No. 15-684

IN THE

Supreme Court of the United States

STATE OF OHIO,
Petitioner,

v.

SIERRA CLUB, et al,
Respondents.

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

BRIEF OF INDIANA AND NINE STATES AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
(*Counsel of Record*)
HEATHER HAGAN MCVEIGH
LARA LANGENECKERT
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, Indiana 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for Amici *States*
Additional counsel with signature block

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—and the rest of the area—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?

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Arkansas, Colorado, Kansas, Michigan, Mississippi, South Dakota, Tennessee, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of Petitioner. The Sixth Circuit's decision vacated EPA's "attainment" redesignation of the Cincinnati-Hamilton region, concluding EPA should have ignored the region's air improvements because certain words were missing from the State Implementation Plans. This holding directly conflicts with holdings from other circuits and creates purposeless bureaucratic barriers that even EPA deems unnecessary. By reinstating the region's nonattainment status (with corresponding regulatory requirements), the decision below will needlessly stifle economic development without improving air quality. *Amici* States agree with Ohio's legal arguments and wish to emphasize the negative consequences that will follow if—as the decision below requires—States must have magic language concerning pollution control measures in their state plans prior to redesignation, regardless of any environmental benefit. Accordingly, *Amici* States urge the Court to grant Ohio's petition for certiorari and reverse the Sixth Circuit's decision.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the *Amici* States' intention to file this brief more than 10 days prior to the due date of this brief.

SUMMARY OF THE ARGUMENT

As Ohio's petition describes in detail, the Sixth Circuit's decision conflicts with decisions from four other circuits on two important issues. First, it conflicts with the Seventh Circuit's conclusion that the redesignation statute's "applicable implementation plan" need not include all nonattainment requirements. Ohio Pet. at 15 (citing 42 U.S.C. § 7407(d)(3)(E)(ii)). Second, it conflicts with the Fifth, Ninth, and D.C. Circuits' conclusions that the nonattainment statute's "reasonably available control measures" and "reasonably available control technology" refer only to measures actually necessary to achieve attainment. *Id.* (citing 42 U.S.C. § 7502(c)(1)). These circuit conflicts create particular problems for redesignation of nonattainment areas—like the one at stake in this case—that are in more than one judicial circuit.

What is more, the Sixth Circuit's idiosyncratic conclusion contradicts EPA's longstanding interpretations of these statutes, thus frustrating States' reasonable expectations that they can obtain redesignation if they demonstrate attainment. Finally, the Sixth Circuit's decision increases administrative and economic burdens on States without doing anything to improve air quality—an outcome completely at odds with the purpose of the Clean Air Act.

ARGUMENT

I. The Circuit Split over the Meaning of "Applicable Implementation Plan" Creates Immediate Confusion in the Cincinnati and Louisville Nonattainment Areas and Potential Confusion Throughout the Nation

It is critical for any federal regulatory program to be applied in a uniform and predictable fashion. That is why the Sixth Circuit's sharp divergence from EPA's longstanding interpretations of the Clean Air Act (interpretations never before rejected and explicitly adopted by four circuits) is so problematic: it subjects different parts of the country to different standards. Moreover, with nonattainment designations, the applicable standard will not always be clear. This toxic combination of inequity and uncertainty, if allowed to stand, will have serious consequences for both the Cincinnati and Louisville areas and potentially the entire country.

Air currents flow freely, without regard for state lines or judicial circuit boundaries. Accordingly, EPA evaluates air quality by region rather than by state. As shown below, twelve regions that EPA has designated "nonattainment" are multi-state, and ten fall within plural judicial circuits. The Sixth Circuit's outlier holding thus has immediate negative consequences for two of those areas and potential problematic implications for several more.

Area	Air Quality Standard	States	Circuit(s)
Campbell-Clermont	Sulfur Dioxide (2010)	Kentucky, Ohio	Sixth
Chicago-Naperville	8-hour ozone (2008)	Illinois, Indiana, Wisconsin	Seventh
Cincinnati	8-hour ozone (2008)	Indiana, Kentucky, Ohio	Sixth, Seventh
Logan	PM-2.5 (2006)	Idaho, Utah	Ninth, Tenth
Louisville	PM-2.5 (1997)	Indiana, Kentucky	Sixth, Seventh
Memphis	8-hour ozone (2008)	Arkansas, Mississippi, Tennessee	Fifth, Sixth, Eighth
New York-N. New Jersey-Long Island	8-hour ozone (2008)	Connecticut, New Jersey, New York	Second, Third
Philadelphia-Wilmington-Atlantic City	8-hour ozone (2008)	Delaware, Maryland, New Jersey, Pennsylvania	Third, Fourth
St. Louis	PM-2.5 (1997)	Illinois, Missouri	Seventh, Eighth
St. Louis-St. Charles-Farmington	8-hour ozone (2008)	Illinois, Missouri	Seventh, Eighth
Steubenville-Weirton	Sulfur Dioxide (2010)	Ohio, West Virginia	Fourth, Sixth
Washington	8-hour ozone (2008)	District of Columbia, Maryland, Virginia	District of Columbia, Fourth

U.S. EPA, *Current Nonattainment Counties for All Criteria Pollutants*, (Oct. 1, 2015), http://www3.epa.gov/airquality/greenbk/ancl.html.

The implications of this case are most serious for the Cincinnati nonattainment area and the Louisville nonattainment area, both of which include land in the Sixth and Seventh Circuits. Those two circuits have adopted diametrically opposing interpretations of the phrase "applicable implementation plan" in Section 7407(d)(3)(E)(ii), and those opposing interpretations make it impossible to know what the Cincinnati region must do to achieve redesignation to attainment status. What is more, if other circuits follow in the Sixth Circuit's errant footsteps, many more areas could be in the same impossible situation.

1. The conflict-creating cases both addressed the same question: whether "applicable implementation plan" is ambiguous such that EPA's reasonable interpretation must prevail. In the opinion below, the Sixth Circuit answered "no," so it never got past *Chevron* step one. *Sierra Club v. EPA*, 793 F.3d 656, 669 (6th Cir. 2015) ("we must respectfully disagree with the Seventh Circuit that 'applicable implementation plan' is sufficiently vague to trigger *Chevron* deference.").

But in *Sierra Club v. EPA*, 375 F.3d 537, 542 (7th Cir. 2004), the Seventh Circuit reached the opposite conclusion: It upheld EPA's ozone attainment redesignation of the St. Louis region, specifically

rejecting the argument that the statutorily required "fully approved . . . applicable implementation plan" refers to a "fully approved" non-attainment State Implementation Plan amendment that includes "reasonably available" control measures and technology. *Id.* at 538–39 (quoting 42 U.S.C. § 7407(d)(3)(E)(ii)). Writing for a unanimous panel, Judge Easterbrook concluded the term "applicable" was ambiguous. *Id.* at 541. The court compared EPA's definition of "applicable" (whatever was in the plan at the time the region achieved the air-quality standards) with the Sierra Club's definition of "applicable" ("whatever should have been in the plan at the time of attainment") and concluded "EPA's view is at least as sensible as the Sierra Club's, likely more so." *Id.* The court deferred to EPA's interpretation because the purpose of all SIP requirements is to improve air quality and, therefore, "it would be odd to require them even when they turned out to be unnecessary." *Id.*

In reaching the opposite conclusion, the Sixth Circuit relied upon *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001), where the court concluded Ohio had not satisfied requirements for redesignation because its pre-attainment State Implementation Plan lacked reasonably available control technology provisions. *Id.* at 441. But *Wall* dealt with a different statute that required ozone nonattainment State Implementation Plans "to include provisions to require the implementation of reasonably available control technology" and to "provide for the implementation

of" those reasonably available control technology provisions "as expeditiously as practicable but no later than May 31, 1995." 42 U.S.C. § 7511a(b)(2). And when it concluded a State Implementation Plan without reasonably available control technology could not be "fully approved" for Section 7407(d)(3)(E)(ii) purposes, the Court noted its conclusion was consistent with EPA's traditional interpretation. *Wall*, 265 F.3d at 441 (citing Memorandum from Michael H. Shapiro, Acting Assistant Adm'r for Air & Radiation, EPA, to Eight Dirs. of EPA, at 6 (Sept. 17, 1993)).

2. The bottom line is that, under the foregoing precedent, the Cincinnati and Louisville nonattainment areas have no clear path to redesignation. If they submit redesignation requests based upon pre-attainment state plans, those requests could be denied under the Sixth Circuit standard—even if they have actually demonstrated attainment. Indeed, that is exactly what the Sixth Circuit determined should have happened in this case. The only way, then, for the areas to demonstrate attainment would be for them to draft new state plans, obtain EPA approval of those plans, and apply for redesignation again—a process that would take several years.

As things now stand, EPA can continue to apply its interpretation of "applicable implementation plan" in the other eleven Circuits. But if even one Circuit—say the Eighth—followed the Sixth Circuit's lead, two

more current multi-state nonattainment regions would be operating under a split of authority. The St. Louis and St. Louis-St. Charles-Farmington areas are both in the Seventh and Eighth Circuits. The Memphis area, in the Fifth, Sixth, and Eighth Circuits, could be affected as well.

The redesignation process is already costly and time-consuming. Affected areas should not be further plagued with the possibility that the rules will change halfway through, rendering their investments of time and money worthless and requiring them to start all over again. This scenario can be prevented only by a single answer to the interpretation—an answer that only this Court can give.

II. The Sixth Circuit's Decision Effectively Changes the Redesignation Requirements for Areas that Have Already Implemented Attainment Plans

EPA's interpretations of both "applicable implementation plan" and "reasonably available" control measures and technology are longstanding. This stability is important to States, which must work together over the long term to attain and maintain air-quality standards. The Sixth Circuit's decision disrupts this certainty and creates a risk that areas progressing toward attainment under plans EPA has already approved will be unable to obtain redesignation—even after they have already attained the air-quality standards—simply because those

already-approved plans do not contain certain requirements that the Sixth Circuit decided should be included. That result is unfair, and in recognition of that unfairness, this Court has said before that where "there has undoubtedly been reliance upon [EPA's] interpretation by the States and other parties affected by the [Clean Air Act]," it is particularly inappropriate for a Court of Appeals to "substitute[e] its judgment for that of the Agency." *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1975).

1. As discussed in Section I, *supra*, the seminal case on the meaning of "applicable implementation plan" is *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004), which has been in place for nearly twelve years. Since then, EPA has cited it over a hundred times in rulings and proposed rulings on state implementation plans and redesignation requests. *See, e.g.*, *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, 80 Fed. Reg. 33840, 33945 n.354 (June 12, 2015); *see also, e.g.*, *Approval and Promulgation of Implementation Plans; Designation of Areas for Air Quality Planning Purposes; State of California; PM2.5; Redesignation of Yuba City-Marysville to Attainment; Approval of PM2.5 Redesignation Request and Maintenance Plan for Yuba City-Marysville*, 79 Fed. Reg. 61822, 61825 (Oct. 15, 2014);

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Michigan; Redesignation of the Allegan County Area to Attainment for Ozone, 75 Fed. Reg. 42018, 42021 (July 20, 2010).

2. EPA's interpretation of "reasonably available" control measures and technology is even more well-established. By its plain terms, 42 U.S.C. § 7502(c)(1) provides that fine particulate matter nonattainment State Implementation Plans "shall provide for the implementation of" reasonably available control measures and technology "and shall provide for attainment of [air-quality standards]." Thus, Section 7502(c)(1) is focused on achieving attainment, not on implementing reasonably available control technology for its own sake. Accordingly, for over thirty years, in both adjudication and rule, EPA has reasonably interpreted Section 7502(c)(1) such that a State need not submit a plan including reasonably available control measures and technology if it demonstrates it can achieve attainment without them. *See* EPA's Pet. for Reh'g En Banc at 9 n.1, *Sierra Club v. EPA*, 793 F.3d 656 (6th Cir. 2015) (Nos. 12-3169, 12-3182, & 12-3420), ECF No. 119 (citing *State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas*, 44 Fed. Reg. 20375 (Apr. 4, 1979) (codified at 40 C.F.R. § 51.1010(a))). And if air quality in a nominal "nonattainment" area improves enough to satisfy the fine particulate air-quality standards, reasonably available control measures and

technology implementation is no longer required. 40 C.F.R. § 51.1004(c). This interpretation and agency practice advances the purpose of the Clean Air Act—ensuring air quality across the country.

In short, all parties agree the air in the Cincinnati-Hamilton region met the 1997 fine particulate matter air-quality standards when Indiana applied for 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. 64825 (Oct. 19, 2011). Retention of nonattainment status simply because the air-quality standards were achieved through one means rather than another is both illogical and unproductive. And given that the region submitted and implemented its implementation plans based on the definitions of "applicable implementation plan" and "reasonably available" control measures and technology that EPA had advanced for decades, it is a particularly harsh result to withhold redesignation based upon novel interpretations of those terms.

III. Continuing to Designate an Area as Nonattainment Even After It Has Met the Air-Quality Standards Creates an Economic Burden Without an Environmental Benefit

In a nutshell, the Sixth Circuit held that "applicable implementation plan" includes requirements that (1) were never in place because (2) neither EPA nor the States believed they were necessary, and (3) were actually proven to be unnecessary when the region achieved the air-quality standards through other measures. If implemented, that interpretation would inject a needless additional layer of Dickensian Circumlocution Office-style bureaucracy into an otherwise effective federal-state pollution control effort. And that bureaucracy comes with a high price tag for States already struggling to attract and maintain jobs in our country's stagnant economy.

A nonattainment designation has serious negative economic consequences for the entire region. First, it burdens existing businesses with permitting requirements and compliance costs. *See* Statement of Michael Fisher, President, Greater Cincinnati Chamber of Commerce, to U.S. Senate Comm. on Env't & Pub. Works (Apr. 1, 2004), *available at* http://www.epw.senate.gov/hearing_statements.cfm? id=219986 [hereinafter Fisher Statement]. These burdens make businesses less likely to expand their operations and hire more employees: "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 . . . ." *Id.* And that disincentive comes with a high price tag: a 2013 study of the possible economic impact of a nonattainment designation for fine particles and ozone in the Twin Cities determined the cost could be as high as $240 million per year. Courtney Blankenheim, *Estimating the Economic Impact of Ozone and Fine Particulate Nonattainment in the Twin Cities* 7 (April 10, 2013), *available at* http://conservancy.umn.edu/handle/11299/150030.

What is more, a nonattainment designation puts existing facilities at a competitive disadvantage because their competitors in attainment areas are able to modify and expand their facilities without going through the same costly and time-consuming permit process. Fisher Statement. For example, empirical studies show that the expense and difficulty of obtaining a permit discourage existing power plants from making needed modifications to their facilities. John A. List et al., *The Unintended Disincentive in the Clean Air Act*, 4 Advances in Econ. Analysis & Pol'y 1, 14 (2004). That is not just bad for business—it's bad for air quality as well, because often those modifications would actually result in reduced emissions. *Id.*

In addition to depressing growth of existing businesses, a nonattainment designation also discourages new businesses from locating facilities in the area. Fisher Statement. Job creators are reluctant to invest in such areas because of the expensive, bureaucratic permit processes they must navigate whenever they wish to modify an existing facility or construct a new one. *Id.*

Finally, the longer an area is in nonattainment status, the greater the negative impact on the area's economy. Douglas Alan Carr, *Environmental Regulatory Policy: Political Economy, Industrial Geography, and Intergovernmental Fiscal Effects* (Univ. of Ky. Doctoral Dissertation 2007) at 41, *available at* http://uknowledge.uky.edu/gradschool_diss/525/. Employment and total wages continue to decrease over time; "[a]fter ten years of nonattainment status, a 19% reduction in total . . . employment and an 11% reduction in total wages is expected." *Id.* The impact reaches beyond the borders of the nonattainment area: neighboring counties experience an average decrease of 11% in both employment and wages. *Id.* at 43. But after redesignation to attainment, both employment rates and wages begin to recover. *Id.* at 42.

It is one thing for Congress to make an affirmative decision to impose such economic burdens on States in order to achieve certain air-quality goals. But here, neither Congress nor EPA has made such a decision. Rather, contrary to EPA's interpretation of a federal

statute, a federal court has undertaken to impose unnecessary burdens on States. This Court should grant certiorari and ensure that the requirements of the Clean Air Act apply uniformly and fairly to every State.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana
THOMAS M. FISHER
Solicitor General
(*Counsel of Record*)
HEATHER HAGAN MCVEIGH
LARA LANGENECKERT
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

Dated: December 22, 2015

ADDITIONAL COUNSEL

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA COFFMAN
Attorney General
State of Colorado

DEREK SCHMIDT
Attorney General
State of Kansas

BILL SCHUETTE
Attorney General
State of Michigan

JIM HOOD
Attorney General
State of Mississippi

MARTY J. JACKLEY
Attorney General
State of South Dakota

HERBERT H. SLATERY III
Attorney General and
Reporter
State of Tennessee

SEAN REYES
Attorney General
State of Utah

PETER K. MICHAEL
Attorney General
State of Wyoming

Counsel for Amici States