No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Clean Air Act, the EPA sets national air-quality standards for pollutants and designates areas of the country as in "attainment" or "nonattainment" with those standards. For nonattainment areas, States must submit nonattainment plans that implement "reasonably available control measures." 42 U.S.C. § 7502(c)(1). Once an area meets the standards, EPA may redesignate it to "attainment" if a State meets five conditions, including that EPA "has fully approved the applicable implementation plan for the area." *Id.* § 7407(d)(3)(E)(ii). Here, EPA designated the Cincinnati area as "nonattainment" for certain air-quality standards, but Ohio met the standards without new measures. EPA redesignated the area to "attainment" based on its view that "reasonably available control measures" in § 7502(c)(1) requires only measures necessary for attainment. Reversing, the Sixth Circuit held (1) that "applicable implementation plan" in § 7407(d)(3)(E)(ii) requires States that have achieved attainment to *continue* implementing nonattainment-plan requirements, and (2) that the nonattainment-plan requirement to use "reasonably available control measures" compels measures that are unnecessary for attainment.

This case asks two questions:

1. Does the redesignation statute's use of the phrase "applicable implementation plan" in § 7407(d)(3)(E)(ii) refer to a nonattainment plan and require a State seeking attainment status to continue implementing all nonattainment-plan mandates?

2. Does the nonattainment-plan statute's mandate to use "reasonably available control measures" in § 7502(c)(1) compel States to impose measures unnecessary to meet the relevant air-quality standards?

PARTIES TO THE PROCEEDINGS

The Petitioner in this Court is the State of Ohio. The State of Ohio successfully moved to intervene in the circuit court as an intervenor-respondent.

The Respondent in this Court is the Sierra Club. The Sierra Club was the petitioner below.

The United States Environmental Protection Agency, and Gina McCarthy, Administrator, were additional respondents below.

The Ohio Utility Group also successfully moved to intervene in the circuit court as an intervenor-respondent.

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The Sixth Circuit's original opinion, *Sierra Club v. EPA*, 781 F.3d 299 (6th Cir. 2015), is reproduced at Pet. App. 30a. Its amended opinion, *Sierra Club v. EPA*, 793 F.3d 656 (6th Cir. 2015), is reproduced at Pet. App. 3a. The U.S. Environmental Protection Agency's final rule, *Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio and Indiana; Redesignation of the Ohio and Indiana Portions of the Cincinnati-Hamilton 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment*, 76 Fed. Reg. 80253 (Dec. 23, 2011), is reproduced at Pet. App. 58a.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its original decision on March 18, 2015. Pet. App. 30a. It issued an amended decision on July 14, 2015. Pet. App. 3a. On September 3, 2015, it denied petitions for rehearing en banc. Pet. App. 1a. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix includes three sections of the Clean Air Act: 42 U.S.C. §§ 7407, 7410, and 7502.

STATEMENT OF THE CASE

A. The Clean Air Act Has Long Used Cooperative Federalism To Achieve National Air-Quality Standards

For all of its complexity, Title I of the Clean Air Act, 42 U.S.C. §§ 7401-7515, has long followed a simple two-step approach to protect public health in an efficient way that preserves federalism. At step one,

EPA sets national ambient air quality standards (sometimes called "NAAQS," but referred to here as "air-quality standards") at levels that "are requisite to protect public health." 42 U.S.C. § 7409(b)(1). At step two, States develop state implementation plans (sometimes called "SIPs," but referred to here as "state plans") to attain those air-quality standards. *Id.* §§ 7410, 7502. This two-step approach—requiring EPA to set air-quality standards and granting States flexibility in meeting them—has been a mainstay of the Act through its three significant revisions.

1. *Clean Air Act of 1970.* The 1970 Act initially directed EPA to set air-quality standards. 42 U.S.C. § 1857c-4 (1970). EPA has since set those standards for six pollutants. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2435 (2014). Yet the 1970 Act recognized that "the prevention and control of air pollution at its source is the . . . responsibility of States and local governments." 42 U.S.C. § 1857(a)(3) (1970). So it assigned to the States the "primary responsibility for assuring air quality" within their borders, *id.* § 1857c-2(a), by developing state plans to meet EPA's standards, *id.* § 1857c-5 (1970).

The 1970 Act imposed few requirements on state plans. For the most part, a plan had to include *procedural* provisions showing that the State could implement the Act, including, for example, that the State could monitor air quality and had adequate resources to enforce its plan. *Id.* § 1857c-5(a)(2)(C), (F) (1970). As for *substantive* regulations, the Act required a plan to impose those emissions limits and other "measures as may be necessary to insure attainment and maintenance of" EPA's standards. *Id.*

§ 1857c-5(a)(2)(B) (1970). Accordingly, "so long as the ultimate effect of a State's choice of emission limitations [was] compliance with the national standards for ambient air, the State [was] at liberty to adopt whatever mix of emission limitations it deem[ed] best suited to its particular situation." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). The Act required States to meet the air-quality standards "as expeditiously as practicable," but no later than three years after EPA issued them. 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970). But it did allow EPA to grant a two-year extension if a State showed that certain sources lacked the necessary technology and that there were no "reasonably available alternative means of attaining" the standards. *Id.* § 1857c-5(e)(1)(B) (1970).

The Act relegated EPA to a "secondary role" in implementing the standards. *Train*, 421 U.S. at 79. EPA had to provide States with information about, among other things, "available technology and alternative methods of prevention and control of air pollution." 42 U.S.C. § 1857c-3(b)(1) (1970). This information would provide States assistance and guidance in the development of their state plans.

In response to that mandate, EPA issued regulations identifying what it viewed as "reasonably available control technology," which EPA defined as measures "the application of which will permit attainment of" the specific emissions limitations that EPA recommended to meet its standards. 40 C.F.R. § 51.1(o) (1972). EPA's guidance clarified that a State need not adopt these limitations without considering "the necessity of imposing [them] in order to attain and maintain a national [air-quality] stand-

ard." *Id.* That is, the ultimate goal remained attainment: The "failure of a State agency to adopt any or all of the" reasonably available control technology in EPA's guidance would "not be grounds for rejecting a State implementation plan if that implementation plan provide[d] for attainment." *Id.* Part 51, app. B (1972).

2. *1977 Amendments*. The 1970 Act's deadlines came and went with many States yet to attain EPA's standards. 123 Cong. Rec. S18013, 18014 (daily ed. June 8, 1977) (statement of Sen. Muskie) (stating that only 91 of 247 areas had met the standards). Congress thus amended the Act. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. While making a variety of changes, the 1977 Act retained the core structure. It required EPA to set air-quality standards and reconsider them every five years, 42 U.S.C. § 7409(d) (1982), and directed States to develop a plan that "provide[d] for implementation, maintenance, and enforcement of" those standards, *id.* § 7410(a)(1) (1982).

As a new addition, the 1977 Act required EPA to designate areas in the country that had yet to meet its standards. *Id.* § 7407(d) (1982). The Act created a new subchapter (Subchapter D) for these "nonattainment" areas. *Id.* §§ 7501-7508 (1982). The newly enacted § 7502 (sometimes referred to here as the "nonattainment-plan statute") required state plans to meet additional mandates for nonattainment areas. These included that nonattainment plans "provide for the implementation of all *reasonably available control measures* as expeditiously as practicable," *id.* § 7502(b)(2) (1982) (emphasis added), and that they "require, in the interim, reasonable further pro-

gress . . . including such reduction 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(b)(3) (1982) (emphasis added). (These two statutory terms are sometimes called "RACM" and "RACT," but will be referred to here as "reasonably available control measures" and "reasonably available control technology.") The 1977 Act broadly permitted a State to redesignate an area that had achieved attainment as long as it obtained EPA's approval before doing so. *Id.* § 7407(e)(1) (1982).

While the 1977 Act did not define "reasonably available control measures" or "reasonably available control technology," EPA issued guidance on those terms that was similar to its earlier guidance. Treating the two together, EPA interpreted "reasonably available control measures" to mean measures "necessary to assure reasonable further progress and attainment by the required date," including the use of "reasonably available control technology." *State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas*, 44 Fed. Reg. 20372, 20375 (April 4, 1979). The new § 7502, according to EPA, did "not require that all sources apply [reasonably available control measures] if less than all [of them] w[ould] suffice for . . . attainment." *Id.*; *State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas—Supplement (on Control Techniques Guidelines),* 44 Fed. Reg. 53761, 53762 (Sept. 17, 1979). Instead, by using the phrase "reasonably available control technology," "Congress apparently adopted EPA's pre-existing conception of that term" from its

earlier guidance—a conception that had tied what measures were "reasonably available" to whether the measures would assist in achieving timely attainment. 44 Fed. Reg. at 53762.

3. *1990 Amendments*. The Act's last major revision came in 1990. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. The 1990 Act again kept the core structure intact. It made no changes to the section governing EPA's air-quality standards. 42 U.S.C. § 7409. And it again gave States the primary responsibility to attain and maintain those standards. *Id.* § 7410(a)(1).

The 1990 Act restructured EPA's designation duties, requiring it to designate each area of the country as "nonattainment," "attainment," or "unclassifiable" for each air-quality standard. *Id.* § 7407(d)(1). It also amended the *general* nonattainment-plan requirements in § 7502, and added *specific* nonattainment-plan requirements in later sections for certain pollutants, *see, e.g.*, *id.* § 7511a (ozone). The changes to § 7502's general requirements closely tracked EPA's guidance. That guidance had combined the 1977 Act's requirement to use "reasonably available control measures" with its requirement to use "reasonably available control technology," and connected *both* to attainment. 44 Fed. Reg. at 20375. The 1990 Act did the same: Nonattainment 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).

The 1990 Act also added five requirements before EPA could redesignate nonattainment areas to attainment. *Id.* § 7407(d)(3)(E) (sometimes referred to here as the "redesignation statute"). *First*, EPA must conclude that the area has met the standards. *Id.* § 7407(d)(3)(E)(i). *Second*, EPA must have "fully approved the applicable implementation plan for the area under section 7410(k)." *Id.* § 7407(d)(3)(E)(ii). The 1990 Act amended the definition of "applicable implementation plan" to mean "the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under section 7410 of this title, . . . and which implements the relevant requirements of this chapter." *Id.* § 7602(q). *Third*, attainment must have resulted from "permanent and enforceable reductions in emissions. . . ." *Id.* § 7407(d)(3)(E)(iii). *Fourth*, EPA must have "fully approved a maintenance plan for the area as meeting the requirements of section 7505a." *Id.* § 7407(d)(3)(E)(iv). The 1990 Act required the maintenance plan to include "additional measures, if any, as may be necessary to ensure such maintenance" for 10 years. *Id.* § 7505a(a). And the maintenance plan had to contain "contingency provisions" in case the area fell out of attainment, including that the State would implement its *old* nonattainment plan's measures. *Id.* § 7505a(d). *Fifth*, the State must have "met all requirements applicable to the area under section 7410 of this title and part D of this subchapter." *Id.* § 7407(d)(3)(E)(v).

Once again, EPA issued guidance on the revised statute. This time, it did so to fulfill the Act's com-

mand to provide "written guidelines, interpretations, and information to the States" about what constitutes an "adequate and approvable" nonattainment plan. *Id.* § 7502(d). The Act also required EPA, when it issued guidance, to "take[] into consideration any such guidelines, interpretations, or information provided before November 15, 1990." *Id.*; *id.* § 7515 (preserving prior guidance). Consistent with its longstanding view, EPA determined that the phrase "reasonably available control measures" includes *only* measures necessary for attainment. *State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990*, 57 Fed. Reg. 13498, 13560 (1992). Since the 1990 Act, EPA has repeatedly codified this interpretation in regulations. It has, for example, adopted rules providing that "reasonably available control measures" are those that would advance attainment by a year. 40 C.F.R. § 51.1010(b). And it has stated that an area's achievement of the applicable air-quality standards suspends any requirement to impose additional control measures. *Id.* § 51.1004(c).

B. EPA Redesignated The Cincinnati Area To Attainment After Ohio Achieved The Standards For Fine Particulate Matter

This case involves the pollutant known as fine particulate matter (sometimes called "$PM_{2.5}$," but referred to here as "fine particulate matter"). The term "particulate matter" is a "generic" one covering "a broad class of chemically and physically diverse substances that exist as discrete particles (liquid droplets or solids) over a wide range of sizes" in the atmosphere. *National Ambient Air Quality Standards for Particulate Matter,* 62 Fed. Reg. 38652, 38653

(July 18, 1997). Particulate matter can enter the atmosphere directly from mobile sources (like cars and trucks), from stationary sources (like factories), or from natural sources (like dust blowing in the wind). *Id.* It can also form in the atmosphere when dust, water droplets, or other substances mix with gases like sulfur oxides, nitrogen oxides, and volatile organic compounds. *Id.* Fine particulate matter is the smallest kind, measuring "about one-thirtieth the thickness of a human hair" or less. *Air Quality Designations and Classifications for the Fine Particles ($PM_{2.5}$) National Ambient Air Quality Standards*, 70 Fed. Reg. 944, 945 (Jan. 5, 2005).

In 1997, EPA issued new rules revising the air-quality standards for fine particulate matter. 62 Fed. Reg. at 38654. After extensive litigation reaching this Court, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), the D.C. Circuit eventually dismissed challenges to those new fine-particulate-matter standards, *Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 358 (D.C. Cir. 2002).

From 2001 to 2003, while this cloud of litigation passed, EPA and the States gathered air-quality data for the fine-particulate-matter standards. 70 Fed. Reg. at 946. In January 2005, EPA designated areas as attainment or nonattainment for those standards, effective April 5, 2005. *Id.* at 944-46. EPA designated the Cincinnati area—including portions of Indiana, Kentucky, and Ohio—as nonattainment. 70 Fed. Reg. at 970 (Indiana), 975 (Kentucky), 995 (Ohio). That designation required the States to submit plans within three years explaining how they would attain the standards by April 5, 2010. 42 U.S.C. § 7502(b) (requiring States to submit plans

within three years of nonattainment designation); *id.* § 7502(a)(2)(A) (requiring attainment "as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment").

Ohio submitted its state plan in July 2008 outlining how the entire State—including the Cincinnati area—would meet the fine-particulate-matter standards. Ohio's plan envisioned that the Cincinnati area would quickly meet the standards by 2009. Ohio Request for Redesignation, App. to Petr's Br., Nos. 12-3169, 12-3182, 12-3240, at PageID#109-11 (6th Cir. July 7, 2013). Given the short period between submission and attainment, the plan noted that Ohio would not have time to identify, require, and implement any additional control measures for the area's pollution sources. *Id.* Ultimately, Cincinnati's air improved as predicted, and, in December 2010, Ohio asked EPA to redesignate the Cincinnati area to attainment. *Id.* at PageID#61-120.

EPA undertook two rulemakings in response. It initially determined that the Cincinnati area had timely attained the fine-particulate-matter standards, and approved Ohio's plan for doing so. *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). Under 40 C.F.R. § 51.1004(c), this finding suspended any need for Ohio to implement additional control measures. 76 Fed. Reg. at 60376. This rulemaking provided an opportunity to challenge EPA's finding of Ohio's attainment of the standards and the adequacy of Ohio's plan for doing so, but no party disputed EPA's ruling.

Three months later, EPA changed the designation of the Cincinnati area from nonattainment to attainment, and approved Ohio's maintenance plan for maintaining the fine-particulate-matter standards going forward. Pet. App. 58a. When doing so, EPA rejected the Sierra Club's various objections to redesignation. Pet. App. 62a-82a.

C. The Sixth Circuit Agreed With The Sierra Club That EPA Had Wrongly Redesignated The Cincinnati Area To "Attainment"

1. The Sierra Club challenged EPA's redesignation of the Cincinnati area. It filed three petitions for review, including one in the Seventh Circuit, because the Cincinnati area includes three state plans. Pets. for Review, App. to Petr's Br., Nos. 12-3169, 12-3182, 12-3240, at PageID#5-13 (6th Cir. July 7, 2013). The Seventh Circuit transferred that petition to the Sixth Circuit because the Sierra Club had filed there first. Doc.7, Order, No. 12-1343 (7th Cir. Apr. 5, 2012). The Sixth Circuit consolidated all three petitions. Doc.4-1, Order, No. 12-3420 (6th Cir. Apr. 13, 2012). Ohio moved to intervene because, while the Sierra Club challenged an EPA action, the real burden of the continued nonattainment designation fell on the State and its citizens. The Sixth Circuit granted the State's motion, as well as a similar motion by the Ohio Utility Group. Doc.40-1, Order, No. 12-3182 (6th Cir. July 13, 2012).

2. The Sixth Circuit's original decision resolved three questions. *First*, the court held that the Sierra Club had standing. Pet. App. 37a-45a.

Second, the court rejected the Sierra Club's challenge tied to § 7407(d)(3)(E)(iii)'s third redesignation

factor—which requires EPA to conclude that a State's attainment of the air-quality standards arose from "permanent and enforceable reductions in emissions." Pet. App. 41a. The Sierra Club argued that reductions from cap-and-trade programs could not qualify as "permanent." *Id.* The court disagreed, noting that the subsection's text allowed EPA to take a regional approach because it did not tie emissions reductions to local sources. Pet. App. 45a-51a.

Third, as relevant here, the Sixth Circuit agreed with the Sierra Club's reading of § 7407(d)(3)(E)(ii)'s second redesignation factor—which requires that EPA "has fully approved the applicable implementation plan for the area under section 7410(k)." Pet. App. 51a-53a. A "full" approval, the court noted, requires a plan to meet all "'applicable requirements'" of the Act. Pet. App. 54a-56a (quoting 42 U.S.C. § 7410(k)(3)). And § 7502(c)(1) notes that nonattainment plans "'shall'" provide for the implementation of reasonably available control measures, including reasonably available control technology. Pet. App. 55a. Based on *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001), the court read the verb "shall" to *unambiguously* require plans to implement reasonably available control measures before EPA could "fully" approve them. Pet. App. 52a-56a. The court then held that Ohio did not satisfy § 7407(d)(3)(E)(ii)'s redesignation factor that EPA "fully approve" the "applicable implementation plan" because EPA wrongly approved a plan that failed to implement reasonably available control measures. Pet. App. 56a.

The court rejected two contrary arguments—one based on the redesignation statute, the other on the nonattainment-plan statute. Pet. App. 53a-55a. As

for the redesignation statute, the Seventh Circuit had already interpreted it *not* to require a plan to continue meeting all of the requirements for nonattainment plans. *Sierra Club v. EPA*, 375 F.3d 537, 540-42 (7th Cir. 2004) (Easterbrook, J.). *Sierra Club* had held, the Sixth Circuit conceded, that "applicable implementation plan" in § 7407(d)(3)(E)(ii) "could conceivably refer to something other than the [nonattainment plan]; perhaps the 'applicable' modifier 'implies that there may be differences between the contents of the pre-attainment plan and those required for the post-attainment period.'" Pet. App. 54a (quoting 375 F.3d at 541). The Sixth Circuit held that *Wall* foreclosed this interpretation, noting that it "must respectfully disagree with the Seventh Circuit that 'applicable implementation plan' is sufficiently vague to trigger" deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 54a-55a.

As for the nonattainment-plan statute, EPA has always interpreted "reasonably available control measures" to include only measures necessary to attain the relevant standards. Pet. App. 54a. Under that view, no more measures were "reasonably available" here because Ohio had met the fine-particulate-matter standards. The Sixth Circuit found that *Wall* foreclosed this reading too. Pet. App. 54a-55a. It held that "a State seeking redesignation 'shall provide for the implementation' of [reasonably available control measures], even if those measures are not strictly necessary to demonstrate attainment." Pet. App. 55a-56a (citation omitted). In a footnote, however, the court suggested that it may "defer, as our sister circuits have done, to a view that individual measures are not [reasonably available] if they do

not meaningfully advance the date of attainment, but we leave that question for another day." Pet. App. 56a n.5. This footnote cited *Sierra Club v. EPA*, 314 F.3d 735, 743-45 (5th Cir. 2002), and *Sierra Club v. EPA*, 294 F.3d 155, 162-63 (D.C. Cir. 2002), both of which had accepted EPA's reading that "reasonably available control measures" includes only measures necessary for timely attainment. *Id.*

3. EPA, Ohio, and the Ohio Utility Group moved for rehearing en banc. Ohio's petition highlighted the Sixth Circuit's express departure from the Seventh Circuit, and noted that the Sixth Circuit's holding—that measures can be "reasonably available" even when unnecessary—conflicted with the very Fifth Circuit and D.C. Circuit cases that it had cited in the footnote.

The Sixth Circuit issued an amended decision. Pet. App. 3a. That decision, while making minor changes, left the logic of its earlier decision intact. Pet. App. 3a-29a. The amended decision, even more so than the original, noted that *Wall* compelled the Sixth Circuit to reject the Seventh Circuit's approach. Pet. App. 26a-28a. Further, in response to Ohio's argument that the earlier decision's footnote conflicted with its body's reasoning, the amended decision simply eliminated the footnote's language suggesting that the court could later adopt the Fifth and D.C. Circuit's views regarding the meaning of "reasonably available." *Compare* Pet. App. 28a n.5, *with* Pet. App. 56a n.5.

The Sixth Circuit denied supplemental petitions for rehearing en banc. Pet. App. 1a. It stayed its mandate for the filing of this petition.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT DEPARTED FROM EVERY OTHER CIRCUIT THAT HAS ADDRESSED THE QUESTIONS PRESENTED

The Court should review the Sixth Circuit's holding that EPA cannot redesignate an area to "attainment" until a State imposes undefined control measures that—in the Sixth Circuit's words—are "not strictly necessary to demonstrate attainment." Pet. App. 28a. That conclusion creates two significant circuit conflicts. One, it conflicts with the Seventh Circuit's view that the "applicable implementation plan" referenced in the redesignation statute does not need to implement all nonattainment-plan requirements. 42 U.S.C. § 7407(d)(3)(E)(ii). Two, it conflicts with the views of the Fifth, Ninth, and D.C. Circuits that the phrases "reasonably available control measures" and "reasonably available control technology" in the nonattainment-plan statute are best read to include only measures necessary for timely attainment. *Id.* § 7502(c)(1).

A. The Sixth Circuit Disagreed With The Seventh Circuit Over The Meaning Of "Applicable Implementation Plan" In The Redesignation Statute

Before EPA can redesignate a nonattainment area to "attainment," EPA must, among other things, have "fully approved the applicable implementation plan for the area" under § 7410(k). *Id.* § 7407(d)(3)(E)(ii). The Sixth and Seventh Circuits disagree over the meaning of this provision.

1. The Seventh Circuit considered this question when the Sierra Club challenged EPA's redesigna-

tion of the St. Louis area to attainment with respect to EPA's ozone standards. *Sierra Club*, 375 F.3d at 538-39. St. Louis had achieved the ozone standards, but had not implemented all of the special requirements for ozone nonattainment areas. *Id.* at 539, 541. The case asked whether the "applicable implementation plan" referenced in the redesignation statute must have fully implemented all of the *nonattainment-plan* requirements before EPA can redesignate an area. The parties' disagreement "boil[ed] down to a single question: Is an 'applicable' plan the same as the area's pre-attainment plan (as Sierra Club contends), or is it limited to those measures that have proved to be necessary to achieve compliance (the EPA's view)?" *Id.* at 540.

The Seventh Circuit rejected the Sierra Club's reading that "applicable implementation plan" *unambiguously* refers to the prior nonattainment plan and requires the State to have fully implemented the requirements for that type of plan before seeking redesignation. *Id.* at 540-42. "Because the statute does not define 'applicable,' there is no ineluctable basis for a choice between" the parties' readings. *Id.* at 541. If anything, EPA had the better textual argument. If Congress had meant for the Sierra Club's understanding, the Seventh Circuit noted, the statute would have read: EPA "'has determined that the area will continue to abide by the implementation plan that was, or should have been, in place.'" *Id.* The text instead used the word "applicable," a word that suggests "that there may be differences between the contents of the pre-attainment plan and those required for the post-attainment period." *Id.*

After this textual analysis, the Seventh Circuit next found the Sierra Club's reading inconsistent with the Act as a whole. Under Sierra Club's view, the court noted, "compliance does not have a payoff." *Id.* "[T]he residents and businesses of St. Louis must take the same costly steps that would be required had the area been less successful." *Id.* But the statute mandated those steps only to goad the area to attainment. *Id.* "[I]t would be odd to require them even when they turned out to be unnecessary." *Id.*

2. The Sixth Circuit *accepted* the same argument from the same party that the Seventh Circuit *rejected* in *Sierra Club*. It held that a nonattainment plan must contain reasonably available control measures, but that Ohio's plan did not satisfy that *nonattainment-plan* requirement. Pet. App. 24a-25a. As a result, the Sixth Circuit held that EPA violated § 7407(d)(3)(E)(ii) by allowing Ohio to seek redesignation without implementing all of the requirements for nonattainment areas. Pet. App. 28a-29a.

The Sixth Circuit's *explicit* refusal to follow the Seventh Circuit confirms that those circuits cannot reconcile their opinions. Pet. App. 26a-27a. The Sixth Circuit read the Seventh Circuit as holding that "the 'applicable' modifier 'implies that there may be differences between the contents of the pre-attainment plan and those required for the post-attainment period.'" Pet. App. 27a (quoting *Sierra Club*, 375 F.3d at 541). It then "*respectfully disagree[d]* with the Seventh Circuit that 'applicable implementation plan' is sufficiently vague to trigger *Chevron* deference." Pet. App. 27a (emphasis added). According to the Sixth Circuit, § 7407(d)(3)(E)(ii) unambiguously tells EPA that it cannot approve a plan

at the attainment-redesignation stage unless that plan has already implemented all of the requirements for nonattainment areas. *Id.*

B. The Sixth Circuit's Decision Creates A Conflict Over The Control Measures That State Nonattainment Plans Must Adopt

Even assuming that the Sixth Circuit correctly held that the "applicable implementation plan" referenced in the redesignation statute requires a State to have implemented all requirements for *nonattainment plans*, its decision created an additional conflict over what those nonattainment plans must contain. The nonattainment-plan statute indicates that those 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) . . . ." 42 U.S.C. § 7502(c)(1). The Sixth Circuit's holding that § 7502(c)(1) requires control measures and technology that are *unnecessary* for attainment conflicts with the views of the Fifth, Ninth, and D.C. Circuits.

1. The Fifth, Ninth, and D.C. Circuits have all held that EPA reasonably read § 7502(c)(1)'s "reasonably available" text to include only measures and technology that would "contribute to timely and expeditious attainment." *NRDC v. EPA*, 571 F.3d 1245, 1253 (D.C. Cir. 2009); *Sierra Club*, 314 F.3d at 743-45; *Ober v. Whitman*, 243 F.3d 1190, 1198 (9th Cir. 2001); *Sierra Club*, 294 F.3d at 162.

D.C. Circuit. The D.C. Circuit initially addressed § 7502(c)(1) when EPA approved nonattainment

plans for the District of Columbia area with respect to EPA's ozone standards. *Sierra Club*, 294 F.3d at 158. The Sierra Club challenged EPA's decision that no "reasonably available control measures" existed for that area because none would advance attainment. *Id.* at 159. Specifically, the Sierra Club argued "that treating as potential [reasonably available control measures] only those measures that would advance the date at which an area reaches attainment 'conflicts with the Act's text and purpose and lacks any rational basis.'" *Id.* at 162.

The D.C. Circuit disagreed. The court noted that "[t]he Act, on its face, 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 in the relevant area." *Id.* The court thus found the Act ambiguous and deferred to EPA's reading under *Chevron*: "The Congress's choice of the phrase 'reasonably available' clearly bespeaks its intention that the EPA exercise discretion in determining which control measures must be implemented, and neither that phrase nor any other in § [7502](c)(1) suggests that the Congress intended to preclude the EPA, in so doing, from considering the costs of its decisions." *Id.* at 162-63. Ultimately, even though the court upheld EPA's definition, it invalidated EPA's specific approval in the case because the agency had not considered whether any measures fit its own definition of that term. *Id.* at 164 (remanding for further consideration).

The D.C. Circuit next revisited the meaning of "reasonably available" in the context of EPA rules implementing revised ozone standards. *NRDC*, 571

F.3d at 1252-53. Those implementation rules defined "reasonably available control measures" in the same way as EPA had before, and added that "reasonably available control technology" also means technology that is "'necessary to demonstrate attainment as expeditiously as practicable.'" *Id.* at 1252 (citation omitted). Whatever the meaning of "reasonably available control measures," NRDC argued, § 7502(c)(1) required nonattainment plans to implement some "reasonably available control technology" because of its "at a minimum" text. *Id.* The D.C. Circuit again disagreed, extending its previous analysis in *Sierra Club* to reasonably available control measures *and* technology. For either phrase, the court held, EPA may tie the words "reasonably available" to attainment because, "[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 [air-quality standards]." *Id.* at 1253.

Fifth Circuit. In its own *Sierra Club* case, the Fifth Circuit considered this issue when EPA approved Texas's nonattainment plan for the Beaumont area with respect to EPA's ozone standards. 314 F.3d at 737. EPA did not require additional control measures in the approved plan because § 7502(c)(1) requires only measures "that contribute to attainment as expeditiously as practicable." *Id.* at 743. As in the other circuits, the Sierra Club "assert[ed] that the EPA improperly limited the menu of [reasonably available control measures] to those that would advance the date of attainment." *Id.* The Fifth Circuit disagreed, upholding EPA's reading that § 7502(c)(1) requires States to implement "only those measures that would advance [an area's] attainment date." *Id.*

at 745. Because no identified measures would hasten attainment, the court held that implementing them "would be a pointless expenditure of effort, which courts are reluctant to require." *Id.* at 744. The court reached that conclusion even though the Beaumont area had *not* yet attained the applicable standards and even though EPA had conceded that Texas could have implemented additional control measures. *Id.* at 743.

Indeed, the Fifth Circuit did more than just defer to EPA's reading of "reasonably available." It suggested that EPA's interpretation was the *only* available one now because Congress had incorporated that reading *into the Act* itself. *See id.* EPA had previously read "reasonably available" in the same way "in a number of final actions before the [Act] was amended in 1990." *Id.* That led the court to conclude that Congress "intended to preserve the EPA's interpretation" of § 7502(c)(1) because the 1990 amendments "preserved all existing EPA guidance." *Id.* (citing 42 U.S.C. § 7515).

Ninth Circuit. The Ninth Circuit considered this question when EPA adopted a federal nonattainment plan for the Phoenix area with respect to particulate matter (EPA had rejected the state plan). *Ober*, 243 F.3d at 1192. While finding the statutory attainment deadline for the Phoenix area impracticable, the federal plan also "exempted from control a variety of sources of [particulate-matter] pollution that EPA considered 'de minimis.'" *Id.* at 1193. The petitioners challenged this de minimis determination. *Id.* The court acknowledged that "[t]he Act makes no explicit provision for a 'de minimis' exception." *Id.* at 1193. But it said that the Act's use of broad lan-

guage ("reasonably available") "allow[ed] for the exercise of agency judgment." *Id.* at 1195. It then found that EPA had properly applied this exception to the Phoenix area because no exempted source would have made a difference between attaining and not attaining the relevant air-quality standards any sooner. *Id.* at 1196-98.

The Ninth Circuit reached a similar conclusion when EPA issued a rule both finding that the San Francisco Bay area had attained the ozone standards and suspending all nonattainment-plan requirements, including § 7502(c)(1), for that area. *Our Children's Earth Found. v. EPA*, No. 04-73032, 2005 WL 1515057, *1 (9th Cir. June 28, 2005). The petitioners challenged the suspension of § 7502(c)(1)'s requirements. *Id.* The Ninth Circuit rejected their challenge, noting that § 7502(c)(1) does "not apply to [an area] as long as it continues to achieve attainment." *Id.*

2. The Sixth Circuit's contrary decision stands alone. It held that § 7502(c)(1) requires a State to impose additional, undefined control measures "even if those measures *are not strictly necessary to demonstrate attainment*" with the air-quality standards. Pet. App. 28a (emphasis added). In the process, it rejected EPA's decades-old interpretation that § 7502(c)(1)'s requirements are "operative only 'if needed to bring about the attainment of the [air-quality] standard.'" Pet. App. 25a-26a (quoting *Wall*, 265 F.3d at 433). As its basis for doing so, the Sixth Circuit indicated that "the phrase 'shall provide' in § 7502(c)(1) unambiguously" requires reasonably available control measures and technology. Pet. App. 27-28a. Yet, other than concluding that "reasonably

available" requires a state plan to include more than just measures "strictly necessary to demonstrate attainment," Pet. App. 28a, the Sixth Circuit offered *no* analysis on what the phrase covers or what measures Ohio must include in its plan. Pet. App. 24a-29a.

Both the Sixth Circuit's amended decision and the facts of this case confirm this conflict. Starting with the Sixth Circuit's amended decision, a footnote in its original decision had noted that the court might defer in a later case to EPA's view "that individual measures are not [reasonably available] if they do not meaningfully advance the date of attainment." Pet. App. 56a n.5 (citing *Sierra Club*, 314 F.3d at 743-45; *Sierra Club*, 294 F.3d at 162). But Ohio's rehearing petition pointed out that this language was irreconcilable with the court's judgment. Ohio had achieved timely attainment so—by definition—no additional measures were reasonably available under EPA's longstanding interpretation. In response, the Sixth Circuit's amended decision merely deleted this language from that footnote. Pet. App. 28a n.5. By doing so, the Sixth Circuit confirmed that this case conflicts with the cited cases.

Turning to this case's facts, the need for control measures here is far less pressing than the need for control measures in the other cases. Here, the Cincinnati area has attained the relevant air-quality standards for fine particulate matter. That point is undisputed: nobody challenged EPA's initial rulemaking to that effect. 76 Fed. Reg. at 60376. Compare this Cincinnati area to the Beaumont area in the Fifth Circuit case. That area had not attained the applicable standards, and was not projected to do so for years. *Sierra Club*, 314 F.3d at 739. Likewise,

the area in the Ninth Circuit case had so failed to attain the relevant standards that EPA had reclassified it as in serious nonattainment. *Ober*, 243 F.3d at 1192-93. This factual comparison shows the conflict's stark nature: The conflict requires one State *in attainment* to do more while allowing other States *outside of attainment* to do less.

II. THE SIXTH CIRCUIT'S ANSWERS TO BOTH QUESTIONS ARE INCOMPATIBLE WITH THE FOCUS ON EFFICIENT ATTAINMENT IN THIS COURT'S CASES

The Sixth Circuit interpreted "applicable implementation plan" in the redesignation statute to *unambiguously* require States that have attained EPA's air-quality standards to continue implementing all nonattainment-area requirements as if nothing had changed. Pet. App. 26a-27a. It likewise interpreted "reasonably available control measures" in the nonattainment-plan statute to *unambiguously* require measures that are unnecessary for attainment. Pet. App. 27a-28a. By unmooring both of these provisions from the Clean Air Act's central goal of efficiently attaining the air-quality standards, these holdings interpret the Act in a manner that is incompatible with the Court's cases.

A. *Whitman v. American Trucking Associations*. As noted, *supra* at 1-8, the Act adopts a two-step approach for achieving clean air: EPA sets air-quality standards; the States develop plans to meet them. This Court's reading of the first step in *American Trucking* shows why the Sixth Circuit mistakenly interpreted the second step in this case.

At the first step, EPA sets air-quality standards at levels that "are requisite to protect the public

health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). *American Trucking* held that "this text does not permit the EPA to consider costs in setting the standards." 531 U.S. at 465. The Court gave three reasons: (1) the phrase public health, when read "in the context of § 7409(b)(1)," means the health of the community, *id.* at 466; (2) many "[o]ther provisions" *explicitly* "permitted or required" EPA to consider costs, *id.* at 467; and (3) the Act would have explicitly referenced costs in § 7409 if it meant for EPA to consider them because the standards are "the engine that drives" Title I of the Act and Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *id.* at 468. This case is the flip side of *American Trucking* in all of these respects.

First, the phrases "applicable implementation plan" and "reasonably available" must be read "in the context of" § 7407(d)(3)(E) and § 7502—both of which deal with the implementation stage, not the standard-setting stage. *See Am. Trucking*, 531 U.S. at 466. Section 7407(d)(3)(E) concerns redesignation and applies only to areas that achieved *attainment*. 42 U.S.C. § 7407(d)(3)(E)(i). It makes no sense to read "applicable implementation plan" in that context as requiring state plans to *continue* implementing nonattainment-plan rules. *Sierra Club*, 375 F.3d at 541-42; *cf.* 42 U.S.C. § 7602(q) (defining "applicable implementation plan"). Indeed, the fourth redesignation factor also requires EPA to have approved the additional maintenance plan for the area—the plan that ensures continued attainment *going forward* but that does not have to follow nonattainment-plan rules. 42 U.S.C. §§ 7407(d)(3)(E)(iv), 7505a(c). Here, EPA approved the *old* nonattain-

ment plan when it found that Ohio attained the relevant standards, and nobody challenged that final rule. 76 Fed. Reg. at 60376. It then approved the *new* maintenance plan when it redesignated the Cincinnati area. Pet. App. 61a-62a. All of Ohio's plans—old and new—were fully approved.

Likewise, the nonattainment-plan statute's many provisions focus on *attaining* EPA's standards. *See, e.g.*, *id.* § 7502(a)(2), (c)(4), (6), (9). It is unlikely that by using "reasonably available" in § 7502(c)(1), Congress directed the States to an entirely different statutory target. The statutory history removes all doubt. The 1977 Act adopted that "reasonably available" phrase only after EPA had *already* linked it to attainment. 44 Fed. Reg. at 53762. And the 1990 Act changed § 7502(c)(1) to align it even more closely with EPA's attainment-focused guidance. *Compare* 44 Fed. Reg. at 20375, *with* 42 U.S.C. § 7502(c)(1).

Second, many "[o]ther provisions" *expressly* require States to enforce certain types of restrictions whether or not those restrictions are necessary for attainment. *See Am. Trucking*, 531 U.S. at 467. As one example, all new sources must generally comply with special standards of performance. 42 U.S.C. § 7411; *Chevron*, 467 U.S. at 846. As another, the Prevention of Serious Deterioration Program requires some sources to use best-available-control-technology, "notwithstanding attainment and maintenance of" the air-quality standards. 42 U.S.C. § 7470(1); *Util. Air Regulatory Grp.*, 134 S. Ct. at 2435. It is unlikely that Congress *implicitly* incorporated those "over and above attainment" requirements into the redesignation and nonattainment-

plan statutes—both of which focus on meeting the standards. *Am. Trucking*, 531 U.S. at 466.

Third, that EPA's air-quality standards "are the engine that drives nearly all of" Title I must guide the Court when it interprets the provisions *implementing* those standards just as it guided the Court when it interpreted the provision *establishing* them. *Am. Trucking*, 531 U.S. at 468. In that regard, that Congress does not "hide elephants in mouseholes"—e.g., "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *id.*—cuts both ways. At step one, it means that Congress would not have allowed cost considerations to sneak into EPA's setting of the health-based, air-quality standards. *See id.* At step two, however, it means that Congress would not have departed from the Act's central focus on achieving the air-quality standards with terms such as "applicable implementation plan" or "reasonably available." Rather, it would have used only the clearest of language if it had intended that type of departure. But no such clear language exists in § 7407 or § 7502.

B. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). The Sixth Circuit's holding conflicts with *EME Homer*, which recognized as "costly overregulation" measures like the ones the Sixth Circuit imposed here. *Id.* at 1605. *EME Homer* considered the Act's "Good Neighbor Provision," which directed upwind States to implement emissions limitations for in-state sources that contributed significantly to nonattainment in downwind States. 42 U.S.C. § 7410(a)(2)(D)(i). The Court upheld EPA's decision to consider costs when determining the amount of emissions limitations that each upwind State should

implement for downwind States to reach attainment. 134 S. Ct. at 1603-07. In the process, the Court rejected an approach that could have reduced upwind emissions by *more* than was necessary for downwind attainment in every affected state. That result, the Court held, "would be costly overregulation unnecessary to, indeed in conflict with, the Good Neighbor Provision's goal of attainment." *Id.* at 1605.

The Sixth Circuit—both in requiring areas that have achieved attainment to follow nonattainment rules and in requiring nonattainment areas to use measures unnecessary for attainment—compels the overregulation that *EME Homer* rejected for the Good Neighbor Provision. *Id.* The Sixth Circuit held that the allegedly unambiguous text of § 7407 and § 7502 required this overregulation. Pet. App. 27a. But the text of the Good Neighbor Provision in *EME Homer*—that upwind States cut "amounts" of air pollutants that "contribute significantly" to downwind "nonattainment"—was far more susceptible to this "clear meaning" approach than are phrases like "applicable" or "reasonably available." *Compare EME Homer*, 134 S. Ct. at 1611 (Scalia, J., dissenting), *with Sierra Club*, 375 F.3d at 541; *and NRDC*, 571 F.3d at 1253. In short, if it qualifies as "costly overregulation" to require a State to implement more measures than are necessary to achieve attainment in all *downwind States*, *EME Homer*, 134 S. Ct. at 1605, it qualifies as costly overregulation to require a State to implement more measures than are "strictly necessary to demonstrate attainment" in the *State itself*, Pet. App. 27a-28a. "Super" attainment is no more appropriate in this context than it was in that one.

C. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The Sixth Circuit's decision conflicts with *Michigan*, which interpreted a similarly general phrase to require EPA to use a cost-benefit analysis when determining the regulations to impose. *Id.* at 2707-08. In *Michigan*, the Court examined a section of the Act directing EPA to regulate "hazardous air pollutants" from power plants if EPA determined that regulation was "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). EPA found regulation appropriate and necessary without considering the regulation's costs, arguing that the agency had reasonably read the appropriate-and-necessary language to make costs irrelevant. 135 S. Ct. at 2706. This Court reversed. *Id.* at 2707-11. It held that the phrase prohibited EPA from "deem[ing] cost irrelevant to the decision to regulate," *id.* at 2712, because "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions," *id.* at 2708.

The Sixth Circuit interpreted similarly general phrases to unambiguously *prohibit* what *Michigan* said the phrase "appropriate and necessary" unambiguously *required*. Here, just as in *Michigan*, "[o]ne does not need to open up a dictionary in order to realize the capaciousness of [the relevant] phrase[s]," *id.* at 2707: "appropriate and necessary" in *Michigan*; "reasonably available" or "applicable" in this case. But the Sixth Circuit paid no attention to either the advantages *or* disadvantages of the additional measures it found § 7407(d)(3)(E)(ii) and § 7502(c)(1) to compel. The Act itself undertakes this cost-benefit analysis by ignoring costs at the standard-*setting* stage but making costs a key factor at the standard-*implementation* stage. In other words, when an area

has attained the relevant air-quality standards, additional limitations going beyond attainment are unnecessary because, as noted, EPA sets those standards at a level that adequately protects public health with an adequate margin for safety. *Am. Trucking*, 531 U.S. at 465. But there are decided disadvantages in the form of "costly overregulation," *EME Homer*, 134 S. Ct. at 1605, disadvantages that the Sixth Circuit nowhere even considered, Pet. App. 28a-29a; *cf. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217 (2009) (noting that an even more stringent *best*-available-technology requirement in the Clean Water Act permitted EPA to consider costs).

III. The Questions Presented Are Important And Recurring And The Circuit Conflict Needs Immediate Resolution

The Court should grant review because the questions presented are important, because the questions will perpetually arise, and because these particular circuit conflicts raise forum-shopping concerns.

A. The questions presented are of great importance for the States and their citizens.

The States. The Sixth Circuit's answer harms the States. An inflexible requirement that States must implement all nonattainment mandates to achieve redesignation undermines the Act's cooperative federalism. Through the Act, "Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976). Reading the Act in a wooden fashion to require States to implement all possible federal provi-

sions whether or not the States achieve attainment in other ways runs at cross purposes with the Act's federalism-enhancing goal. It also imposes unnecessary burdens on the States because nonattainment plans must include measures on top of the usual requirements. Some of these requirements apply to all pollutants, including, for example, that the States adopt contingency plans if the area fails to achieve timely attainment. 42 U.S.C. § 7502(c)(9). Others are pollution-specific, such as, for example, the requirement to implement emission checks for vehicles in ozone nonattainment areas. *See id.* § 7511a.

The Sixth Circuit's decision also leaves Ohio in the dark on what it must do on remand for the Cincinnati area and in all future nonattainment plans. By requiring reasonably available control measures "even if those measures are not strictly necessary to demonstrate attainment," the Sixth Circuit fails to provide any example of what control measures a State should consider "reasonably available" once a State is in attainment. *Id.* So the Sixth Circuit offered Ohio no guidance on how to amend its plan to include additional "control measures" for an air-pollutant standard that, there is no dispute, Ohio met years ago. 76 Fed. Reg. at 60376. By creating an unclear baseline on which a state plan can be found inadequate, this regulatory uncertainty increases the risk that EPA will spontaneously impose a federal implementation plan on a State. 42 U.S.C. § 7410(c)(1); *cf. EME Homer*, 134 S. Ct. at 1595.

The Regulated Community. A "nonattainment" designation creates a host of additional regulatory requirements for the business community. New or expanding businesses, for example, must comply

with more onerous permitting requirements in nonattainment areas. *See* 42 U.S.C. § 7503. Those businesses must, among other things, install equipment capable of meeting the "lowest achievable emission rate," a standard more stringent than the best-available-control-technology standard that applies to new or expanding businesses in attainment areas. *Compare id.* § 7503(a)(2), *with id.* § 7475(a)(4). New or expanding businesses must also prove that any other sources that they own or operate in a State comply with the Act. *Id.* § 7503(a)(3). And they must offset their new or expanded emissions with equal—if not greater—emission reductions from those existing sources. *Id.* § 7503(a)(1). Finally, nonattainment-plan requirements for specific types of pollutants sometimes call for even more stringent reductions. *See, e.g.*, *Sierra Club*, 375 F.3d at 541 (discussing emissions reductions required from businesses in ozone nonattainment areas).

The greater burdens that come with the nonattainment designation show that the questions presented have real-world consequences. As one Cincinnatian noted, "conducting business in an area designated as non-attainment is more complicated, more time-consuming and more costly." Statement of Michael Fisher, President, Greater Cincinnati Chamber of Commerce to U.S. Senate Comm. on Env't & Public Works (Apr. 1, 2004), *available at* http://perma.cc/NN82-UJXK. And, as the Seventh Circuit noted, a designated "area" like the Cincinnati area "is an abstraction, a convenient collective phrase for millions of people whose own lives and fortunes are at issue." *Sierra Club*, 375 F.3d at 542. The Sixth Circuit's decision imposes real costs on

those people without countervailing public-health benefits because Ohio has achieved attainment.

B. The questions presented will arise frequently. Both questions consider the Act's general requirements, rather than pollutant-specific or standard-specific rules. The redesignation statute applies to *all* redesignation requests for *any* air-pollutant standard. 42 U.S.C. § 7407(d)(3)(E). And the reasonably-available-control-measure requirement applies generally to *all* nonattainment areas, *id.* § 7502(c)(1), in contrast to the more specific rules applicable for specific pollutants, *see id.* §§ 7511-7514a.

Further, air-pollution reduction is a cyclical process, so these two questions will perpetually arise. EPA regularly reconsiders and potentially revises air-quality standards every five years. *See* 42 U.S.C. § 7409(d)(1). Every time it revises the standards, EPA then designates the areas of the country as in "attainment" or "nonattainment" with those standards. *Id.* § 7407(d)(1)(B)(i). The States with nonattainment areas must then develop plans to attain the new standards, including by using "reasonably available control measures." *Id.* §§ 7410(a)(1), 7502(c)(1). And once the States have achieved attainment with the new standards, they may then request redesignation to attainment if they can satisfy the five conditions. *Id.* § 7407(d)(3)(E). The process then repeats itself. *See id.* § 7409(d)(1). Because the Sixth Circuit's decision addresses the meaning of a general nonattainment-plan requirement and the redesignation process for EPA's constantly evolving standards, it will continue to affect a broad swath of situations.

C. Finally, the lack of national uniformity on the questions raises greater concerns than does the av-

erage circuit split. As for the first question, *neighboring* circuits—the Sixth and Seventh—disagree over whether EPA's redesignation of an area to "attainment" requires a State to meet all nonattainment-plan requirements. *Compare* Pet. App. 26a-28a, *with Sierra Club*, 375 F.3d at 540-41. Normally, the Seventh Circuit's legal rule would apply to Indiana, because it falls within the Seventh Circuit. But because the Cincinnati area is a multi-state area including a portion of Indiana, that State is now subject to conflicting interpretations. For multi-state areas involving Ohio or Kentucky, whether Indiana's future redesignation requests will survive judicial review could hinge solely on the courthouse in which a particular petitioner files a petition for review.

This case proves the point. With the Seventh Circuit's *Sierra Club* case and the Sixth Circuit's *Wall* case both on the books, the Sierra Club filed its first petition for review in the Sixth Circuit rather than the Seventh. That led the Seventh Circuit to transfer the later-filed petition to the Sixth Circuit for consolidated proceedings there. *See* Doc.7, Order, No. 12-1343 (7th Cir. Apr. 5, 2012). By obtaining review in the Sixth Circuit, the Sierra Club could take advantage of the more favorable *Wall* decision while sidestepping the *Sierra Club* decision that had already rejected the precise argument that the Sierra Club would make. And now that the Sixth Circuit's decision below has cemented this circuit disagreement, future challengers will continue to channel their petitions into the Sixth Circuit.

As for the second question, the circuit conflict over the meaning of "reasonably available control measures" includes the D.C. Circuit, which is prob-

lematic given the Clean Air Act's judicial-review provisions. The Act creates a bifurcated review process in which petitioners must seek review of all *national* regulations in the D.C. Circuit, but must seek review of *regional* regulations (like those at issue here) in the circuit court in which the region sits. *See* 42 U.S.C. § 7607(b)(1). Under this judicial-review process, the D.C. Circuit could uphold EPA's interpretation of the Act made in national regulations, only to have a regional circuit later upend that interpretation in local applications of the national rules (invalidating the national rules in that circuit).

That is what happened here. EPA has long incorporated into national rules its view that the phrase "reasonably available control measures" includes those measures necessary for attainment. When the D.C. Circuit upheld that interpretation, for example, it was in the context of national ozone rules. *NRDC*, 571 F.3d at 1251 (evaluating 40 C.F.R. § 51.912(c)(1)). EPA has also issued national particulate-matter rules incorporating this same view of "reasonably available control measures." 40 C.F.R. §§ 51.1010(a), 51.1004(c); *see also NRDC v. EPA*, 706 F.3d 428, 437 (D.C. Cir. 2013) (remanding those rules for reconsideration on other grounds without vacating them). Indeed, EPA relied on one of those rules in its initial rulemaking in this case, which suspended any requirement for Ohio to enact further control measures after it reached attainment. *See* 76 Fed. Reg. at 60376 (citing 40 C.F.R. § 51.1004(c)); *cf. Our Children's Earth Found.*, 2005 WL 1515057, at *1. So the Sixth Circuit has now effectively contravened national rules for the States of Ohio, Michigan, Kentucky, and Tennessee.

CONCLUSION

The petition for a writ of certiorari should be granted.

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