No. 16-1369

In the Supreme Court of the United States

ARIZONA, PETITIONER

v.

SANDRA L. BAHR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency permissibly approved, as "contingency measures" for purposes of petitioner's State Implementation Plan under the Clean Air Act, 42 U.S.C. 7502(c)(9), certain pollution-reduction measures that petitioner had previously commenced.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-43) is reported at 836 F.3d 1218.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2016. Petitions for rehearing were denied on January 9, 2017 (Pet. App. 84-86). On March 10, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 10, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act, 42 U.S.C. 7401 *et seq.* (CAA or Act), establishes a comprehensive program for controlling and improving the Nation's air quality through both

state and federal regulation. Among other requirements, the Act instructs the Environmental Protection Agency (EPA) to promulgate National Ambient Air Quality Standards (NAAQS) for air pollutants that may endanger public health or welfare. 42 U.S.C. 7408-7410. One of the pollutants for which the EPA has promulgated NAAQS is particulate matter with a diameter of 10 micrometers or less (*i.e.*, small dust particles), referred to as PM-10. 40 C.F.R. 50.6.

Under the NAAQS program, the CAA assigns to each State the "primary responsibility for assuring air quality" within its borders. 42 U.S.C. 7407(a). In particular, the Act requires each State to adopt a State Implementation Plan (SIP) that sets forth a comprehensive approach for implementation, maintenance, and enforcement of air quality standards. *Ibid.*; 42 U.S.C. 7410(a)(1). SIPs generally must include enforceable emission limitations and other control mechanisms to meet the requirements of the Act. See 42 U.S.C. 7410(a)(2)(A). A State must submit its SIP, and any revisions thereto, to the EPA for approval. 42 U.S.C. 7410(a)(1), (k).

2. Petitioner is the State of Arizona. In 1990, Congress designated an area that includes parts of Maricopa County, Arizona (the Maricopa Area) as a "nonattainment" area for PM-10. Pet. App. 12; see Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Tit. I, § 101(a), 104 Stat. 2399 (42 U.S.C. 7407(d)(4)(B)); see also 52 Fed. Reg. 29,383-29,384 (Aug. 7, 1987). That designation reflected a determination that the area "d[id] not meet" (or contributed to another area's failure to meet) the NAAQS for PM-10. 42 U.S.C. 7407(d)(1)(A)(i). Since that time, the Maricopa Area has continued not to meet the NAAQS for PM-10, and petitioner's SIPs have

been subject to an increasingly stringent series of statutory requirements with respect to that area. Pet. App. 13-15.

By 2006, petitioner's SIP was required to include a so-called "Five Percent Plan," which must provide for an annual reduction of at least five percent in PM-10 or PM-10 precursor emissions until the NAAQS are attained. Pet. App. 15; see 42 U.S.C. 7513a(d). The five percent plan for the Maricopa Area is subject to the requirements of 42 U.S.C. 7502(c)(9). Titled "Contingency measures," Section 7502(c)(9) requires that a SIP "shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the [EPA]." *Ibid.*

After submitting a SIP in 2007 and then withdrawing it in 2011, petitioner submitted a revised SIP in 2012. Pet. App. 14-15. That SIP proposed to comply with Section 7502(c)(9) through five measures. *Id.* at 16. Four of those five measures—"paving existing dirt roads and alleys, paving and stabilizing unpaved shoulders, repaving or overlaying paved roads with rubberized asphalt, and lowering speed limits on dirt roads and alleys"—were accomplished between 2008 and 2011. *Ibid.* "The fifth contingency measure required the purchase of PM-10 certified sweepers," which had been done by the end of 2009, "and ongoing sweeping of ramps, freeways, and frontage roads." *Ibid.* All of those measures were

"surplus to the measures used to demonstrate five percent reductions" and to satisfy other SIP requirements. 79 Fed. Reg. 7124 (Feb. 6, 2014).

In 2014, the EPA issued a final rule approving petitioner's 2012 revised SIP. 79 Fed. Reg. 33,107 (June 10, 2014). In promulgating that rule, the EPA expressed its disagrement with a comment submitted by Sandra Bahr and David Matusow (the private respondents in this Court), which urged the EPA to disapprove the proposed contingency measures because they were "already being implemented." *Id.* at 33,114; see Pet. App. 4, 20. In responding to that comment, the EPA stated that, although "[c]ontingency measures must provide for additional emission reductions" beyond those relied upon to meet other SIP requirements, "[n]othing in the statute precludes a state from implementing such measures before they are triggered." 79 Fed. Reg. at 33,114 (citing *Louisiana Envtl. Action Network* v. *EPA*, 382 F.3d 575 (5th Cir. 2004)). The EPA further noted that it had previously "approved numerous SIPs" on that understanding. *Ibid.*

3. Bahr and Matusow challenged the final rule approving petitioner's SIP by filing a petition for review in the court of appeals. Pet. App. 20; see 42 U.S.C. 7607(b)(1). The court of appeals rejected two objections that are not at issue here. See Pet. App. 24-33. The court agreed with Bahr and Matusow, however, that the SIP's contingency measures did not meet the requirements of Section 7502(c)(9). *Id.* at 33-37. The court "remand[ed] to the EPA for further consideration of this portion of the SIP." *Id.* at 38.

The court of appeals evaluated the EPA's decision to approve the State's contingency measures under the framework set forth in *Chevron U.S.A. Inc.* v. *Natural*

Resources Defense Council, Inc., 467 U.S. 837, 843 (1984). Pet. App. 35; see *id.* at 22-23. The court of appeals explained that, under that framework, "a court should accept the agency's interpretation" of a statute "'if Congress has not previously spoken to the point and the agency's interpretation is reasonable.'" *Id.* at 23 (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001)). The court declined to defer to the EPA's interpretation of Section 7502(c)(9), however, finding it "clear" that the "'contingency measures'" required by that provision "are control measures that will be implemented in the future." *Id.* at 35; see *id.* at 34-37. The court cited a dictionary definition of "contingency" as "a possible future event or condition or an unforeseen occurrence that may necessitate special measures." *Id.* at 35 (citing *Webster's Third New International Dictionary* 493 (2002)). The court concluded that "[c]ontrol measures that have already been implemented are not measures 'to be undertaken' or 'to take effect' in the future, and the statute cannot reasonably be so interpreted." *Id.* at 36 (quoting 42 U.S.C. 7502(c)(9)).

In reaching that conclusion, the court of appeals expressed disagreement with "the Fifth Circuit's interpretative approach" in *Louisiana Environmental Action Network* v. *EPA*, *supra*. Pet. App. 36; see *id.* at 35-37. The Fifth Circuit had found the statutory language "ambiguous" because "it 'neither affirms nor prohibits continuing emissions reductions—measures which originate prior to the SIP failing, but whose effects continue to manifest an effect after the plan fails—from being utilized as a contingency measure.'" *Id.* at 35-36 (quoting *Louisiana Envtl. Action Network*, 382 F.3d at 583). The Fifth Circuit had also viewed the EPA's interpretation as furthering the CAA's overall goal of improving

air quality quickly and efficiently. See *Louisiana Envtl. Action Network*, 382 F.3d at 583-584; Pet. App. 37. The court of appeals in this case reasoned, however, that "[e]ven if we agreed that the EPA's policy considerations are compelling, such considerations cannot override the plain language of the statute." Pet. App. 37.

Judge Clifton dissented in relevant part, Pet. App. 38-43, stating that he "would give *Chevron* deference to the EPA's interpretation of § 7502(c)(9)," *id.* at 43. He reasoned that "early-implemented contingency measures * * * 'take effect' and are 'undertaken' not only at the time they are first implemented but also thereafter, including at the time they might formally be required due to nonattainment" of NAAQS. *Id.* at 39 (quoting 42 U.S.C. 7502(c)(9)). In his view, although "contingency measures must be in effect at the time an area fails to achieve the goals outlined in the SIP," nothing in the statute prohibits States "from *also* implementing the measures before that future event occurs." *Id.* at 40. He found the EPA's interpretation to be consistent with both the policy underlying the CAA and the statutory requirement that contingency measures "take effect . . . without further action by[ ]the State or the [EPA]." *Id.* at 40-41 (quoting 42 U.S.C. 7502(c)(9)).

ARGUMENT

The court of appeals' decision does not warrant this Court's review. The disagreement between the Fifth and Ninth Circuits concerning the range of contingency measures that are permissible under 42 U.S.C. 7502(c)(9) does not create any unmanageable practical difficulties. This case would also be an unsuitable vehicle for clarifying the scope of Section 7502(c)(9) because, although the various contingency measures identified in petitioner's SIP raise distinct legal issues, the parties and

the court appeared to assume during the proceedings below that the measures must stand or fall together. And while the EPA has often approved SIP contingency measures whose implementation had already begun at the time of SIP approval, the agency has not promulgated any generally applicable regulation that specifies when that course is appropriate. This Court should allow the EPA to consider these issues more fully in light of the Ninth Circuit's decision.

1. Contrary to petitioner's contention (Pet. 14-16), the decision below does not implicate any methodological conflict about application of the interpretive framework set forth in *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The court of appeals in this case correctly recognized and explained the operation of that framework. Pet. App. 22-23. And, like the Fifth Circuit in *Louisiana Environmental Action Network* v. *EPA*, 382 F.3d 575 (2004), it found the framework applicable to the EPA's interpretation of Section 7502(c)(9). See Pet. App. 34; *Louisiana Envtl. Action Network*, 382 F.3d at 581.

Although the court below disagreed with the Fifth Circuit's application of the *Chevron* framework in *Louisiana Environmental Action Network*, the contrasting results in the two cases do not reflect any difference between the two courts' understanding of the framework itself. In particular, the Ninth Circuit has previously recognized that the initial *Chevron* inquiry into statutory ambiguity requires a reviewing court to "analyze the provision in the context of the governing statute as a whole." *Association of Irritated Residents* v. *EPA*, 686 F.3d 668, 679 (9th Cir. 2012). Its decision below neither held nor suggested that context is irrelevant in de-

termining whether particular statutory language is ambiguous. Its decision in this case therefore does not conflict with decisions of other circuits that have considered context in assessing the presence or absence of statutory ambiguity. See Pet. 15.

In any event, this case would be an unsuitable vehicle for any general clarification of *Chevron* principles. Although the EPA has previously "approved numerous SIPs" on the understanding that "[n]othing in the statute precludes a state from implementing [contingency] measures before they are triggered," 79 Fed. Reg. at 33,114, it has not promulgated any generally applicable regulation that defines the circumstances under which States may treat previously-implemented ameliorative steps as "contingency measures" for purposes of Section 7502(c)(9). The agency will now have the opportunity to further examine these issues in light of the court of appeals' decision, and any resulting future actions would present a reviewing court with a more complete agency explanation and administrative record for review. In the record presented here, however, the EPA has not examined possible distinctions between previously-implemented steps that require continuing state conduct even after the SIP is approved and previously-implemented steps that do not, see pp. 9-10, *infra*, or codified formal criteria for determining whether a particular previously-implemented step may be considered a "contingency measure." This case therefore would provide no opportunity for the Court to address the application of *Chevron* to the paradigmatic situation in which the agency has issued a codified regulation that is intended to guide future agency conduct and that is accompanied by an explanation for the agency's interpretation of the disputed statutory language.

2. In the proceedings below, the parties and the court of appeals litigated and decided this case on the assumption that the various contingency measures identified in petitioner's SIP must stand or fall together. But for purposes of the Ninth Circuit's line between contingency measures "that had already been implemented by the state" when its SIP was submitted and approved, Pet. App. 36, and contingency measures to be implemented in the future, that assumption is incorrect.

Some of the contingency measures identified in petitioner's SIP—"paving existing dirt roads and alleys, paving and stabilizing unpaved shoulders, [and] repaving or overlaying paved roads with rubberized asphalt," Pet. App. 16—were on-the-ground improvements that were completed before petitioner submitted its SIP. Those measures were expected to have continuing *effects* on PM-10 levels within the nonattainment area, but no continuing state *activity* appears to have been required in order to achieve those benefits. The "purchase of PM-10 certified sweepers," *ibid.* was likewise a fully completed action.

By contrast, the "ongoing sweeping of ramps, freeways, and frontage roads" that the SIP identified as a contingency measure, Pet. App. 16, was not simply a pre-SIP state-government action with continuing effects. Rather, that contingency measure contemplated ongoing government *conduct*. Although petitioner appears to have commenced the sweeping by the time it submitted its SIP, sweeping activities contemplated for future years could reasonably be viewed as distinct government actions "to be undertaken" (42 U.S.C. 7502(c)(9)) after the SIP was approved. The remaining contingency measure identified in petitioner's SIP—"lowering speed limits on dirt roads and alleys," Pet. App. 16—

likewise contemplated ongoing state enforcement actions, rather than simply continuing *effects* from wholly completed state conduct.

3. Despite the disagreement between the Fifth and Ninth Circuits concerning the range of contingency measures that States may include in their SIPs, the petition for a writ of certiorari should be denied. As explained above, some of the contingency measures identified in petitioner's SIP contemplated ongoing state implementation after the SIP was approved, while others involved wholly completed state actions with continuing effects. That difference might bear on whether the various ameliorative steps qualified as contingency measures "to be undertaken" within the meaning of Section 7502(c)(9). But because neither the parties nor the court focused on that distinction in the proceedings below, this case would be an unsuitable vehicle for defining the range of contingency measures that are permissible under the Act.

Compliance with the Ninth Circuit's decision will not present any insurmountable obstacles for either the EPA or States. The decision does not, for example, foreclose petitioner from proposing, or the EPA from approving, contingency measures similar to those that petitioner has already proposed, provided that their implementation occurs at a later time permitted under the Act. And because the decision below is limited to "[c]ontrol measures that have already been implemented," Pet. App. 36, it does not clearly preclude certain common contingency measures such as the future application of more stringent emission standards to mobile sources like cars and trucks. See, *e.g.*, 78 Fed. Reg. 37,741, 37,745 (June 24, 2013).

The EPA's regional-consistency regulations address circumstances in which "a decision of a federal court adverse to the EPA * * * arises from a challenge to locally or regionally applicable actions," and they provide that such decisions "will not automatically apply uniformly nationwide." 81 Fed. Reg. 51,102, 51,103 (Aug. 3, 2016). Those regulations allow the EPA to limit the immediate effect of the decision below to the Ninth Circuit, thereby affording the EPA an opportunity to assess the decision's consequences and determine the best regulatory approach going forward.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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