No. 15-684

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

SIERRA CLUB,

Respondent.

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

RESPONDENTS, THE OHIO UTILITY GROUP AND ITS MEMBERS' RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Ohio Utility Group is an association of individual electric utilities in the State of Ohio. The electric utilities own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers. The Ohio Utility Group has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

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QUESTIONS PRESENTED BY THE STATE OF OHIO

The Ohio Utility Group ("OUG") has summarized the questions before this Court as presented in the State of Ohio's Petition for Writ of Certiorari:

1. Under Section 7407(d)(3)(E)(ii) of the Clean Air Act, does the term "applicable implementation plan" explicitly require a state to continue to implement nonattainment area plan requirements in an area that is attaining a National Ambient Air Quality Standard ("NAAQS")?
2. Under Section 7502(c)(1), does the Clean Air Act explicitly require a state to impose Reasonably Available Control Measures ("RACM") and Reasonably Available Control Technology ("RACT") in an area that is attaining a NAAQS?

SUMMARY OF WHY THIS COURT SHOULD GRANT THE STATE'S PETITION FOR WRIT OF CERTIORARI

Respondent OUG and its member companies intervened in Sierra Club's Petition for Review to the Sixth Circuit Court of Appeals ("Sixth Circuit") of the redesignation of the Cincinnati-Hamilton PM2.5 nonattainment area to attainment. Members of OUG own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers. The emissions from these plants contain various amounts of PM2.5 and its precursors. OUG intervened because the issues raised by Sierra Club had a direct impact on the ultimate regulatory requirements for those power plants.

In *Sierra Club v. U.S. EPA*, 793 F.3d 656, 668-670 (6th Cir. 2015), the decision at issue in Ohio's Petition, two findings are relevant. First, the Sixth Circuit found that Section 7502(c)(1) of the Clean Air Act is unambiguous in requiring RACM/RACT before redesignating an area as attainment. Second, the Sixth Circuit found U.S. EPA was not entitled to deference regarding what is an "applicable implementation plan" under Section 7407(d)(3)(E)(ii) of the Clean Air Act because Section 7502(c)(1) unambiguously requires RACM/RACT.

The decision below conflicts with three Circuits. The Fifth, Seventh, and D.C. Circuits – and even the Sixth Circuit in a separate decision – have interpreted portions of the relevant sections of the Clean Air Act as ambiguous and have deferred to U.S. EPA's interpretation. In contrast, the Sixth Circuit decision creates a separate rule of law for industrial sources and states within its jurisdiction, and restricts U.S. EPA's ability to determine what is required to redesignate an area from nonattainment to attainment when a state has concluded from actual air quality data that its areas are attaining the NAAQS.

The decision below has a detrimental impact on Ohio, Kentucky, Michigan, Tennessee, and a portion of Indiana. It places an unreasonable administrative burden on these states, not the rest of the nation, by requiring them to implement RACM/RACT even when it is not necessary.[1] *Sierra Club v. U.S. EPA*, 793 F.3d at 670 ("In sum, a State seeking redesignation 'shall

[1] 40 C.F.R. 51.1010(a) states: "For each PM2.5 nonattainment area, the State shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all [RACM] (including RACT for stationary sources) necessary to demonstrate attainment as expeditiously as practicable …."

provide for the implementation' of RACM/RACT, even if those measures ***are not strictly*** necessary to demonstrate attainment with the PM2.5 NAAQS")(emphasis added). It stigmatizes areas of a state, slows the new industrial expansion, and imposes wasteful burdens on scarce state air quality planning resources. This will recur: the Clean Air Act requires that every time there is a revised NAAQS and area designations of nonattainment, states under the jurisdiction of the Sixth Circuit will have the added burden of implementing more stringent controls than other states, even when an area has demonstrated that the area has attained the NAAQS as demonstrated by actual air data.

STATEMENT OF THE CASE

I. The Clean Air Act has a statutory framework to achieve and maintain the NAAQS by imposing different requirements on areas meeting the NAAQS and on areas not meeting the NAAQS.

The Clean Air Act, 42 U.S.C. §§7401, *et seq.*, charged U.S. EPA with controlling and abating air pollution by, among other things, establishing NAAQS for a variety of pollutants, including particulate matter. NAAQS "prescribed under [the Clean Air Act] shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator … are requisite to protect the public health." 42 U.S.C. §7409(b)(1). When an area attains the NAAQS, there is a presumption that the air quality in the area is protective of human health.

Congress found that "air pollution control at its source is the primary responsibility of states and local governments." 42 U.S.C. §7401(a)(3). Placing the

primary responsibility for assuring air quality on the states, Congress requires each state to submit a State Implementation Plan ("SIP") specifying how NAAQS will be achieved and maintained within each state's air quality control regions. 42 U.S.C. §7407(a).

After U.S. EPA promulgates a new or revised NAAQS, each state must submit to U.S. EPA a list designating all areas in the state as "nonattainment," "attainment," or "unclassifiable." 42 U.S.C. §7407(d)(1)(A). A nonattainment area is one that: (1) does not meet the NAAQS for the specific pollutants involved; or (2) contributes those pollutants to ambient air quality in a nearby area that does not meet the NAAQS. *Id*. An attainment area is one that meets the NAAQS and does not contribute to a nearby area's failure to meet the NAAQS. An unclassifiable area is one that cannot be classified on the basis of available information. *Id.*

The designation of an area as nonattainment has significant consequences for industry. For example, the New Source Review provisions of the Clean Air Act impose stringent requirements on the construction of new or modified sources, which would otherwise not be necessary in an attainment area. A proposed source in an attainment area must comply only with the less onerous requirements for the "prevention of significant deterioration of air quality," which includes obtaining a preconstruction permit, demonstrating that emissions will not exceed the allowable pollution increment, and meeting an emission rate deemed to be the "best available control technology" ("BACT"). 42 U.S.C. §7475. In contrast, a source seeking a permit in a nonattainment area must obtain emission offsets (to ensure reasonable progress toward attainment), certify all sources within the state are in compliance with state and federal regulations, comply with the more

stringent "lowest achievable emission rate," ("LAER") and meet other requirements of U.S. EPA's offset policy. 42 U.S.C. §7503(a); 40 C.F.R. Part 51, Appendix S. In addition to its impact on industry, a nonattainment designation imposes substantial, expensive, and time-consuming administrative obligations on a state that includes submitting a SIP that provides for how the nonattainment area will come into attainment.[2]

The Clean Air Act provides for the redesignation of a nonattainment area. 42 U.S.C. §7407(d)(3)(E). An area may be redesignated as attainment if the following is demonstrated: (1) U.S. EPA determines that the area has attained the applicable NAAQS; (2) U.S. EPA fully approved the applicable SIP for the area under 42 U.S.C. §7410(k); (3) U.S. EPA determines that the improvement in air quality is due to permanent and enforceable reductions in emissions that resulted from the implementation of the SIP; (4) U.S. EPA has fully approved a maintenance plan for the area; and (5) the state containing the area has met the requirements applicable to the area under 42 U.S.C. §7410 and Part D of the Clean Air Act. 42 U.S.C. §7407(d)(3)(E).

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[2] For nonattainment areas, the state must submit a plan that: (1) implements RACM including RACT; (2) requires reasonable further progress toward attainment; (3) includes a current emissions inventory; (4) identifies and quantifies emissions sources that will be allowed from the construction or modification of major stationary sources; (5) requires permits for new or modified major stationary sources; (6) includes other emissions limitations or measures that may be necessary to provide for attainment; (7) complies with 42 U.S.C. §7410(a)(2); and (8) provides for contingency measures if the area fails to make reasonable further progress or fails to attain the NAAQS by the date applicable under the part. 42 U.S.C. §7502(c).

Any state that submits a request for redesignation to attainment under 42 U.S.C. §7407(d) must submit a revised SIP that provides for the maintenance of the NAAQS. That SIP must include contingency measures to assure that the state corrects any violation of the NAAQS after the redesignation. This requires the state to implement "all measures with respect to the control of the air pollutant concerned which were contained in the [SIP] for the area before redesignation of the area as an attainment area." 42 U.S.C. §7505a(d).

II. The holding of the case below regarding the State of Ohio's request to redesignate the Cincinnati-Hamilton area as attainment.

In 1997, U.S. EPA promulgated an annual NAAQS for PM2.5 of 15 micrograms per cubic meter of ambient air based on a three-year average. National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38652 (July 18, 1997). On January 5, 2005, U.S. EPA promulgated the air quality designations for the annual PM2.5 NAAQS. Air Quality Designations and Classifications for the Fine Particles (PM2.5) National Ambient Air Quality Standards, 70 Fed. Reg. 944 (Jan. 5, 2005). The Cincinnati-Hamilton area was designated nonattainment based on actual air monitoring data that indicated an exceedance of the NAAQS.

On July 16, 2008, Ohio EPA submitted its SIP for attaining and maintaining the annual NAAQS for PM2.5. This included a demonstration of attainment of the NAAQS by April 2010. On April 1, 2010, Ohio EPA submitted a letter regarding clean data showing attainment for the PM2.5 annual NAAQS for nonattainment areas in the State of Ohio. This letter stated that the 2007 – 2009 ***actual air quality monitoring data*** indicated that the Ohio portion of the Cincinnati-Hamilton nonattainment area was

monitoring attainment. Ohio EPA also submitted an analysis demonstrating that these monitoring data were based on "permanent and enforceable" reductions in pollution and requested U.S. EPA to make a formal finding that the Cincinnati-Hamilton area was attaining the annual PM2.5 NAAQS, which U.S. EPA approved. Approval and Promulgation of Air Quality Implementation Plans; Ohio, Kentucky, and Indiana; Cincinnati-Hamilton Nonattainment Area; Determinations of Attainment of the 1997 Annual Fine Particulate Standards, 76 Fed. Reg. 60373 (Sept. 29, 2011).

On December 9, 2010, Ohio EPA submitted its request for redesignation of the Cincinnati-Hamilton nonattainment area to attainment. This submittal included a 52-page justification that outlined why the redesignation should be approved. Ohio EPA, Redesignation Request and Maintenance Plan for the Ohio Portion of the Cincinnati-Hamilton, OH-KY-IN Annual PM2.5 Nonattainment Area (Dec. 2010).[3] On October 19, 2011, U.S. EPA proposed to approve the request via a final direct rule. Approval and Promulgation of Air Quality Implementation Plans, Ohio and Indiana; Redesignation of the Ohio and Indiana Portions Cincinnati-Hamilton Area to Attainment of the 1997 Annual Standard for Fine Particulate Matter, 76 Fed. Reg. 64825 (Oct. 19, 2011); Approval

[3] It also included the following supporting the redesignation request: (1) 2009 State and Local Air Monitoring Stations PM2.5 and Ozone Data Certification; (2) Cincinnati-Hamilton Area Monitoring Data 2007 – 2009 PM2.5 Annual Standard; (3) 2005 Base Year PM2.5 SIP Inventory; (4) Mobile Source Emissions Inventory for the Cincinnati Ozone Nonattainment Area; (5) LADCO Technical Support Documents; and (6) Public Participation Documentation.

and Promulgation of Air Quality Implementation Plans, Ohio and Indiana; Redesignation of the Ohio and Indiana Portions Cincinnati-Hamilton Area to Attainment of the 1997 Annual Standard for Fine Particulate Matter, 76 Fed. Reg. 64880 (Oct. 19, 2011). Because U.S. EPA received adverse comments from Sierra Club, U.S. EPA withdrew the direct final rule. On December 23, 2011, U.S. EPA issued a final rule in which it redesignated the Cincinnati-Hamilton area as attainment for the 1997 annual PM2.5 NAAQS; in this notice, U.S. EPA addressed Sierra Club's objections to the redesignation. Approval and Promulgation of Air Quality Implementation Plans; Ohio and Indiana; Redesignation of the Ohio and Indiana Portions Cincinnati-Hamilton Area to Attainment of the 1997 Annual Standard for Fine Particulate Matter, 76 Fed. Reg. 80253 (Dec. 23, 2011).

Sierra Club filed with the Sixth Circuit a Petition for Review on several issues. OUG and the State of Ohio intervened in support of U.S. EPA's decision. Relevant to this Petition, the Sixth Circuit narrowly interpreted Section 7502(c)(1) of the Clean Air Act as unambiguously requiring RACM/RACT regardless of whether an area is monitoring attainment. In doing so, the Sixth Circuit found that U.S. EPA was not entitled to deference in what constitutes an "applicable implementation plan" under Section 7407(d)(3)(E)(ii). *Sierra Club v. U.S. EPA*, 781 F.3d 299 (6th Cir. 2015), *citing*, *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001).

The Sixth Circuit ignored other Circuit decisions that found the terms "applicable," "RACM," and "RACT" were ambiguous and U.S. EPA's interpretation was not arbitrary or capricious under *Chevron Inc. v. Natural Res. Def. Council, Inc.*, 457 U.S. 837, 842-43 (1984). Instead, the Sixth Circuit cut short this

analysis and vacated U.S. EPA's redesignation of the Cincinnati-Hamilton area for PM2.5.

While a request for rehearing en banc was pending, the Sixth Circuit revised its opinion, deleted the footnote that suggested that what constitutes RACM/RACT was open for review, and noted that it disagreed with other Circuits regarding what is required for redesignation of an area to attainment. *Sierra Club v. U.S. EPA*, 793 at 669. On September 3, 2015, the Sixth Circuit denied the motions for rehearing en banc. On November 20, 2015, the State of Ohio filed a Petition for Writ of Certiorari to this Court. This Petition was docketed as 15-684 on November 24, 2015.

REASONS FOR GRANTING THE STATE OF OHIO'S PETITION FOR WRIT OF CERTIORARI

I. The Sixth Circuit decision conflicts with other Circuits on U.S. EPA's reasonable interpretation that certain nonattainment area implementation plan requirements are not required in an area that is monitoring attainment for a NAAQS.

The State of Ohio's Petition for Writ of Certiorari describes the conflict with other Circuit Courts that the Sixth Circuit decision creates. OUG incorporates those arguments by reference. However, OUG highlights some issues that this Court should consider in support for granting the Petition.

A. Contrary to other Circuits, the Sixth Circuit narrowly read Section 7502(c)(1) to require RACM/RACT despite an area demonstrating attainment through quality assured monitoring data and permanent and enforceable pollution reductions.

Sierra Club argued, and the Sixth Circuit agreed, that U.S. EPA erred in redesignating the Cincinnati-Hamilton area because Ohio EPA did not have RACM/RACT limits in its SIP and, thus, did not have a fully approved SIP. The Panel concurred with Sierra Club, relying on *Wall*, 265 F.3d 426. *Sierra Club v. U.S. EPA*, 793 F.3d at 668-670.[4] Focusing only on the word "shall" rather than the Section as a whole, the Sixth Circuit found that the Clean Air Act was unambiguous and required "RACT in the area's SIP as a prerequisite to redesignation …." *Id.* at 669 (citing to *Wall*, 265 F.3d at 440). The decision conflicts with other Circuit opinions that support U.S. EPA's interpretation of "reasonably available."

Relying on its previous decision in *Wall*, 265 F.3d 426, the Sixth Circuit found that the language in 42 U.S.C. §7511a(b)(2) and 42 U.S.C. §7502(c)(1) were

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[4] In its original opinion, the Sixth Circuit noted in a footnote that it did not make a finding that RACM/RACT was or was not present in Ohio EPA's SIP. It also stated that review of that question would be for another day. "It may be the case that we will defer, as our sister circuits have done, to a view that individual measures are not RACM/RACT if they do not meaningfully advance the date of attainment, *see Sierra Club v. EPA*, 314 F.3d 735, 743-45 (5th Cir. 2002); *Sierra Club v. EPA*, 294 F.3d at 162-63, but we leave that question for another day.…" *Sierra Club v. U.S. EPA*, 781 F.3d at 313, fn. 5, *superseded by Sierra Club v. U.S. EPA*, 793 F.3d 656.

nearly identical. *Sierra Club v. U.S. EPA*, 793 F.3d at 669. In *Wall*, Petitioners argued that the State was required to have RACT requirements for "[e]ach category of VOC sources in the area covered by a CTG document issued by the Administrator between November 15, 1990 and the date of attainment." *Wall*, 265 F.3d at 432. The Sixth Circuit found that the statutory language was unambiguous and that RACT was required under this provision of the statute.

However, the section at issue here is not 42 U.S.C. §7511a(b)(2) but rather 42 U.S.C. §7502(c)(1); and the D.C. Circuit, reading the section as a whole, found that the language in 42 U.S.C. §7502(c)(1) was ***ambiguous*** and, thus, U.S. EPA was entitled to deference to its interpretation of the section. In *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002), the D.C. Circuit was reviewing U.S. EPA's interpretation of 42 U.S.C. §7502(c)(1), which states:

> Such plan provisions 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.

In the D.C. Circuit case, Sierra Club challenged U.S. EPA's approval of certain SIPs because the states did not adopt RACM and U.S. EPA concluded that the additional control measures were not necessary because they would not advance the attainment date. Sierra Club argued, in that instance, "EPA applied an unreasonable standard for determining whether a control measure is 'reasonably available' for purposes

of §172(c)(2) [*sic*]…." *Id.* at 160. The court disagreed, siding with U.S. EPA and finding that the statutory language "neither elaborates upon which control measures shall be deemed 'reasonably available,' nor compels a state to consider whether any measure is 'reasonably available' without regard to whether it would expedite attainment." *Id.* at 162. Thus, the D.C. Circuit held that because "the statutory provision is ambiguous and the EPA's construction of the term 'RACM' is reasonable, we defer to the Agency." *Id.*

In another case, *Natural Res. Def. Council v. U.S. EPA*, 571 F.3d 1245, 1252 (D.C. Cir. 2009), the D.C. Circuit Court applied a similar interpretation to RACT as it did for RACM. The Natural Resources Defense Council ("NRDC") challenged the Phase 2 implementation rules for the 8-hour ozone NAAQS. Among other things, NRDC argued that the rules were unlawful because the rules stated that the RACT requirement would be satisfied if a state submitted an attainment demonstration that the area adopted "all control measures necessary to demonstrate attainment as expeditiously as possible." *Id*. at 1252 (*quoting* Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule to Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter, and Ozone NAAQS, 70 Fed. Reg. 71612, 71701 (Nov. 29, 2005)). The court found that U.S. EPA has the discretion "to conclude that a measure was not 'reasonably available' if it would not expedite attainment." *Natural Res. Def. Council*, 571 F.3d at 1252. The D.C. Circuit held:

> [t]o the extent an area is ***already achieving attainment as expeditiously as possible, imposition of additional control technologies would not hasten achievement of the NAAQS***. In such a situation, U.S. EPA may reasonably conclude that no control technologies are reasonably available and the area need not implement further technologies to satisfy the RACT requirement.

Id. at 1253 (emphasis added). Thus, U.S. EPA properly concluded that RACT controls were not necessary because the area was monitoring attainment. *See*, *also*, *Sierra Club v. U.S. EPA*, 314 F.3d 735, 743 (5th Cir. 2002) (deferring to U.S. EPA's interpretation that "only those control measures that contribute to attainment as expeditiously as practicable are required.")

When U.S. EPA approved Ohio's SIP, the Cincinnati-Hamilton area was monitoring attainment. The Sixth Circuit found that this was due to permanent and enforceable reductions made by Ohio EPA. *Sierra Club v. U.S. EPA*, 793 at 665-668. These cases demonstrate that U.S. EPA has discretion to determine whether or not RACT was necessary to have a fully approvable SIP and, thus, support U.S. EPA's decision that the Cincinnati-Hamilton SIP met all requirements and was fully approvable.

B. In conflict with other circuits, the Sixth Circuit failed to defer to U.S. EPA's interpretation of "applicable implementation plan," under Section 7407(d)(3)(E)(ii) of the Clean Air Act because Section 7502(c)(1) unambiguously requires RACM/RACT.

The Sixth Circuit also disagreed with the Seventh Circuit's deference to U.S. EPA's interpretation of "applicable implementation plan," again citing to *Wall*. This creates a conflict between Circuits. The decision is also contrary to the interpretation in *Wall* of "applicable."

In *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004), Sierra Club challenged what is required under an "applicable implementation plan." Specifically, Sierra Club argued that "***every*** attainment plan for an area at the serious level [of ozone] must specify the implementation of all reasonably available control measures …." *Id.* at 540 (emphasis in the original). The Seventh Circuit disagreed. The Court found the word "applicable" ambiguous under the Clean Air Act. The Court found that the "applicable" "plan requires an area to continue doing whatever worked, and nothing more. In other words, the EPA wants the plan to contain all provisions that required some set of controls to be in place before the date the area met the national standard." *Id.* at 540-41.

The Sixth Circuit's decision in *Sierra Club* is also inconsistent with its previous decision in *Wall* regarding whether "applicable" is unambiguous under the Clean Air Act. In *Wall*, the Sixth Circuit found that the term "applicable" was ambiguous in interpreting 42 U.S.C. §7410 as allowing U.S. EPA to determine what requirements were "applicable" to redesignate

an area from nonattainment to attainment. U.S. EPA acknowledged that Kentucky did not submit a revision to the SIP to meet all of the transportation-conformity requirements of the Clean Air Act. However, the Sixth Circuit granted deference to U.S. EPA, acknowledging U.S. EPA's rationale "that requiring the submission of transportation-conformity rules at the redesignation request state is unnecessary to ensure that the area will abide by the transportation-conformity provisions of Part D, because other requirements … are already in place to ensure that the area does so." *Wall*, 265 F.3d at 438-439. Thus, while the Sixth Circuit allowed U.S. EPA to determine what was "applicable" for redesignation purposes in *Wall*, it ignored this interpretation in *Sierra Club v. U.S. EPA* as it relates to what is an "applicable" implementation plan under Section 7407(d)(3)(E)(ii) of the Clean Air Act. *Sierra Club v. U.S. EPA*, 793 at 669 ("*Wall* forecloses either of these readings. Again, we held in that case that the Act unambiguously requires RACT in the area's SIP as a prerequisite to redesignation.").

III. Ohio's Petition raises nationally important issues because it upsets U.S. EPA's longstanding redesignation practice, it is prejudicial to existing and new industry under the Sixth Circuit's jurisdiction, and this issue will recur with any revisions to the NAAQS.

Four states – Ohio, Kentucky, Michigan, and Tennessee – as well as the Indiana portion of the Cincinnati-Hamilton area are impacted negatively by the Sixth Circuit decision; and, the repercussions of this decision will recur. The issue is of importance for the following reasons. First, the decision undermines one of the cornerstones of the Clean Air Act – the improvement

of air quality via implementation of the NAAQS. Second, the decision imposes unnecessary obligations on existing industry and creates a disadvantage to these states in attracting new industry. Third, because of the structure of the Clean Air Act, the decision not only impacts the redesignation of the Cincinnati-Hamilton nonattainment area for PM2.5 but impacts any future redesignation requests in these states, putting these states at a disadvantage compared to the rest of the nation.

A. U.S. EPA's longstanding interpretation and regulatory definition.

The Sixth Circuit decision undermines the long-standing interpretation of 42 U.S.C. §7502(c)(1) that provides U.S. EPA and the states flexibility to determine what is required as RACM/RACT:

> By including language in Section 172(c)(1) that only "reasonably available" measures be considered for RACT/RACM, and that implementation of these measures need be applied only "as expeditiously as practicable," Congress clearly intended that the RACT/RACM requirement be driven by an overall requirement that the measure be "reasonable." Thus, the rule of "reason" drives the decisions on what controls to apply, what should be controlled, by when emissions must be reduced, and finally, the rigor required in a State's RACT/RACM analysis. For example, we previously stated that the Act "does not require measures that are ***absurd, unenforceable, or impractical***" or result in "severely disruptive socioeconomic impacts" 55 FR 38327.

Clean Air Fine Particle Implementation Rule, 79 Fed. Reg. 20586, 20610 (Apr. 25, 2007) (emphasis added). U.S. EPA has interpreted RACM/RACT as technology only necessary to meet attainment. This definition has been promulgated as a regulation for implementation of the PM2.5 NAAQS: "For each PM2.5 nonattainment area, the State shall submit with the attainment demonstration a SIP revision demonstrating that it has adopted all [RACM] (including RACT for stationary sources) necessary to demonstrate attainment as expeditiously as practicable …." 40 C.F.R. 51.1010(a).

By ignoring U.S. EPA's longstanding interpretation, the Sixth Circuit has imposed an administrative burden on these states that has no benefit to human health. The purpose of the Clean Air Act is to attain NAAQS via the implementation of various controls and measures. Inherent in this purpose, is the practice to only impose those controls necessary to meet the NAAQS. When an area is already attaining a NAAQS, there is ***no technology reasonably available*** to demonstrate attainment as expeditiously as possible. Thus, U.S. EPA was not arbitrary and capricious when it determined that a RACM/RACT analysis was not necessary for redesignation of the Cincinnati-Hamilton area where data already demonstrated attainment.

The Sixth Circuit decision takes away the flexibility inherent in U.S. EPA's longstanding interpretation and now requires states to spend their limited resources focusing on areas that are already attaining the NAAQS – resources that would otherwise be directed at the development of implementation plans for areas still in nonattainment. And development of RACM/RACT in these attaining areas will have no

added health benefit as the area is meeting the NAAQS.

B. Industry disadvantage – existing sources and new or modified sources.

This precedent is also harmful as it puts industry in Ohio, Michigan, Kentucky, Tennessee, and the Indiana portion of the Cincinnati-Hamilton area at a disadvantage. First, once an area has been designated a nonattainment area, the Sixth Circuit decision ***requires*** implementation of RACM/RACT on existing sources regardless of whether the area eventually attains the NAAQS. These controls may be costly and provide no added health benefits to the area. In contrast, industry in other states is afforded the deference to U.S. EPA to suspend this requirement once the area is attaining the NAAQS.

As discussed in the introduction, nonattainment areas also impose additional requirements on industry that intends to build or expand a business in the area. A source seeking a permit in a nonattainment area must obtain emission offsets (to ensure reasonable progress toward attainment), must comply with the more stringent LAER, and meet other requirements of U.S. EPA's offset policy. 42 U.S.C. §7503(a); 40 C.F.R. Part 51, Appendix S. Because of these requirements, an area designated as nonattainment is stigmatized and industry will frequently avoid building or expanding in a nonattainment area:

> Sophisticated businesses carefully analyze the costs and risks associated with expansion in different locations. The increased scrutiny, potential for higher fines if permit violations occur, and the uncertainty over what the next round of

> regulations may bring; all serve as a disincentive for reinvestment and expansion of businesses, especially manufacturing operations, located in non-attainment areas ….

Statement of Michael Fisher, President, Cincinnati Chamber, to U.S. Senate Comm. on Env't & Public Works (Apr. 1, 2004), https://perma.cc/NN82-UJXK.[5]

C. Recurring nature of this matter.

Finally, the Clean Air Act requires U.S. EPA to review each NAAQS every five years and revise the NAAQS to ensure adequate protection of human health. 42 U.S.C. §7409(d). Each time that U.S. EPA revises a NAAQS, the states must determine which areas are not attaining the NAAQS and, therefore, should be listed as nonattainment. Once an area is designated as nonattainment, the state must then develop a nonattainment implementation plan to ensure that the area will come into attainment within the required time period. Once the area meets attainment, the state will request redesignation of the area from nonattainment to attainment. Thus, the decision of the Sixth Circuit does not impact just one nonattainment area – the 1997 PM2.5 nonattainment area for the Cincinnati-Hamilton area; instead, it will

[5] The current energy policy set forth by this administration encourages a transition from coal-fired power plants to power generation via natural gas. *See*, Carbon Pollution Emission Guidelines for Existing Station Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015). The Sixth Circuit decision places states in its jurisdiction at a disadvantage in siting a new power generation, due to the emission offset and LAER requirements in nonattainment areas.

have an impact on any present and future nonattainment areas within Ohio, Kentucky, Michigan, Tennessee, and the Cincinnati-Hamilton Area for Indiana. In each instance, nonattainment areas in these states will be held to a higher standard than other areas nationwide. This is inconsistent with the Clean Air Act and an important issue that should be considered by this Court.

CONCLUSION

For the reasons set forth above and in the State's Petition, the State of Ohio's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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