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

REPLY BRIEF FOR THE PETITIONER

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Back in 2009, Ohio attained EPA's national ambient air quality standards ("air-quality standards") for fine particulate matter in the Cincinnati area. Pet. App. 61a. Now, some six years later, the Sixth Circuit's decision below leaves Ohio and other States in the dark on what they must do to redesignate an area from "nonattainment" to "attainment." Pet. 30-31; Br. of *Amici* States 3-8. It also leaves the regulated community under costly nonattainment rules while Ohio proceeds through the administrative process (and potentially the judicial one) yet again. Br. of *Amici* U.S. Chamber of Commerce et al. 11-16; Resp. Br. of Ohio Util. Grp. et al. 15-20.

As the Petition noted (at 15-24), the Court should grant review because the Sixth Circuit's decision committed two mistakes that created two conflicts—one involving the "redesignation statute" (42 U.S.C. § 7407(d)(3)(E)), the other involving the "nonattainment-plan statute" (42 U.S.C. § 7502). *First*, the Sixth Circuit's holding that the redesignation statute requires a state plan to meet nonattainment-plan mandates before redesignation conflicts with a Seventh Circuit case that rejected the same argument by the same party. *Second*, the Sixth Circuit's separate holding that Ohio did not meet the nonattainment-plan requirement to implement "reasonably available control measures" even though it timely achieved attainment conflicts with cases that have held that "reasonably available control measures" includes only those measures necessary for timely attainment.

In response, the Sierra Club and EPA, while disagreeing on the merits, are content to keep Cincinnati in nonattainment while Ohio proceeds through the redesignation process again. Their arguments—

which are inconsistent with what they asserted below—do not undermine the need for review.

I. THE SIERRA CLUB CANNOT RECONCILE THE DECISION BELOW WITH THE SEVENTH CIRCUIT'S READING OF THE REDESIGNATION STATUTE

As the Petition noted (at 15-18), the Court should grant review because the Sixth and Seventh Circuits disagree over the meaning of the redesignation statute's second requirement: that EPA "has fully approved the applicable implementation plan for the area under section 7410(k)." 42 U.S.C. § 7407(d)(3)(E)(ii). Rejecting the Sierra Club's view that this provision required a state plan to include "'whatever should have been in the plan at the time of attainment,'" the Seventh Circuit upheld EPA's view that it merely "require[d] an area to continue doing whatever worked, and nothing more." *Sierra Club v. EPA*, 375 F.3d 537, 540-41 (7th Cir. 2004). Based on its prior decision in *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001), by contrast, the Sixth Circuit "disagree[d]" with the Seventh Circuit that the "applicable" plan need not include everything a nonattainment plan must contain. Pet. App. 27a. In response, the Sierra Club mistakenly argues (1) that the cases do not conflict and (2) that the Sixth Circuit issued a limited decision.

A. While conceding that the Sixth Circuit's decision is in "some tension" with the Seventh Circuit's, the Sierra Club argues that the cases do not "squarely conflict." Opp. 3, 29-32. That is so, the Sierra Club alleges, because this case addresses the *general* nonattainment-plan requirement to implement reasonably available control measures in 42 U.S.C. § 7502(c)(1), whereas the Seventh Circuit case in-

volved the *specific* nonattainment-plan mandates for ozone in 42 U.S.C. § 7511a. This distinction is legally irrelevant and factually mistaken. As EPA concedes (U.S. Br. 10-12), the cases are irreconcilable.

Legally, both cases ask the same question: What does the redesignation statute mean when it says that EPA must have "fully approved the applicable implementation plan for the area under section 7410(k) of this title"? 42 U.S.C. § 7407(d)(3)(E)(ii). The Seventh Circuit held that the "applicable" plan need not contain everything a nonattainment plan should include; the Sixth Circuit held that it must. This conflict turns on the meaning of § 7407(d)(3)(E)(ii), not on the specific nonattainment-plan requirement that a specific challenger argues a plan fails to satisfy. Whether a plan allegedly fails to meet the general requirement in § 7502(c)(1), the specific requirements in § 7511a, or some other nonattainment requirement is beside the point.

Factually, the Seventh Circuit case *did* involve the question whether a nonattainment plan must include reasonably available control technology. The ozone-specific rules direct nonattainment plans "to require the implementation of reasonably available control technology under [§ 7502(c)(1)]" for pollutants that contribute to ozone. *Id.* §§ 7511a(b)(2), (c). The Sierra Club argued that "Missouri does not have a fully approved [state plan] that meets 'applicable' [reasonably available control technology] requirements." Pet'rs Br., *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004) (No. 03-2839, 03-3329), 2003 WL 23339973. And the Seventh Circuit recognized that the Sierra Club argued that redesignation was improper partially because "*every* attainment plan for

an area at the serious level must specify the implementation of all reasonably available control measures." *Sierra Club*, 375 F.3d at 540.

Indeed, the Sierra Club's current view (in this Court) that *Sierra Club* is distinguishable because it involves ozone-specific requirements conflicts with the Sierra Club's previous view (in the Sixth Circuit) that *Wall* compelled the Sixth Circuit's decision even though it involved ozone-specific requirements. EPA and Ohio sought to distinguish *Wall* on the ground that the Sierra Club now invokes to distinguish *Sierra Club*. But the decision below "agree[d] with the Club" that *Wall* applied "despite the fact that [it] interpreted [reasonably-available-control-technology] requirements for ozone nonattainment areas," because the "statutory language at issue in that case [was] functionally identical to—and directly reference[d]—§ 7502(c)(1)." Pet. App. 26a. In short, either *Wall* and *Sierra Club* both are distinguishable or neither is. By agreeing with the Sierra Club's view of *Wall*, the Sixth Circuit disagreed with the Seventh Circuit's view in *Sierra Club* (as it acknowledged). This conflict is irreconcilable.

B. The Sierra Club also attempts to cabin the Sixth Circuit's decision, arguing that the Sixth Circuit held *only* that "applicable implementation plan" in § 7407(d)(3)(E)(ii) compels a state plan to meet § 7502(c)(1)'s requirements, not *all* nonattainment-plan requirements. Opp. 1, 21. Yet the Sixth Circuit described the Seventh Circuit's *Sierra Club* decision—the decision that it rejected—as holding that EPA does not have to approve "*all* statutory provisions imposed on nonattainment areas." Pet. App. 27a (emphasis added). And the Sierra Club offers no

textual hook for interpreting "applicable implementation plan" in § 7407(d)(3)(E)(ii) as distinguishing between some nonattainment-plan mandates that fall within the subsection and others that do not.

To make this argument, moreover, the Sierra Club suggests that the Sixth Circuit held that the relevant statutory "language could be read to 'limit[] the number of actual requirements within [§ 7410] and Part D that apply to a given area.'" Pet. App. 27a-28a (quoting *Wall*, 265 F.3d at 439); Opp. 27-28. Yet this portion of the decision addressed a *different* redesignation requirement: that the State has "met all requirements applicable to the area." 42 U.S.C. § 7407(d)(3)(E)(v). *Wall* had said that "applicable" in *that* provision was ambiguous, but the decision below *rejected* reliance on this part of *Wall* because the sections "in this case"—§§ 7407(d)(3)(E)(ii) and 7502(c)(1)—"do not contain similar language." Pet. App. 28a. In all events, if the Sierra Club's reading is correct, the Sixth Circuit leaves unclear which nonattainment-plan requirements a state plan must satisfy under § 7407(d)(3)(E)(ii). That uncertainty adds to the need for immediate review.

II. THE SIERRA CLUB CANNOT UNDERMINE THE NEED FOR REVIEW BY NARROWLY INTERPRETING THE SIXTH CIRCUIT'S HOLDING CONCERNING THE NONATTAINMENT-PLAN STATUTE

Even *assuming* the redesignation statute requires the "applicable" plan to satisfy § 7502(c)(1), the Sixth Circuit created another conflict by holding that Ohio's plan failed to implement "reasonably available control measures" even though it timely achieved the relevant standard. Pet. 18-24. Before the decision below, circuit courts agreed that § 7502(c)(1)'s re-

quirement to implement "reasonably available control measures" compelled only measures that are necessary for attainment. *See NRDC v. EPA*, 571 F.3d 1245, 1253 (D.C. Cir. 2009); *Sierra Club v. EPA*, 314 F.3d 735, 743-45 (5th Cir. 2002); *Sierra Club v. EPA*, 294 F.3d 155, 162-63 (D.C. Cir. 2002); *Ober v. Whitman*, 243 F.3d 1190, 1198 (9th Cir. 2001). The Sixth Circuit, however, stated: "[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. 28a (citation omitted).

In response, the Sierra Club and EPA characterize the Sixth Circuit's holding as an "administrative" one that may "result[] in no additional pollution-reduction measures." Opp. 28; U.S. Br. 13-14. According to them, the Sixth Circuit held only that state plans must adequately discuss the requirement to implement reasonably available control measures, and did not upset the traditional view that no such measures exist for plans that timely meet the air-quality standards. Opp. 27-28. Based on this reading, the Sierra Club and EPA say, this case does not implicate the Petition's second question or the conflicting cases interpreting § 7502(c)(1). Opp. 25-26, 31-32; U.S. Br. 17. This reading of the decision below cannot insulate it from review because (1) the reading is in tension with the decision itself, and (2) the decision warrants immediate review no matter how the Sixth Circuit will one day interpret it.

A. The Court should not decline review based on the Sierra Club's narrow reading of the decision below. *First*, the narrow reading conflicts with what EPA did below. The Sierra Club argues that the

Sixth Circuit's decision held "only that EPA cannot categorically ignore section 7502(c)(1)'s mandate." Opp. 1-2; *id.* at 25-29. But EPA did *not* "eras[e]," "bypass," "ignore," "re-write," or "alter" § 7502(c)(1). Opp. 22-23 (citations omitted). It merely noted that § 7502(c)(1)'s requirement was "linked to attainment," and that Ohio "satisfied [this] requirement without need for further measures" because it achieved timely attainment. Pet. App. 78a. There is a wide gap between what the Sierra Club says EPA did (*ignore* § 7502(c)(1)) and what EPA did (find § 7502(c)(1) *satisfied*). Thus, EPA sought en banc review partially because the decision below was "in substantial tension with other court of appeals decisions upholding EPA's interpretation of § 7502(c)(1)." Doc.133, U.S. Supplement in Supp. of Rehearing En Banc, at 2 (6th Cir. No. 12-3169, July 28, 2015).

To suggest that the Sixth Circuit did not consider EPA's view that Ohio satisfied § 7502(c)(1) because it timely attained the relevant standard, the Sierra Club cites a *different* argument. Opp. 25-26. The intervenor utilities (and Ohio) alternatively asserted that Ohio met § 7502(c)(1) because Ohio's control measures for *other pollutants* also met § 7502(c)(1)'s commands for *fine particulate matter*. That argument, the Sixth Circuit said, was not "advocated by EPA as the justification for its rulemaking." Pet. App. 28a-29a n.5. The Sixth Circuit then noted: "Recall that EPA took the position when approving redesignation that [reasonably-available-control-technology] requirements as a category only apply if needed to reach attainment." Pet. App. 29a n.5. The Petition seeks to address EPA's traditional argument, not the utilities' separate one.

Second, the narrow reading conflicts with what Ohio submitted to EPA. The Sierra Club says that Ohio's redesignation request "admitted that [Ohio] had still not met" § 7502(c)(1)'s "requirement that it adopt an implementation plan identifying" reasonably available control measures. Opp. 11-12. Not so. The page cited by the Sierra Club notes that § 7502(c)'s standards "only have meaning for areas not attaining the standard," and that later chapters "discuss [§ 7502(c)'s] requirement in more detail." Ohio Request for Redesignation, App. to Petr's Br. No. 12-3169, App. 70, PageID#74 (6th Cir. July 10, 2013); *see id.* App. 105-07, PageID#109-11. Those chapters describe how the Lake Michigan Air Directors Consortium ("LADCO") conducted studies exploring control measures for various pollutants and that, "[b]ased on the results," the consortium's "project team felt it would not be possible to advance [the] attainment date for" fine particulate matter. *Id.* at App. 106, PageID#110. "Because of a projected 2009 attainment date," Ohio concluded, "it would not have been reasonably possible or practicable for Ohio to develop [control measures], promulgate regulations and implement a control program prior to the projected attainment date." *Id.* at App. 106-07, PageID#110-11. Thus, if the Sixth Circuit required Ohio to engage in a mere "administrative" step, the Court should summarily reverse because Ohio did so.

Third, the narrow reading conflicts with the Sixth Circuit's analysis of the Sierra Club's standing. The Sixth Circuit held that the Club had standing because, if the Club succeeded, it was "*highly likely* that imposition of [reasonably available control measures] would have some marginal effect on area emissions." Pet. App. 43a (emphasis added). That

was so, the court added, because the Sierra Club's interpretation of "reasonably available control measures" in § 7502(c)(1) "would *directly* reduce emissions at sources already known to exist." Pet. App. 44a (emphasis added). Indeed, the Sierra Club argued below that "fine particulate matter kills innocent people," and so "requiring reasonably available control technology measures for fine particulate matter" even if an area has attained the relevant air-quality standard "can save people's lives." Doc.128, Sierra Club's Opp. to Pet. for Rehearing En Banc, at 6-7 (6th Cir. No. 12-3169, June 19, 2015). It is unlikely that the Sierra Club had an "administrative" paperwork mandate in mind when it made these statements (which conflict with the entire regulatory regime since EPA sets air-quality standards at levels protecting public health, *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465 (2001)).

Fourth, the narrow reading conflicts with the Sixth Circuit's amended decision. Its original decision said that the court might later agree "that individual measures are not [reasonably available] if they do not meaningfully advance the date of attainment." Pet. App. 56a n.5. After Ohio pointed out that this *limiting* language conflicted with the Court's holding—because, by definition, no measures are "reasonably available" when an area has achieved timely attainment—the court removed the language without reconciling its decision with the conflicting cases. Pet. App. 28a-29a n.5. The Sierra Club claims that by *removing* language *limiting* the decision the Sixth Circuit somehow meant to limit the decision's scope even further. Opp. 27. According to the Sierra Club, the Sixth Circuit may have made this deletion based on EPA's view that the

court lacked jurisdiction to consider the broader question of what measures are "reasonably available" because that question implicated a nationwide regulation. *Id.*; *see* 40 C.F.R. § 51.1010. Yet the Sixth Circuit's decision, even when read narrowly, implicates a nationwide regulation suspending § 7502(c) once an area achieves attainment. *See* 40 C.F.R. § 51.1004(c). If the court agreed with EPA, it would have dismissed the Sierra Club's entire argument. It would not have eliminated limiting language.

Fifth, the narrow reading conflicts with the Sixth Circuit's *judgment*, which necessarily addressed this issue. The question of whether § 7502(c)(1) sets a mandatory command (the question that the Sierra Club says the Sixth Circuit resolved) is inseparable from the question of what that command actually is (the question that Ohio addresses). Sierra Club's arguments prove this point. In Part I.A, the Sierra Club criticizes Ohio for allegedly violating § 7502(c)(1) because that subsection uses the word "shall" and imposes a mandatory command. Opp. 21-25. In Part I.B, however, the Sierra Club argues that "[n]othing in the opinion below directly addresses what 42 U.S.C. § 7502(c)(1) requires from a State." Opp. 25. According to the Sierra Club, the Sixth Circuit told Ohio that it did not meet § 7502(c)(1)'s *requirements* without telling Ohio what § 7502(c)(1) *requires*.

B. To be sure, by relying on the allegedly narrow scope of the Sixth Circuit's decision as the basis for this Court to deny review, the Sierra Club would be bound by that reading. Yet the decision still warrants immediate review. To begin with, whatever § 7502(c)(1) means, it cannot mean what the Sierra

Club says the Sixth Circuit interpreted it to mean. Section 7502(c)(1) states, in relevant part, that non-attainment-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)." *Id.* This text requires a state plan to provide for the implementation of reasonably available control measures. When no such measures exist, the text nowhere suggests that a plan must contain language to that effect. That is, if "reasonably available control measures" exist, § 7502(c)(1) requires a state plan to provide for their implementation; if those measures do not exist, § 7502(c)(1) requires a state plan to do nothing. Section 7502(c)(1) nowhere imposes an empty paperwork mandate.

In addition, while EPA claims that the decision below, when interpreted narrowly, lacks "practical significance" for the agency (U.S. Br. 12), it does have practical significance for the States and their citizens—as the *amicus* briefs show. Ohio should not have to wait potentially years to see how the Sixth Circuit will interpret its decision. After all, three years passed in this case between when the Sierra Club filed its petition and when the Sixth Circuit issued a decision. Further uncertainty is "not good for government, not good for business, and not good for the citizens who reside in [the affected] cities." Br. of *Amici* U.S. Chamber of Commerce et al. 16. It bears repeating that 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. And it should be noted that

the Cincinnati area continues to meet the relevant standards; indeed, it has met stricter fine-particulate-matter standards that EPA separately promulgated in 2012. *See* 40 C.F.R. § 81.336 (identifying 1997 and 2012 fine-particulate-matter standards); 80 Fed. Reg. 18535, 18537 (Apr. 7, 2015). Neither the State's enforcement planning nor the regulated community's investment planning should have to turn on their divining what a court meant with changes to its footnotes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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