No. 15-684

IN THE

Supreme Court of the United States

STATE OF OHIO,
Petitioner,

v.

SIERRA CLUB,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND STATE AND LOCAL CHAMBERS IN THE SIXTH CIRCUIT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The U.S. Chamber advocates for its members' interests before Congress, the Executive Branch, and the courts, and regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community.

The Cincinnati USA Regional Chamber ("Cincinnati Chamber") is one of the Nation's largest chambers, representing the interests of 4,000 member businesses. Its mission is to leverage the potential of the business community to create economic prosperity for the region. The Cincinnati Chamber serves its membership and the community through leadership and professional development programs, government advocacy, regional vision and collaboration, networking opportunities, and educational programs.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. Pursuant to Rule 37.2(a), counsel for *amici* represent that all parties have consented to the filing of this brief. Petitioner and Respondent Ohio Utility Group have filed letters granting blanket consent to the filing of *amici* briefs; written consent of the remaining respondents is being submitted with this brief.

From its beginnings more than 65 years ago, the Kentucky Chamber of Commerce ("Kentucky Chamber") has evolved into the premier business association in Kentucky. Today, the Kentucky Chamber represents 3,800 member businesses—from family-owned shops to Fortune 500 companies—that employ over half of the Commonwealth's workforce. Its powerful grassroots network, through a partnership with more than 80 local chambers in the state, consists of 25,000 professionals. Strength in numbers continues to help the Kentucky Chamber consult with policymakers in areas such as business taxation, fiscal policy, environmental and safety issues, workers' compensation, health care, and education reform.

The Northern Kentucky Chamber of Commerce ("Northern Kentucky Chamber") promotes and supports the development of strong businesses and a vibrant economy in the Northern Kentucky region, through leadership and advocacy, resulting in a better quality of life for all. A nationally accredited five-star Chamber, it is a chamber of all business types and sizes whether small, mid-size, or large, blue chip or blue collar—made up of 78% small business and 22% having less than 5 employees.

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse business advocacy organization. It works to promote and protect the interests of its more than 8,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena.

The Chamber of Commerce serving Johnson City–Jonesborough–Washington County ("Tennessee Cha-

mber") celebrates its centennial this year with nearly 700 members that employ about 45,000 citizens in the Tri-Cities Tennessee–Virginia region. Its services run the gamut from working with small businesses and industry to intergovernmental relations, tourism, and economic and community development collaborations that address quality of life for our citizens. The Tennessee Chamber continues to promote and advocate for business and the free enterprise spirit.

This case presents a question of vital importance to the U.S. Chamber, Cincinnati Chamber, Kentucky Chamber, Northern Kentucky Chamber, Ohio Chamber, and Tennessee Chamber (collectively "*amici*") and their members: under the Clean Air Act, when an area the EPA had designated as a nonattainment area with respect to national ambient air quality standards ("NAAQS") subsequently satisfies those standards, whether that area of the country must continue to implement costly nonattainment requirements and control measures that are, by definition, no longer necessary for attainment.

The answer to this question has tremendous consequences for *amici*'s members and, as a result, the national economy. The designation of nonattainment under the Clean Air Act imposes substantial economic burdens on such areas of the country and discourages businesses from investing in those American cities. It is thus no surprise that the EPA has long interpreted the Clean Air Act to allow the EPA to redesignate an area as an attainment area—and thus relieve the area of the more costly requirements for nonattainment areas—once it meets the NAAQS.

The decision below not only contradicts the EPA's correct and longstanding position and imposes severe economic burdens on certain American cities, but it

also disrupts the previously uniform nationwide regulatory scheme. The Sixth Circuit's decision squarely conflicts with that of the neighboring Seventh Circuit, and is in substantial tension with decisions from four other circuits. Such a patchwork regulatory scheme unnecessarily imposes additional costs and uncertainty on *amici*'s members that operate businesses nationwide and in the affected areas, and it disadvantages certain cities for no reason other than the fact that they are located in Kentucky, Michigan, Ohio, and Tennessee (the Sixth Circuit).

Amici have participated in many cases addressing the proper interpretation of the Clean Air Act. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Michigan v. EPA*, 135 S. Ct. 2699 (2015). *Amici* have both a unique perspective on the question presented and a substantial interest in ensuring that the Clean Air Act is interpreted consistent with Congress' design.

INTRODUCTION AND SUMMARY

Under the Clean Air Act, the EPA sets national ambient air quality standards ("NAAQS") at levels that "are requisite to protect public health." 42 U.S.C. § 7409(b)(1). States, in turn, are responsible for developing implementation plans to attain and maintain these standards. *Id.* §§ 7410, 7502. States enjoy great flexibility in designing those plans.

For areas of the country that have not attained the air quality standards and thus the EPA has designated as nonattainment areas, however, the state implementation plans must include "all reasonably available control measures" ("RACM"),

adopt "reasonably available control technology" ("RACT"), and thus "provide for attainment of the national primary ambient air quality standards." *Id.* § 7502(c)(1). The Clean Air Act instructs the EPA to redesignate areas from nonattainment to attainment once the areas have attained the NAAQS and met other statutory requirements. *Id.* § 7407(d)(3).

Critically, for more than two decades, the EPA has correctly interpreted its designation authority as motivated by the ultimate objective of promoting attainment. In other words, once an area achieves attainment with the air quality standards, the area no longer must pursue "all reasonably available control measures" and adopt "reasonably available control technology" that were designed to attain those standards. Prior to the decision below, no circuit had cast doubt on this settled interpretation of the EPA's redesignation authority. Indeed, the Seventh Circuit had previously rejected a similar challenge raised by the same challenger here—with respect to an area (St. Louis) that as the crow flies is about 300 miles from the area at issue here (Cincinnati). *Sierra Club v. EPA*, 375 F.3d 537, 540–42 (7th Cir. 2004) (per Easterbrook, J.).

In this case, the EPA had designated the Cincinnati area—including portions of Indiana, Kentucky, and Ohio—as nonattainment with respect to fine particulate matter ("$PM_{2.5}$"). The State of Ohio submitted its implementation plan, and within a few years Cincinnati's air quality had improved to meet the EPA-mandated NAAQS for $PM_{2.5}$. The EPA approved Ohio's plan and redesignated Cincinnati to attainment status, in the process rejecting objections raised by Respondent Sierra Club. Pet. App. 9a. The Sixth Circuit vacated the EPA's rule, holding that "re-

designation to attainment status is improper" because "a State seeking redesignation 'shall provide for implementation' of RACM/RACT, even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS." Pet. App. 28a.

This Court should grant the Petition and reverse the decision below. *Amici* focus on two of the many reasons for reversal.

First, the Sixth Circuit's interpretation of the Clean Air Act displaces the EPA's correct and decades-old interpretation of its redesignation authority, and in the process creates a conflict among the circuits. Indeed, as the EPA noted in its petition for rehearing en banc, the decision "conflicts with a decision of the Seventh Circuit and is in substantial tension with the decisions by the Fifth, Tenth, and D.C. Circuits." Dkt. No. 119, at 3. It also conflicts with Ninth Circuit precedent. The circuit split takes on added importance because it displaces a longstanding, uniform nationwide regulatory scheme and, indeed, imposes conflicting commands on certain areas, such as Cincinnati, that cross circuit borders.

Second, this disruption of the national regulatory scheme imposes significant economic and administrative burdens. As the EPA observed in its rehearing petition, "[t]he importance of this question is heightened because the panel's decision imposes a purposeless administrative process on states to adopt and submit, and the EPA to review, additional RACM/RACT provisions when the Area has *already* achieved the end goal of attaining the applicable air quality standard." Dkt. No. 119, at 3. These burdens, however, are not limited to governmental inefficiencies. They are passed directly onto the citizens who live there and the businesses that have invested or are

considering investing in those cities. That is because of the substantially greater uncertainties and costs to businesses of complying with the permitting regimes required of nonattainment areas.

Without further review, the confusion and uncertainty created by the decision below will continue to significantly raise the costs of investing in certain American cities based solely on the circuit in which the city is located. Review is warranted to correct this egregious interpretation of the Clean Air Act and to restore the correct and uniform national regulatory scheme the EPA has long embraced.

ARGUMENT

I. The Sixth Circuit's Erroneous Interpretation Conflicts with the EPA's Settled Position and Decisions by Five Other Circuits

In vacating the EPA's rule redesignating Cincinnati as an attainment area under the Clean Air Act, the Sixth Circuit erroneously held that "re-designation to attainment status is improper" because "a State seeking redesignation 'shall provide for implementation' of RACM/RACT, even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS." Pet. App. 28a. As set forth in greater detail in the Petition, *see* Pet. 15–24, this erroneous interpretation of the Clean Air Act contradicts the EPA's longstanding interpretation, expressly conflicts with Seventh Circuit precedent, and is in substantial tension with decisions by four other circuits. Each will be addressed in turn.

1. EPA. Over two decades ago, the EPA promulgated via notice-and-comment rulemaking its interpretation of the relevant provisions of the Clean Air

Act. In particular, the EPA determined that the phrase "reasonably available control measures" is limited to measures necessary for attainment. *State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990*, 57 Fed. Reg. 13498, 13560 (1992). The EPA, moreover, determined that the RACM/RACT requirements are suspended "[u]pon a determination by the EPA that an area designated nonattainment for the $PM_{2.5}$ NAAQS has attained the standard." 40 C.F.R. § 51.1004(c).

As the EPA correctly argued at length in the proceedings before the Sixth Circuit—including in its petition for rehearing en banc—the decision below "conflicts with settled EPA regulations" and is "also flawed because the panel's statutory analysis addressed only two words of the provision, rather than the entire provision." Dkt. No. 119, at 2, 8.

2. Seventh Circuit. The decision below also expressly rejects the Seventh Circuit's approach. *Compare* Pet. App. 26a–27a, *with Sierra Club*, 375 F.3d at 540. The Seventh Circuit agreed with the EPA's position that "applicable implementation plan" for redesignation purposes is not the same as the nonattainment implementation plan but instead does not include the RACM/RACT requirements that are no longer necessary for attainment. 375 F.3d at 540–42.

This express disagreement between the Sixth and Seventh Circuits on the interpretation of an important national regulatory regime—without more—should counsel in favor of the Court's review. But this split among *neighboring* circuits is particularly problematic. Areas of the country under the Clean Air Act are not geographically limited to just one State, or even one circuit. Indeed, the Cincinnati area includes

portions of Ohio, Kentucky, and Indiana, with Kentucky and Indiana in the Sixth Circuit and Indiana in the Seventh. The Cincinnati area is thus now subject to conflicting judicial commands; whether redesignation is possible depends on where the challenger seeks review. Indeed, it is surely no coincidence that Respondent Sierra Club sought review in the Sixth Circuit where binding Seventh Circuit precedent did not foreclose its challenge.

3. Fifth, Ninth, Tenth, and D.C. Circuits. As the EPA argued in its rehearing petition, the Sixth Circuit's decision is also "in substantial tension with decisions by the Fifth, Tenth, and D.C. Circuits." Dkt. No. 119, at 3. *Amici* agree with the EPA's assessment, though note that "substantial tension" is arguably an understatement and that the decision below also conflicts with Ninth Circuit precedent.

Consider the D.C. Circuit's opinion in *NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009). There, albeit with respect to the ozone NAAQS and not the $PM_{2.5}$ NAAQS, the D.C. Circuit reached a conclusion polar opposite to the Sixth Circuit's here:

> To the extent an area is already achieving attainment as expeditiously as possible, imposition of additional control technologies would not hasten achievement of the NAAQS. In such a situation, the EPA may reasonably conclude that no control technologies are reasonably available and the area need not implement further technologies to satisfy the RACT requirement.

Id. at 1253; *cf.* Pet. App. 28a ("In sum, a State seeking redesignation 'shall provide for the implementation' of RACM/RACT, even if those measures are not strictly

necessary to demonstrate attainment with the PM2.5 NAAQS.").

As highlighted in the EPA's rehearing petition, *see* Dkt. No. 119, at 13 n.2, and detailed in the Petition, *see* Pet. 18–24, the decision below also conflicts or is in substantial tension with decisions by the Fifth, Ninth, Tenth, and D.C. Circuits. *See Sierra Club v. EPA*, 314 F.3d 735, 743–45 (5th Cir. 2002) (holding that States are required to implement "only those measures that would advance [an area's] attainment date"); *accord Sierra Club v. EPA*, 294 F.3d 155, 162–63 (D.C. Cir. 2002); *see also Sierra Club v. EPA*, 99 F.3d 1551, 1557–58 (10th Cir. 1996) (exempting areas from certain nonattainment requirements because they were attaining NAAQS); *Ober v. Whitman*, 243 F.3d 1190, 1196–98 (9th Cir. 2001) (holding that the "reasonably available" requirement only includes measures and technology that contribute to attainment).

In sum, this Petition merits the Court's review because the decision below expressly conflicts with the Seventh Circuit's *Sierra Club* decision, conflicts or at least is in substantial tension with decisions by four other circuits, and displaces the EPA's longstanding and correct interpretation of its redesignation authority under the Clean Air Act.[2]

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[2] As the Petition further details, by discarding the central goal of the Clean Air Act to attain air quality standards, the decision below is also incompatible with this Court's precedent interpreting the Clean Air Act. *See* Pet. 24–30 (discussing, *inter alia*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Michigan v. EPA*, 135 S. Ct. 2699 (2015)).

II. The Sixth Circuit's Erroneous Decision Arbitrarily Imposes Severe Economic Burdens on States, Affected Cities, and the Nation's Business Community

The decision below merits this Court's review for the additional reason that it unfairly imposes significant economic and administrative burdens.

As the EPA emphasized in its petition for rehearing en banc, "[t]he importance of this question is heightened because the panel's decision imposes a purposeless administrative process on states to adopt and submit, and the EPA to review, additional RACM/RACT provisions when the Area has *already* achieved the end goal of attaining the applicable air quality standard." Dkt. No. 119, at 3.

To the extent the decision below seeks to impose additional requirements that would make the process not purposeless, the "decision also leaves Ohio [and the rest of the Sixth Circuit] in the dark on what it must do on remand for the Cincinnati area and in all future nonattainment plans." Pet. 31. By providing no clear guidance on what more is required on remand before the agency, the Sixth Circuit has introduced regulatory uncertainty that could cause the EPA to impose a federal implementation plan on the State of Ohio (and perhaps other States within the Sixth Circuit). *See* Pet. 31 (citing 42 U.S.C. § 7410(c)(1); *EME Homer*, 134 S. Ct. at 1595).

These burdens, however, are not limited to governmental inefficiencies and uncertainties at the local, state, and federal level. Judge Easterbrook, writing for the Seventh Circuit in *Sierra Club*, aptly explained that a nonattainment area, such as the Cincinnati metropolitan area, "is an abstraction, a

convenient collective phrase for millions of people whose own lives and fortunes are at issue." 375 F.3d at 542. "Once an area has met the national air quality standard," Judge Easterbrook explained, "the statutory system would not be much of a goad if the tighter controls must continue even after attainment. It is not as if neighborhood bakeries and other smallish point sources were themselves blameworthy and in need of 20 lashes for transgressions." *Id.*

Amici's members have experienced firsthand the substantial economic burdens caused by the tightened controls imposed on nonattainment areas, which make investment in such cities costly for current businesses and unappealing for new businesses. Under the Clean Air Act, businesses seeking to modify existing facilities or create new ones face more exacting permitting requirements in nonattainment areas. *See* Pet. 31–33 (discussing the permitting requirements in 42 U.S.C. § 7503 for nonattainment areas). The permitting process is expensive and time-consuming. Even more important, compliance with the higher standards imposed in nonattainment areas for facility creation or modification is much more expensive and often can be cost-prohibitive for businesses.

In 2004, then-President for one of *amici*, the Cincinnati Chamber, testified before Congress about the costs imposed by nonattainment status in the Cincinnati area: "Simply stated, conducting business in an area designated as non-attainment is more complicated, more time-consuming and more costly. In addition to the incremental burdens that are placed on the businesses already located here, the non-attainment designation is a disincentive for new business investment into our region." Statement of Michael Fisher, President, Cincinnati Chamber, to

U.S. Senate Comm. on Env't & Public Works (Apr. 1, 2004), https://perma.cc/NN82-UJXK.

In his testimony, the Cincinnati Chamber President detailed a number of negative consequences that *amici* and their members in Cincinnati and in cities across the country have experienced firsthand when doing business in areas that have been designated as nonattainment under the Clean Air Act. A few of those adverse effects merit mention here.

First, nonattainment status leads to job loss. Citing a 1995 study conducted by the National Economic Research Associates, the Cincinnati Chamber President testified that "the economic impact of ozone non-attainment in Greater Cincinnati projected job losses of 14,000, including both manufacturing and spin-off jobs, for the period 1995 until 2000." *Id.* Indeed, from 1995 to 2003 Cincinnati lost 35,000 jobs. "While it is difficult to discern the specific number of job losses attributable to the non-attainment designation," he testified, "it is clear that the 35,000 workers were displaced and the non-attainment status was at least one contributing factor." *Id.*

Second, nonattainment status discourages businesses from expanding in such cities. As the Cincinnati Chamber President testified, nonattainment causes "increased scrutiny, potential for higher fines if permit violations occur, and the uncertainty over what the next round of regulations may bring; all serve as a disincentive for reinvestment and expansion of businesses, especially manufacturing operations, located in non-attainment areas like ours." *Id.* This is particularly problematic, he observed, because "non-attainment areas are often urban areas—the very locations large metropolitan Chambers are frequently trying to revitalize." *Id.*

Third, nonattainment status drives away potential businesses from investing in cities labeled as nonattainment. The Cincinnati Chamber President testified that national location site consultants had informed the Cincinnati Chamber that "non-attainment areas are frequently not even included as potential locations for major new manufacturing projects," and thus "[a]s a non-attainment area, Greater Cincinnati suffers in some cases because we never make it onto the prospect list." *Id.* Potential investments in significant new or expanded operations are also driven away from nonattainment areas by the uncertainty of securing appropriate and sufficient offsets that decrease emissions more than the project's proposed emission increase. Attainment areas competing for these projects have no such obstacle.

Fourth, the negative effects on business investment are particularly acute with respect to "foreign investors who are highly sensitive to compliance costs, potential public relations problems associated with environmental concerns, and the quality of life perceptions of their executives soon to be relocated to the United States." *Id.* Because of the correlation between nonattainment status and urban populations, areas of the country that may otherwise be most attractive to foreign investment—the large metropolitan American cities—may never make it on the investor's short list due to the investment concerns that accompany the nonattainment label.

Fifth, as discussed above, businesses in nonattainment areas must implement more costly measures to obtain permits to modify or create new facilities. As the Cincinnati Chamber President testified, "[t]he Hamilton County (our major urban county) Department of Environmental Services strongly advises

applicants for air permits to hire a consultant to assist in the development of information required for submission." *Id.* Moreover, he testified, "these stricter standards cost businesses time and money, and sometimes negatively impact the ability of a company to keep or win customers—especially when competitors, both domestic and overseas, are not held to the same standards." *Id.*

Finally, even a city's transportation infrastructure can be threatened by nonattainment status. That is because, the Cincinnati Chamber President testified, the "region's metropolitan planning organization is required to demonstrate that its regional transportation improvement plan is consistent with the overall emissions budget for the region. Failure on this can also result in significant reductions in federal highway funding." *Id.*

In this brief, *amici* focus on the substantial economic costs caused by a nonattainment designation for a region that has already satisfied air quality standards; the wisdom of imposing similar costs on other nonattainment regions, for little to no benefit, is beyond the scope of this brief, though has been frequently addressed by amici elsewhere. *See, e.g.*, U.S. Chamber Energy Inst., *Grinding to a Halt: Examining the Impacts of New Ozone Regulations on Key Transportation Projects* 6 (2015), https://perma.cc/36XV-HZB3. But as the EPA has long stated and every other circuit that has considered the issue has agreed, such burdens should no longer be imposed on cities that have attained those standards. Nor should those attaining cities be denied attainment redesignation for failure to implement costly nonattainment requirements and control measures that are, by definition, no longer necessary for attainment.

The contrary, nonsensical conclusion that the Sixth Circuit reached here is not good for government, not good for business, and not good for the citizens who reside in those cities. This Court should grant the Petition and reverse the decision below to restore the uniform nationwide regulatory scheme that the EPA correctly embraced over two decades ago.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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