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

AMICUS BRIEF IN SUPPORT OF STATE OF ARIZONA'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act ("CAA" or "Act") requires non-attainment areas to implement "contingency measures" in the event that the area fails to meet reasonable further progress milestones or to attain the national ambient air quality standards ("NAAQS") on time. 42 U.S.C. §§ 7502(c)(9), 7511a(c)(9); CAA §§ 172(c)(9), 182(c)(9). These contingency measures must be implemented "without further action" by the State or the United States Environmental Protection Agency ("EPA") if such a failure occurs. EPA's longstanding interpretation allows for a state's early implementation of a contingency measure, even before it is required by the Act, provided that the measure produces additional emission reductions beyond those required to meet reasonable further progress or attainment. *See* General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13,498, 13,511 (Apr. 16, 1992).

The Fifth Circuit Court of Appeals upheld EPA's interpretation. *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004). A dozen years later, the Ninth Circuit Court of Appeals disagreed. *Bahr v. EPA*, 836 F.3d 1218 (9th Cir. 2016).

The question presented here is whether the Ninth Circuit erred in concluding that the Act precludes EPA from approving a state implementation plan ("SIP") that provides for the implementation of contingency measures before they are mandated by the Act, where

QUESTION PRESENTED – Continued

such measures produce emission reductions in excess of that required to meet reasonable further progress or attainment.

PARTIES TO THE PROCEEDINGS

Petitioner is the State of Arizona, Respondent-Intervenor in the Ninth Circuit.

Respondents are Sandra Bahr and David Matusow, Petitioner in the Ninth Circuit.

The United States Environmental Protection Agency, former EPA Administrator Gina McCarthy, and Jared Blumenfeld, former EPA Region IX Administrator, were Respondents in the Ninth Circuit. Scott Pruitt is the current EPA Administrator.

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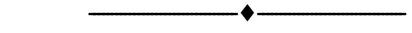
IDENTITY OF *AMICI CURIAE*

The proposed *amici curiae* are two regional California air pollution control districts, each of which is primarily responsible for the control of air pollution from all sources except motor vehicles within its jurisdiction. Cal. Health & Safety Code §§ 39002, 40000, 40001.[1] The South Coast Air Quality Management District ("South Coast District") has jurisdiction over the South Coast Air Basin, consisting of all of Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernardino Counties. Cal. Code Regs. tit. 17, § 60104; Cal. Health & Safety Code § 40414. The San Joaquin Valley Unified Air Pollution Control District ("San Joaquin District") has jurisdiction over the Counties of Fresno, Kings, Madera, Merced, San Joaquin, Stanislaus, Tulare, and the valley portion of Kern County. Cal. Health & Safety Code § 40600. These two districts (collectively "Air Districts") are the only two "extreme" ozone areas in the nation. Similarly, they are the only two "serious" areas for the 2006 $PM_{2.5}$ standard in the nation.[2]



[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.2(a), *amici curiae* state that petitioner and all respondents received timely notice of the intent to file this brief and each has given written consent to the filing of this brief. Copies of all written consents are being submitted along with this brief to the Clerk.

[2] https://www3.epa.gov/airquality/greenbook/hnc.html (last visited June 8, 2017).

INTERESTS OF *AMICI CURIAE*

The Air Districts have a vital interest in the outcome of this case because the Ninth Circuit ruling directly contradicts well-reasoned precedent on which these districts have relied in past state implementation plans ("SIPs"), and on which they will need to rely in the future. The 2-1 panel decision in *Bahr* requires states to adopt, but not implement, contingency measures that go beyond what is required for reasonable further progress ("RFP") or attainment. *Bahr v. EPA*, 836 F.3d 1218, 1236 (9th Cir. 2016). Paradoxically, therefore, states must do less than they can to reduce pollution, because they must somehow hold pollution-reduction measures in reserve for later implementation.

In contrast, under EPA's past practice, and the Fifth Circuit decision in *LEAN*, states may adopt a more stringent SIP than is otherwise required by the Clean Air Act ("CAA" or "Act") by implementing their contingency measures even before they are required by the Act. *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575 (5th Cir. 2004) ("*LEAN").*

If the *Bahr* decision stands, it could render many of the Air Districts' respective SIPs, both present and future, unapprovable under the Act, resulting in devastating sanctions against these regions. Even more significantly, it will perversely prevent these Air Districts from doing the maximum possible to protect public health and to meet the CAA mandate to attain all applicable national ambient air quality standards

("NAAQS") "as expeditiously as practicable." 42 U.S.C. § 7502(a)(2)(A); CAA § 182.

The Air Districts have relied on already-implemented measures as contingency measures in the past, a practice which would now be unlawful.

For example, the South Coast District's 2007 $PM_{2.5}$ Plan relied on already implemented measures.[3] Similarly, San Joaquin's 2015 Plan for the 1997 $PM_{2.5}$ NAAQS, 2012 $PM_{2.5}$ Plan for the 2006 NAAQS and 2013 Plan for the revoked 1-hour Ozone NAAQS also relied on continued implementation of adopted controls not relied on for attainment or RFP to satisfy contingency measure requirements.[4]

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[3] The South Coast District's 2007 $PM_{2.5}$ SIP relied on existing California Air Resources Board mobile source measures that, while providing current air quality benefits, would continue to achieve 24 tons per day (tpd) of NO_X reductions the year after the 2015 attainment year. 78 Fed. Reg. 37,741, 37,742 col. 2-3 (June 24, 2013). EPA approved additional South Coast contingency measures that provided emission reductions not needed for RFP but which had begun to be implemented before any contingency occurred. 78 Fed. Reg. 37,741, 37,745-37,746 (final approval 78 Fed. Reg. 64,402 (Oct. 29, 2013).)

[4] The San Joaquin District's 2013 Plan for the Revoked 1-hour Ozone Standard identified sufficient emissions reductions achieved through implementation of adopted control measures to satisfy rate of progress contingency requirements. San Joaquin 2013 Plan for the Revoked 1-hour Ozone Standard, pp. 4-5 through 4-9. http://www.valleyair.org/Air_Quality_Plans/OzoneOneHourPlan2013/04Chapter4FederalRequirementsV2.pdf. EPA approved these contingency measures, citing a 1993 memo stating that "it seems illogical to penalize nonattainment areas that are taking extra steps to ensure attainment of the NAAQS" by "implement[ing] their contingency measures early, even though the

These Air Districts must also rely on already-implemented fleet turnover measures such as California Air Resources Board motor vehicle measures to serve as contingency measures for their most recent air quality plans. These include the South Coast District's 2016 Air Quality Management Plan,[5] and San Joaquin's 2016 8-hour ozone and $PM_{2.5}$ SIPs.[6]

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measures are not needed now for their attainment demonstration or to meet RFP." 81 Fed. Reg. 2140, 2153 (proposed Jan. 15, 2016), *citing* G.T. Helms, *Early Implementation of Contingency Measures for Ozone and Carbon Monoxide (CO) Nonattainment Areas* (Aug. 13, 1993), https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/19930813_helms_early_implementation_contingency_measures_ozone_co_naa.pdf; 81 Fed. Reg. 19,492, 19,493 (Apr. 5. 2016).

[5] The South Coast District's 2016 Air Quality Management Plan is the SIP for the 2008 8-hour ozone standard, the 2012 annual $PM_{2.5}$ standard, as well as a new plan for the 2006 24-hour $PM_{2.5}$ standard. p. ES-1, http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2016-air-quality-management-plan/final-2016-aqmp/executive-summary.pdf?sfvrsn=4 (last visited June 8, 2017). This plan relies on existing adopted measures for contingency measures for the 24-hour $PM_{2.5}$ standard and excess air quality improvement from existing measures in order to meet ozone contingency requirements. *Id*. at 4-51, and 4-52.5. http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2016-air-quality-management-plan/final-2016-aqmp/chapter4.pdf?sfvrsn=4 (last visited June 8, 2017).

[6] The San Joaquin District's 2016 Plan for the 2008 8-hour Ozone Standard, pp. 6-12 through 6-13, http://www.valleyair.org/Air_Quality_Plans/Ozone-Plan-2016/06.pdf; 2015 Plan for the 1997 $PM_{2.5}$ Standard, pp. 6-9 through 6-13, http://www.valleyair.org/Air_Quality_Plans/docs/PM25-2015/06.pdf; and 2016 Moderate Area Plan for the 2012 $PM_{2.5}$ Standard, pp. 3-13 through 3-16, http://www.valleyair.org/Air_Quality_Plans/docs/PM25-2016/03.pdf (last visited June 8, 2017).

As discussed in the Argument, Part III, these Air Districts need to rely on implementing these measures to help meet multiple air quality standards that must be attained in the future.

SUMMARY OF ARGUMENT

This case presents the vital issue of whether residents of the most polluted areas in the country must breathe dirtier air due to the erroneous decision of the Ninth Circuit Court of Appeals concluding that air agencies must withhold implementation of some feasible pollution control measures to serve as "contingency" measures. The decision conflicts with both the Fifth Circuit's ruling on this precise point and this Court's precedent.

The *amici curiae* are the regional agencies charged under California law with controlling air pollution in the South Coast Air Basin (the four-county Los Angeles region), and the San Joaquin Valley Air Basin (an eight-county region covering California's fast-growing Central Valley). The Air Districts are the only two regions in the nation that are designated under the Act as in "extreme" nonattainment for ozone and "serious" nonattainment for particulate matter less than 2.5 microns in diameter ("$PM_{2.5}$"). They must adopt and implement plans to attain the NAAQS established by EPA for both these pollutants. At present, they must meet four separate standards for $PM_{2.5}$ and three separate standards for ozone. If allowed to stand,

the Ninth Circuit decision will mean these districts cannot implement all feasible measures as expeditiously as practicable to combat their critical air pollution problems, so their residents will breathe dirtier air than they would under EPA's nearly 25-year-old interpretation.

The Ninth Circuit held that air agencies must hold in reserve some pollution control measures to be implemented only in the event of a "contingency," such as a failure to attain clean air standards on time. EPA's interpretation, upheld by the Fifth Circuit, allowed air pollution agencies to rely on surplus emission reductions from pollution control measures that had already begun implementation, but would provide additional emission reductions in the event a "contingency" occurred. Thus, the Ninth Circuit decision has the perverse result that the Air Districts must implement fewer pollution control measures than they could under EPA's view. The decision below may also make it impossible for these Air Districts to develop approvable plans to attain the multiple overlapping standards they must meet in the future. If these areas cannot develop approvable plans, they will be subject to sanctions including a cut-off of federal highway funding and additional onerous requirements for new and expanding businesses.

According to EPA, it has applied its interpretation to clean air plans in eight different circuits. (App. F to Pet. For Cert., App. 94-98.) The issue is therefore one of clear national significance. The Ninth Circuit opinion conflicts with that of the Fifth Circuit upholding

early implementation of contingency measures. It also contradicts the decision of this Court holding that EPA must approve provisions in SIPs that are more stringent than the Act requires. *Union Electric Co. v. EPA*, 427 U.S. 246, 265 (1976). The Ninth Circuit also erred in focusing on the definition of contingency measures in isolation from the rest of the statute, rather than looking at both the specific context of the statutory language and the broader context of the statute as a whole, as compelled by this Court's precedent. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 132-133 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). As a result, the court below concluded that the statute precluded early implementation of contingency measures despite the fact that (1) the statute does not expressly so provide, and (2) there is no policy reason for such an interpretation.

ARGUMENT

I. This Case Creates A Split In the Circuits On An Issue of Nationwide Importance

The Ninth Circuit voted 2-1 to hold that EPA could not approve contingency measures that have already been implemented. *Bahr*, 836 F.3d at 1235-1236. This result is directly contrary to the unanimous decision of the Fifth Circuit. *LEAN*, 382 F.3d at 580. The decision in *Bahr* will have the perverse result that California air districts, with the most difficult attainment challenges in the nation, must withhold implementing

feasible control measures in order to hold some measures "in reserve" as contingency measures. Residents of California and other Ninth Circuit areas will suffer compared to the rest of the U.S. where states and EPA can follow the *LEAN* decision. This split in the circuits calls for resolution by this Court to address a vital issue for air quality planning.

As explained below, the Act does not preclude early implementation of contingency measures, provided they produce continuing emission reductions each year beyond what is needed to demonstrate attainment or RFP. A contingency measure with continuing emission reductions has the exact same effect on air quality when the "contingency" occurs, regardless of whether or not the state implements it in earlier years. The only difference is that, if the measures are implemented earlier, residents will breathe cleaner air in the earlier years. The Ninth Circuit's interpretation is contrary to the purposes of the Act.

The circuit split creates enormous uncertainty for states in other circuits, who cannot know whether their court of appeals will follow the Fifth Circuit or the Ninth Circuit. States in eight circuits have relied on EPA's interpretation, so this is an issue having significant national implications. (App. F to Pet. For Cert., App. 94-98.) This Court should grant certiorari to resolve the existing uncertainty.

Since at least 1992, EPA has interpreted CAA Section 172(c)(9) to allow states to implement contingency

measures even before the area fails to attain. (*See* General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13,498, 13,511 (Apr. 16, 1992).) This interpretation encourages states to achieve air quality standards as expeditiously as practicable. *Id. Amici* Air Districts must implement all available emission reduction measures to clean the air as quickly as possible. If the Ninth Circuit decision is allowed to stand, EPA may have to initiate "SIP calls" under CAA Section 110(k)(5) to require these areas to stop implementing their already-implemented contingency measures. 42 U.S.C. § 7509; CAA § 179. This would be contrary to the fundamental purpose of the Act to protect public health from the dangers of air pollution as quickly as possible.

II. The Ninth Circuit Decision Conflicts With This Court's Decision Holding that EPA Must Approve State Implementation Plans that Are More Stringent than Federal Law Requires

Certiorari may be granted where a court of appeals has decided an important question of federal law in a way that conflicts with decisions of this Court. Sup. Ct. R. 10. The Ninth Circuit did exactly that.

The Act's primary mandate requires states to attain air quality standards "as expeditiously as practicable." 42 U.S.C. § 7502(a)(2)(A); CAA § 182(a)(2)(A). Consistent with this mandate, the Act authorizes states to implement more stringent control measures

than are required by the Act. 42 U.S.C. § 7416; CAA § 116. This Court long ago held that states may submit plans more stringent than federal law requires and EPA must approve such plans if they meet the minimum requirements of the Act. *Union Electric Co. v. EPA*, 427 U.S. at 265. That decision is controlling here.

A SIP containing a contingency measure which obtains emission reductions prior to when such reductions are needed (but which can be relied upon as additional emission reductions in the event RFP or attainment milestones are missed) enables states to do *more* than is required under the Act, and thus is more stringent than required by the Act.

A bedrock principle of the Act expressly conflicts with the Ninth Circuit's decision. Under Section 116 of the Act, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce" any requirement respecting the control of air pollution. 42 U.S.C. § 7416; CAA § 116. The Ninth Circuit's decision directly clashes with this fundamental principle by precluding the state from implementing an emission standard earlier than required by federal law.

Section 116, of course, precludes a state from implementing a measure that is "less stringent" than any measure in effect under an implementation plan or under Section 111 or Section 112. But implementing a contingency measure *before* it is mandated by federal law is more stringent than withholding implementation to a later date.

Accordingly, the state has the right to submit a plan containing a contingency measure that is implemented before it is mandated, and is thus more stringent than federal law requires. As long as it meets the requirements of a contingency measure – that it provide emission reductions beyond those required to meet RFP or attainment – the EPA must approve it. The Ninth Circuit decision conflicts with *Union Electric* and must be reversed.

III. The Split in the Circuits Will Cause a Substantial Inequity And Unnecessary Exposure To Sanctions

The facts in *Bahr* involved a straightforward case where the Maricopa County nonattainment area had adopted a plan to meet the 24-hour PM_{10} [particulate matter less than 10 microns in diameter] standard. 79 Fed. Reg. 7118, 7119 (Feb. 6, 2014). The Court did not consider the impact of its decision in cases where an area faces multiple attainment dates because in Maricopa County, there were no other PM_{10} standards that the area was required to meet.

In contrast, South Coast, San Joaquin, and potentially other areas must meet multiple, overlapping standards which will require the implementation of *all* available control measures. There are currently two 24-hour and two annual NAAQS for $PM_{2.5}$.[7] Each

[7] *See* https://www.epa.gov/criteria-air-pollutants/naaqs-table (last visited June 8, 2017).

standard carries its own progress milestones and attainment deadlines. If these regions must withhold measures and emission reductions to satisfy a contingency measure need for the 1997 $PM_{2.5}$ NAAQS, for example, then these regions would significantly damage their ability to meet their milestones and attainment deadlines for the more stringent 2006 and 2012 $PM_{2.5}$ NAAQS. Similarly, the Air Districts must have attainment plans for the 1997 8-hour ozone NAAQS, the 2008 8-hour ozone NAAQS, as well as the newest 2015 8-hour ozone NAAQS.[8] An area that might be able to withhold implementation of a contingency measure to meet the 1997 8-hour ozone NAAQS might need that measure to meet milestones for the 2008 and 2015 8-hour ozone NAAQS. In the Air Districts, any available emission reductions must continue to be implemented as quickly as reasonably possible not just for public health benefits, but to meet legal obligations under these other NAAQS.

Even more importantly, oxides of nitrogen (NO_X) reductions are critical for *all* of the ozone and $PM_{2.5}$ NAAQS.[9] A measure that might not be needed for one standard for one pollutant and thus could serve as a contingency measure, may still be critical to meet RFP

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[8] *See* 62 Fed. Reg. 38,856 (July 18, 1997) (setting 1997 8-hour ozone NAAQS of 0.08 ppm); 73 Fed. Reg. 16,436 (Mar. 27, 2008) (setting 2008 8-hour ozone NAAQS of 0.075 ppm); 80 Fed. Reg. 65,292 (Oct. 26, 2015) (2015 8-hour ozone NAAQS of 0.070 ppm).

[9] EPA: Ozone Pollution, https://www.epa.gov/ozone-pollution (last visited June 8, 2017); EPA: Particulate Matter Basics, https://www.epa.gov/pm-pollution/particulate-matter-pm-basics (last visited June 8, 2017).

or attainment for the other pollutant. If Air Districts cannot implement their $PM_{2.5}$ contingency measure before the happening of a "contingency," they may not be able to demonstrate attainment and submit an approvable plan for the ozone standard. If these areas cannot submit an approvable plan they will be subject to sanctions, including a cut-off of federal highway funds and more onerous requirements for new and expanding businesses. 42 U.S.C. §§ 7410(m), 7509; CAA §§ 110(m), 179.

Contrast this against the situation Congress addressed with the 1990 Clean Air Act Amendments. For *amici* Air Districts, there were two main NAAQS of concern, the 1979 1-hour ozone standard and the 1987 PM_{10} standard. *See* 42 U.S.C. § 7407(d)(4); 52 Fed. Reg. 24,634 (July 1, 1987) (PM_{10} NAAQS); 44 Fed. Reg. 8202 (Feb. 8, 1979) (1-hour ozone NAAQS). Each of these had a different regulatory focus, with volatile organic compounds (VOCs) and NO_X controls necessary to attain the 1-hour ozone NAAQS, while controls addressed to directly-emitted, primarily geologic particulates were needed for attainment of the PM_{10} NAAQS. Regions did not have to consider any overlap between the two standards. A control measure that might be withheld as an ozone contingency measure would not affect the region's progress on the PM_{10} NAAQS for the simple reason that the pollution sources were entirely different. Today, however, the measures required to meet each standard may overlap.

This is not a mere theoretical concern. Based on current knowledge, it is quite possible that the Ninth

Circuit ruling, if allowed to stand, may prevent these areas from submitting approvable plans to attain the 2008 or 2015 8-hour ozone NAAQS, or the 2012 annual $PM_{2.5}$ NAAQS. In fact, implemented measures used as contingency reductions for the years 2010, 2013, and 2016 in San Joaquin's 2013 Plan for the Revoked 1-hour Ozone Standard are also used to satisfy RFP targets in San Joaquin's other SIPs.[10] If San Joaquin would have delayed implementation of control measures to satisfy 2013 Plan contingency needs, it would not have been able to meet its RFP targets in the 2007 and 2015 Plans.

If these areas cannot submit a plan that demonstrates attainment of a later-adopted standard, because they cannot rely on contingency measures that have already been implemented for an earlier-adopted standard, the regions will be subject to sanctions. 42 U.S.C. §§ 7410(m), 7509; CAA §§ 110, 179. These sanctions include a near-doubling of the offset ratio for new and expanded business development, and a cut-off of most federal highway funding. 42 U.S.C. § 7509(b); CAA § 179(b).

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[10] *See* San Joaquin 2013 Plan for the Revoked 1-hour Ozone Standard, pp. 4-5 through 4-9; 2007 Ozone Plan (milestone years 2008-2023), pp. 10-2 through 10-4, http://www.valleyair.org/Air_Quality_Plans/OzoneOneHourPlan2013/04Chapter4FederalRequirementsV2.pdf; 2015 Plan for the 1997 $PM_{2.5}$ Standard (milestone years 2014-2017), pp. 6-6 through 6-8, http://www.valleyair.org/Air_Quality_Plans/docs/PM25-2015/06.pdf (last visited June 8, 2017).

Accordingly, if allowed to stand, the *Bahr* decision will have significant unintended consequences that the Ninth Circuit failed to consider.

IV. The Ninth Circuit Erred in Determining that the Act Unambiguously Precludes Implementation of Contingency Measures Before They are Required

A. Congress Did Not Address the "Precise Question at Issue" – Whether the Act Precludes Early Implementation of Contingency Measures

The Ninth Circuit erred in concluding that Congress had "directly spoken to the precise question at issue" in this case. *Bahr*, 836 F.3d at 1235, *citing Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

The Ninth Circuit concluded that "Congress was clear that 'contingency measures' are control measures that will be implemented in the future, and the statutory language is not susceptible to multiple interpretations." *Bahr*, 836 F.3d at 1235. The Court relied on the dictionary meaning of the word "contingency" as "a possible future event or condition or an unforeseen occurrence that may necessitate special measures." *Id*. The Court also concluded that the statutory language "to take effect" and "to be undertaken" in the event of a contingency clearly referred to a measure that would become effective in the future. *Id.*

We do not quarrel with the Court's interpretation of the word "contingency," standing in isolation. The statute does require contingency measures to be implemented in the event the nonattainment area fails to meet RFP milestones or reach attainment. But this does not answer "the precise question at issue" in this case, which is whether the statute *also* intends to *prohibit* an area from implementing such measures even before they are mandated by statute, thus providing earlier clean air benefits for the area's residents.

As the Fifth Circuit correctly held, the language of the statute "neither affirms nor prohibits *continuing* emission reductions" that begin before they are mandated but continue in effect in the event a *contingency* occurs. *LEAN*, 382 F.3d at 583 (*emphasis in original*). As discussed below, there is no policy reason to prohibit early implementation.

By looking exclusively at the language defining contingency measures, the Ninth Circuit fell into the same trap as the Court of Appeals did in *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60 (1975). In *Train*, the Court of Appeals held that Section 110(f), establishing requirements for granting a "postponement" of any requirement of a plan, precluded EPA from approving a SIP revision which granted an individual source a "variance." *Train*, 421 U.S. at 87-88. The Court of Appeals relied on statutory language in CAA Section 110(f) relating to "any source" and "any requirement of an applicable implementation plan."

After thorough review of the statute, this Court concluded that Section 110(f) need only be met where the variance affected timely attainment of the NAAQS. *Train*, 421 U.S. at 81. If it did not, an ordinary SIP revision could be approved. This Court held that the Court of Appeals "read more into Section 110(f)" than "careful analysis can sustain." *Train*, 421 U.S. at 88. This Court explained: "section 110(f) serves only to define the matters with respect to which the governor of a State may apply for a postponement. The language does not, as the Fifth Circuit would have it, state that all sources desirous of any form of relief must rely solely on the postponement provision." *Id.*

Similarly in this case, the Ninth Circuit "read too much" into the definition of a contingency measure. The language it relied on simply does not in any manner preclude a state from implementing a contingency measure *before* it is mandated by the Act, thus speeding up air quality improvement. Congress, in defining a contingency measure, did not speak to "the precise question at issue" any more than Congress, in setting forth requirements for a postponement under Section 110(f), spoke to the specific issue involved in *Train*.

B. The Ninth Circuit Decision Failed to Properly Consider Either the Specific Context of the Statutory Language or the Broader Context of the Statute as a Whole

1. Whether Statutory Language is Ambiguous is Determined by Reference to the Language Itself, the Specific Context in Which the Language is Used, and the Broader Context of the Statute as a Whole

The Ninth Circuit improperly concluded that the Act precluded EPA's interpretation. The Ninth Circuit failed to heed this Court's directive that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. at 341. Under this approach, the term "employees" can include "former employees," since Congress had neither specifically included former employees nor specifically limited the language to current employees. *Id*. Similarly, the specific language discussed by the Ninth Circuit neither "affirms nor prohibits *continuing* emission reductions. . . ." *LEAN*, 382 F.3d at 583 (*emphasis in original*).

Moreover, "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only be evident when placed in context." *Food & Drug Admin.*

v. Brown & Williamson Tobacco Corp., 529 U.S. at 132-133. The courts must bear "in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotations omitted). The Ninth Circuit erred in looking at the definition of contingency measures in isolation from the remainder of the statute, failing to consider the statutory language in either its specific context or in light of the broader statutory purpose.

2. EPA's Interpretation is Consistent with the Specific Statutory Context

As explained by EPA, the purpose of contingency measures is to "provide for additional emission reductions that are not relied on for RFP [reasonable further progress] or attainment and that are not included in the attainment demonstration. . . ." *Bahr*, 636 F.3d at 1235, *citing* 79 Fed. Reg. at 33,114. The Ninth Circuit never disputed EPA's interpretation of the statutory purpose, instead holding that the definition of contingency measures requires that they go into effect only "*if* the area fails to make reasonable further progress. . . ." *Bahr*, 636 F.3d at 1236, *citing* 42 U.S.C. § 7502(c)(9) (*emphasis in original*). The Ninth Circuit refused to consider whether EPA's interpretation fulfilled the specific statutory purpose of a contingency measure or was consistent with the overall policy of the Act, stating that even if these considerations were

"compelling," they "cannot override the plain language of the statute." *Bahr*, 836 F.3d at 1236-1237. The Court erroneously looked at a "particular statutory provision in isolation," in violation of this Court's directive. *Food & Drug Admin.*, 529 U.S. at 132.

The Ninth Circuit ignored the fact that EPA's interpretation is completely consistent with the specific statutory context, including a fundamental characteristic of a contingency measure: that it must "take effect without further action by the State or [EPA]." *LEAN*, 382 F.3d at 584. The Court should have considered this specific context in deciding whether the statute unambiguously precluded early implementation.

Because it erroneously looked at statutory language in isolation, the Ninth Circuit ascribed a specific intent to Congress that does not make sense in context. We contend that Congress had no intent to *preclude* early implementation of contingency measures. It would have had no reason to do so, because a contingency measure has the *exact same effect* on air quality upon the occurrence of the contingency regardless of whether it was implemented early or not until the contingency occurs.

Consider a hypothetical: EPA approves a SIP that will obtain 100 tons per day of emission reductions over the next five years, by measures in its core control strategy. These reductions are projected to be sufficient to attain the national ambient air quality standard. In addition, the state submits and EPA approves a contingency measure that will obtain 20 tons per day of

emission reductions. After five years of implementing the measures in the core control strategy and obtaining 100 tons per day of emission reductions, the area has not attained the standard. The contingency measure is triggered and the area has now implemented 120 tons per day of emission reductions.

Now suppose that the area implements its contingency measure early, after two years. After implementing its core control strategy obtaining 100 tons per day of emission reductions, and its contingency measure that obtains 20 tons per day of emission reductions, the area still has obtained 120 tons per day of emission reductions by the attainment date. The contingency measure has the *exact same effect* on air quality at the occurrence of a contingency, regardless of whether it is implemented early or only upon the contingency. The only difference is that if the measure is implemented *before* it is triggered, the area has an additional 20 tons per day of emission reductions – and thus cleaner air – in the earlier years.[11]

As is shown by this hypothetical, the Ninth Circuit erroneously failed to consider whether EPA's interpretation was consistent with the specific context of the statute – i.e., whether it served the purpose of a contingency measure. It erred in looking only at the dictionary definition of "contingency," in isolation from

[11] This hypothetical is not affected by whether or not the core control strategy actually obtains the 100 tons it is projected to obtain, because the contingency measure contributes the same 20 tons of emission reductions to whatever the air quality actually is when the contingency occurs.

the remainder of the statute. *Food & Drug Admin.*, 529 U.S. at 132-133.[12]

3. The Ninth Circuit Improperly Rejected EPA's Arguments Based on the Overall Policy of the Statute, Ignoring the Fact that this Statutory Context Informs the Decision Whether a Statute is Ambiguous

The Ninth Circuit rejected EPA's arguments that its interpretation of "contingency measure" is consistent with the Act's policy goals, taking the view that the Court was bound by what it had concluded to be the plain meaning of the term. *Bahr*, 836 F.3d at 1236-1237. In doing so, the Court erroneously ignored the principle that in determining whether language is ambiguous, the Court must consider "the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. What the Court described as "policy" arguments are merely the broader context of the statute as a whole. In contrast, the Fifth Circuit, and the dissent in *Bahr*,

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[12] Moreover, this case presents no occasion for concern over EPA's interpretation. In approving Arizona's contingency measures, EPA also determined that Maricopa County had already attained the PM_{10} standard. In its final notice, EPA stated that "this area has demonstrated that it attained the PM-10 NAAQS [national ambient air quality standards] by December 31, 2012. . . ." 79 Fed. Reg. 33,107, 33,109, col. 2 (June 10, 2014). This was the date specified in the SIP approved by EPA. 79 Fed. Reg. 7118, 7122 col. 1. Therefore, there is no evidence that the Arizona contingency measures failed to serve their purpose or were even triggered.

got it right. The Fifth Circuit looked at other provisions of the Act to help determine that the statute was ambiguous in context. That Court observed that Section 172(c)(1) of the Act requires nonattainment areas to implement "all reasonably available control measures as expeditiously as practicable." *LEAN*, 382 F.3d at 583-584. In view of this mandate, 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 CAA's mandate that such states achieve NAAQS compliance as 'expeditiously as practicable.'" *LEAN*, 382 F.3d at 584.

The Ninth Circuit panel majority wrongly failed to consider the broader context of the statute as a whole in concluding that it was unambiguous.

V. The Ninth Circuit Decision Causes Absurd Results that Will Compel California Residents to Breathe Dirtier Air than they Would Under EPA's Interpretation

The Ninth Circuit felt itself constrained by the "plain meaning" of the words "contingency" and "to take effect." *Bahr*, 836 F.3d at 1235. But even if the Ninth Circuit had correctly identified a "plain meaning," the inquiry should not stop there. If a statute's "plain meaning" creates absurd results, the courts may adopt an interpretation that avoids those results. *See, e.g.*, *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), *Envtl. Def. Fund v. EPA*, 82 F.3d 451, 468 (1996)

(literal meaning of statute would frustrate Congressional intent to allow states to provide air pollution emission reductions to offset project emissions in determining conformity).

This Court has recently emphasized the importance of the consequences of a statutory interpretation in determining statutory meaning. *Utility Air Regulatory Grp.*, 134 S. Ct. at 2441. Where a claimed "plain meaning" creates "extreme" or "counterintuitive" consequences, or is "contrary to common sense," it may be rejected. *Id.* Therefore, this Court held that the term "any air pollutant" was ambiguous in the specific permitting context before the Court. For the CAA permitting programs, this Court held that the term "any air pollutant" would be limited to those pollutants "emitted in quantities that enable them to be sensibly regulated at the statutory thresholds." Ascribing the "plain meaning" to the term would have burdened smaller sources incapable of bearing the "heavy substantive and procedural burdens" of the permitting programs. *Utility Air Regulatory Grp.*, 134 S. Ct. at 2442-2443. In the case of CAA permitting programs, a literal interpretation of the term "any air pollutant" would have been incompatible with Congressional intent.

Similarly, even if the language relied upon by the Ninth Circuit had a "plain meaning" that precluded early implementation of contingency measures, such an interpretation should be rejected because the consequences directly conflict with Congressional intent to hasten clean-up of the nation's air and would lead to

absurd results. Within the Ninth Circuit, EPA would disapprove SIPs including early implementation of contingency measures. As a result, California residents would breathe dirtier air than they otherwise would. This result is directly contrary to the Act's command to attain the standards as expeditiously as practicable, and should be rejected. 42 U.S.C. § 7502(a)(2)(A); CAA § 182.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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