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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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The Ninth Circuit created an acknowledged split with the Fifth Circuit over the approval of State Implementation Plans (SIPs) under the Clean Air Act. EPA recognized that conflict—and the error of the Ninth Circuit's approach—in 2015, and the current Administration stood by that recognition. U.S. Br. in Opp. 6–7. Likewise, air regulators in California drew the same conclusion when the Ninth Circuit said that it "cannot agree with the Fifth Circuit's interpretative approach." Pet. App. 36. This diverse coalition is no accident. The Ninth Circuit has misread a requirement on noncompliant States as a restriction on States that desire to act earlier than required. But the Act does not contain such a prohibition, and inventing one undermines the goal of clean air. This Court should grant certiorari to clarify the meaning of this vital law.

Despite a split acknowledged by both the majority and dissent below as well as EPA, Respondents Bahr and Matusow (collectively "Bahr") maintain that "[t]here is no conflict." Br. in Opp. 6. Bahr's effort to obscure the split rests on something even shakier than a distinction without a difference; it rests on a distinction without a distinction. Bahr fixates on the "sequence of events" in this case and in *Louisiana Environmental Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004) (*LEAN*), suggesting that the text of Section 7502(c)(9) might allow early implementation in some cases but not others. Br. in Opp. 9–10. Not only is there nothing in the statutory text to support Bahr's legal theory, but a closer look at the two cases reveals an identical administrative posture. Simply stated, the

Fifth Circuit and the Ninth Circuit cannot both be correct.

Bahr's subsidiary arguments are similarly unpersuasive. It is immaterial that *LEAN* concerned ozone while the present case concerns particulate matter called PM-10. Section 7502(c)(9) applies to both—and was the provision at issue in *LEAN*—and the other provision Bahr identifies, 42 U.S.C. § 7511a(c)(9), uses *identical* statutory language. Either these provisions permit early implementation, or they do not; there is no third option.

Finally, the suggestion that this case is unimportant is dead wrong. The national ambient air quality standards are among the most expensive regulations in American history. *Infra* 8–10. And because of the Clean Air Act's "cooperative federalism," they uniquely implicate the sovereignty of States like California and Arizona. If the meaning of Section 7502(c)(9) were unimportant, EPA would not have sought rehearing en banc and asserted that the decision had national impact because pollution-control areas cross state lines and therefore span circuits. *See* Reply App. 1–16.

In addition to the importance of the provision at issue, Bahr's brief highlights the confusion surrounding *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984). Nowhere is the blurring of judicial and executive functions more apparent than in Bahr's assertion that "the Court should allow the government the [rulemaking] opportunity it seeks *before itself construing the statute*." Br. in Opp. 31–32 (emphasis added). Truly, clarity on the role of courts as interpreters of law could not be

more needed. *See* Pet. 16 (explaining that statutory construction disposes of this case).

Bahr's Brief in Opposition offers two meaningless distinctions, belied by the record and the law. This Court should grant the Petition.

I. Bahr's Attempts to Obscure the Circuit Split Are Unavailing.

In order to deny the force of the circuit split between *LEAN* and the present case, Bahr suggests that the Fifth and Ninth Circuits faced different facts and applied different law. Neither distinction is valid. First, Bahr misstates the administrative posture in which the two SIPs arose. Even without that error, the particular point in the SIP process at which a State implements contingency measures is legally irrelevant. Second, it makes no difference to the construction of the statute whether the triggering event is PM-10 nonattainment or an ozone "milestone." Regardless of the triggering event, the identical statutory language either allows early implementation, or it does not.

A. The Fifth Circuit in *LEAN* and the Ninth Circuit Here Considered the Same Facts and Arguments.

In trying to harmonize the decision in this case with *LEAN*, Bahr proposes an irrelevant factual distinction by misstating the facts in *LEAN*.

Bahr endeavors to draw a distinction between contingency measures implemented "before an attainment deadline" and contingency measures implemented "before the SIP was submitted to or approved by EPA." Br. in Opp. 9. Bahr claims that

the Ninth Circuit here "held that a measure implemented pre-submission or pre-approval cannot be a contingency measure under the Clean Air Act" but did not consider "the permissibility of post-approval but *pre-deadline* implementation." *Id.* at 14.[1] In contrast, Bahr asserts, "*LEAN* held that pre-deadline implementation is permissible." *Id.* Bahr goes so far as to assert that the *LEAN* decision "would not control a future Fifth Circuit case concerning *pre-submission* or *pre-approval* implementation." *Id.*

First, this distinction is completely irrelevant. No one—not the Fifth Circuit, the Ninth Circuit, EPA, California *Amici*, or even Bahr in her lower-court briefing—has drawn any distinction based on how early a State has implemented its contingency measures. The reason is plain: Section 7502(c)(9) supports only one conceivable delay requirement, based on nonattainment.

Any implementation of contingency measures before they become mandatory is equally "early." The statutory language speaks only in terms of the attainment date: "Such plan shall provide for the implementation of specific measures to be undertaken if the area fails [to comply] *by the attainment date*." 42 U.S.C. § 7502(c)(9) (emphasis added). If this provision

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[1] Bahr maintains that the Ninth Circuit "did not hold that contingency measures must not be implemented until they become mandatory at the attainment deadline." Br. in Opp. 11. That is precisely the holding: "The statutory language in §7502(c)(9) is clear: it 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. 34–35.

forbids any early implementation, it does so in relation to "the attainment date" alone—*i.e.*, everything before the attainment date is equally early and therefore equally permissible or forbidden, depending on the circuit.

But even if there was a valid legal distinction, *LEAN* in fact addressed the same factual and legal question as the present case. The action challenged in *LEAN* was EPA's 2002 approval of Louisiana's "substitute contingency measures plan" requiring that a gas compressor station "permanently reduce its VOC emissions." 382 F.3d at 580. To that end, the compressor station "installed a flare . . . *in 1998*." *Id.* (emphasis added). Thus, contrary to Bahr's representations, *LEAN* addressed whether contingency measures may be implemented before the SIP was submitted to or approved by EPA. *Contra* Br. in Opp. 9. Moreover, the *LEAN* brief Bahr cites does not undermine that conclusion. To the contrary, that brief challenged the approval of an "emissions reduction that occurred in 1998" and argued that Section 7502(c)(9) "precluded the use of past reductions." *LEAN* OB 34–35. Bahr later concedes this point, noting that in *LEAN* the "SIP's submission and approval occurred in 2002, while the flare had been installed in 1998" and therefore "the sequence of events in *LEAN* actually did involve pre-approval implementation." Br. in Opp. 13.

The reason for this shared sequence of events is that locations with attainment problems often need to resubmit their SIPs to account for intervening action by EPA. In *LEAN*, the intervening action was a reclassification to "severe" nonattainment, 382 F.3d at 580, while the event here was EPA's notification that

the 2007 Five Percent Plan would not gain agency approval, Pet App. 15. EPA, knowing that SIPs are routinely revised during the prolonged approval process, has consistently approved SIPs like those in *LEAN* and the present case. The common question presented to both the Fifth and Ninth Circuits is whether such approvals are permissible.

B. The Clean Air Act Provisions Governing Ozone and PM-10 Are Functionally Identical.

Bahr fairs no better suggesting that a special rule applied in *LEAN* because of the pollutant at issue. Once again, it is not an accident that no one, including Bahr, has previously seized on this distinction. The reason is that the relevant provisions operate—and, indeed, read—identically. Here are the parallel paragraph (c)(9)s with verbatim language underlined:

> 7502(c)(9)
> 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.
>
> 7511a(c)(9)
> [T]he plan revision shall provide for the implementation of specific measures to be undertaken if the area fails to meet any applicable milestone. Such measures shall be

> included in the plan revision as contingency measures to take effect without further action by the State or the Administrator upon a failure by the State to meet the applicable milestone.

The only difference between these provisions is that Section 7511a adds an additional trigger: missing a "milestone" for improvement in a serious ozone nonattainment area. That addition does nothing to the interpretative question that divided the Fifth and Ninth Circuits. So immaterial is that difference that Bahr lumped the two provisions together in the briefing below, citing EPA's guidance "[i]n the context of discussing ozone plans" to support Respondents' proposed interpretation of Section 7502(c)(9). OB 54; *see also* Reply 26 ("the public is not protected if the attainment demonstration proves wrong and a *milestone or deadline* is missed") (emphasis added)). That was entirely appropriate, as the two provisions impose structurally identical requirements.

Bahr also suggests that the pollution-reduction credits in *LEAN* "*could* be viewed" as measures that would only take effect upon the statutory triggering event and "*may* therefore" satisfy Bahr's view of the requirement in Sections 7502 and 7511a. Br. in Opp. 17 (emphasis added). That theory is both untested and provides no basis for distinguishing a case that reached its holding on other grounds—grounds that directly conflict with the reasoning below.

Ultimately, both of Bahr's attempts to blur the clean and acknowledged division between two of America's largest and most populous circuits fails. This Court should grant the Petition.

II. State Implementation Plans Are of Great National Importance.

Bahr suggests that this case is unimportant because the longstanding peace created by *LEAN* and followed by EPA across numerous presidential administrations has only been shattered by one circuit. True enough, but SIPs are not localized matters that can afford protracted "percolation." EPA was correct when it told the en banc Ninth Circuit that the panel decision "substantially affects the construction of a statutory provision of national application in which there is an overriding need for national uniformity." Reply App. 3, 14. Nothing in Bahr's brief discredits this fact.

As EPA explained in its briefing below, regulatory areas under the Clean Air Act cross circuit lines, amplifying the impact of the Ninth Circuit's holding. Not only is the issue one of national proportions, but, as EPA argued in the Ninth Circuit, different standards based on circuit geography would sow "significant uncertainty within other Circuits in the country regarding which contingency measures are permissible." Reply App. 14. Of particular concern for national uniformity were areas that straddle jurisdictional lines. The Logan, Utah, nonattainment area, for example, "includes portions of both Utah (within the Tenth Circuit) and Idaho (within the Ninth Circuit), and thus the single nonattainment area could be subject to potentially different legal standards." *Id.* These structural considerations manifest a "need for national uniformity." *Id.*

And the economic impact is vast. As *Amici* California Air Regulators explain, allowing the Ninth Circuit decision to stand would have dramatically

disruptive consequences. Amicus Br. 14 (sanctions against the California *Amici* may "include a near-doubling of the offset ratio for new and expanded business development, and a cut-off of most federal highway funding"). For example, the South Coast Air Quality Management District's SIP submittal for the PM-2.5 standards relies on contingency measures that are implemented early and continue to be implemented in the future such as the Drayage Truck Regulation. South Coast Air Quality Management Plan A-51, A-52. Among the already-implemented requirements of this regulation is that all drayage trucks must be equipped with a 1994 or newer model year engine that meets or exceeds model year 2007 California or federal emission standards. Tit. 13 Cal. Code Regs. § 2027(d)(2). If allowed to stand, the Ninth Circuit decision would require California to stop implementing these mobile source measures in order for them to be used for purposes of Section 7502(c)(9).

Indeed, there is little that the federal government does that imposes a greater cost on States and the private economy than the promulgation of NAAQS, which are implemented through SIPs. Between 2006 and 2010, EPA promulgated four different NAAQS rules with costs exceeding $1,000,000,000 per year.[2] These rules are among the most expensive in the nation, and the burden they represent for state regulators is correspondingly massive. *See generally*

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[2] 2010 Primary NAAQS for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010); 2008 NAAQS for Ozone, 73 Fed. Reg. 16,436 (March 27, 2008); 2008 NAAQS for Lead, 73 Fed. Reg. 77,517 (Dec. 19, 2008); 2006 NAAQS for Particular Matter (PM-2.5), 71 Fed. Reg. 61,144 (Oct. 17, 2006).

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (holding that EPA cannot consider traditional economic costs in setting a NAAQS). Even the Ninth Circuit has recognized that the Clean Air Act "places much of its enforcement burden on the states" via the SIP process. *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1066 (9th Cir. 2008).

States shoulder this burden as an exercise in cooperative federalism, which so far, EPA has supported by approving, over two decades and across 15 States, more than two dozen SIPs that included early-implemented contingency measures. App. 94–98. Bahr attempts to deflate this number, but does so by eliminating SIPs based on the illusory distinctions discussed above. Br. in Opp. 22 (discounting ten SIPs based on how early the implementation occurred and seven more because they concerned ozone). For the same reason these distinctions do not defuse the circuit split, they provide no support for the notion that SIP approval is unimportant.

III. The Ninth Circuit Erred in Holding that a Potential Future Obligation Precludes Early Adoption.

Bahr's defense of the Ninth Circuit holding is inconsistent with the text and structure of the Clean Air Act and, at most, proves the ambiguity that drove the Fifth Circuit to apply *Chevron*.

Bahr seizes on the term "contingency measures" in the heading of Section 7502(c)(9). Br. in Opp. 23. Dictionary definitions of "contingency" regularly refer to events that will happen in the future, but they do not include a prohibition on taking those measures

sooner than when they become necessary. *E.g., Webster's Third New International Dictionary* 493 (1961) ("the condition that something may or may not occur"); *American Heritage Dictionary* 288 (1st ed. 1969) ("An event that may occur but that is not likely or intended . . . A possibility that must be prepared against").

Indeed, Bahr is fighting a non-existent battle. There is no question about what Section 7502(c)(9) *requires* for States in nonattainment; the question is what that provision *allows*. Bahr argues as if her task is to show that the contingency measures necessarily "require[] future action." Br. in Opp. at 7 (emphasis omitted). Indeed they do—for States that enter nonattainment. But Bahr's actual hurdle is different: she must prove that the Clean Air Act's requirement is also a prohibition. Specifically, the question in this case is whether these extra measures that *must* "take effect in any such case [*i.e.,* nonattainment] without further action by the State" *may not* be initiated prior to the triggering event. This situation is like a coach saying "if you fumble the ball, then you have to run laps." Nothing in that edict forbids pre-fumble running. Likewise, nothing in the text of the Clean Air Act prohibits early implementation. This is the question that the Ninth Circuit, EPA, the California *Amici*, and Petitioner all recognize has divided the lower courts.

Within the context of the Clean Air Act, the measures identified in Section 7502(c)(9) are defined by two traits discussed in the Petition: they are not necessary to attain the NAAQS, and they require no further regulatory action by the State. Pet. 12–13.

Beyond these two traits, the text of Section 7502(c)(9) imposes nothing. That plain meaning obviates the need for further construction or agency deference, but even if Bahr's interpretation were plausible enough to create ambiguity, the split with the Fifth Circuit would only grow more pronounced.

Finally, at the level of statutory purpose, Bahr's arguments for requiring delay make no sense. As between the alternatives of an early-implemented pollution-control measure and one that is dormant, the former is always better. Bahr attempts to dispute this truism by explaining that Section 7502(c)(9) exists to prevent delay between a finding of nonattainment and the implementation of these pollution-control measures. Br. in Opp. 28. There is, however, no delay if the measure is already in effect. Similarly, Bahr misses the mark on the perverse incentive that the Ninth Circuit's rule creates. *See* Pet. 9. To this point, Bahr observes that the lower court's rule "does not require that that States implement *only* those control measures necessary for attainment." Br. in Opp. 27. But that is just the point: if an early-implemented measure cannot satisfy Section 7502(c)(9)—and the State must propose something to satisfy that section—then the incentive is to implement "*only* those control measures necessary for attainment." Br. in Opp. 27. In the meantime, air quality is worse than it would be under the Fifth Circuit's rule.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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