No. 15-684

In the Supreme Court of the United States

OHIO,

Petitioner,

v.

SIERRA CLUB, *et al*.,

Respondents.

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

BRIEF IN OPPOSITION

SANJAY NARAYAN
Counsel of Record
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
85 Second St., 2nd Floor
San Francisco, California 94105
(415) 977-5769
sanjay.narayan@sierraclub.org

ROBERT UKEILEY
LAW OFFICE OF ROBERT UKEILEY
255 Mountain Meadows Rd.
Boulder, Colorado 80302
(303) 442-4033
rukeiley@igc.org

Counsel for Respondent Sierra Club

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

If a State contains an area designated as not attaining one of the Clean Air Act's national ambient air quality standards, the Act requires the State to adopt an implementation plan which, *inter alia,* "shall provide for the implementation of all reasonably available control measures," including "reasonably available control technology," in the area. 42 U.S.C. 7502(c)(1). Are those "reasonably available control measures" and "reasonably available control technology" plan provisions within the scope of the "applicable implementation plan for the area," which must be "fully approved" by the U.S. Environmental Protection Agency before it re-designates the area from nonattainment to attainment of the relevant air quality standard, under 42 U.S.C. 7407(d)(3)(E)(ii)?

RULE 29.6 STATEMENT

The respondent has no parent corporation, and no publicly held company has any ownership interest in the respondent.

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INTRODUCTION

The petition for certiorari is premised upon two holdings that the court of appeals did not make. The Sixth Circuit did not hold that "a State seeking attainment status" must "implement[] *all* nonattainment-plan mandates," before the federal Environmental Protection Agency ("EPA," or the "Agency') may re-designate an area from "nonattainment" to "attainment" of a national ambient air quality standard under the Clean Air Act, 42 U.S.C. 7407(d)(3)(E)(ii) (the "Act"). Petition for Writ of Certiorari ("Petition") i (emphasis added). The court held that *one specific* mandate must be met prior to re-designation: the adoption of plan measures satisfying 42 U.S.C. 7502(c)(1)'s demand for "reasonably available control measures" and "reasonably available control technology." Petitioners' Appendix ("Pet. App.") 28a-29a (recognizing that statute may "limit[] the number" of nonattainment requirements that must be met (citation omitted, alteration in original)).

And the court of appeals did not hold that in order to satisfy that one specific mandate, a State must adopt "measures unnecessary to meet the relevant air-quality standards," Petition i. Because EPA did not argue that it had approved *any* measures to comply with section 7502(c)(1), the Sixth Circuit did not reach the question of what *sort* of plan provisions might suffice as "reasonably available" measures or technology. Pet. App. 28a-29a n.5. In fact, EPA has already issued an administrative decision confirming that the court of appeals' decision does not require

States to adopt measures beyond those necessary to attain the standards, under its governing regulations. 80 Fed. Reg. 56,418, 56,420 (Sept. 18, 2015) (responding to decision by supplementing re-designation of Tennessee nonattainment area with formal finding that no further measures need be added to state implementation plan beyond those that ensured timely attainment); 80 Fed. Reg. 68,253 (Nov. 4, 2015) (finalizing re-designation).

The court of appeals held only that EPA cannot categorically ignore section 7502(c)(1)'s mandate for plan provisions implementing "reasonably available control measures" and "technology." Pet. App. 28a-29a. That holding requires an administrative step: the States must demonstrate that their plans contain "reasonably available" measures and technology (per EPA, just those necessary to attainment), and EPA must formally issue its approval. *See* 80 Fed. Reg. at 56,420. The Sixth Circuit correctly refused to make that demonstration discretionary. The mandate contained in 42 U.S.C. 7502(c)(1) is stated in unambiguously non-discretionary terms, underscored by a firm statutory deadline, *see, e.g.,* 42 U.S.C. 7502(b). Congress' use of the word 'applicable,' in the provisions setting the prerequisites for an area's re-designation, 42 U.S.C. 7407(d)(3)(E)(ii), provides no plausible grounds to elide that compulsory text. The petitioner's effort to read the Clean Air Act as specifying only an end-result—attainment of air quality standards—is refuted by the statute. The Act prescribes both ends *and* means.

The Sixth Circuit's decision does not squarely conflict with any decision from any other Circuit. No court has held that the Act grants EPA the discretion to wholly ignore 42 U.S.C. 7502(c)(1). The Sixth Circuit's reasoning is in some tension with that of the Seventh Circuit in *Sierra Club v. EPA,* 375 F.3d 537 (7th Cir. 2004). But the Seventh Circuit's decision addressed separate statutory provisions, featuring different text and serving a different function from the statutory section addressed by the decision below. Those distinctions provide sufficient room for the two Circuits to reconcile the divergence in their approaches without this Court's intervention. And in any event that divergence may prove procedural rather than substantive. So long as the Sixth Circuit accepts EPA's responsive interpretation—which affirms that 42 U.S.C. 7502(c)(1) requires only those measures necessary for prompt attainment—both Circuits will have agreed on the basic principle that 42 U.S.C. 7407(d)(3)(E) requires an area that has attained an air quality standard to "continue doing whatever worked and nothing more," *Sierra Club v. EPA,* 375 F.3d at 540-41. That leaves, as grounds for a potential (but not yet extant) conflict, only the necessity of a formal plan-approval verifying compliance with 42 U.S.C. 7502(c)(1)—a task which EPA accomplished in just a few months following the decision below. *See* 80 Fed. Reg. at 56,420.

The practical consequences of the court of appeals' decision do not demand this Court's intervention. Ohio and Indiana need only submit their plans to EPA for approval if (as they claim) their plans contain all measures necessary to demonstrate attainment. *See id.* This case arose only because those States, and EPA,

unlawfully delayed compliance with 42 U.S.C. 7502(c)(1)'s planning requirements. In the vast majority of cases, plans satisfying that section will have been submitted and approved long before any request for re-designation—as they would have here, had the States and EPA followed the statutorily mandated deadlines. And there is no danger of any State being subject to conflicting Circuit case-law. The Clean Air Act's venue provisions ensure that Indiana and EPA may secure venue in the Seventh Circuit, if they wish, by issuing a stand-alone decision addressing that State's re-designation. 42 U.S.C. 7607(b)(1).

STATEMENT

A. STATUTORY AND REGULATORY BACKGROUND

1. National Ambient Air Quality Standards and Nonattainment Areas

The Clean Air Act was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). To that end, the Act instructs EPA to establish national ambient air quality standards ("NAAQS," or "air quality standards") at levels sufficient to protect public health, and to review and if necessary revise those standards at regular intervals. 42 U.S.C. 7408, 7409. Following the promulgation of an air quality standard, EPA, in consultation with the States, identifies and designates those areas of the country in which air pollution exceeds the standard ("nonattainment areas," in the jargon of the Clean Air Act, 42 U.S.C. 7501(2)). 42 U.S.C. 7407(d)(1)-(2). *See generally Environmental Protection Agency v. EME*

Homer City Generation, 134 S. Ct. 1584, 1587 (2014); *Natural Res. Def. Council v. EPA,* 777 F.3d 456, 458 (D.C. Cir. 2014).

Nonattainment areas must adopt state implementation plans ("SIPs," or "plans") directed towards reducing air pollution. The required contents of such plans are enumerated in Part D of the Act. 42 U.S.C. 7501-7515. Those contents depend, in part, on the pollutant in question. In the 1990 Clean Air Act Amendments, Congress added specific additional requirements for, *inter alia,* ozone nonattainment areas (Subpart 2, *id.* 7511-7511f) and particulate matter nonattainment areas (Subpart 4, *id.* 7513-7513b), to the previously existing requirements governing "nonattainment areas in general" (Subpart 1, *id.* 7501-7509a). *See generally Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 484-85 (2001); *South Coast Air Quality Mgmt. Dist. v. EPA,* 472 F.3d 882, 886-88 (D.C. Cir. 2006), *decision clarified on denial of reh'g,* 489 F.3d 1245 (D.C. Cir. 2007) ("The 1990 amendments abandoned the discretion-filled approach of two decades prior in favor of more comprehensive regulation of six pollutants that Congress found to be particularly injurious to public health," including "ozone" and "small particulate matter").

2. Reasonably Available Control Measures and Technology

One of Part D's general requirements is that nonattainment areas' implementation plans:

> shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such

> reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.

42 U.S.C. 7502(c)(1). (EPA refers to "reasonably available control measures" and "reasonably available control technology" as "RACM" and "RACT," respectively.)

The Act requires States to adopt implementation plans identifying the reasonably available control measures, and reasonably available control technologies, that will be applied in a nonattainment area no later than three years after the area's designation, 42 U.S.C. 7502(b). The Act further demands (as it does for all state implementation plans) that EPA review plan provisions that the State identifies as satisfying section 7502(c)(1)'s RACM and RACT requirements, and confirm that they meet that section's mandate. 42 U.S.C. 7410(k). If the State fails to submit such provisions to EPA, or makes an inadequate submission, EPA must (as with other similar requirements) issue its own implementation plan with the necessary measures and technology-based standards. 42 U.S.C. 7410(c)(1). *See generally Homer City,* 134 S. Ct. at 1600-01.

When reviewing control measures offered in a state implementation plan as "reasonably available control measures," or "reasonably available control technology," EPA has typically understood RACM to mean specific "measures that would advance the date at which an area reaches attainment," *Sierra Club v.*

EPA, 294 F.3d 155, 162 (D.C. Cir. 2002), and RACT to mean "those control measures [at stationary sources] that would facilitate expeditious attainment of the NAAQS," *Natural Res. Def. Council v. EPA,* 571 F.3d 1245, 1253 (D.C. Cir. 2009) (upholding EPA's interpretation of "reasonably available" as "only control technologies that advance attainment").[1]

Ozone nonattainment areas are subject to additional, more specific RACT requirements. Subpart 2 of Part D (which governs ozone nonattainment areas) requires EPA to classify such areas according to the severity of their pollution, from "marginal" to "extreme." 42 U.S.C. 7511(a). *See South Coast,* 472 U.S. at 887-88.[2] Within that gradated system, ozone nonattainment areas classified "moderate" or worse must include provisions in their implementation plans that "require the implementation of reasonably available control technology under [42 U.S.C. 7502(c)(1)]" for specified sources of volatile organic compounds (one group of the pollutants that lead to ozone formation). 42 U.S.C. 7511a(b)(2).[3]

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[1] The Act does not define either "reasonably available control measure," or "reasonably available control technology."

[2] That classification system subjects areas with greater pollution to more specific and substantial controls, but gives them more time to meet air quality standards. *See Sierra Club v. EPA,* 311 F.3d 853, 855-56 (7th Cir. 2002).

[3] Subpart 2 also requires EPA to promulgate "Control Technology Guidance[s]" to inform and constrain States' selection of RACT for certain sources of ozone-forming pollutants. 42 U.S.C. 7511b.

3. Re-Designation from Non-Attainment to Attainment

The Act allows EPA to re-designate an area from nonattainment to attainment of an air quality standard if five conditions are met:

> (i) the Administrator determines that the area has attained the national ambient air quality standard;
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> (ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;
>
> (iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;
>
> (iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and
>
> (v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

42 U.S.C. 7407(d)(3)(E).

"[S]ection 7410(k)" of the Act, to which 42 U.S.C. 7407(d)(3)(E)(ii) refers, establishes a detailed set of

procedures by which EPA must review state implementation plans in order to confirm that they meet the statutory requirements they are intended to fulfill. 42 U.S.C. 7410(k). Section 7410(k) provides specific timelines, ensuring that the States and EPA move promptly to address air pollution, *e.g., id.* 7410(k)(2) (requiring that EPA act on submitted plans "[w]ithin 12 months"), and defines the range of actions EPA may take following its review, *id.* 7410(k)(3) (defining terms of approval or disapproval).

Congress enacted 42 U.S.C 7407(d)(3)(E), in the 1990 Amendments, to make clear that EPA could only redesignate an area "after determining that the area has met all the requirements applicable to it under part D and section [7410] of the Act" including "implementation of all stationary and mobile source controls specified in the Act." Legis. History of the Clean Air Act Amendments of 1990 (Cong. Research Serv. 1993) (Leg. History) at 8356 (S. Rep. No. 101-228). *See South Coast,* 472 F.3d at 886-87 (Congress, in 1990 Amendments, sought to constrain EPA's and States' discretion after prior, highly discretionary, regime led to widespread "failures" to timely attain air quality standards).

B. THE AGENCY DECISION: EPA'S REDESIGNATION OF NONATTAINMENT AREAS IN OHIO AND INDIANA

Airborne particulate matter, when inhaled, causes "adverse health effects that include premature mortality," "development of chronic respiratory disease," such as asthma, and "cardiovascular disease." 78 Fed. Reg. 3,086, 3,088, 3,103-04 (Jan. 15, 2013). In 1997 EPA issued a revised national ambient air quality

standard for particulate matter, governing particulates of less than 2.5 microns in diameter ("$PM_{2.5}$"). 62 Fed. Reg. 38,652, 38,654 (July 18, 1997). The D.C. Circuit rejected the last legal challenge to that standard over thirteen years ago. *Am. Trucking Ass'ns v. EPA,* 283 F.3d 355, 360-63 & 380 (D.C. Cir. 2002) (describing promulgation of standard and subsequent litigation, and rejecting last of legal challenges). EPA has since recognized that the 1997 standard is insufficient to protect the public against the adverse health effects of particulate matter, and issued new, more protective standards. 78 Fed. Reg. at 3,121, 3,164.[4]

The Agency has promulgated an implementation rule for its 1997 particulate matter standard, which sets out the substantive measures that States must include in their plans to satisfy 42 U.S.C. 7502(c)(1). 40 C.F.R. 51.1010(a)-(b). That regulation requires States containing nonattainment areas to submit plan provisions "demonstrating that [the State] has adopted all reasonably available control measures (including RACT for stationary sources) necessary to demonstrate attainment as expeditiously as practicable," in particular those measures that "would advance the attainment date by one year or more." *Id.*

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[4] Particulate matter causes harm to human health, even at concentrations below air quality standards. *See* 77 Fed. Reg. 9,304, 9,431 (Feb. 16, 2012) (particulate matter "NAAQS [is] not set at a level of zero risk," so pollution reductions are beneficial even in areas meeting air quality standards); 70 Fed. Reg. 65,984, 65,988 (Nov. 1, 2005) ("[E]missions reductions resulting in reduced concentrations below the level of the standards may continue to provide additional health benefits to the local population"). *Cf.* Petition 33 (asserting that measures reducing such pollution would provide no "public-health benefits").

In 2004, the Agency designated the portions of Indiana, Ohio, and Kentucky that make up the Cincinnati metropolitan area as among the areas in the country that were not attaining the 1997 particulate matter standard. 70 Fed. Reg. 944, 970, 975 & 995 (Jan. 5, 2005).[5] Neither Ohio nor Indiana prepared an implementation plan identifying the "reasonably available control measures" or "reasonably available control technology" demanded by 42 U.S.C. 7502(c)(1), despite the passage of the statutory deadlines for both States' submission of such a plan. Petition 10; Pet. App. 79a. And despite the further passage of the statutory deadline for EPA's promulgation of a federal implementation plan remedying that failure, EPA likewise failed to take any action to address section 7502(c)(1)'s requirements.[6]

In 2010 Ohio asked the Agency to re-designate its portion of the Cincinnati nonattainment area as having attained the 1997 fine particulate standard. Pet. App. 60a. Ohio admitted that it had still not met Part D's requirement that it adopt an implementation plan

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[5] The designations were made on December 17, 2004, but published in the Federal Register the following January. 70 Fed. Reg. at 945.

[6] Ohio and Indiana were required to submit a plan describing RACM and RACT within three years of the areas' designation—by April 5, 2008. 42 U.S.C. 7502(b). *See* http://www3.epa.gov/airquality/urbanair/sipstatus/reports/oh_elembypoll.html#pm-2.5__1997__755 (summarizing deadlines). EPA was required to promulgate a federal plan within two years of recognizing that failure, 42 U.S.C. 7410(c)(1)(A). A sufficient plan should consequently have been in place well before the States submitted their redesignation requests (in December 2010 and October 2011). Pet. App. 60a.

identifying RACT and RACM, 42 U.S.C. 7502(c)(1). C.A. App. 70.[7] The State claimed that it had attained the national standard without identifying the statutorily enumerated measures and technology, so that those statutory requirements were superfluous. *Id.* (asserting that requirements of section 7502(c) "only have meaning for areas not attaining the standard"). Indiana made a similar request for its counties surrounding Cincinnati in 2011, also without having complied with section 7502(c)(1). Pet. App. 60a.

EPA approved Ohio's re-designation request, and Indiana's, in a single action. Pet. App. 58a. The Agency acknowledged that Part D of the Act, and EPA's regulations, required a State containing a nonattainment area to adopt an implementation plan "demonstrating that it has adopted all reasonably available control measures (including RACT for stationary sources) necessary to demonstrate attainment" in the area. Pet. App. 78a. EPA did not contend that Ohio or Indiana had made that demonstration, much less that the Agency had "approved" any such plan, 42 U.S.C. 7407(d)(3)(E)(ii). Instead, the Agency found that because the States had reached the end-result desired by Congress—attainment of the particulate matter standard—the Agency could forego the means specified by Congress to reach that end: an approved implementation plan identifying reasonably available control measures and technology, 42 U.S.C. 7502(c)(1). *Id.* ("If an area is attaining the PM2.5 standard, it clearly does not need further measures to reach attainment."). Consequently,

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[7] The court of appeals' joint record appendix ("C.A. App.") was filed in Case No. 12-3169 as documents number 60 and 73.

the Agency deemed the areas to have "satisfied the RACT [and RACM] requirement[s]," and determined that it could approve the States' re-designation requests under 42 U.S.C. 7407(d)(3)(E)(ii), without having approved (or even identified and reviewed) any individual plan provisions that fulfilled those requirements. Pet. App. 78a.

Sierra Club sought review of the Agency's final action re-designating the portions of Ohio and Indiana surrounding Cincinnati. Pet. App. 5a. Because the Clean Air Act's venue provisions permitted review in either the Sixth or Seventh Circuits, Sierra Club filed petitions in both.[8] C.A. App. 1, 4. The Seventh Circuit transferred its petition to the Sixth Circuit, pursuant to the parties' joint motion.[9] *Sierra Club v. EPA,* Case No. 12-1343 (7th Cir. 2012) (Doc. No. 7, April 5, 2012).

C. THE COURT OF APPEALS' OPINIONS

1. The Court's March Opinion

The Sixth Circuit issued an initial decision on March 18, 2015, granting Sierra Club's petition in part, and denying it in part. Pet. App. 30a-31a. The court of appeals determined that the Sierra Club had standing

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[8] The Clean Air Act specifies venue in the "appropriate" Circuit, 42 U.S.C. 7607(b)(1)—that is, the Circuit containing the area being re-designated. *See Am. Rd. & Transp. Builders Ass'n v. EPA,* 705 F.3d 453, 455 (D.C. Cir. 2013).

[9] The Sixth Circuit consolidated the petitions for review of EPA's approval of Ohio's and Indiana's re-designation requests with a separate petition (not at issue here, *see* Pet. App. 25a n.4) challenging EPA's re-designation of the Kentucky nonattainment area adjacent to Cincinnati. Case No. 12-3169, Doc. No. 20.

to challenge EPA's re-designations, Pet. App. 45a, and held that EPA had properly attributed the areas' improved air quality to various "permanent and enforceable" regulations, as required by 42 U.S.C. 7407(d)(3)(E)(iii). Pet. App. 51a.

The Sixth Circuit found, however, that EPA had not "fully approved the applicable implementation plan for" the nonattainment areas "under section 7410(k)," and had thereby violated 42 U.S.C. 7407(d)(3)(E)(ii). The court noted that section 7410(k)(3) defined a "fully" approved plan as one that "meets all 'applicable requirements' of Chapter 85, Title 42"; and that "[o]ne such requirement" was 42 U.S.C. 7502(c)(1)'s demand that nonattainment areas adopt plans that "shall provide for the implementation of all reasonably available control measures [RACM]." Pet. App. 51a-52a (alteration in original). Neither Ohio nor Indiana had submitted plan provisions identifying such reasonably available control measures or technology for fine particulate matter in the re-designated areas, and so EPA had never approved the States' plans as meeting the RACM or RACT requirements of 42 U.S.C. 7502(c)(1). Pet. App. 36a-37a.

The court of appeals' March opinion understood EPA's rationale—that the areas were "attaining the [air quality standard]," and so "clearly do[] not need" the "measures" mandated by 42 U.S.C. 7502(c)(1), Pet. App. 78a—as invoking three possible statutory interpretations: (1) that EPA could "fully approve[]" an area's plan "under section 7410(k)," 42 U.S.C. 7407(d)(3)(E)(ii), even if the State had not demonstrated that its plan contained the measures mandated by 42 U.S.C. 7502(c)(1); (2) that the words

"applicable implementation plan" in 42 U.S.C. 7407(d)(3)(E)(ii), could be understood to exclude the requirements of 42 U.S.C. 7502(c)(1), where EPA deemed those requirements superfluous; and (3) that the term "applicable requirements" in 42 U.S.C. 7410(k)(3) could be read in the same fashion—as excluding 42 U.S.C. 7502(c)(1)'s mandate, where EPA found it unnecessary. Pet. App. 51a-55a.

The Sixth Circuit first addressed the argument that EPA had, in fact, 'fully approved,' the areas' implementation plans. *Id.* at 52a. The Agency contended that it "interpreted" 42 U.S.C. 7502(c)(1) "to mandate [RACM and RACT] only if needed to attain the air quality standard" at issue, so that an area which had attained a standard was not required comply with 42 U.S.C. 7502(c)(1). *Id.* The court found that argument foreclosed by its precedent. *Id.* at 52a-53a. In *Wall v. EPA,* the Circuit had previously established that "the statutory language regarding the implementation of RACT rules is not ambiguous," and that this language demanded that nonattainment areas adopt implementation plans prior to re-designation that "include 'provisions to require the implementation of' RACT measures." 265 F.3d 426, 440 (6th Cir 2001) (citation omitted). Likewise, here, the court of appeals found that the words "'shall provide' in § 7502(c)(1) unambiguously mean[] that" the States' implementation plans for their nonattainment areas must contain "RACM and RACT provisions." Pet. App. 53a.

The court "reject[ed] EPA's attempt to distinguish *Wall"* as a case "confined to the particulars of the ozone provisions." *Id. Wall* had addressed EPA's re-

designation of the Cincinnati area from nonattainment of an ozone air quality standard; the measures it found mandatory were therefore the ozone-specific RACT provisions of Subpart 2 of Part D. *Wall,* 265 F.3d at 431, 440. But in the decision below, the court of appeals noted that Subpart 2's "statutory language … is functionally identical to—and directly references—§ 7502(c)(1)." Pet. App. 53a. Consequently, the court held that 42 U.S.C. 7502(c)(1) required that nonattainment area plans include provisions specifying "reasonably available control measures" and "reasonably available control technologies," and that given the absence of those provisions, EPA had not "fully approve[d]" Ohio's and Indiana's implementation plans "under section 7410(k)," 42 U.S.C. 7407(d)(3)(E)(ii). Pet. App. 53a.

The court of appeals, second, addressed EPA's contention that even if the Agency had failed to "fully approve" the areas' implementation plans, the non-approved plan provisions were outside the "applicable implementation plan" whose approval 42 U.S.C. 7407(d)(3)(E)(ii) demands prior to re-designation. Pet. App. 53a-54a. EPA pointed out that the Seventh Circuit had held that "the phrase 'applicable implementation plan' in [42 U.S.C.] 7407(d)(3)(E)(ii)" was ambiguous, and "could conceivably refer to something other than the pre-attainment SIP." *Id.* (quoting *Sierra Club v. EPA,* 375 F.3d at 541). The Agency urged the Sixth Circuit to hold that the words "applicable implementation plan" were vague enough to permit exclusion of the "reasonably available control measure" and "technology" provisions required by 42 U.S.C. 7502(c)(1), from the "applicable" plan described by 42 U.S.C. 7407(d)(3)(E)(ii). *Id.* at 54a.

The court of appeals held that the statutory text did not permit that interpretation. Having established, in *Wall*, that "the Act unambiguously requires RACT in the area's SIP as a prerequisite to redesignation," the court of appeals refused to read the phrase "applicable implementation plan" as "an implicit delegation to EPA to require [RACM and RACT] only if necessary to attainment." *Id.* Accordingly, the court found that it "must respectfully disagree with the Seventh Circuit that 'applicable implementation plan' is sufficiently vague to trigger *Chevron* deference." *Id.* at 54a-55a (citing *Sierra Club v. EPA,* 375 F.3d at 540-41).

Finally, the court rejected what it believed to be EPA's third statutory rationale: that the term "applicable requirements … presumably as used in 7410(k)(3)" excluded any of the Act's planning requirements that EPA believed unnecessary to achieve attainment. *Id.* at 54a. The court recognized, as it had in *Wall,* that the word 'applicable' "could be read to 'limit[] the number of actual requirements within [section 7410] and Part D that apply to a given area." *Id.* at 55a (quoting *Wall,* 265 F.3d at 439) (alterations in original). But, again following *Wall,* the court of appeals held that 42 U.S.C. 7502(c)(1)'s requirements were not among those that EPA could deem 'inapplicable' to a nonattainment area seeking re-designation: Section 7502(c)(1) "says that a State 'shall' include RACT [and RACM] in the area's SIP," and "this mandatory language … preclude[s] any conceivable inference[] from … the phrase 'applicable requirements,' that RACT [and RACM] could be implemented at the agency's discretion." Pet. App. 55a.

In a footnote, the court's March opinion addressed an additional argument, raised by an intervenor: "that Ohio's SIP in fact includes RACT for $PM_{2.5}$." *Id.* at 56a n.5. The court refused to reach that argument, because EPA had not offered it in its decision. *Id.* The Agency had instead claimed the authority to forego the requirements of 42 U.S.C. 7502(c)(1) "as a category"; it had "not attempted, through procedures carrying the force of law, to identify *individual* control measures that" might satisfy those requirements. *Id.* The court speculated that, if EPA advanced specific plan provisions as satisfying 42 U.S.C. 7502(c), it might, like other Circuits, defer to EPA's "view that individual measures are not RACM/RACT if they do not meaningfully advance the date of attainment." *Id.* (citing *Sierra Club v. EPA*, 314 F.3d 735, 743-45 (5th Cir. 2002); *Sierra Club v. EPA,* 294 F.3d 155, 162-63 (D.C. Cir. 2002)). But in the absence of any decision by EPA approving Ohio's or Indiana's plans as having met the requirements of section 7502(c)(1), the court refused to reach the question of what sorts of plan provisions might, or might not, suffice to justify such approval. *Id.* (holding "only that EPA cannot categorically exclude the Ohio and Indiana regions from the mandates of 7502(c)(1).")

The court of appeals summarized its decision as follows: "a State seeking redesignation 'shall provide for the implementation' of RACM/RACT, even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS. If the State has not done so, EPA cannot 'fully approve[]' the area's SIP, and redesignation to attainment status is improper." *Id.* at 55a-56a (citation omitted, alteration in original).

2. The Court's Final September Opinion

EPA and intervenor-respondents petitioned for rehearing. The court of appeals issued an amended opinion, on September 3, 2015, before denying the petitions. Pet. App. 1a-3a.

In its rehearing petition, EPA contended, *inter alia,* that the court's March opinion implied "that EPA's interpretation of RACM/RACT under [section] 7502(c)(1) was an open question in this Circuit," by stating "that [the court] was not addressing the question of whether any '*individual* measures are not RACM/RACT if they do not meaningfully advance the date of attainment.'" Pet. for Reh'g En Banc & Panel Reh'g, May 4, 2015 (Case No. 12-3169, Doc. No. 119) ("EPA Reh'g Pet.") 14-15 (quoting Pet. App. 56a n.5). EPA argued that it had promulgated "nationally-applicable regulations" addressing that question and that these regulations were "not subject to review by this Court." *Id.* (noting that Agency regulations define "RACM/RACT as only those measures necessary for attainment"). The court of appeals' final opinion eliminated the portion of the March opinion to which EPA objected. Pet. App. 28a-29a n.5.

The Agency's petition further claimed that the portion of *Wall* cited in the March opinion's discussion of 42 U.S.C. 7410(k)(3) "involved EPA's interpretation of 42 U.S.C. 7407(d)(3)(E)(v) and 7506(c)," and in fact "deferred to EPA's interpretation." EPA Reh'g Pet. 11. For that reason, EPA asserted, *Wall* could not foreclose its argument—which, the Agency clarified, was based upon the word "applicable" in 42 U.S.C. 7407(d)(3)(E)(ii). *Id.* The court's final September opinion removed the discussion of EPA's "presum[ed]"

reliance on 42 U.S.C. 7410(k)(3)—the third statutory interpretation its March opinion had ascribed to the Agency. *See* Pet. App. 54a. The final opinion addressed only the word "applicable" in 42 U.S.C. 7407(d)(3)(E)(ii), explaining that *Wall*'s deference to EPA's interpretation of 42 U.S.C. 7407(d)(3)(E)(v) and 7506(c) did not command deference to EPA's interpretation of the distinct "statutory sections at issue in this case—§ 7407(d)(3)(E)(ii) [and] § 7502(c)(1)." *Id.* at 28a. The September opinion concluded, like the original March opinion, by holding that the statutory text might allow EPA to decide that *some* requirements do not "apply to a given area," for purposes of the area's redesignation; but it did not allow EPA to wholly disregard the requirements of 42 U.S.C. 7502(c)(1) as not "applicable," given the latter section's mandatory terms. *Id.* at 27a-28a.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit Correctly Held That the Measures Demanded By 42 U.S.C. 7502(c)(1) are "Applicable" Plan Requirements for Purposes of Redesignation.

A. The Decision Below Correctly Holds That the General Language of Section 42 U.S.C. 7407(d)(3)(E)(ii) Cannot Be Read to Give EPA Implicit Authority to Bypass 42 U.S.C. 7502(c)(1)'s Mandatory Requirements.

In the decision below, the Sixth Circuit held only that 42 U.S.C. 7502(c)(1)'s demand for plan provisions identifying "reasonably available control measures" and "reasonably available control technology" is, given that section's strongly mandatory language, within the "applicable implementation plan," that EPA must approve before re-designating an area from nonattainment to attainment under 42 U.S.C. 7407(d)(3)(E)(ii). The court of appeals did not hold that "*all* nonattainment-area mandates" are "applicable" requirements under that section, Petition i (emphasis added). On the contrary, the Sixth Circuit expressly recognized that the section "could be read to 'limit[] the number of actual requirements within … Part D that apply to a given area.'" Pet. App. 27a-28a (quoting *Wall,* 265 F.3d at 439) (alteration in original).

That narrow holding follows straightforwardly from the statutory text. The Clean Air Act expressly enumerates "plan provisions … *required* to be submitted" by every area designated nonattainment, and the particulars with which those provisions "*shall* comply." 42 U.S.C. 7502(c) (emphases added). Among

those particulars, the Act specifies "provisions [which] *shall* provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology)." *Id.* 7502(c)(1) (emphases added). That imperative language imposes a decidedly non-discretionary obligation—emphasized by a firm deadline by which the obligation must be met, *id.* 7502(b) (a deadline which the States and EPA ignored, giving rise to this case). *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 661-62 (2007); *Lopez v. Davis,* 531 U.S. 230, 241 (2001) (where Congress uses "shall," "EPA does not have … discretion"). And the text plainly makes plan provisions identifying RACT and RACM a separate, additive requirement to "attainment" of air quality standards. 42 U.S.C. 7502(c)(1) (plan provisions "shall provide" RACM/RACT "*and* shall provide for attainment of the national primary ambient air quality standards" (emphasis added)).

The court of appeals correctly refused to read the word "applicable," in 42 U.S.C. 7407(d)(3)(E)(ii), as effectively erasing the entirety of that mandatory text. The Agency's rationale—that by requiring it to "fully approve[] the applicable implementation plan for the area under section 7410(k) of this title," before re-designating an area, Congress gave EPA discretion to bypass section 7502(c)(1)'s demand for "reasonably available control measures"—claims the sort of "roving license to ignore the statutory text" that this Court has consistently refused to grant. *Massachusetts v. EPA,* 549 U.S. 497, 533 (2007). That rationale would

transform section 7502(c)(1)'s repeated uses of the word "shall," into "may." *See RadLAX Gateway Hotel, v. Amalgamated Bank,* 132 S. Ct. 2065, 2070 (2012) (refusing to accept statutory interpretation in which one provision "permits precisely what" another prohibits, and noting that "where Congress has enacted a comprehensive statutory scheme and targeted specific problems with specific solutions," general terms cannot be understood to over-ride specific commands). And it would re-write the statute to require "reasonably available control measures" *or* provisions securing "attainment" of the standard—while Congress used the word "and," indicating that one cannot be substituted for the other, 42 U.S.C. 7502(c)(1). *Young v. United Parcel Serv.,* 135 S. Ct. 1338, 1357 (2015) (Alito, J., concurring) (use of the "word 'and' … certainly suggests that what follows represents an addition to what comes before").

Nothing in the text or structure of 42 U.S.C. 7407(d)(3)(E) suggests that Congress meant to "alter the fundamental details of [the] regulatory scheme" imposed by the Clean Air Act's nonattainment provisions in the manner the petitioner suggests. *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001). Section 7407(d)(3)(E) requires, before re-designation, that: "the area [have] attained the … standard"; the State have met the Act's post-attainment "maintenance" planning requirements; the State have also "met all requirements applicable to the area under section 7410 … and part D" of the Act; *and* that EPA have "fully approved the applicable implementation plan … under section 7410(k)." *Id.* 7407(d)(3)(E)(i), (iv), (v) & (ii). Those requirements are, by their terms, not directed solely to whether an area

has attained the standards. Nor are they silent as to whether Part D's nonattainment requirements apply.

The petitioner complains that the Sixth Circuit's decision compels a "wooden" approach. Petition 30-31. But the decision's analysis is not inflexible; it recognizes that some of Part D's nonattainment requirements may not be prerequisites to re-designation. Pet. App. 28a. That reflects EPA's long-standing understanding of 42 U.S.C. 7407(d)(3)(E)(ii). *See* C.A. App. 141 (EPA guidance stating that "[a]ny [Part D] requirements that came due prior to the submittal of the redesignation request must be fully approved into the plan at or before the time EPA redesignates the area"). A holding that *every* nonattainment requirement could be ignored as not 'applicable' for purposes of re-designation would radically upset expectations, and sharply depart from EPA's and the States' current understanding of the law. *Id.*

The petitioner would read section 7407(d)(3)(E) as demanding nothing, in essence, beyond attainment, by whatever means the States and EPA deem most "efficient." *See, e.g.,* Petition 24. That is not, however, what the statute says. The Clean Air Act specifies not only the *ends* that the States must meet (attainment), but also certain *means* that they must adopt to promptly reach those ends. Indeed the 1990 Amendments (in which section 7407(d)(3)(E) was enacted) emerged from Congress' recognition that "specif[ying] the ends to be achieved but le[aving] broad discretion as to the means" had proven ineffective. *South Coast,* 472 F.3d at 886-87 (citation omitted). As a practical matter, the result sought by the petitioner

would encourage the States and EPA to ignore 42 U.S.C. 7502(c)(1)'s mandate (as they did here) unless and until they failed to attain the standards by the statutory deadline, producing exactly the kind of foot-dragging that the 1990 Amendments were meant to solve. *Id.* The Sixth Circuit correctly applied the statutory text to impose a non-discretionary command that States adopt plans providing for reasonably available control measures and technology in nonattainment areas before re-designation.

B. The Court of Appeals Did Not Decide What Substantive Measures Section 7502(c)(1) Compels.

The second question suggested by the petitioner for this Court's review is not presented by court of appeals' opinion. The court did not hold that 42 U.S.C. 7502(c)(1) demands "measures unnecessary to meet the relevant air-quality standards," Petition i; it held only that EPA may not ignore section 7502(c)(1)'s requirements "*as a category*." Pet. App. 28a-29a n.5 (emphasis added). Nothing in the opinion below directly addresses what 42 U.S.C. 7502(c)(1) requires from a State, or the circumstances under which EPA may approve plan components as having satisfied that section's mandate. *See id*. (refusing to reach question of whether "Ohio's SIP in fact includes RACT for $PM_{2.5}$" because "[t]his is not … the interpretation advocated by EPA as the justification for its [decision]"). And EPA has indicated that a State need *not* adopt controls "unnecessary to meet the relevant air quality standards," Petition i, in response to the decision below. 80 Fed. Reg. at 56,420. Under the Agency's governing regulations, the States have only to confirm

that their plans include those individual measures "necessary to demonstrate attainment as expeditiously as practicable," and which "would advance the attainment date by one year or more." *Id.* (citing 40 C.F.R. 51.1010(a)-(b)). *See* EPA Reh'g Pet. 14-15 (suggesting that because Ohio and Indiana have already attained standard, no additional measures are required).

The petitioner and amici seize on two portions of the opinion to urge this Court to nevertheless decide whether section 7502(c)(1) "compel[s] States to impose measures unnecessary to meet relevant air-quality standards." Petition i. First, they point to the court of appeal's summary of its decision: "a State seeking redesignation 'shall provide for the implementation' of RACM/RACT, even if those measures are not strictly necessary to demonstrate attainment with the [] NAAQS." Petition 13 (quoting Pet. App. 28a). But in context, that statement is best understood as holding that the mere fact of attainment—that air pollution has fallen below the air quality standard—does not relieve a State of the obligation to *demonstrate* that its plan "provide[s] for the implementation" of the measures specified in 42 U.S.C. 7502(c)(1). In light of the court's express refusal to decide whether or not the States' implementation plans actually satisfied section 7502(c)(1), the decision cannot be fairly read to have engaged the substantive requirements of that section, or to have held that the measures currently in place are inadequate. Pet. App. 28a-29a n.5. *See California v. Rooney,* 483 U.S. 307, 311 (1987) ("This Court

'reviews judgments, not statements in opinions.'" (citations omitted)).[10]

Second, the petitioner implies that by amending its March decision to eliminate the suggestion that "[i]t may be the case" that it would reach the same understanding of 42 U.S.C. 7502(c)(1) as its "sister circuits," the Sixth Circuit announced a split with those Circuits. Petition 14 & 18 (quoting Pet. App. 56a n.5). But EPA's rehearing petition had argued that the Sixth Circuit lacked jurisdiction to reach that question at all, because the Agency had issued a nation-wide regulation answering it (and establishing that section 7502(c)(1) requires only measures necessary for prompt attainment). EPA Reh'g Pet. 14. *See* Petition 35 (making same argument). The court's amendment likely reflects only its acceptance of that possibility.

There is consequently no reason for this Court to grant certiorari as to the nature of the individual plan measures required to satisfy 42 U.S.C. 7502(c)(1). The court of appeals' decision requires, in essence, a mechanical rather than substantive step: that the States demonstrate to EPA that their plans satisfy section 7502(c)(1)'s mandate for reasonably available control measures and technology. What such measures and technology will entail will be, in the first instance,

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[10] The court found the possibility that a favorable decision would produce additional measures sufficient to support Sierra Club's standing, based in part on intervenors' testimony that further controls would result from such a decision. Pet. App. 16a-17a. Acknowledging that non-speculative possibility, however, is a far cry from holding that the statute "compel[s]" controls beyond those required for attainment. Petition i. *See Monsanto v. Geertson Seed Farms,* 561 U.S. 139, 152-53 (2010).

decided by the States and EPA. EPA has indicated that its governing regulations require only those measures and technology necessary to attain the standards, which it believes Ohio and Indiana to have already adopted, 80 Fed. Reg. at 56,420 (citing 40 C.F.R. 51.1010(a)-(b)); EPA Reh'g Pet. 14-15. The Court need not, and should not, address any contrary interpretation of the Act at this time.[11]

Despite its administrative nature, moreover, the decision below is not meaningless—even if it results in no additional pollution-reduction measures. Nor does it produce an incoherent statutory scheme. By refusing, *ex post,* to sanction non-compliance with the statutorily specified requirements, the court of appeals has ensured that those requirements will in the future be observed *ex ante;* and in many cases such observation will prove critical (as Congress believed) to prompt attainment. *See Natural Res. Def. Council v. EPA,* 571 F.3d at 1270 (explaining that area-specific demonstration ensures that where measures are available, they will be adopted). And even for an area that has successfully attained the standards, a formal demonstration that the State has adopted specific reasonably available measures, in its federally sanctioned implementation plan, provides assurance that air pollution will remain below the standard.

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[11] Granting review of the substantive obligations imposed on the petitioner by 42 U.S.C. 7502(c)(1) would require the Court to address EPA's regulations defining those obligations, 40 C.F.R. 51.1010(a)-(b)—regulations which are not properly within the scope of this case. 42 U.S.C. 7607(b)(1) (providing for review of nationally applicable regulations only in D.C. Circuit, within sixty days of publication).

Without such firmly defined specifics, Congress recognized, predictions of "future air quality based on assumed control programs" remain "susceptible to 'paper' demonstrations of attainment that bear little relationship to the likelihood of actual attainment." Leg. History at 8,351 (S. Rep. 101-228).

II. No Circuit Has Held that EPA May Ignore 42 U.S.C. 7502(c)(1)'s Requirements As Categorically Not "Applicable" Under 42 U.S.C. 7407(d)(3)(E)(ii).

The court of appeals held that the 'reasonably available control measures' and 'technology' mandated by 42 U.S.C. 7502(c)(1) were "applicable," within the meaning of 42 U.S.C. 7407(d)(3)(E)(ii). That holding does not squarely conflict with *Sierra Club v. EPA,* 375 F.3d 537 (7th Cir. 2004), or any other decision from another Circuit. The Seventh Circuit's *Sierra Club* addressed a different section of Part D's nonattainment plan requirements—the ozone-specific provisions triggered by an area's classification as "serious," under Subpart 2, 42 U.S.C. 7511(b)(2)(A). The Seventh Circuit upheld EPA's interpretation of 42 U.S.C. 7407(d)(3)(E)(ii) as excluding these ozone-specific serious-area requirements from those necessarily "applicable" for purposes of re-designation. 375 F.3d at 537. The Seventh Circuit did not address the functionally separate requirements of section 7502(c)(1), or that section's distinct, and strongly mandatory, text.[12] Conversely, the decision below does

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[12] EPA had, in the Seventh Circuit's *Sierra Club,* approved plan measures that satisfied section 7502(c)(1), and the ozone-specific RACT requirements of Subpart 2 of Part D. 65 Fed. Reg. 31,482

not address the language or complex structure of Subpart 2's area-classification scheme; its analysis is tightly focused on the text of section 7502(c)(1), and concedes that other statutory provisions might produce a different result. Pet. App. 28a.

To be sure, the decision below does depart from the reasoning adopted by the Seventh Circuit in *Sierra Club*. The Seventh Circuit found the word "applicable" to be "protean," and believed that in order for "compliance" with the Act to "have a payoff," section 42 U.S.C. 7407(d)(3)(E)(ii) should be read to "require[] an area to continue doing whatever worked, and nothing more." 375 F.3d at 541-42. The decision below examined the statutory text and found it unambiguous, at least insofar as sections 7407(d)(3)(E)(ii) and 7502(c)(1), read together, require nonattainment areas to identify, prior to re-designation, 'reasonably available control measures' and 'technology' in their plans—even if an area could attain the air quality standard without undertaking that procedural step. Pet. App. 27a (noting "respectful[] disagree[ment]" with Seventh Circuit's application of *Chevron v. Natural Res. Def. Council,* 467 U.S. 837 (1984)).

(May 18, 2000). The State had failed only to meet the Act's further demands for "serious" nonattainment areas, under 42 U.S.C. 7511a(c). *Sierra Club,* 375 F.3d at 540-41 (noting additional sources that would be subject to RACT under "serious" area classification). The Seventh Circuit did not suggest that EPA could categorically bypass 42 U.S.C. 7502(c)(1) (or its Subpart 2 overlay). *See id.* (citing *Sierra Club v. EPA*, 294 F.3d at 162-63, which holds that while statute does not require every available measure, EPA must conduct analysis of particular measures before approving plan).

That divergence in reasoning does not warrant certiorari, however, for two reasons. First, there is no reason to presume that the Circuits' differing analytic approaches will mature into a square conflict. The Seventh Circuit has not held that an area can be re-designated before EPA has approved plan provisions satisfying 42 U.S.C. 7502(c)(1)[13]; and the Sixth Circuit has not held that 42 U.S.C. 7511(b)(2)'s "serious" area requirements must always be met prior to re-designation. Both Circuits have recognized that section 7407(d)(3)(E)(ii) requires EPA to approve some Part D requirements, but not all. There is thus room for both Circuits to agree that 42 U.S.C. 7502(c)(1)'s RACM and RACT requirements are necessarily 'applicable,' but 7511(b)(2)'s 'serious'-area requirements are not, for purposes of re-designation under 42 U.S.C. 7407(d)(3)(E)(ii).

Second, as noted above, the Sixth Circuit did not decide what substantive measures 42 U.S.C. 7502(c)(1) demands; as a result, the tension between the Circuits remains very poorly developed, for purposes of this Court's review. EPA has determined that under its interpretation of section 7502(c)(1), the States need not materially alter their implementation plans. They need only submit their current plans to the Agency for approval, demonstrating (on a plan-specific basis) that they have adopted measures "required to bring the area into attainment." 80 Fed. Reg. at 56,420. That interpretation vitiates the primary concerns raised by

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[13] The Seventh Circuit noted no disagreement with the Sixth Circuit's decision in *Wall* (which required plan measures demonstrating RACT and RACM in ozone nonattainment areas). *See* 375 F.3d at 541 (favorably citing *Wall,* 265 F.3d at 438-40).

the petitioner—that the States will need to adopt individual control measures unnecessary to attain air quality standards. *See, e.g.,* Petition 15. And it narrows any possible difference between the Sixth and Seventh Circuits to one of administrative procedure. Under either approach, the States need only "continue doing whatever worked" to reach attainment "and nothing more." *Sierra Club,* 375 F.3d at 540-41. The Sixth Circuit has required EPA to make a formal finding to that effect, *e.g.,* 80 Fed. Reg. at 56,420. The Seventh may not (or may) require such a finding.

For now, neither EPA nor the Sixth Circuit has conclusively determined whether the petitioner will need to adopt any additional measures to satisfy 42 U.S.C. 7502(c)(1)—much less what such additional measures might demand. As a result, the consequences of any difference between the Sixth and Seventh Circuits remain obscure, depriving this Court of the context and record necessary to meaningfully engage the petitioner's historical and policy-based arguments, *e.g.* Petition 24 (asserting "Clean Air Act's central goal of efficiently attaining the air-quality standards").

The Sixth Circuit's decision is in no tension with the decisions of the D.C., Fifth, and Ninth Circuits cited by the petitioner. Those cases do not discuss the re-designation requirements of 7407(d)(3)(E)(ii), or *whether* a nonattainment area must demonstrate that its plan satisfies section 7502(c)(1) *at all*. Each instead addresses what must be *contained within* such a demonstration—namely, what constitutes "reasonably available" measures and technology, 42 U.S.C. 7502(c)(1). And each supports the court of appeals' conclusion that section 7502(c)(1) imposes mandatory

requirements that neither EPA nor the States can categorically ignore.

In *Natural Resources Defense Council v. EPA,* the D.C. Circuit partially upheld an Agency rule defining the specific provisions that States would need to include in their nonattainment-area plans to satisfy 42 U.S.C. 7502(c)(1) and the ozone-specific RACT requirements of 42 U.S.C. 7511a. 571 F.3d at 1251. That regulation interpreted section 7502(c)(1) to require States to "submit[] an attainment demonstration SIP demonstrating that the [nonattainment] area has adopted all control measures necessary to demonstrate attainment." *Id.* at 1252. In upholding that interpretation, the D.C. Circuit did not suggest that the Act allowed EPA and the States to wholly avoid making any such 'demonstration' (as occurred here, C.A. App. 70). Indeed, the Circuit emphasized that EPA's interpretation had not deprived section 7502(c)(1) of "all meaning," but rather ensured that "[w]hen control technology is necessary to advance attainment, it is 'reasonably available' … and would be required." *Id*. at 1253. *See Sierra Club v. EPA,* 294 F.3d at 163 (remanding EPA's failure to address whether "particular measures" are 'reasonably available' under its definition).[14]

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[14] In the D.C. Circuit's *Sierra Club v. EPA,* the State's plan failed, as did the plans here, to address the reasonably available control measures specified by section 7502(c)(1). 294 F.3d at 162. EPA, like the court of appeals in the decision below, understood that failure to violate the Act; the Agency therefore undertook its own review of "all control measures that could qualify as RACT." *Id.* (citation omitted).

The Fifth Circuit's *Sierra Club v. EPA* concerned EPA's determination that certain specific control measures were beyond those required by section 7502(c)(1). 314 F.3d at 744. The State had demonstrated that various individual control measures in its implementation plan were sufficient to satisfy section 7502(c)(1), and the Agency had "analyze[d] potential reductions" from the additional suggested measures and concluded that "they would not contribute to expeditious attainment." *Id.* The Fifth Circuit did not suggest that EPA could disregard section 7502(c)(1) entirely; indeed, it took pains to "impress upon the EPA that it has a duty" to undertake precisely the analysis of specific plan measures that the Agency bypassed here. *Id.* at 745 (Agency must "demonstrate that it has examined" plan measures and "provide a satisfactory explanation for its rejection of [specific measures] and why they, individually and in combination, would not advance the [area's] attainment date").

In *Ober v. Whitman,* EPA had (again) made a formal determination that specific plan provisions (a federal plan, provided in lieu of a state plan pursuant to 42 U.S.C. 7410(c)(1)), were adequate to satisfy section 42 U.S.C. 7502(c)(1). 243 F.3d 1190, 1192 (9th Cir. 2001). The Ninth Circuit upheld EPA's determination that certain additional measures were not required by section 7502(c)(1). *Id.* at 1196. But that Circuit did not suggest that EPA could categorically exempt an area from section 7502(c)(1)'s requirements. Indeed, the Agency had itself acknowledged that it would be "inappropriate" even to exempt particular types of sources (let alone the entire area) from section 7502(c)(1) "automatically," because the section could

only be satisfied by a specific demonstration that the area had adopted those controls that would "make the difference between attaining and not attaining" the air quality standard "by the deadline set by the statute." *Id.* at 1196.

III. The Court of Appeals' Decision Has No Widespread or Unfair Effects.

The administrative process demanded by the Sixth Circuit's decision is not burdensome; EPA completed it, for the State of Tennessee, within two months of the court's September opinion. 80 Fed. Reg. at 68,253. Moreover, this case arose from unusual circumstances that are not likely to occur often. The portions of Ohio and Indiana surrounding Cincinnati were designated nonattainment eleven years ago. 70 Fed. Reg. at 975 & 995. Both States (and EPA) allowed six years to pass, without preparing a nonattainment plan meeting the requirements of 42 U.S.C. 7502(c)(1). Such a six-year delay should not happen frequently; it is flatly prohibited by the Clean Air Act, which requires States to submit plans satisfying section 7502(c)(1) no later than three years after designation, 42 U.S.C. 7502(b) (and EPA to provide a federal plan if a State fails to submit an acceptable plan, within an additional two years, 42 U.S.C. 7410(c)(1)). In the vast majority of cases, those statutory deadlines will require nonattainment areas to promptly address the requirements of section 7502(c)(1), and the situation presented here—in which a State seeks re-designation, having ignored those requirements but nonetheless

attained the underlying standard—will never occur.[15] Indeed, *Wall v. EPA* has been the law of the Sixth Circuit for fourteen years. In that time, the issue of whether EPA must approve plan measures satisfying 42 U.S.C. 7502(c)(1) prior to re-designation has not arisen in the Sixth (or any other) Circuit, aside from this single instance.

Finally, the petitioner contends that Indiana (an amicus) is "subject to conflicting interpretations." Petition 34. But that is not so. Indiana (like every other State) prepares its own separate implementation plans, and makes its own separate re-designation requests, for all nonattainment areas within its boundaries—regardless of whether the area is adjacent to other States' areas in a "multi-State" metropolitan region. *See, e.g.,* Pet. App. 60a (noting that States submitted separate requests for their nonattainment areas surrounding Cincinnati); C.A. App. 67, 118, 129 (separate requests for each State, describing separate plans). The Clean Air Act specifies the Seventh Circuit (not the Sixth) as the venue for any challenge to EPA's re-designation of an Indiana nonattainment area (including those parts of the State surrounding Cincinnati). 42 U.S.C. 7607(b)(1). EPA took the unusual step here of re-designating Ohio and Indiana

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[15] It is theoretically possible for an area to attain standards before the three-year statutory deadline for submission of a nonattainment plan demonstrating compliance with 42 U.S.C. 7502(c)(1)—but very unlikely. EPA designs its air quality standards to avoid creating nonattainment areas with short-term, ephemeral air pollution of the sort that might quickly dissipate. *See* 78 Fed. Reg. at 3,124 (standards designed to provide a "stable measure of air quality and to characterize longer-term" pollution).

in a single action, so that venue was available in multiple Circuits. Pet. App. 58a. *Cf.* 76 Fed. Reg. 65,458 (Oct. 21, 2011) (stand-alone action re-designating Kentucky's portion of the Cincinnati area). If the Agency believes that the Seventh Circuit would provide a more favorable forum for review of its decisions regarding Indiana, it need only follow its usual practice of approving each State's re-designation in a separate action, subject to review by a single Circuit.[16]

[16] Any difference between the Sixth and Seventh Circuits' approaches to re-designation is not new. The Sixth Circuit's view of 42 U.S.C. 7407(d)(3)(E)(ii) was established in *Wall*—a decision that predates the Seventh Circuit's *Sierra Club,* and addresses (like *Sierra Club*) the ozone-specific provisions of Subpart 2. Those decade-old cases have produced no dramatic consequences for any multi-State nonattainment area.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SANJAY NARAYAN
Counsel of Record
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
85 Second St., 2nd Floor
San Francisco, California 94105
(415) 977-5769
sanjay.narayan@sierraclub.org

ROBERT UKEILEY
LAW OFFICE OF ROBERT UKEILEY
255 Mountain Meadows Rd.
Boulder, Colorado 80302
(303) 442-4033
rukeiley@igc.org

Counsel for Respondent
Sierra Club