No. 16–1369

In the Supreme Court of the United States

STATE OF ARIZONA, *Petitioner*,

v.

SANDRA L. BAHR AND DAVID MATUSOW, *Respondents*

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

BRIEF OF RESPONDENTS BAHR AND MATUSOW IN OPPOSITION

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QUESTION PRESENTED

The Clean Air Act requires regions not in compliance with specific national pollution standards to submit State Implementation Plans (SIPs) to EPA. A SIP must provide for "contingency measures" that are "to be undertaken" and "to take effect" if the region fails to meet or make reasonable progress towards its deadlines to attain air quality standards. 42 U.S.C. § 7502(c)(9).

The question presented is:

Whether EPA may approve a previously implemented particulate-matter reduction measure as a "contingency measure" that is "to be undertaken" or "to take effect."

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STATEMENT

This case involves a State Implementation Plan (SIP) submitted by petitioner under the Clean Air Act. The court of appeals mostly agreed with petitioner and largely affirmed EPA's approval of petitioner's SIP. The court disagreed with petitioner, however, on just one point, involving what constitutes a "contingency measure."

The Clean Air Act requires that a SIP include "contingency measures" that are "to be undertaken" and "to take effect" under specified circumstances. 42 U.S.C. § 7502(c)(9). The court of appeals held that Section 7502(c)(9) could not be satisfied by measures included in petitioner's SIP that had nothing "contingen[t]" about them but had already been implemented long before the SIP was submitted or approved. Petitioner apparently concedes that the issue here has virtually never been litigated; petitioner contends that only one other case has addressed it in the 27 years since Congress first required SIPs to include contingency measures (and we dispute even that contention). Moreover, even if petitioner's question presented would warrant this Court's review at some time, such review would be premature now because the provision at issue, and the key factual and legal distinctions that arise in its application, are completely undeveloped in the lower courts.

1. The Clean Air Act ("the Act") was enacted in 1963 to "promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). It was amended in 1970 to grant the federal government power to prescribe national ambient air quality standards (NAAQS) for certain pol-

lutants. 42 U.S.C. § 7409. NAAQS are standards that EPA finds "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). States are required to submit SIPs to meet the NAAQS by statutory deadlines. 42 U.S.C. § 7407. Areas that fail to meet the NAAQS are deemed "nonattainment areas," and are subject to further regulation. 42 U.S.C. §§ 7407(d), 7501(2).

After the widespread failure of States to achieve attainment, Congress again amended the Act in 1990 to specify deadlines for SIP submissions and revisions. It provided for more comprehensive federal regulation of six particular pollutants, including small particulate matter (also called PM-10)—the pollutant at issue in this case. 42 U.S.C. §§ 7511-7514a. PM-10 particulate matter has "an aerodynamic diameter less than or equal to a nominal ten micrometers," 42 U.S.C. § 7602(t), and "causes adverse health effects by penetrating deep in the lungs, aggravating the cardiopulmonary system," 79 Fed. Reg. 7118 (Feb. 6, 2014). Areas failing to meet NAAQS for particulate matter by congressionally-specified deadlines are deemed "marginal," "moderate," "serious," "severe," or "extreme" nonattainment areas, and are subjected to more stringent regulations. 42 U.S.C. § 7511(a) tbl.1.

Also included in the 1990 Amendments was a requirement that SIPs include "contingency measures," or "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." 42 U.S.C. § 7502(c)(9). Such contingency measures "shall be

included in the [SIP] [so] as to take effect … without further action by the State." *Id.* Contingency measures were intended to serve a unique and central public health purpose, operating as interim public health safeguards when an area fails to make reasonable progress or reach attainment and the State begins to go through the SIP process again. *See* 59 Fed. Reg. 41,998-01, 42,015 (Aug. 16, 1994).

2. Petitioner, the State of Arizona, has a history of nonattainment in the Phoenix Metropolitan Area. Pet. App. 12a-15a. In the 1990 Amendments, Congress designated the "Phoenix planning area," including most of Maricopa County, Arizona, as a "moderate" nonattainment area for particulate matter. 42 U.S.C. § 7407(d)(4)(B); 52 Fed. Reg. 29,383 (Aug. 7, 1987). Since then, that area has never met the NAAQS for particulate matter; indeed, the area has been reclassified from a "moderate" to a "serious" nonattainment area. 61 Fed. Reg. 21,372 (May 10, 1996).

"Serious" nonattainment areas may be granted five years to comply with the applicable NAAQS. 42 U.S.C. § 7513(e). Petitioner therefore had until the end of 2001 to achieve compliance after its "serious" designation in 1996. 61 Fed. Reg. 21,372 (May 10, 1996). A year before the 2001 attainment deadline, however, petitioner requested a five-year extension. Pet. App. 13a. EPA granted the request, thus delaying the attainment date until 2006. *Id.*

In 2007, EPA found that petitioner failed to meet its 2006 attainment deadline. 72 Fed. Reg. 31,183 (June 6, 2007). Petitioner was therefore required to submit a "Five Percent Plan" that would provide for

at least 5% annual reductions in particulate matter until NAAQS attainment. *Id.*; 42 U.S.C. § 7513a(d). Under Section 7502(c)(9), the SIP was also required to include contingency measures.

In 2010 EPA published a notice of proposed partial disapproval of the particulate-matter SIP that petitioner had submitted in 2007. Pet. App. 15a. "To avoid a partial disapproval, [petitioner] withdrew the plan in 2011." *Id.* EPA therefore found that petitioner failed to make a required SIP submittal. *Id.* Petitioner submitted a new plan in 2012. *Id.*; *see* Pet. C.A. E.R. 239-352.

In its 2012 SIP, petitioner listed five contingency measures. Pet. App. 16a. Four of them were one-time, permanent changes with enduring effects: "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." *Id.* The fifth required an initial capital investment, followed by continuing activity: the purchase of "[particulate matter] certified sweepers (which had already been accomplished by the end of 2009), and ongoing sweeping of ramps, freeways, and frontage roads." *Id.*; *see* U.S. Opp. 9-10.

Petitioner completed all the paving and speed limit changes and purchased and began using the street sweepers between 2008 and 2011, before submitting the 2012 SIP that listed those measures as "contingency measures." Pet. C.A. E.R. 341, 343. The 2012 SIP acknowledged the State's pre-submission implementation, stating that "[t]he contingency requirement is met in the [SIP] by quantifying the

benefits of [particulate matter] reduction projects that were completed in 2008-2011." Pet. C.A. E.R. 339.

3. Respondents Sandra Bahr and David Matusow submitted a comment urging EPA to disapprove the 2012 SIP; EPA rejected all of respondents' arguments. Pet. App. 44a-83a. Respondents then sought review of EPA's approval of the SIP in the Ninth Circuit.

The court of appeals rejected most of respondents' claims. Pet. App. 24a-33a. Those included respondents' argument that EPA erred in characterizing 135 separate "exceedances"—*i.e.*, instances when a pollutant's measured concentration is above the "24-hour standard" for that pollutant—as "exceptional events" that are excluded from the NAAQS calculation. 40 C.F.R. § 50 App. K; *see* Pet. App. 27a-30a.

The court did agree with one of respondents' arguments. The court held that EPA had erroneously approved petitioner's SIP because its "contingency measures" had already been implemented. Pet. App. 33a-38a. The court held that the unambiguous text of the Act precluded EPA from approving "contingency measures" that were already implemented. On that basis, the court refused to defer to EPA. Pet. App. 34a-35a. The court reasoned that Section 7502(c)(9) "requires the SIP to provide for the implementation of measures 'to be undertaken' *in the future*" and "'to take effect' automatically *in the future*." *Id.* (emphasis added). As the court noted, a contingency is "a possible *future* event or condition or an unforeseen occurrence that may necessitate special measures." Pet. App. 35a (quoting Webster's

Third New International Dictionary (2002) (emphasis added)).

Judge Clifton dissented on the contingency-measures issue. Pet. App. 38a-43a. While conceding that the statute's language "most often refers to measures that are to be implemented in the future," Judge Clifton was "not persuaded that the provision's text forecloses the interpretation advanced by EPA and applied in this case." Pet. App. 38a.

REASONS FOR DENYING THE WRIT

The court of appeals generally *upheld* EPA's approval of the SIP in this case, including absolving petitioner of responsibility for the 135 "exceedances" over a two-year period. The court sided with respondents only in holding that EPA cannot approve a pollution control measure implemented in the past as a "contingency measure" that is "to be undertaken" or "to take effect" in the future. 42 U.S.C. § 7502(c)(9). That ruling was a direct application of the terms of the Act, and it advances the Act's public health goals by ensuring that States have mechanisms available to mitigate poor air quality when the actions promised elsewhere in their SIPs fail to do so.

Petitioner alleges a 1-1 conflict between the decision in this case and one decision of the Fifth Circuit thirteen years ago in *Louisiana Environmental Action Network (LEAN)* v. *EPA*, 382 F.3d 575 (5th Cir. 2004). There is no conflict. The holdings of this case and *LEAN* addressed materially different sequences of events that petitioner lumps together as "early implementation." Pet. 1, 8, 10, 12, 14. Neither court

reached a conclusion on the sequence that was considered in the other case. Moreover, *LEAN* involved a different pollutant that is subject to a different statutory provision designed specially to encourage earlier implementation of contingency measures; that provision has no application here.

The question presented here arises very rarely. The Clean Air Act is a much-litigated statute. Yet even if petitioner were correct about the conflict with *LEAN*, these would be the only two cases that have come close to addressing the question presented in the 27 years since contingency measures were first required. EPA has approved thousands of SIPs in that time. Yet even if the ruling in this case were adopted and enforced (retroactively) by all circuits, at most a handful of approved SIPs beyond those in this case and *LEAN* would be (or would have been) affected.

The court of appeals' ruling follows directly from the terms of the Act. The Act requires SIPs to include "contingency measures" that are "to be undertaken" under certain conditions and "to take effect" without further state regulatory action. 42 U.S.C. § 7502(c)(9). Those terms each require *future* action. A measure that has already been completed cannot be said to be a "contingency measure" that is "to be undertaken" or "to take effect."

The focus on future action directly supports the Act's public health goals. If a State has already implemented its supposed "contingency measures" before submission or approval of a SIP and (as is unfortunately common) fails to meet its attainment deadline, its residents will suffer from degraded air quali-

ty with no relief during the sometimes-lengthy period until a new SIP or SIP revision is submitted and approved.

Finally, as the United States has informed the Court, further review is unwarranted here because the law in this area is woefully underdeveloped. No regulation generally addresses early implementation of contingency measures; the Court therefore should give the government its desired "opportunity to further examine these issues in light of the court of appeals' decision." U.S. Opp. 8. Moreover, crucial factual and legal distinctions have never been considered, developed, or addressed by any court. Those include the possible distinction, noted by the government, between fully-completed contingency measures and those requiring continuing conduct. *See* U.S. Opp. 9-10. They also include the distinction between pre-approval and pre-deadline implementation, and the distinction between the general contingency-measure regulatory system and that applicable to ozone or other particular pollutants. If further percolation was ever needed, it is needed here.

I. THERE IS NO CONFLICT IN THE CIRCUITS

Petitioner contends that the decision of the court of appeals in this case conflicts with one thirteen-year-old decision of one other court: the Fifth Circuit's decision in *LEAN*. Those are the only two decisions that petitioner alleges (or of which we are aware) that have ever addressed claims of premature implementation of contingency measures.

Even petitioner's claim of a 1-1 conflict is mistaken. *LEAN* differed from this case in two critical re-

spects. First, *LEAN* reached no conclusion on the question presented here, because its holding addressed whether contingency measures may be implemented before an attainment deadline. By contrast, the holding in this case concerned contingency measures implemented even before the SIP was submitted to or approved by EPA. Second, *LEAN* relied on a different statutory provision that regulates a different pollutant (ozone), which is subject to a distinct regulatory scheme not at issue here.

Petitioner's claim that the court of appeals' application of *Chevron* departs from the approach of other circuits is likewise baseless. Consistent with the approach taken by all other circuits, the court of appeals relied on the plain meaning of the statutory text to conclude that the statute is unambiguous at *Chevron* step one.

A. The Fifth and Ninth Circuits Addressed Different Sequences of Events

Petitioner has used the vague term "early implementation" (*e.g.*, Pet. 10) to conflate two different sequences of events: (1) implementation of contingency measures before a State's submission or EPA's approval of a SIP; and (2) their implementation before the SIP's applicable attainment deadline, which is the date by which the State must bring its air quality into compliance with EPA's standards. *See* Pet. 5. The court below held the former to be impermissible, *see* Pet. App. 36a, while the Fifth Circuit held the latter to be permissible, *see LEAN,* 382 F.3d at 583-84. Neither court, however, addressed the sequence that was at issue in the other case. The rules adopted by the two courts are consistent with each

other and with the principle that the Act's requirement that SIPs include "contingency measures" precludes measures that were already implemented before the SIP's submission or approval.

1.a. In this case, the court of appeals held that "contingency measures" under the statute cannot be measures that have been implemented "already" at the time of a SIP's submission or approval; the SIP must provide for them to be implemented (if at all) "in the future." *See* Pet. App. 36a ("Control 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." (emphasis added)); Pet. App. 35a ("Because Congress was clear that 'contingency measures' are control measures that will be implemented *in the future*, … we must give effect to its plain meaning." (emphasis added)); Pet. App. 5a ("[U]nder the plain language of § 7502(c)(9) contingency measures are measures that will be taken *in the future*, not measures that have *already* been implemented." (emphasis added)).

The only sequence of events at issue in this case and addressed by the court of appeals was that four of Arizona's contingency measures were "completed in the years 2008 through 2011," the fifth was begun "by 2010," and EPA approved the SIP in a "2014 Final Rule." Pet. App. 33a-34a. As the court framed it, the issue was whether "EPA *erred in approving* the contingency measures in the [SIP] because those measures *had already been implemented*." Pet. App.

33a (emphasis added).[1] The United States now agrees that the issue in this case is "[w]hether the [EPA] permissibly *approved* … as 'contingency measures' … certain pollution-reduction measures that petitioner had *previously* commenced." U.S. Opp. I (emphasis added). The problem was the "already implemented" status of the contingency measures at the time of EPA approval.

b. Contrary to petitioner's argument (*e.g.*, Pet. 9), the court of appeals did not hold that contingency measures must not be implemented until they become mandatory at the attainment deadline, which is ordinarily long after EPA approval. The question of what States may or may not do *after* EPA approves their SIPs was not before the court, and the court did not rule on it. Rather, the court interpreted the statute to dictate only what "the SIP [is required] to provide for," Pet. App. 34a-35a,[2] so that EPA would not "err[] in approving" it. Pet. App. 33a. The court held that EPA erred in approving petitioner's SIP because the contingency measures were not

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[1] The contingency measures here had been implemented before both the SIP's submission in 2012, Pet. App. 15a, and its approval in 2014, Pet. App. 17a. Accordingly, the court had no need to and did not specify whether the operative date is a State's submission of a SIP or its approval by EPA.

[2] 42 U.S. C. § 7502(c)(9) provides: "*Such plan 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 Administrator." (emphasis added).

"'to be undertaken' in the event of a contingency," but rather had been implemented prior to the SIP's submission and approval. Pet. App. 36a; *see* Pet. App. 37a-38a.

The court did acknowledge EPA's and the Fifth Circuit's position that the statute should not be interpreted to preclude pre-*deadline* implementation. Pet. App. 34a ("[T]he EPA concluded that '[n]othing in the statute precludes a state from implementing [contingency] measures before they are triggered.'"); Pet. App. 37 (addressing the Fifth Circuit's view that the statute "allow[s] states to implement contingency measures before the contingency occurs"); *but see* pp. 14-17, *infra* (noting that *LEAN* involved an additional statute). The court reasoned that that position was of no consequence here, because, under the unambiguous text of the statute, the pre-*submission* and pre-*approval* implementation that occurred in this case invalidated EPA's approval of the SIP in question. *See* Pet. App. 36a; Pet. App. 35a; Pet. App. 5a. The Ninth Circuit remains free in the future to consider the permissibility of implementation after submission and approval but before the deadline.

2. The holding of the Fifth Circuit in *LEAN* concerned pre-deadline, not pre-approval, implementation of a contingency measure. The contingency measure in *LEAN* was the banking of pollutant "reduction credits" created by the installation of a flare at a power plant. 382 F. 3d at 584.

The court explained that implementation of the flare "occurred in 1998 one year prior to the Baton Rouge area missing its attainment deadline." 382 F.3d at 582. In that context, the court noted that a

contingency measure like the flare could be implemented "before the contingency measure is triggered." *Id.* at 583. The court concluded that "it seems illogical to penalize nonattainment areas that are taking extra steps, such as implementing contingency measures *prior to a deadline*, to comport with the [Clean Air Act's] mandate that such states achieve NAAQS compliance as 'expeditiously as practicable.'" *Id.* at 584 (quoting 42 U.S.C. § 7502(c)(1) (emphasis added)). Thus, *LEAN*'s reasoning was that a SIP's approval should not be invalidated because its contingency measures were implemented before the applicable attainment deadline.

Although the court in *LEAN* discussed only pre-*deadline* implementation and did not discuss pre-*approval* implementation, it turns out that the sequence of events in *LEAN* actually did involve pre-approval implementation. The *LEAN* SIP's submission and approval both occurred in 2002, while the flare had been installed in 1998. *See* 382 F.3d at 579-80; 67 Fed. Reg. 35,468, 35,469 (May 20, 2002).[3] The challenger, however, raised only the issue of the permissibility of pre-*deadline* implementation. *See LEAN* Brief for Petitioner at 34 (arguing that the flare "[c]annot [q]ualify as a [c]ontingency [m]easure" because it "occurred … *before the Baton Rouge area missed its deadline*") (emphasis added).

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[3] Although the court noted that the attainment deadline was extended as a matter of law when the area was reclassified to "severe" nonattainment upon failure to meet the 1999 deadline, 382 F.3d at 580, the court repeatedly referred to 1999 as the relevant attainment deadline, 382 F.3d at 579, 580, 582.

Accordingly, the court's analysis addressed only that "challenge," which "focuse[d] on the agency's approval" of a contingency measure implemented "one year prior to the Baton Rouge area *missing its attainment deadline*." 382 F.3d at 582 (emphasis added).

3. Thus, the decision in this case does not conflict with *LEAN*. The court of appeals here held that a measure implemented pre-submission or pre-approval cannot be a "contingency measure" under the Clean Air Act. That holding would not control a future Ninth Circuit case concerning the permissibility of post-approval but *pre-deadline* implementation. *LEAN* held that pre-deadline implementation is permissible. That holding would not control a future Fifth Circuit case concerning the permissibility of *pre-submission* or *pre-approval* implementation. Since the two cases address materially different sequences of events that petitioner conflates under the label "early implementation," *e.g.*, Pet. 10, they do not conflict.

B. The Fifth Circuit in *LEAN* Addressed the Regulatory Scheme for Ozone Contingency Measures, which are Regulated Differently than the Particulate-Matter Contingency Measures at Issue Here

LEAN also does not conflict with the decision in this case because the two cases addressed a different "interpretative question." Pet. 15. In *LEAN*, the Fifth Circuit reviewed ozone contingency measures that are regulated and operate differently than the particulate-matter contingency measures at issue here. Those differences also explain the differing results in the two cases.

1.a. Section 7502(c)(9) of the Act applies to contingency measures for all air pollutants, including particulate matter, ozone, and other pollutants. But serious ozone nonattainment areas are required to submit SIPs with contingency measures also governed by Section 7511a(c)(9), which applies "*[i]n addition to* the contingency provisions required under section 7502(c)(9)." 42 U.S.C. § 7511a(c)(9) (emphasis added). The ozone provision requires ozone SIPs to include contingency measures to be implemented "if the area fails to meet any applicable milestone." *Id.*

Tying a system of contingency measures to "milestones" is unique to the ozone-specific provision. It differs from the generally applicable requirement at issue in this case that contingency measures must be triggered by a "fail[ure] to make reasonable further progress" or "to attain the [NAAAQS] by the attainment date." 42 U.S.C. § 7502(c)(9). The ozone "milestone" system was "intended to assure that areas falling behind in their efforts to achieve the standard by the applicable deadline take *early* corrective action." Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVT'L L. 1721, 1761 (1991) (emphasis added).

In light of that focus on "early corrective action," EPA has stated in its guidance document concerning the 1990 amendments that ozone nonattainment areas can satisfy the contingency-measure requirement "by requiring the *early implementation* of measures scheduled for implementation at a later date." 57 Fed. Reg. 13,498, 13,511 (Apr. 16, 1992) (emphasis added). *See, e.g.*, Approval and Promulgation of State Implementation Plan; Indiana, 62 Fed.

Reg. 15,844 (Apr. 3, 1997) (permitting early implementation of ozone contingency measures).

b. In *LEAN*, the Fifth Circuit evaluated a SIP from a serious ozone nonattainment area and relied on the ozone-specific statutory and regulatory provisions. 382 F.3d at 579. *See id.* at 582 (noting that contingency measures are governed by "Section 172(c)(1) *and* § 182(c)(9)" of the Clean Air Act) (emphasis added). Further, the court found "persuasive" an ozone-specific portion of EPA's guidance document, and thus approved of "utilizing contingency measures early." *Id.* at 584 (citing 57 Fed. Reg. at 13,511). The court's approval of "EPA's early contingency plan," therefore, relied on the ozone-specific statutory and regulatory scheme that explicitly allows and indeed encourages early implementation. 382 F.3d at 584.

A future panel of the Fifth Circuit presented with a SIP involving the early implementation of *non-ozone* contingency measures, like the SIP at issue here, would not be bound by *LEAN*'s result. The ozone-specific scheme encouraging early corrective action, upon which *LEAN* relied, would not be implicated in non-ozone cases.

2. In addition, the Fifth Circuit in *LEAN* noted, but may not have realized the full significance of, a key feature of the regulatory scheme applicable to ozone that is inapplicable to particulate matter and thus further distinguishes this case from *LEAN*.

The contingency measure at issue in *LEAN* was the banking of pollutant "reduction credits" created by the installation of a flare at a power plant. 382

F.3d at 584. Although the flare was installed prior to the SIP's approval, the court of appeals explained that "the reduction credits" were "in effect set aside, '*to be applied*' in the event that attainment" was not achieved. *Id.* at 584 (emphasis added) ((quoting 67 Fed. Reg. 60,590-01, 60,592 (Sept. 26, 2002)) (citing 57 Fed. Reg. at 13,511) (EPA's General Preamble)). The banked credits were "to be applied" only if and when the area failed to meet its attainment goal. *Id.*

Reduction credits to be applied if and when an area fails to achieve attainment could be viewed as measures "'to be undertaken' or 'to take effect' in the future," and they may therefore satisfy the statute's future-oriented requirement. Pet. App. 36a. Accordingly, the Ninth Circuit, faced with a SIP relying on reduction credits like those in *LEAN*, could find that they satisfy the requirements for a contingency measure. Correspondingly, a future panel of the Fifth Circuit, presented with already implemented measures (like those at issue here) not involving reduction credits would not be bound by the holding of *LEAN*.

C. The Court of Appeals Faithfully Applied the Familiar *Chevron* Analysis

Petitioner argues that the court of appeals "depart[ed] from other circuits" in applying the familiar *Chevron* analysis by "reject[ing] the existence of an ambiguity created by statutory context." Pet. 14-15.

1. As the United States explains, the decision below "neither held nor suggested that context is irrelevant in determining whether particular statutory language is ambiguous," and it "does not implicate

any methodological conflict about [the] application of … [*Chevron*]." U.S. Opp. 7-8. The Ninth Circuit itself has repeatedly held that *Chevron* requires a court to "analyze … provision[s] in the context of the governing statute as a whole." *Association of Irritated Residents* v. *EPA*, 686 F.3d 668, 679 (9th Cir. 2012). *See, e.g.*, *Padash* v. *I.N.S.*, 358 F.3d 1161, 1170 (9th Cir. 2004) ("We must analyze the statutory provision in question in the context of the governing statute as a whole."); *Redmond-Issaquah R.R. Preservation Ass'n* v. *Surface Transp. Bd.*, 223 F.3d 1057, 1061 (9th Cir. 2000) ("We derive meaning from context, and this requires reading the relevant statutory provisions as a whole.") (quoting *In re Rufener Const., Inc.*, 53 F.3d 1064, 1067 (9th Cir. 1995).

Nothing in the court of appeals' decision in this case departed from that principle. The court simply concluded that the plain language of 42 U.S.C. § 7502(c)(9) made Congress's meaning clear.

2. The other courts cited by petitioner have taken the same approach.

a. In *ConocoPhillips Co.* v. *EPA*, the Fifth Circuit reviewed EPA's interpretation of a provision of the Clean Water Act. 612 F.3d 822, 839 (5th Cir. 2010). "[F]irst look[ing] to [the statute's] plain meaning," the court of appeals observed that "[t]here is certainly no evidence in the plain language—or in the rules of English grammar—to support" the agency's interpretation. *Id.* As in this case, the Fifth Circuit concluded that "the statute is unambiguous," without relying on the broader statutory context. *Id.*

b. The D.C. Circuit has also relied on the plain meaning of statutory text to conclude that a statute was unambiguous at *Chevron* step one. Indeed, one of the D.C. Circuit cases upon which petitioner itself relies (at Pet. 15) expressly acknowledged that "our assessment of the ambiguity of statutory text sometimes begins and ends with the definitions provided in contemporary general-usage dictionaries." *Am. Coal Co.* v. *Fed. Mine Safety & Health Review Comm'n*, 796 F.3d 18, 26 (D.C. Cir. 2015). Thus, in *Performance Coal Co. v. Fed. Mine & Health Review Comm'n*, 642 F.3d 234, 238-39 (D.C. Cir. 2011), the D.C. Circuit concluded that "[j]ust a plain reading of th[e] text alone satisfies us that the provision" at issue in that case was "unambiguous."

c. The Federal Circuit has held that the "plain meaning" of a statutory term precluded the agency's conclusion that the statute was unambiguous. *Fathauer* v. *United States*, 566 F.3d. 1352, 1356-57 (Fed. Cir. 2009). The court observed: "When the words of a statute are unambiguous, this first canon is also the last: judicial inquiry is complete." *Id.* at 1357 (quoting *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002)). The Federal Circuit's application of the *Chevron* framework is indistinguishable from that of the court in this case. *See also Gazelle* v. *Shulkin*, 868 F.3d 1006, 1010-11 (Fed. Cir. 2017) (relying on dictionary definitions to find the "plain meaning of the statute" controlling).

II. THE QUESTION PRESENTED ARISES VERY RARELY, AND THE RULING HERE WOULD AFFECT VERY FEW CASES

Further review of this case would have very limited effect. Even petitioner asserts that only two cases—this case and *LEAN*—have ever addressed the question of what petitioner terms "early implementation" of contingency measures (and for the reasons given above, the two cases actually addressed different issues, *see* pp. 9-17, *supra*). EPA has approved thousands of SIPs since Congress first required contingency measures in 1990. Yet out of those thousands, petitioner identifies only a handful that possibly would be (or would have been) affected if the ruling in this case were adopted retroactively by every court of appeals nationwide. Moreover, petitioner's own calculation is significantly exaggerated.

1. Notwithstanding abundant litigation of Clean Air Act issues, cases concerning contingency measures very rarely arise. Aside from this case and *LEAN*, petitioner cites *no* case that has even *discussed* contingency measures. We have found eight. None of them comes close to addressing the question presented here.[4] Even if the question presented

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[4] *See South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882, 904 (D.C. Cir. 2006) (interpreting the effect of Congress' transition from the one-hour to eight-hour ozone standard on ozone contingency measures); *Kentucky Resources Council* v. *EPA*, 467 F.3d 986, 988 (6th Cir. 2006) (permitting Kentucky to re-designate a provision as a contingency measure); *Association of Irritated Residents* v. *EPA*, 423 F.3d 989, 997 (9th Cir. 2005) (holding that EPA can postpone approval of contingency measures); *Greenbaum* v. *EPA*, 370 F.3d 527, 541 (6th Cir. 2004) (holding that "[t]he contingency measures may

would otherwise warrant this Court's review, such review should at least await further examination and development of the law in this area in the lower courts (and by the agency, *see* U.S. Opp. 8). If further "percolation" is ever appropriate, it is appropriate here.

2. Petitioner contends that the question presented is important because "[o]ver the past two decades, EPA has approved 26 SIPs that contain already-implemented contingency measures, affecting 15 States and the District of Columbia." Pet. 2. Petitioner's calculation is mistaken. Even if it were correct, petitioner's identification of a mere handful of SIPs confirms that the ruling in this case, even if adopted and applied retroactively by every court of appeals nationwide, would not have widespread effects.

The Clean Air Act divides States into areas, and then determines if those areas meet the NAAQS for

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be triggered upon notification by the Ohio EPA or the United States EPA of a determination by either agency that a violation has occurred"); *Bayview Hunters Point Comm. Advocates* v. *Metropolitan Transp. Comm'n*, 366 F.3d 692, 702 (9th Cir. 2004) (holding that the area had met its enforceable obligations under the SIP, and did not have to implement contingency measures); *Sierra Club* v. *EPA*, 294 F.3d 155, 164 (D.C. Cir. 2002) (denying a SIP that did not include contingency measures); *Wall* v. *EPA*, 265 F.3d 426, 440-41 (6th Cir. 2001) (holding that for redesignation requests, a state does not meet its requirements by listing reasonable available control technology as contingency measures); *Citizens for a Better Environment* v. *Deukmejian*, 731 F. Supp. 1448, 1456 (N.D. Cal. 1990) (discussing the district's requirement for implementing additional contingency measures for stationary sources).

six pollutants: carbon monoxide, ground-level ozone, lead nitrogen oxides, sulfur dioxide, and particulate matter. 40 C.F.R. § 50. If an area is found to be in nonattainment for one of those pollutants, it must submit a SIP detailing a strategy to reach attainment for that pollutant. Some areas are in nonattainment for multiple pollutants. For example, "[p]ortions of Maricopa County have been designated as being in nonattainment for three pollutants: particulate matter (PM10), carbon monoxide (CO) and ozone (O3)."). Maricopa County, *State Implementation Plan*, https://www.maricopa.gov/DocumentCenter/View/7729. The regulatory scheme has resulted in thousands of SIPs.[5]

Of the thousands of SIPs submitted, petitioner cites 26 that it claims include "already-implemented contingency measures." Pet. 2; Pet. App. 94a-98a. Of those 26 SIPs, at least 10 are incorrectly identified. Three SIPs contained contingency measures that were not implemented prior to approval.[6] Seven SIPs address the pollutant ozone, governed by a different statutory scheme and different contingency-measure

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[5] A search for "Approval and Promulgation of Implementation Plans" in the Federal Register returns 3,066 EPA rules since 1995.

[6] *See* 79 Fed. Reg. 59,435 (Oct. 2, 2014) (discussing Idaho SIP for PM-10, the contingency measures submitted were to be implemented at the time of the SIPs approval); 62 Fed. Reg. 10,690 (Mar. 10, 1997) (discussing Colorado SIP for Carbon Monoxide, the contingency measures were implemented prior to nonattainment, but after approval of the SIP); 61 Fed. Reg. 51,014 (Sep. 30, 1996) (discussing Montana SIP for PM-10, the contingency measures were not implemented until after approval).

requirements than particulate matter.[7] *See* pp. 14-17, *supra*. One SIP was counted twice.[8] That leaves at most 16 SIPs out of thousands approved by EPA since 1990 that could possibly have been affected by the ruling in this case. The ruling in this case, even if adopted retroactively nationwide, would have very little effect.

III. THE COURT OF APPEALS CORRECTLY HELD THAT MEASURES ALREADY IMPLEMENTED CANNOT BE "CONTINGENCY MEASURES"

The court of appeals held that the "contingency measures" that are "to be undertaken" and "to take effect" under Section 7502(c)(9) of the Act must be "measures that will be taken in the future." Pet. App. 5a. That holding is correct. Petitioner's SIP was invalid under the Clean Air Act because it claimed measures already implemented in the past as "contingency measures" that are "to be undertaken" and "to take effect."

1. The court of appeals held that it could "not defer to EPA's interpretation of § 7502(c)(9)" because the statutory language is unambiguous. Pet. App. 34a. Thus, because Congress has "directly spoken to the precise question at issue," the court of appeals gave "effect to the unambiguously expressed intent

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[7] *See* 75 Fed. Reg. 68,251 (Nov. 5, 2010); 67 Fed. Reg. 63,586 (Oct. 15, 2002); 66 Fed. Reg. 34,878 (July 2, 2001); 66 Fed. Reg. 30,811 (June 8, 2001); 65 Fed. Reg. 78,961 (Dec. 18, 2000); 62 Fed. Reg. 66,279 (Dec. 18, 1997); 61 Fed. Reg. 11,735 (Mar. 22, 1996).

[8] 66 Fed. Reg. 34,878 (July 2, 2001).

of Congress." *Id.* (quoting *Chevron v. NRDC*, 467 U.S. 837, 842–43 (1984)).

The court explained that Section 7502(c)(9) requires "the SIP to provide for the implementation of measures 'to be undertaken' in the future, triggered by the State's failure 'to make reasonable further progress' or to attain the NAAQS." Pet. App. 34a-35a (quoting 42 U.S.C. § 7502(c)(9)). *See also id.* ("to take effect"). The court held that, because the dictionary definition of contingency is "a possible future event or condition … Congress was clear that 'contingency measures' are control measures that will be implemented in the future." *Id.* A measure wholly completed in the past cannot be said to be a "contingency measure" that is "to be undertaken" or "to take effect." The statutory language is "not susceptible to multiple interpretations." *Id.*

a. Both general usage and legal dictionaries in use at the time of the 1990 Amendments demonstrate that a "contingency" is "a possible *future* event or condition or an unseen occurrence that may necessitate special measures." Webster's Third New International Dictionary (1961) (emphasis added). As here, it necessitates action "if" certain events occur. 42 U.S.C. 7502(c)(9). It is "[s]omething that may or may not happen … the possibility of coming to pass; an event which may occur; a possibility." Black's Law Dictionary (6th ed., 1990). A "contingency" is necessarily a possible *future* event.

Further, the statute states that contingency measures are "to be undertaken" and "to take effect." As indicated by this Court's usage, "to take effect" references a future state. *See, e.g., Util. Air Regula-*

tory Grp. v. *EPA*, 134 S. Ct. 2427, 2437 (2014) ("EPA in short order promulgated greenhouse-gas emission standards for passenger cars, light-duty trucks, and medium-duty passenger vehicles *to take effect* on January 2, 2011") (emphasis added); *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 42 (2002) (discussing change in policy announced in 1991 "*to take effect* on February 1, 1992") (emphasis added). The plain meaning of a "contingency measure" that is "to be undertaken" or "to take effect" is, as the court below correctly held, a "control measure[] that will be implemented in the future." Pet. App. 35a.

b. Petitioner's argument that the purpose of Section 7502(c)(1) of the Clean Air Act would be "frustrated" (Pet. 9) by the court of appeals' decision misreads that provision. Section 7502(c)(1) requires that nonattainment plans "shall provide for the implementation of all reasonably available control measures as expeditiously as practicable." 42 U.S.C. § 7502(c)(1). Petitioner mistakenly contends that this text requires *all* control measures to be implemented as quickly as possible. Pet. 13. Under the statute, however, "reasonably available control measures" are not *all* control measures; they are only measures that will provide for attainment by the deadline "through the adoption, at a minimum, of reasonably available control technology." 57 Fed. Reg. 13,498, 13,540 (April 16, 1992) (quoting 42 U.S.C § 7502(c)(1)).

By contrast, contingency measures are by definition control measures "*beyond* those required to attain the standards" and "may go beyond [reasonably available control measures]." 57 Fed. Reg. 13,498,

13,540 (April 16, 1992) (emphasis added). The statutory text and EPA's guidance thus establish that "contingency measures" are a distinct set of control measures to be implemented if an area fails to make reasonable further progress or meet its attainment deadline—not necessarily to be implemented "as expeditiously as practicable." 42 U.S.C. § 7502(c)(9); 57 Fed. Reg. 13,498, 13,512 (April 16, 1992).

Petitioner also claims that the requirement that contingency measures must "take effect without further action by the State," 42 U.S.C § 7502(c)(9), supports its interpretation because "[n]othing requires less 'further action by the State' than a measure that is already in effect." Pet. 13. Under that theory, the statute would apparently allow a State to claim a control measure implemented even *decades* earlier as "contingency" measures "to be undertaken."

That absurd result aside, petitioner's argument misreads "no further action." EPA interprets "no further action" to mean only "that no further *rulemaking* activities by the State or EPA would be needed to implement the contingency measures." 57 Fed. Reg. 13,498, 13,512 (April 16, 1992) (emphasis added). It does not mean that the measure must require the State to do nothing at all, but instead means that the State need not take further regulatory or legislative action before the measure can be implemented. Indeed, most contingency measures *do* require the State to do something, such as implement a capital improvement. *See, e.g.*, 81 Fed. Reg. 1136-01, 1140 (Jan. 11, 2016) (approving, in a SIP to attain the Clean Air Act's standards for lead pollution, the contingency measure of altering the height of emission

stacks); s*ee also* 59 Fed. Reg. 41,998-01, 42,015 (Aug. 16, 1994) (recognizing "that certain [non-regulatory and non-legislative] actions, such as the notification of sources, modification of permits, etc., would probably be needed before a [contingency] measure could be implemented effectively.").

2. Petitioner argues that the court of appeals' decision creates a "perverse incentive" for States to "forbear implementing any pollution control measures beyond those necessary to demonstrate attainment." Pet. 9. Petitioner is mistaken: the rule embodied in the plain language of the statute makes sense. Contrary to petitioner's contention (at Pet. 9, 13-14), holding EPA to the plain and unambiguous meaning of "contingency measures" is critical to ensuring that the Clean Air Act's purpose to protect public health is achieved.

First, petitioner asserts that the court of appeals' holding means that "States must forbear implementing any pollution control measures beyond those necessary to demonstrate attainment." Pet. 9. The plain meaning of the contingency-measure provision, however, does not require that States implement *only* those control measures necessary for attainment: rather, it requires States to identify certain measures as contingency measures to be reserved for use as standbys. States are free to take any other steps to go beyond attainment. *See Union Elec. Co.* v. *EPA*, 427 U.S. 246, 264-65 (1976); s*ee also* 42 U.S.C. § 7416 (allowing States to "adopt or enforce" air quality measures more stringent than required by the Act). Nothing in the court of appeals' decision disturbs or has anything to do with that principle.

Second, contingency measures serve a unique public health purpose that would be undermined by approval of already-implemented contingency measures. When EPA approves a SIP, the agency determines whether computer modeling demonstrates that the attainment measures proposed will achieve attainment of the applicable NAAQS by the deadline. Before the 1990 Amendments, a State's progress towards attainment would essentially be put on hold once a State missed a deadline, until that State submitted a new SIP and EPA approved it.

With the addition of the contingency-measures requirement in 1990, if an area fails to meet a deadline, the contingency measures serve as a kind of patch during the interim period so that the area continues making progress towards attainment—on top of any progress already made—while the area goes through the SIP process again. *See* 59 Fed. Reg. 41,998-01, 42,015 (Aug. 16, 1994) (describing, in EPA's Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, particulate-matter contingency measures as providing "interim public health and welfare protection"). *See also* S. Rep. No. 228, 101st Cong., 1st Sess. 63 (1989) (describing certain contingency measures in a precursor bill as "measures which are held ready in a standby capacity and which can be implemented should the area fail to attain the standard or meet an interim milestone").

If a State has already implemented its contingency measures before submission or approval of a SIP, it will be left holding an empty tool bag when it real-

izes it is not going to reach attainment, and its citizens' public health will suffer until a new SIP is approved.

3. Amici California air quality districts, who concede (Br. 5) that they are "the only two regions in the nation" that face uniquely poor ozone and certain small particulate pollution, argue that the court of appeals' decision will cause them difficulty. They assert that they are currently using all available pollution control measures to attain their progressively more stringent milestones and NAAQS. They seem to argue (Br. 11-12) that they therefore cannot find hitherto unused measures to use as contingency measures in their current and future SIPs. They claim (Br. 13) that the problem is a result of conditions that have changed since Congress required contingency measures in 1990.

Amici's argument is mistaken. First, as a legal matter, Congress in 1990 unambiguously required that SIPs "shall provide for the implementation" of contingency measures. 42 U.S.C. § 7502(c)(9). Congress deliberately provided no exception for States that assert that they plan to use all available measures to reach attainment and thus have none available in the event of a contingency.

Second, as a practical matter, there are always additional measures that a State can take, although they may be costly. One of the amici has in fact chosen in the past *not* to include all possible control measures in a SIP, presumably because of their cost. *See Latino Issues Forum* v. *EPA*, 558 F.3d 936, 947 (9th Cir. 2009). Those more costly measures are pre-

cisely what amici would be expected to include in a SIP as contingency measures.

Further, it is true that a State or area may have multiple (*e.g.*, 1997, 2006, and 2012) SIPs to address a particular pollutant. Amici Br. 12. But that does not mean, as amici suggest, that a State would suffer a penalty for including in one SIP a control measure that had previously been designated as a contingency measure in an earlier SIP. *Id.* Of course, the State that does so would then have to include new *contingency* measures in the new SIP, but that is not a penalty; it is a consequence of the statutory requirement that a SIP must contain not only measures designed to reach attainment by the deadline, but also contingency measures designed to fill the gap if that goal is not achieved.

4. Finally, the Act's plain meaning gives States an incentive to avoid cutting corners and encourages them to submit and implement SIPs that are genuinely likely to meet milestones and attainment deadlines. The Clean Air Act Amendments of 1970 reflected "congressional dissatisfaction with the progress of existing air pollution programs and a determination to 'tak(e) a stick to the States,' in order to guarantee the prompt attainment and maintenance of specified air quality standards." *Union Elec. Co.*, 427 U.S. at 249 (quoting *Train* v. *NRDC*, 421 U.S. 60, 64 (1975)). The 1990 Amendments sought to push States to attain the NAAQS in a number of ways. Henry Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 Envt'l L. 1721, 1756 (1991).

Contingency measures serve as one of the Act's "sticks" to prod States to meet attainment deadlines. If a State misses its attainment deadline for particulate matter, it will have to implement the contingency measures within 60 days. 59 Fed. Reg. 41,998-01, 42,015 (Aug. 16, 1994). Typically, implementing contingency measures is costly. A desire to avoid that cost gives States an incentive to submit plans that are genuinely likely to meet their deadlines and otherwise to follow through to meet their attainment deadlines. Allowing States to receive credit for already-implemented "contingency" measures removes that important incentive under the Act.

IV. THIS CASE IS AN UNSUITABLE VEHICLE

This case is an unsuitable vehicle for determining whether already-implemented contingency measures are permissible, because key issues that may be decisive in the analysis were not addressed by the parties or considered by the courts below.

1. EPA has yet to promulgate a rule that "codifie[s] formal criteria for determining whether a particular previously implemented step may be considered a 'contingency measure'" under Section 7502(c)(9). U.S. Opp. 8. The United States has informed the Court, however, that it "will now have the opportunity to further examine these issues in light of the court of appeals' decision," thus providing a future "reviewing court with a more complete agency explanation and administrative record for review." U.S. Opp. 8. Especially in light of the rarity with which the issue in this case arises—even petitioner cites only this case and *LEAN* in the 27 years since the 1990 amendments—the Court should allow

the government the opportunity it seeks before itself construing the statute.

2. The United States also has explained that there may be "possible distinctions between previously-implemented [contingency measures] that require continuing state conduct even after the SIP is approved and previously-implemented [contingency measures] that do not." U.S. Opp. 8. As the government notes, "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,' were on-the-ground improvements that were completed before petitioner submitted its SIP." U.S. Opp. 9 (internal citations omitted). Those contingency measures are completed "measures [that are] expected to have continuing *effects* on [particulate-matter] levels," but that require "no continuing state *activity*." *Id.*

The government contrasted such measures with the "ongoing sweeping of ramps, freeways, and frontage roads" that followed the one-time "purchase of PM-10 certified sweepers." U.S. Opp. 9 (internal quotation marks omitted). The road sweeping operations were a "contingency measure [that] contemplated ongoing government *conduct*" if there was to be a continuing effect on air quality in the future. *Id.* According to the government, the sweeper measure thus could potentially "be viewed as distinct government actions 'to be undertaken' after the SIP was approved." *Id.* (internal citations omitted).

Contrary to petitioner's contention, the United States therefore *did* "explain why the distinction be-

tween contingency measures that are wholly implemented (like road resurfacing) and those that include continuing operations (like deploying street sweepers a State has already purchased) has any legal significance." Pet. Reply Br. 9. As the United States suggests, a wholly completed measure may not qualify as a future action—*i.e.*, a "contingency measure 'to be undertaken' within the meaning of Section 7502(c)(9)," U.S. Opp. 9—but a measure that requires continuing conduct extending into the future might qualify under that provision. *See* U.S. Opp. 10.

The distinction between contingency measures requiring ongoing state action in order to have continuing effects, and mere ongoing effects of past action, was neither briefed below nor addressed by the court of appeals. *See* Pet. App. 33a-38a. As the government acknowledged, "[i]n 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." U.S. Opp. 9. That certainly does not make the case "a better vehicle for this Court's review." Pet. Reply Br. 9. This Court should not consider the validity of already-implemented contingency measures in the first instance, when no court of appeals has ever considered a key difference that the government itself now believes may be decisive in the analysis. *See FCC* v. *Fox TV Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court, however, is one of final review, not of first view.") (internal quotations omitted).

3. In addition, the critical issues about the sequence of events and other distinctions that could determine the validity of contingency measures were not identified, developed, or addressed by the parties or the court of appeals here (or in *LEAN*). As noted above, *see* pp. 10-12, *supra*, the court of appeals held that measures already implemented before a SIP's submission to or approval by EPA are not "measures to be undertaken" or "contingency measures to take effect" under Section 7502(c)(9), but the court did not address implementation of contingency measures after EPA approval of a SIP. Nor are we aware of any other district or appellate court that has addressed the distinction between the two different time sequences and its relevance to the analysis. In light of the entirely undeveloped state of the law on that important distinction under Section 7502(c)(9), further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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