dictated by the area's nonattainment classification under the more stringent, currently applicable standard, rather than under the less stringent standard that no longer applies. As EPA explained, the NSR program establishes a procedure designed to ensure that economic growth does not interfere with the State's

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[5] *See, e.g.*, 42 U.S.C. §§ 7511a(b)(5), (d)(2) (emission offset ratios of 1.15 to 1 for "moderate" nonattainment areas and 1.3 to 1 for "severe" areas); *id.* § 7511a(b) (in moderate nonattainment areas, major sources are defined by annual emissions of 100 tons (*see* 42 U.S.C. § 7602(j)); *id.* § 7511a(d) (in severe nonattainment areas, major sources are defined by annual emissions of 25 tons).

plans for reaching attainment of the applicable air quality standards. 70 Fed. Reg. at 17,025/1 (Pet. App. 569a-570a). In addition, as EPA explained, the NSR program was designed to balance air quality and economic growth under that standard. Accordingly, "it is appropriate to look at areas' present day air quality in determining what major NSR program requirements are necessary to assure future air quality improvements, because an area's ability to accommodate economic growth is related to its *current* air quality conditions." *Id.* (Pet. App. 570a) (emphasis added). EPA also concluded that the Congressional balance between economic growth and air quality protection under the NSR program should be measured according to an area's status under the new standard rather than the revoked 1-hour standard, because "[a]n area's classification under the 8-hour standard is a more accurate reflection of current day air quality than the classification we assigned under a different standard as far back as the early 1990's." *Id.* (Pet. App. 570a).

In addition, EPA found that an NSR program based on the 8-hour classifications will provide a sufficient margin of safety to address major source growth in nonattainment areas, "because it will ensure that any growth in major stationary source emissions will be offset in at least a one to one ratio." 70 Fed. Reg. at 39,421/2 (Pet. App. 666a).[6]

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[6] In marginal nonattainment areas (the lowest category under the provisions of Subpart 2 of Part D of Title I of the Act, 42 U.S.C. §§ 7511-7511f, which contain certain specific provisions for ozone nonattainment area), the required emissions offset ratio for new sources is 1.1 to 1. 42 U.S.C. § 7511a(a)(4). EPA placed some 8-hour ozone nonattainment areas under Subpart 1 of Part D, 42 U.S.C. §§ 7501-7509a; these areas are subject to the generally

4. The court of appeals held that EPA had authority to adopt an anti-backsliding policy for cases where it tightened a NAAQS, but that the Agency violated Section 172(e) (which as discussed above applies to relaxation of NAAQS) by deciding not to require State implementation plans to impose Section 185 fees and contingency measures that were never triggered under the revoked, less stringent NAAQS and NSR programs designed for the revoked standard.

On the issue of authority to fashion an anti-backsliding policy where a standard is made more stringent, the court of appeals concluded that "EPA's determination that section 172(e) supports the introduction of anti-backsliding measures is reasonable." *S. Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248 (D.C. Cir. 2007) (*South Coast II*) (Pet. App. 47a). The court stated that "EPA's interpretation does not violate the plain text of section 172(e), which does not specify how to proceed when the NAAQS is strengthened but the related reclassification would result in weakened controls." *Id.* (Pet. App. 47a). The court also suggested that a more limited interpretation would have an "absurd result" because, the court believed, it would allow EPA to use periodic standard revisions to perpetually extend deadlines for controls required by the Act. *Id.* (Pet. App. 47a).

The court held, however, that EPA lacked discretion to exclude from its anti-backsliding policy Section 185 fees, contingency measures, and NSR programs designed for the less stringent, superseded NAAQS. Despite the court's decision that "Section 172(e) applies only when EPA 'relaxes' a primary NAAQS," *South Coast I*, 472 F.3d at 900

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applicable one-to-one offset ratio imposed by Section 173(c), 42 U.S.C. § 7503(c).

(Pet. App. 30a), and thus that it does not, by its terms, apply here, the court went on to state that the plain language of Section 172(e) compelled the conclusion, as a *Chevron* Step One matter, that each of these provisions was a "control" "applicable" under a revoked and no-longer-applicable NAAQS -- *i.e.,* the "outdated" 1-hour NAAQS; *id.* at 900-05 (Pet. App. 30a-40a) -- and must be retained in State implementation plans.

With regard to Section 185 fees, the court rejected EPA's conclusion that fees did not become "applicable" within the meaning of Section 172(e) until they accrued. Instead, the court concluded, the fees became "applicable" as soon as Section 185 was enacted into law, because the future prospect of fees was designed as an "incentive[] to avoid the penalties." *Id.* at 903 (Pet. App. 36a). Any other interpretation, the court concluded, would create a "glaring loophole" and foster avoidance of what the lower court deemed required controls. *South Coast II*, 489 F.3d at 1248 (Pet. App. 47a-48a).

Similarly, the court of appeals concluded that "if an area were to miss the preexisting [1-hour] threshold of 0.12 ppm," failure to require contingency measures would be "precisely the type of backsliding contemplated by the Act." *South Coast I*, 472 F.3d at 904 (Pet. App. 38a). Accordingly, "one-hour contingency plans must remain in place even after transitioning away from the one-hour standard" -- *i.e.,* even after the 1-hour standard had been revoked and no longer applied. *Id.* (Pet. App. 38a).

The court of appeals also concluded that the NSR permitting process is a "control" within the meaning of Section 172(e) under a *Chevron* Step One analysis, even though EPA had interpreted Section 172(e) as not governing implementation of a more stringent NAAQS and the court

did not disagree that the standard had been made more stringent. *Id.* at 888, 900-02 (Pet. App. 7a, 31a-35a). The court stated that "[s]omething designed to constrain ozone levels is a 'control,' and this would include NSR." *Id.* at 902 (Pet. App. 35a).

REASONS FOR GRANTING THE PETITION

INTRODUCTION

Certiorari is needed because the lower court's decision would rewrite key provisions of the Clean Air Act, requiring EPA to apply an inapplicable statutory provision to air quality standard revisions, would disrupt EPA's and States' ability to select the appropriate control measures to attain revised air quality standards, and conflicts with a decision of the Sixth Circuit. The Court should grant this petition because the court of appeals' decision will have profound and negative implications for implementation of the Clean Air Act's air quality standard program -- the "heart" of the Act. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976).

EPA is currently reviewing several NAAQS, including the current ozone NAAQS, as the Act requires it to do periodically. 42 U.S.C. § 7409(d).[7] As a result of these

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[7] *See* 72 Fed. Reg. 37,818 (July 11, 2007) (proposing revisions to ozone standards based on current NAAQS review); 72 Fed. Reg. 6238 (Feb. 9, 2007) (announcing workshop for assessment of nitrogen oxides and sulfur oxides as part of new NAAQS review); 69 Fed. Reg. 64,926 (Nov. 9, 2004) (announcing current review of lead NAAQS); *see also Communities for a Better Env't v. EPA*, No. 07-cv-3678 (N.D. Cal. filed July 17, 2007) (seeking review of carbon monoxide NAAQS).

reviews, EPA is likely to make some standards more stringent. Because the D.C. Circuit is the only lower court with jurisdiction to review nationally applicable EPA action under the Act,[8] the decision below, if allowed to stand, will govern implementation of every subsequent NAAQS revision. It will, in particular, control which provisions of State implementation plans designed for the previous standard must be retained even if determined by EPA and the States to be unnecessary for -- or, indeed, counterproductive to -- attainment of the new, applicable standard. As this case illustrates, how these matters are resolved will have important and lasting consequences for administration of the Clean Air Act.

Under the decision below, even when a standard is made more stringent, if the attainment deadlines for the new standard are later than the deadlines for the old standard (something that can be expected under a tightened standard), every requirement of State implementation plans for achieving the revoked standard that was in some manner "designed to constrain" levels of the regulated pollutant, *South Coast I*, 472 F.3d at 903 (Pet. App. 37a) -- and that is a fair description of any requirement in State implementation plans[9] -- must remain in place indefinitely and, apparently, permanently. The result is that, as a practical matter, States will be unable to shift resources and revise implementation plans to address the impacts of new air quality standards. Moreover, the court's decision effectively nullifies Agency

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[8] 42 U.S.C. §§ 7607(b)(1), (b)(2), (e).

[9] Under Section 110(a), State implementation plans do not contain elements that are unnecessary to achieve attainment and maintenance of NAAQS. 42 U.S.C. § 7410(a).

revocation of concededly outdated standards and substitution of more protective standards consistent with current health information. This is contrary to the Act's express grant of authority to revise standards as determined by EPA to be "requisite" to meet the Act's mandates. *Whitman*, 531 U.S. at 472-76.

Thus, under the court of appeals' decision, the previous standards effectively remain in place and related State implementation plan requirements are frozen, creating dual enforcement and dual permit systems when requirements for the new standards are established. And resources are diverted from achievement of the new standards that EPA has determined are required to protect public health. As time goes on and standards are revised again and again, the burdens of multiple sets of overlapping and potentially inconsistent requirements in State plans will only increase.

This astonishing result is nowhere required by the limited language of Section 172(e), by any other provision of the Clean Air Act, or by the Congressional policy to prevent deterioration of air quality. The decision below also conflicts with a decision of the Sixth Circuit. It has, moreover, profound implications for the administration of the Clean Air Act, and for the primacy of the States in implementing NAAQS.[10] And it rests on a strikingly expansive view of

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[10] *See* 42 U.S.C. § 7407(a) (giving States "primary responsibility for assuring air quality"). *See also Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 86-87 (1975) ("...Congress, consistent with its declaration that '[e]ach State shall have the primary responsibility for assuring air quality' within its boundaries, [Section 107(a)], left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the

judicial review power that cannot coexist with fundamental principles of law or with this Court's precedents, including *Chevron*.[11] Given the serious ramifications of the court of appeals' decision, this Court's review is warranted.

I. CERTIORARI IS WARRANTED TO COMPEL ADHERENCE TO THE PRINCIPLE THAT COURTS ARE WITHOUT AUTHORITY TO EXPAND STATUTORY DIRECTIVES MERELY BECAUSE THE COURT DEEMS SUCH EXPANSION TO BE CONSISTENT WITH ITS PERCEPTION OF THE STATUTORY PURPOSE.

A. Section 172(e) Does Not Apply When a NAAQS is Tightened.

The limited scope of Section 172(e) is plain on its face. It applies when *and only when* EPA "relaxes" a standard. The 1-hour standard was set at 0.12 ppm, while the new 8-hour standard was set at 0.08 ppm. The court of appeals acknowledged that the new standard was more stringent than the previous one. *South Coast I*, 472 F.3d at 888 (quoting 62 Fed. Reg. at 38,858) (Pet. App. 7a).[12]

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continuing authority to revise choices about the mix of emission limitations.").

[11] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[12] As noted above, while the lower court's characterization of the new standard's increased stringency as "marginal" is legally irrelevant, it is also factually without basis in view of the very high costs associated with that increased stringency. *See* EPA, *supra* note 1, at ES-12.

While concluding that the language of Section 172(e) does not cover this case, the D.C. Circuit nonetheless held that Section 172(e)'s constraints (as construed by the court) must be applied to effectuate the court's conception of the overall Congressional purpose. The court applied Section 172(e) on the ground 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.'" *South Coast I*, 472 F.3d at 900 (quoting 69 Fed. Reg. at 23,972) (Pet. App. 30a). Thus, the court ruled that "EPA is required by statute to keep in place measures intended to constrain ozone levels -- even the ones that apply to outdated [and less stringent] standards -- in order to prevent backsliding." *Id.* at 905 (Pet. App. 40a).

The court of appeals' decision to extend Section 172(e) beyond its plain terms based on its own interpretation of what Congress intended is wholly inconsistent with this Court's precedent. This Court has specifically disapproved of a court's reliance "on its understanding of the broad purposes of the [statute]" to apply it beyond its actual language. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). As the Court has explained, "no legislation pursues its purposes at all costs." *Id.* at 525-26. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Id.* at 526 (emphasis omitted). *See also Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."). The role

of a court "'is not to 'correct' the text [of a statute] so that it better serves the statute's purposes.'" *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996)). The court of appeals failed to heed that fundamental principle here and instead rewrote the statute to apply Section 172(e) as though it read "[i]f the Administrator *revises*" a NAAQS, rather than how it actually reads -- *i.e.*, "[i]f the Administrator *relaxes*" a NAAQS.

To support its decision to rewrite the statutory text and enlarge its scope, the court below argued that failure to apply Section 172(e)'s restrictions to EPA's tightening of a NAAQS would lead to an "absurd" result, because it would allow EPA, through periodic sham NAAQS revisions, to authorize States to avoid deadlines and associated requirements that were designed for attainment of the old, less stringent NAAQS. However, courts have ample authority to deal with sham proceedings. *See, e.g., BE & K Constr. Co. v. NLRB,* 536 U.S. 516 (2000) (interpreting statutory protection from liability for petitioning as not applicable to sham petitions). More important, there is not the slightest suggestion in this case that EPA's hotly contested revision of the ozone NAAQS was a sham, designed to enable the States or industry to avoid deadlines. Indeed, the ozone standard revision resulted from a lengthy and controversial public rulemaking proceeding, and EPA's decision was vigorously contested in the D.C. Circuit and this Court.[13] Establishment of a concededly stricter air quality standard that EPA determined better protects the public health is hardly a sham.

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[13] The proceedings are described in *Whitman*, 531 U.S. at 462-64.

Moreover, the fact that a more stringent NAAQS will inevitably take more time to attain does not make the result "absurd," as promulgation of such a NAAQS naturally entails imposition of emission reductions that, on balance, are more severe than those designed for a less stringent NAAQS. More fundamentally, nothing in Section 172(e) directs EPA (and States) to retain deadlines and associated requirements that apply to an outmoded, less stringent NAAQS, as an intermediate step to attaining a more stringent NAAQS. Indeed, to the contrary, Congress in the Act left the design of control programs to attain more stringent NAAQS to the discretion of the States, *see supra* note 10, subject only to specific constraints that apply on the face of the statute.

Nor can an interpretation of Section 172(e) that adheres to the statutory language be called "absurd." Under all circumstances, including where EPA makes NAAQS more stringent, Section 110(*l*) of the Act prohibits EPA from approving any relaxation of State implementation plan provisions where that change would interfere with attainment or reasonable further progress toward attainment of the new standard -- and that prohibition applies independently of Section 172(e). 42 U.S.C. § 7410(*l*).

In short, Congress addressed the "backsliding" issues that concerned the D.C. Circuit in a comprehensive and logical fashion in other provisions of the Act. Stretching Section 172(e) to apply in situations where it has no role under its plain language is an act of legislation, not judicial review.

B. No Other Statutory Basis Exists for the Court of Appeals' Decision To Compel Retention of Section 185 Fees, Contingency Measures, and NSR Program Designed for a Revoked Standard Where That Standard Has Been Replaced with a More Stringent Standard.

The Clean Air Act contains, in addition to Section 172(e), two additional provisions that specifically define EPA's functions with respect to the prevention of backsliding -- Sections 110(*l*) and 175A. Like Section 172(e), neither of these provisions supports the broad anti-backsliding policy mandated by the court of appeals.

As noted above, Section 110(*l*) prohibits EPA from approving a revision to a State implementation plan that would interfere with attainment or reasonable further progress toward attainment of a NAAQS. 42 U.S.C. § 7410(*l*). But the decision below would prohibit States from revising implementation plans to eliminate requirements *regardless* of whether the revision would interfere with attainment or reasonable further progress.

Section 175A provides that when EPA redesignates a nonattainment area to attainment status, the State may not revoke certain "measures with respect to ... control," but may shift them to contingency measures that would be implemented to "correct any violation" of the NAAQS that occurs after redesignation. 42 U.S.C. § 7505a(d). But the court of appeals' decision would require retention of measures that are *not* needed to "correct any violation" of the new, more stringent NAAQS. (Of course, it is the role of the *new* State implementation plans to evaluate and adopt appropriate measures for the new, more stringent NAAQS. 42 U.S.C. §§ 7410(a)(1), (a)(2)(A), 7502(b). *See also id.* § 7410(k)(3).)

In short, Sections 172(e), 110(*l*) and 175A all address "backsliding" in various forms, and all confirm that Congress addressed the matter in a way that directly contradicts the decision of the D.C. Circuit. Congress did *not* intend to authorize restrictions on State authority to develop implementation plans to attain and maintain a new revised standard, beyond those restrictions it specifically authorized in the Clean Air Act. *Cf. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454, 459-62 (2002) (declining to read terms into statute to impose liability not imposed by Congress and rejecting argument that perceived "absurd results" justify ignoring statutory text); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (declining to apply Fed. R. Civ. P. 9 to situation not expressly provided for by Congress).

Nor are extra-statutory "backsliding" restrictions required by this Court's admonition against any interpretation that would render Subpart 2 of Part D of Title I of the Act (governing implementation of the ozone standard) "abruptly obsolete" when that standard is revised. 68 Fed. Reg. 32,802, 32,819/2 (June 2, 2003) (Pet. App. 128a) (quoting *Whitman,* 531 U.S. at 485). Subpart 2 is not rendered "obsolete" because deadlines for meeting Subpart 2 requirements will no longer be tied to an outdated standard that EPA has revoked pursuant to its authority under the Act. Congress designed the Subpart 2 deadlines, and their attendant penalties, to meet the *currently applicable* health-based standard -- not to meet an inapplicable standard that EPA revoked based on its expert determination that it is no longer requisite to protect health.

C. Even If EPA Had Discretionary Authority To Create an Anti-Backsliding Policy Where It Makes NAAQS More Stringent, the Lower Court's Decision To Force EPA To Apply That Court's Conception of Section 172(e)'s Terms Contradicts *Chevron* and Calls for the Exercise of This Court's Supervisory Power.

The lower court held that its conception of the terms of Section 172(e) strictly and literally applies in determining whether EPA had adopted a permissible anti-backsliding policy. Assuming EPA had discretionary authority to fashion a new anti-backsliding policy (a question the Court need not reach), the issue presented below was *not* whether EPA correctly interpreted Section 172(e) but whether the Agency's interpretation of any general authority it might have was "reasonable in light of the legislature's revealed design." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (citation omitted). In making that determination, the court of appeals was required to "give [the Agency's] judgment 'controlling weight.'" *Id.* (quoting *Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844)).

This is decidedly not what the court of appeals did. To the contrary, the court applied a mixture of *its* construction of the language of the concededly *inapplicable* Section 172(e) and its notions of broad Congressional purpose (untethered to any controlling statutory text) to constrain EPA's reasonable exercise of discretion. That approach completely subverted the *Chevron* principles the court was obliged to follow and is such an extraordinary departure from the normal course of judicial review as to call for exercise of this Court's supervisory power.

The court of appeals' decision to mandate application of its reading of the terms of Section 172(e) (despite the fact that Section 172(e) is facially inapplicable) was driven by the court's view that, "*[c]onsidered as a whole*, the Act reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter." *South Coast I*, 472 F.3d at 900 (emphasis added) (Pet. App. 30a). Grounded in no directly applicable, governing statutory text, the court's pronouncement amounted to an *ipse dixit*. Furthermore, the decision below ignores the reality that the fees and contingency plans that EPA excluded from its anti-backsliding policy had *never* taken effect. EPA reasonably concluded that the schedule and provisions associated with those fees and plans should be dictated by the new, more stringent standard once that standard had replaced the outdated, revoked standard. Moreover, allowing provisions of the NSR program to reflect conditions under the new standard would not lead to deterioration in air quality because, as EPA observed, all NSR programs in nonattainment areas would require emission offsets of at least one-to-one. 70 Fed. Reg. at 39,421/2 (Pet. App. 666a).[14] In addition, EPA's policy leaves in effect emission reductions

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[14] If the court of appeals had properly deferred to EPA's analysis, it would have recognized that EPA found that State implementation plans do not rely on any emission reductions that might, in theory, result from the NSR programs to achieve the NAAQS. EPA found that plans are based on models that do not make assumptions as to the scope of the area's NSR program and that EPA's finding that a plan is adequate to attain a NAAQS does not rely on any such assumptions. 70 Fed. Reg. at 17,024-25 (Pet. App. 568a-569a). Thus, the record provided no basis for the court to conclude that EPA's decision regarding NSR would lead to air quality deterioration.

already in place under the previous standard. Accordingly, contrary to the court of appeals' conclusion, EPA's rules effected no "retreat" from "air quality ... improve[ment]." *South Coast I*, 472 F.3d at 900 (Pet. App. 30a).

Further, the court's misapplication of Section 172(e)'s restrictions improperly prevents EPA (and, by extension, States) from making reasonable determinations that certain measures -- measures that had never taken effect at the time a more stringent standard superseded an outdated, less stringent standard -- should be refocused to address the statutory objective of attaining the new, applicable standard determined under the Act to be "requisite" to protect the public health. *Whitman*, 531 U.S. at 473, 475-76. It is not at all absurd -- in fact, it is eminently reasonable -- for EPA to conclude that, when it replaces a standard with a stricter new standard to achieve the statutory requirement of public health protection, it should preserve emission reductions already achieved but realign the schedule and terms of future reductions to meet the requirement to attain the new standard rather than the revoked, no-longer-requisite standard.

Nor is application of the lower court's reading of Section 172(e) to EPA's policy justified by the fact that EPA's interpretation of the terms "control" and "applicable" deviates from the court of appeals' interpretation of those terms as used in Section 172(e). The court applied what it conceived to be the literal meaning of the words "control" and "applicable," as used in an inapplicable statute, to constrain EPA's reasonable exercise of discretion. That was a total perversion of *Chevron* Step One. If Section 172(e) does not apply, EPA cannot be bound by the lower court's conception of that provision's terms.[15]

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[15] In its action on petitions for reconsideration, EPA carefully explained that its interpretation of "control" did

In addition, the Act requires air quality standards to be attained "as expeditiously as practicable," if the "practicable" date is earlier than the applicable statutory attainment deadline. 42 U.S.C. §§ 7502(a)(2)(A), 7511(a)(1). For example, if EPA were to determine that implementation of the substantial reduction in emissions that Section 185 fees are intended to encourage were practicable earlier than the statutory attainment date and would meaningfully accelerate attainment, then EPA could require States to achieve the reductions by the earlier date, and that could be done without reference to Section 172(e). This illustrates the point that Congress established provisions, wholly apart from Section 172(e), to ensure that, where the revised NAAQS is more stringent than the NAAQS it replaced, the requisite healthful air quality would be achieved "as expeditiously as practicable," consistent with the more stringent standard.

For these reasons, the court of appeals' decision to mandate an expansion of anti-backsliding policy not only was contrary to basic *Chevron* principles and beyond statutory limitations, but also was simply unnecessary for

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"not attempt[] to assign a comprehensive definition to the term 'controls' as used in section 172(e) of the Act." 70 Fed. Reg. at 39,418/2 (Pet. App. 653a). Rather, EPA explained, "we interpret the term solely as it relates to our anti-backsliding policy." *Id.* (Pet. App. 653a). Similarly, in interpreting the term "applicable," EPA stated that it considered not only Section 172(e), but also "other statutory provisions and the Supreme Court decision in *Whitman*." 70 Fed. Reg. at 30,596/2 (Pet. App. 600a). Thus, the court of appeals, in determining to apply its reading of Section 172(e), ran roughshod over the action EPA actually took in its rulemaking -- a decision not to apply Section 172(e) by its literal terms.

achieving statutory air quality objectives. Given the D.C. Circuit's central role in review of Agency actions under the Clean Air Act (and a host of other federal regulatory statutes), certiorari is warranted to restrain that court from exceeding the proper bounds of judicial review in this and other cases.

II. CERTIORARI IS NECESSARY TO REQUIRE THE LOWER COURT TO RETURN TO *CHEVRON*'S STANDARD FOR REVIEW OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTORY LANGUAGE AND TO RESOLVE AN INTER-CIRCUIT CONFLICT ON AN ISSUE IMPORTANT TO THE CLEAN AIR ACT'S IMPLEMENTATION.

Even if EPA were bound to apply the language of Section 172(e) in the circumstances of this case, the terms "applicable" and "control," as used in that provision, are indisputably ambiguous. Given that ambiguity, the court of appeals had an obligation to accord *Chevron* Step Two deference to EPA's reasonable construction of those terms. EPA's interpretation of those terms is both reasonable and in accord with the purposes of the statute.

Section 185 provides that fees must be charged if an area fails to attain the ozone standard by "the *applicable* attainment date," 42 U.S.C. § 7511d(a) (emphasis added), *i.e.*, the attainment date that applies to the NAAQS that is currently in effect. EPA's conclusion that the fees are "applicable" to an area only if the area is in violation of the then-applicable standard on or after that attainment date is consistent with the ordinary usage of language. For example, one might reasonably say that the penalty for filing a tax return late is "applicable" to taxpayers who file late, rather than taxpayers generally. In this respect, even if one could

conclude that the statutory text does not compel EPA's construction of "applicable," it is plainly the case that "applicable" is not free from ambiguity and that the Agency's construction is not precluded.

The same reasoning applies to contingency measures that have not been triggered as of the date the new standard supersedes the old standard. As a matter of ordinary English usage, one would not say that a contingency measure is "applicable" before the contingency that triggers the measure has occurred.

The conclusion that the term "control" does not dictate the D.C. Circuit's interpretation, as a *Chevron* Step One matter, is likewise consistent with the natural understanding of that term. "Control" may reasonably be read to mean the actual, binding restraints imposed on emissions[16] and to exclude, for example, programs, like the NSR permitting program, that establish procedures for imposing emission restraints but are not themselves such restraints.

Indeed, the D.C. Circuit itself has recently described the NSR program in a manner consistent with a distinction between the procedures for imposing controls and the controls themselves. *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006) ("NSR, a permitting process that imposes specific pollution control requirements"), *cert. denied*, 127 S. Ct. 2127 (2007). That reading is consistent with Section 110(a)(2) of the Act, which *separately* lists, as required elements of State implementation plans, "enforceable emission limitations and other control measures," 42 U.S.C.

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[16] One definition of "control" is "check or restraint." *The Random House Dictionary of the English Language* (Unabridged ed., 1981).

§ 7410(a)(2)(A), and "a program to provide for the enforcement of [such] measures ..., including a permit program," *id.* § 7410(a)(2)(C). EPA specifically cited that statutory distinction as one basis for its conclusion that the NSR program is not a "control" subject to anti-backsliding restraints. 69 Fed. Reg. at 23,986/2 (Pet. App. 478a-479a).[17]

The D.C. Circuit's interpretation of "control" to include the NSR program conflicts with *Greenbaum v. EPA*, 370 F.3d 527 (6th Cir. 2004). *Greenbaum*, deferring to EPA's interpretation, held that NSR is not a "measure[] with respect to ... control" under Section 175A of the Act, 42 U.S.C. § 7505a(d). 370 F.3d at 535-38. (As noted above, Section 175A prohibits backsliding where an area has attained the NAAQS.)

The court below sought to distinguish *Greenbaum* on the basis that Section 175A applies to "measures" with respect to control rather than "controls." *South Coast I*, 472 F.3d at 902 (Pet. App. 34a). But if NSR permit programs are not "measures with respect to ... control," it is difficult to see how they can be considered "controls." Indeed, any meaningful distinction between the terms vanishes entirely when examined in the light of the D.C. Circuit's own characterization, in the decision below, of Section 175A

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[17] The court of appeals' references to instances in which EPA, in other contexts, has referred to the NSR program as a "control requirement" or an "emission control program," *South Coast I*, 472 F.3d at 901-02 (Pet. App. 33a-34a), are of no import because they occurred in other, distinguishable contexts. Moreover, EPA's prior usage is perfectly consistent with the distinction found in Section 110(a)(2) between programs or requirements designed for imposing controls and the controls themselves.

"measures" as "controls." *Id.* at 900 (Pet. App. 31a) (describing Section 175A's passage referring to "measures with respect to ... control" as allowing "an attaining area ... to shift *controls* from active enforcement to the contingency plan ...") (emphasis added). If anything, Section 175A's phrase "measures with respect to ... control" is broader in scope than Section 172(e)'s coverage of "controls." In fact, the only relevant difference between the holding in *Greenbaum* and this case is that the Sixth Circuit there, unlike the D.C. Circuit here, was willing to defer to EPA's reasonable interpretation of substantively identical language.

Perhaps most remarkably, given the obvious ambiguity inherent in the statutorily undefined terms "applicable" and "control," the court of appeals held that *the Agency* had erred as a matter of law by "[f]inding ambiguity in the word 'controls.'" *Id.* (Pet. App. 31a). The court declared that word, as used in Section 172(e), to be entirely free of ambiguity, notwithstanding the absence of any statutory definition to which it could point. *Id.* at 902 (Pet. App. 35a) ("there is *no ambiguity* as to the meaning of 'control' in Section 172(e)") (emphasis added). The D.C. Circuit thus plainly overstepped the bounds of a reviewing court by using *Chevron* Step One to impose its own policy preference. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007). In this case, judicial deference to EPA's construction is particularly appropriate, because "a full understanding of the force of the statutory policy in [this] situation ... depend[s] upon more than ordinary knowledge respecting the matter subjected to agency regulations." *Chevron*, 467 U.S. at 844 (citations omitted). As described above, EPA's interpretation is perfectly consistent with Congressional intent, because it ensures that nothing is done to worsen existing air quality, while the schedule and provisions for future emission controls are adjusted to meet

the revised, more stringent standard as expeditiously as practicable.

Moreover, the court of appeals' position -- that everything designed to constrain pollution is a "control" that is "applicable" as soon as it is enacted and may begin to exert some prospective influence -- is, as EPA pointed out, tantamount to saying that every provision associated with a given standard must survive that standard's repeal. That conclusion is at war with the Act's directive to EPA to revise standards as appropriate. 42 U.S.C. § 7409(d). As EPA aptly observed, "[i]f Congress meant to require States to retain all requirements, Congress would have stated so expressly." 70 Fed. Reg. at 17,023/3 (Pet. App. 564a). "Instead, by using only the term 'controls,' Congress implied an intent that some requirements under the old standard would no longer apply under the new standard." *Id.* (Pet. App. 564a-565a). EPA's interpretation was reasonable and well within its *Chevron* discretion.

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The decision below reflects a new way of reviewing federal agencies' interpretations of statutes, an approach utterly foreign to this Court's jurisprudence. The court of appeals used its review power to impose a policy result with no basis in the Act. In a subversion of *Chevron* principles, the court conjured an amalgam of policy preference and putative Congressional purpose in order to apply selected words in Section 172(e) to govern a situation where that provision does not, by its terms, apply. Then, having ignored the provision's terms in order to find it applicable, the court turned *Chevron* Step One on its head by insisting on application of what it erroneously concluded is the literal meaning of statutory terms, not only ignoring but denying the ambiguous nature of those terms and disregarding EPA's

reasonable policy choices in interpreting them. This decision has no basis in law and will have important, adverse consequences for administration of the Clean Air Act.

Nearly three decades ago, this Court admonished the D.C. Circuit that federal agencies' decisions should be set aside "only for substantial ... reasons *as mandated by statute*, ... not simply because the [reviewing] court is unhappy with the result reached." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (emphasis added) (citation omitted). And it has been almost a quarter-century since the Court again corrected the D.C. Circuit -- in a case arising, like this one, under the Clean Air Act -- by making unmistakably clear that the judiciary's role is not to set policy. *Chevron,* 467 U.S. at 842-45, 864-66.

A return to these principles is in order. Here, the court of appeals has compounded error by first applying a plainly non-controlling provision of the statute and then supplanting the agency's reasonable and permissible construction of undefined words in that provision with a judicially fashioned definition. In striking down EPA's rules in this matter, the D.C. Circuit has so far deviated from the standards for judicial review laid down in *Chevron* that it calls for the exercise of this Court's jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

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