Nos. 07-311 and 07-333

In the Supreme Court of the United States

NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION, ET AL., PETITIONERS

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.

THE CHAMBER OF GREATER BATON ROUGE, ET AL., PETITIONERS

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Pursuant to the Clean Air Act (CAA), the Environmental Protection Agency (EPA) has modified the national ambient air quality standard for ozone to make it more stringent. An "anti-backsliding" provision of the CAA states that if EPA "relaxes a national primary ambient air quality standard," it must ensure that any area that had not met the old standard remains subject to "controls which are not less stringent" than the old requirements. CAA § 172(e), 42 U.S.C. 7502(e).

The questions presented are:

1. Whether the court of appeals correctly held that Section 172(e) does not bar EPA from including anti-backsliding measures in circumstances when EPA strengthens rather than relaxes a standard.

2. Whether the court of appeals erred by failing to accord adequate deference to EPA's decision not to retain as anti-backsliding measures three provisions based upon the older, less stringent ozone standard.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 472 F.3d 882.[1] The opinion of the court of appeals clarifying its initial opinion (Pet. App. 42a-49a) is reported at 489 F.3d 1245.

[1] All citations to "Pet. App." refer to the appendix to the petition in No. 07-311.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2006. Petitions for rehearing were denied on June 8, 2007 (Pet. App. 685a-686a). The petitions for a writ of certiorari were filed on September 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to Section 109 of the Clean Air Act (CAA), 42 U.S.C. 7409, the Administrator of the Environmental Protection Agency (EPA) establishes national ambient air quality standards (NAAQS) for certain pervasive air pollutants. The NAAQS for each such pollutant must be "requisite to protect the public health," and "may be revised" at any time. CAA § 109(b), 42 U.S.C. 7409(b). Geographic areas are then designated as "nonattainment" if the pollutant exceeds the NAAQS for that area, or "attainment" if the pollutant meets the NAAQS for that area. CAA § 107(d), 42 U.S.C. 7407(d) (2000 & Supp. IV 2004). Each State develops and submits to EPA an implementation plan for attaining and maintaining the NAAQS through pollution-reduction programs and other measures.

a. Ozone is one of the pollutants regulated by the Act. Nonattainment areas with respect to ozone are subject to various program provisions contained in two subparts of Part D of the CAA. Subpart 2, which is specific to ozone, primarily governs implementation of the ozone NAAQS. See CAA §§ 181-185B, 42 U.S.C. 7511-7511f. Subpart 1 sets out general air-pollution reduction programs that apply to ozone in all nonattainment areas, and certain other measures that apply only in instances

where Subpart 2 does not. See CAA § 172(a)(2)(D), 42 U.S.C. 7502(a)(2)(D).

Under Subpart 2, each area that has not yet attained the ozone NAAQS is placed into one of five classifications ("Marginal," "Moderate," "Serious," "Severe," or "Extreme"), based on the extent to which the area's ozone level exceeds the NAAQS. CAA § 181(a)(1), 42 U.S.C. 7511(a)(1). Each area's classification determines how and when an area is required to achieve compliance with the NAAQS: Subpart 2 sets out increasingly stringent measures that areas in each classification must implement and increasingly distant outside dates by which areas in each classification must attain the NAAQS. States incorporate those requirements into their implementation plans, which demonstrate how nonattainment areas within their borders will attain the NAAQS as expeditiously as practicable, but in no event later than the specified attainment date. For example, every area categorized as "Moderate" or higher must incorporate into its plan "reasonably available control technology" requirements for specified industrial sources. CAA § 182(b)(2), 42 U.S.C. 7511a(b)(2); see also CAA § 182(c), (d) and (e), 42 U.S.C. 7511a(c), (d) and (e). State implementation plans, once approved by EPA, are federally enforceable. If an area fails to attain the NAAQS by the specified date, it may be moved into a more serious classification and must revise its plan accordingly. CAA § 181(b)(2), 42 U.S.C. 7511(b)(2).

The CAA requires the Administrator to review the NAAQS regularly and to revise the NAAQS where appropriate. See CAA § 109(d)(1), 42 U.S.C. 7409(d)(1). "If the Administrator *relaxes* [a NAAQS]," he must promulgate new requirements for any area that had not yet attained the old standard, and the new requirements

"shall provide for controls which are *not less stringent* than the controls applicable * * * before such relaxation." CAA § 172(e), 42 U.S.C. 7502(e) (emphases added). Congress did not mandate a particular approach to the issue of backsliding when the Administrator changes the NAAQS in a way that makes it *stricter* rather than more relaxed. The CAA does, however, prescribe approaches to prevent existing air quality from worsening. For example, EPA may not approve a modification to a State's implementation plan that would "interfere with any applicable requirement concerning attainment and reasonable further progress [toward timely attainment]." CAA § 110(*l*), 42 U.S.C. 7410(*l*).

b. Of the provisions that nonattaining areas are required to include in their implementation plans, three are relevant to this litigation. First, the "new source review" (NSR) program requires States to include a permitting requirement for new (or significantly modified) stationary sources of emissions that contribute to ozone pollution. To qualify for a permit, each new source must identify offsetting decreases in ozone emissions. The permitting restrictions, including the ratio of the required offsets, are more stringent as the area classifications increase under Subpart 2. See, *e.g.*, CAA § 182(b)(5), (c)(10), (d)(2) and (e)(1), 42 U.S.C. 7511a(b)(5), (c)(10), (d)(2) and (e)(1) (increasing required ratios). Second, States whose "Severe" or "Extreme" areas do not timely attain the NAAQS must impose monetary penalties in the form of "fees" on major stationary sources within those areas. CAA § 185, 42 U.S.C. 7511d. Third, States must include contingency measures, to be automatically implemented if an area fails to attain the NAAQS by its attainment date or fails

to make reasonable progress toward attainment. CAA §§ 172(c)(9), 182(c)(9), 42 U.S.C. 7502(c)(9), 7511a(c)(9).

c. Until 1997, one element of the NAAQS for ozone was measuring air quality over a one-hour period. Under this "1-hour standard," the level of the NAAQS was set at 0.12 parts per million (ppm) in 1979. 62 Fed. Reg. 38,857 (1997). In 1997, EPA decided, based on new scientific understanding about the health effects of prolonged exposure to ozone at lower concentrations, to replace the 1-hour standard with an 8-hour standard. *Id.* at 38,858, 38,861. EPA also revised the level of the NAAQS: an average of 0.08 ppm over the 8-hour period. That revised standard is more stringent than the old 1-hour standard, providing greater public health protection. "EPA recognized that an eight-hour level of 0.09 ppm would have 'generally represent[ed] the continuation of the present level of protection.'" Pet. App. 7a (quoting 62 Fed. Reg at 38,858). Thus, EPA concluded, the "anti-backsliding" provision of Section 172(e) did not apply to the change, because EPA was not "relax[ing]" the ozone standard.

EPA determined, however, that some transition measure was warranted to prevent areas that had not yet attained the 1-hour standard from backsliding from measures required for the 1-hour standard in the transition to the 8-hour standard. 62 Fed. Reg. at 38,873. Accordingly, EPA provided that during the transition, the 1-hour standard would remain in effect for all areas that had not yet attained the 1-hour ozone NAAQS. *Ibid.* That transition rule remained in effect while litigation (not directly relevant here) proceeded over whether the 8-hour standard, once implemented, would be governed by Subpart 1, Subpart 2, or a combination of both. See

Whitman v. *American Trucking Ass'ns*, 531 U.S. 457, 476, 481-486 (2001).

This Court's decision in *Whitman* required EPA to reconsider its approach to the implementation of the 8-hour standard under Subpart 1 rather than Subpart 2. EPA accordingly issued new rules providing that some areas would be covered under Subpart 1 and some under Subpart 2. See, *e.g.*, Pet. App. 347a-348a.

When re-issuing its rules on that subject, EPA also decided to revise its related 1997 transition rule. Specifically, EPA determined to revoke the 1-hour ozone standard one year after the effective date of areas' designation for the 8-hour standard. Pet. App. 350a. EPA recognized, however, that revoking the 1-hour standard created the potential for backsliding if areas terminated their pollution-reduction programs as they applied under the 1-hour standard. *Id.* at 412a. The agency "believe[d] that, if Congress intended areas to remain subject to the same level of control where a NAAQS was relaxed," as Section 172(e) requires, Congress "also intended that such controls not be weakened where the NAAQS is made more stringent." *Id.* at 423a; see also *id.* at 128a. EPA reasoned that the CAA does not specify a particular approach to prevent backsliding in the latter circumstance, but that several provisions of the CAA and its overall structure reasonably establish that authority. *Id.* at 422a-423a (citing, inter alia, CAA § 175A(d), 42 U.S.C. 7505a(d)). Although recognizing that the anti-backsliding provision, Section 172(e), does not apply by its terms, EPA deemed it appropriate to look to that provision as one of the sources of guidance in determining how best to formulate anti-backsliding measures for the transition. See, *e.g.*, *id.* at 422a-423a, 478a-479a, 589a. EPA also looked to whether retaining

a particular anti-backsliding measure would further the goals of transitioning to the 8-hour standard. See, *e.g.*, *id.* at 477a.

d. EPA ultimately decided to retain most of the CAA's pollution-reduction programs as they applied to areas under the 1-hour standard. Pet. App. 422a. EPA determined, however, that it need not preserve the three provisions discussed above—*i.e.*, new source review, penalties, and contingency measures—as they had applied under the 1-hour standard.

EPA decided that NSR requirements should apply only based on each area's new classification under the 8-hour standard. EPA explained that the NSR program is not a control that States rely upon to demonstrate how they will reach timely attainment of the applicable NAAQS: If an area does not add any new or modified sources, NSR does not play a role in that area's strategy for attaining the NAAQS. Rather, NSR is a way of ensuring that economic growth can continue without interfering with the State's plans for reaching attainment. See Pet. App. 648a, 658a.

The CAA's penalty provisions had not yet gone into effect. These provisions applied only to areas classified "Severe" and "Extreme," and could be triggered only after an area failed to attain the NAAQS by the date specified in the Act, the earliest of which was November 15, 2005—more than a year after the 1-hour standard no longer applied. Pet. App. 590a. EPA therefore concluded in its rulemaking that it would be counterproductive to impose penalties in the future based on the now-revoked 1-hour standard: States would have to devote additional resources to monitoring, and if necessary, achieving compliance with the 1-hour standard even af-

ter EPA had determined that the old standard was no longer requisite to protect public health. *Id.* at 594a.

EPA likewise determined that if a State's 1-hour contingency measures had not yet been put into effect, the State could in appropriate circumstances remove them from its implementation plan in the future. Pet. App. 610a. These contingency measures are triggered by failure to meet particular benchmarks on the path to attaining the 1-hour standard. CAA § 172(c)(9), 42 U.S.C. 7502(c)(9). In areas where those measures had not yet been triggered, EPA decided not to require States to devote resources to monitoring future compliance with the discontinued 1-hour standard. Pet. App. 610a; see also 70 Fed. Reg. 5597 (2005). Instead, contingency measures should in the future be "linked to the 8-hour standard," meaning that States may revise the triggers for these measures and tie them more directly to the 8-hour NAAQS. Pet. App. 617a-618a. Before States can revise their plans to modify the contingency measures, they must submit those modifications to EPA and demonstrate that the change will not interfere with attainment of, or reasonable progress toward, the NAAQS. *Id.* at 611a-612a.

2. Various States, industry groups, and environmental groups petitioned for review of EPA's rulemaking. The National Petrochemical & Refiners Ass'n (NPRA) and the other petitioners in No. 07-311 challenged EPA's implementation of the Subpart 2 classification scheme for the 8-hour standard. The Chamber of Greater Baton Rouge and the other petitioners in No. 07-333 contended that no anti-backsliding measures based on the 1-hour standard should be retained once that standard was replaced, unless those measures are already contained in an area's existing implementation

plan for the 1-hour standard. The environmental groups argued that EPA should not have revoked the 1-hour standard at all, and in the alternative, that EPA should have maintained the NSR, penalties, and contingency-measures provisions unchanged with respect to the 1-hour standard. The court of appeals agreed with the alternative argument and granted the environmental groups' petitions in part. (In portions of its decision not challenged here, the court of appeals also set aside EPA's determination that Subpart 1 rather than Subpart 2 would govern some areas' implementation of the 8-hour standard, and vacated those portions of the rulemaking applying Subpart 1. Pet. App. 18a-20a.)

a. The court rejected the environmental groups' assertion that the 1-hour standard cannot be withdrawn. The CAA permits EPA to "make such revisions in [the NAAQS] * * * as may be appropriate" following its regular review of the standards. CAA § 109(d)(1), 42 U.S.C. 7409(d)(1). EPA's decision to replace the 1-hour standard with the "even more effective" 8-hour standard was neither arbitrary nor contrary to law. Pet. App. 28a-29a (quoting 62 Fed. Reg. at 38,863).

b. The court next rejected the argument that EPA lacks authority to require States to add *any* measures to their implementation plans to prevent backsliding based upon the revoked 1-hour standard. Pet. App. 29a-31a. The court recognized that the CAA's anti-backsliding provision, Section 172(e), "applies only when EPA 'relaxes' a primary NAAQS," but held that this provision does not support "the counterintuitive claim that the strengthening of the NAAQS entitles [petitioners] to a weaker regulatory regime." *Id.* at 30a. Based upon its review of particular sections and the CAA as a whole, the court held that EPA's assertion of authority to im-

pose anti-backsliding provisions in conjunction with a stronger NAAQS was both reasonable and consistent with the statute. See *id.* at 30a-31a (citing 42 U.S.C. 7502(e), 7505a, 7410(*l*)).

c. The court of appeals held, however, that EPA had acted arbitrarily by not including three 1-hour-based programs on the list of anti-backsliding measures it had decided to retain. Pet. App. 31a-38a. The court noted that EPA had decided to use Section 172(e) (which refers to "controls" on pollutants) as a reference point in determining which anti-backsliding measures to retain. In the court of appeals' view, the three measures that EPA discontinued were just as much "controls" as the measures that EPA retained. See *id.* at 31a.

EPA had explained that new source review is not a "control" because it is not a mandatory measure that helps areas attain the NAAQS. Pet. App. 654a-656a. The court of appeals held that this distinction was "arbitrary," because "EPA nowhere claims that if NSR were not present, there would be no effect on ozone levels." Pet. App. 33a. The court stated that EPA's "[p]ast and current practice confirms that NSR is a control," *id.* at 33a-34a (citing EPA rulemakings referring to NSR as a control); that the CAA's legislative history refers to NSR as a control, *id.* at 34a; and that the text of the Act refers to "control technology" in providing for NSR, *id.* at 33. The court accordingly concluded that NSR unambiguously qualifies as a "control." Although the Sixth Circuit had concluded in *Greenbaum* v. *EPA*, 370 F.3d 527 (2004), that NSR is not a control measure for purposes of a different section of the CAA, the court of appeals held that *Greenbaum* was distinguishable because it "involved a different ultimate question, namely, whether NSR is required for *attainment* areas, and re-

quired that court to determine the meaning of a different term, 'measures.'" Pet. App. 34a.

The court next rejected EPA's conclusion that it need not retain penalties pegged to the 1-hour standard, even though those penalties had not yet been imposed on any nonattaining area. In the court's view, penalties were properly viewed as "applicable" for purposes of the CAA the moment Congress required them, because even if they would not become enforceable for fifteen to twenty years, if ever, they were "designed * * * to influence state action prior to" their effective dates. Pet. App. 36a. The court opined that any other construction would be "untenable," because it would allow EPA forever to avoid imposing fees by modifying the NAAQS just prior to the attainment date for a nonattaining severe or extreme area. *Ibid*.

For similar reasons, the court rejected EPA's decision that contingency measures based on the 1-hour standard need not be retained if they have not yet been triggered. The court applied the same reasoning that it had given with respect to the penalty provision: Any "emphasis on whether the controls have been 'triggered' is a red herring," the court stated, because contingency measures would have automatically been put into place "if an area were to miss the [previous 1-hour] threshold of 0.12 ppm." Pet. App. 38a. Relaxing that automatic requirement, the court thought, would be impermissible backsliding.

d. Several parties sought rehearing, and the court of appeals modified its opinion. Pet. App. 42a-49a.

The NPRA petitioners argued that the three provisions should not be imposed, because *no* anti-backsliding measure is permissible under Section 172(e) if EPA does not "relax[]" the NAAQS. The court of appeals again

held that it "properly deferred to EPA's reasonable interpretation"; it added that petitioners' argument leads to an "absurd result," *i.e.*, that controls mandated by Congress in 1990 would *never* be required so long as EPA continually strengthened the NAAQS by a tiny amount each time. Pet. App. 47a-48a.

The court also clarified that its holding on the three anti-backsliding measures was *not* compelled by the direct application of Section 172(e). The court again acknowledged that Section 172(e) is not "legally binding" when a NAAQS is strengthened. Pet. App. 48a. The court noted, however, that "[i]n the rulemaking, EPA concluded that 'Congress would have intended that control obligations that applied for purposes of the 1-hour NAAQS should remain in place.'" *Ibid.* (quoting Pet. App. 590a).

ARGUMENT

The court of appeals correctly determined that EPA has the authority to establish anti-backsliding measures when adopting a new, more stringent NAAQS. Petitioners' attack on the court of appeals' holding rests on the incorrect notion that Section 172(e) sets out the exclusive source of EPA's authority under the CAA to adopt regulations of that type; in fact, as the court of appeals correctly recognized, Section 172(e) evinces no such exclusivity. Thus, no further review is warranted on the broader question of EPA's authority to preserve measures to prevent backsliding.

Petitioners rightly point out that the court of appeals erred in rejecting EPA's decision not to retain the applicability of the three provisions based on the 1-hour standard, but that aspect of the decision also does not warrant this Court's review. Although the court of appeals

failed to accord adequate deference to EPA's interpretive and policymaking judgment, its error is narrowly cabined to the specific context at issue here, as the court's opinion on rehearing makes clear. Nor does the court of appeals' decision conflict with the decision of any other court.

1. Petitioners argue at the threshold that because Congress in Section 172(e) required EPA to promulgate anti-backsliding measures in a particular manner when EPA "relaxes" a standard, by negative implication that section prohibits EPA from establishing any anti-backsliding measures at all in those circumstances, because the 8-hour standard is more protective than the 1-hour standard. See 07-311 Pet. 15-18; 07-333 Pet. 14-15. The court of appeals correctly rejected that argument.

Congress's specific admonition that EPA *must* impose anti-backsliding measures when it relaxes a standard does not foreclose the agency from imposing such measures when it modifies a standard in other ways. There is no "series of terms from which an omission bespeaks a negative implication," and therefore Section 172(e) creates no inference "that [a] term left out must have been meant to be excluded." *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002).

Congress expressly contemplated that EPA would modify the NAAQS, and it did not expressly direct how to address a situation like that presented here. Although the 8-hour standard is more stringent than the 1-hour standard, its application through Subpart 2's categorization scheme creates circumstances in which some areas had a higher classification under the revoked 1-hour standard than their new classification under the 8-hour standard. Thus, certain controls previously imposed under the less protective 1-hour standard were—

in those areas—more stringent than those that would be imposed based upon the areas' classification under the more protective 8-hour standard.

As the court of appeals explained, nothing in the CAA forecloses EPA from taking steps to limit or preclude backsliding in those narrow circumstances. Pet. App. 47a ("EPA's interpretation does not violate the plain text of section 172(e), which does not specify how to proceed when the NAAQS is strengthened but the related reclassification would result in weakened controls."). Indeed, several specific provisions and the Act as a whole lend support to EPA's interpretation that it may establish appropriate measures to prevent or limit backsliding when the Agency revokes the less stringent NAAQS and puts the new NAAQS into effect. See *id.* at 30a-31a. Petitioners, by contrast, offer no indication from the text or legislative history of the CAA that Congress intended to mandate a relaxation of controls in those circumstances; all they offer is the unsupported negative inference from Section 172(e). In fact, the situation simply is not directly addressed by the statute, leaving a gap for EPA to fill in the exercise of its discretion. Cf. *Whitman*, 531 U.S. at 483.[2]

The court of appeals correctly determined that EPA had the authority to resolve the ambiguity occasioned by

[2] The Chamber petitioners argue that retaining any 1-hour-based measures requires implementation of two standards simultaneously, in contradiction of statutory provisions that it contends "show[] that *only one* NAAQS was allowed to apply at any given time." 07-333 Pet. 23. Petitioners reach that conclusion by observing that the CAA refers to "a" or "the" NAAQS in varying contexts. *Ibid.* None of the provisions petitioners cite, however, addresses (let alone limits) EPA's authority to keep in place measures to achieve the transition from the 1-hour standard to the generally more protective 8-hour standard, including measures to prevent backsliding.

the change from the 1-hour to the 8-hour standard. Nothing in that decision warrants further review.

2. The court of appeals erred by not according EPA appropriate deference in reviewing EPA's judgments that the three provisions based on the 1-hour standard should not be retained as anti-backsliding measures. EPA reached those judgments for several reasons, including its assessment that the three provisions are neither necessary nor appropriate for this purpose. See, *e.g.*, Pet. App. 588a (explaining that the retention of Section 185 penalties in 1-hour severe and extreme nonattainment areas would be "counterproductive" because it would divert limited resources from planning for and monitoring compliance with the 8-hour standard). The court of appeals overlooked important aspects of EPA's reasoning and thus failed to apply the proper deference.

3. Although the court of appeals was incorrect to reject EPA's decision to discontinue three of the programs tied to the old 1-hour standard, petitioners overread the decision. The court of appeals did not announce a binding construction of Section 172(e) that will necessarily apply in all future NAAQS proceedings. To the contrary: EPA in the rule elected to apply Section 172(e), by analogy, as a guide to how it should exercise its discretion to determine which 1-hour-based provisions it should retain as anti-backsliding measures. The court properly understood EPA's argument and recognized that Section 172(e) does not directly apply when, as here, EPA promulgates a more stringent NAAQS. The court clarified in its opinion on rehearing that "EPA's determination that section 172(e) supports the introduction of anti-backsliding measures is reasonable." Pet. App. 47a; see also *id.* at 30a-31a (reviewing

various CAA provisions and the statute as a whole to uphold EPA's authority to impose anti-backsliding provisions). That the court ultimately deemed EPA's determination as to the three programs to be unreasonable given EPA's discretionary decision to apply the Section 172(e) approach does not negate the court's correct understanding that the CAA does not mandate application of the Section 172(e) approach when a more protective NAAQS is established.

For those reasons, petitioners err in asserting that the decision below will necessarily "govern implementation of every subsequent NAAQS revision." 07-311 Pet. 13. Much of the court of appeals' reasoning is unique to the circumstances of this rulemaking and premised upon aspects of the highly prescriptive scheme that Congress established in Subpart 2 specifically for ozone, including in particular the classification and attainment date scheme in Subpart 2 expressly based upon the 1-hour standard and the manner in which EPA adapted that scheme to the 8-hour standard. See, *e.g.*, Pet. App. 36a. Indeed, the penalty provisions that the court of appeals reviewed are specific to Subpart 2 and to ozone, see CAA § 185, 42 U.S.C. 7511d, and any future revision to the ozone NAAQS may not implicate the penalty provision in the manner that EPA's action did here. Thus, the fact that EPA has commenced the rulemaking based upon its regular review of the ozone NAAQS does not, as the NPRA petitioners would have it (07-311 Pet. 12 n.7), suggest that the transition issue they raise is a recurring one.

Nor does the court of appeals' holding that EPA should have retained NSR under the 1-hour standard create a conflict among the courts of appeals. In *Greenbaum* v. *EPA*, 370 F.3d 527 (6th Cir. 2004), the court of

appeals considered EPA's approval of an area's redesignation from nonattainment to attainment. The CAA requires that a State benefiting from such a redesignation maintain as potential contingency measures, for at least ten years, "all measures with respect to the control of the air pollutant concerned which were contained in the State implementation plan for the area before redesignation." CAA § 175A(d), 42 U.S.C. 7505a(d). EPA determined that NSR is not a "measure[] with respect to [] control" under Section 175A(d), and in *Greenbaum* the Sixth Circuit upheld that view as reasonable and consistent with the statute. 370 F.3d at 535-538. As the court of appeals recognized in this case, "*Greenbaum* involved a different ultimate question," and interpreted the statute by resort to other contextual indicia of statutory meaning. Pet. App. 34a. To be sure, the Sixth Circuit correctly recognized that NSR has "no immediate effect on emissions" or "on existing sources, which would be the cause of any violation of the [NAAQS]." 370 F.3d at 538. That aspect of NSR was part of EPA's basis for discontinuing it, but the court below dismissed that reason as inadequate. See Pet. App. 33a. Nonetheless, *Greenbaum*'s interpretation of the CAA is not irreconcilable with the decision below.

Finally, we do not construe the opinion to create undue restrictions on EPA's authority during the court-ordered remand. Consistent with the court of appeals' opinion, EPA intends to engage in notice-and-comment rulemaking to establish appropriate regulations regarding the three 1-hour-based provisions. Petitioners' various arguments about the practical consequences of the decision, such as the allegedly unworkable burden of implementing controls based upon two standards simul-

taneously, are premature at best until EPA has completed its consideration of these issues on remand.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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