No. 21-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SIERRA CLUB, ET AL., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondents.	: : : : : : : : :	On Petition for Review of Action of the U.S. Environmental Protection Agency

BRIEF OF INTERVENOR STATE OF OHIO

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JURISDICTIONAL STATEMENT

The EPA published notice of its final action on November 19, 2020. *See Air Plan Approval; Ohio; Technical Amendment*, 85 Fed. Reg. 73,636-01 (Nov. 19, 2020). The Sierra Club timely petitioned for review on January 19, 2021. *See* 42 U.S.C. §7607(b)(1). This Court has jurisdiction under 42 U.S.C. §7607(b) to decide the case.

STATEMENT OF THE ISSUES

The Clean Air Act requires States to develop "State Implementation Plans." These plans must provide for the "implementation, maintenance, and enforcement" of federally established air-quality standards. 42 U.S.C. §7410(a)(1). And they must "include enforceable emission limitations and other control measures" necessary to ensure attainment of those standards. §7410(a)(2)(A). Ohio's Air Nuisance Rule does not require specific and quantifiable emissions limitations and is not targeted at the implementation, maintenance, or enforcement of air-quality standards.

Did the EPA act arbitrarily and capriciously when it determined that the Air Nuisance Rule did not belong in Ohio's State Implementation Plan?

INTRODUCTION

The Clean Air Act tasks States with proposing State Implementation Plans. These plans specify the state laws and regulations that the issuing State will use to satisfy the EPA's air-quality standards. Ohio included its "Air Nuisance Rule," Ohio Admin. Code §3745-15-07, in the plan it submitted. It should not have done so, and the EPA should not have approved the inclusion of this Rule. State Implementation Plans are supposed to include "enforceable emission limitations and other control measures" necessary to attain the air-quality levels set by the EPA. 42 U.S.C. §7410(a)(2)(A). The Air Nuisance Rule is not the type of enforceable emission limitation or a control measure that belongs in a State Implementation Plan: instead of setting quantifiable limits on, or regulating the emission of, pollutants governed by the EPA's air-quality standards, it simply defines "public nuisance" to include "emission or escape into the open air" of various substances, combinations, and odors. Ohio Admin. Code §3745-15-07. Just as important, Ohio has never relied on the Air Nuisance Rule when explaining how it intends to attain or maintain the air-quality standards. So even if the enforcement of the Air Nuisance Rule might, in some case, result in pollution reductions, the Rule still does not belong in Ohio's Plan.

Congress has empowered the EPA to amend State Implementation Plans to remove provisions that should never have been included. 42 U.S.C. §7410(k)(6). The EPA exercised that power here, and removed Ohio's Air Nuisance Rule from its State Implementation Plan. Rightly so. This Court should uphold the agency's decision.

STATEMENT

1. The States bear primary responsibility for regulating the environment. *Solid Waste Agency of Northern Cook Cnty. (SWANCC) v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Congress's forays into the field respect this traditional allocation of power. The Clean Air Act is especially relevant here. It expressly acknowledges that "air pollution prevention … and air pollution control … is the primary responsibility of States and local governments." 42 U.S.C. §7401(a)(3). And the Act's structure—which envisions the federal and state governments working together—reflects what has come to be known as "cooperative federalism." *Sierra Club v. Korleski*, 681 F.3d 342, 343 (6th Cir. 2012) (quoting *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 467 (6th Cir. 2004)).

This case concerns one particular aspect of this cooperative-federalism structure: the setting of national ambient air-quality standards. (Cases often refer to these standards as "NAAQS." In the interest of avoiding unusual acronyms,

this brief calls them "air-quality standards.") The Clean Air Act tasks the EPA with setting these standards at levels that are "requisite to protect public health." 42 U.S.C. §7409(b)(1). The EPA has done so for six different types of pollutants: carbon monoxide, lead, ozone, particulate matter, nitrogen dioxide, and sulfur dioxide. *See* 40 C.F.R. Part 50. These pollutants are sometimes referred to as "criteria pollutants." *See Southwestern Pa. Growth Alliance v. Browner*, 144 F.3d 984, 985 (6th Cir. 1998).

While the EPA sets the standards, the States decide how to achieve them. The Act charges the States with choosing the combination of restrictions and requirements they believe are appropriate to ensure compliance with the EPA's air-quality standards. 42 U.S.C. §7410(a)(2). The States have quite a bit of leeway when designing their plans. As long as "the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, [a] State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 79 (1975).

Once a State adopts regulations sufficient to satisfy the EPA's air-quality standards, it must submit a State Implementation Plan to the EPA for approval. The plan must include "enforceable emission limitations and other control measures, means, or techniques …, as well as schedules and timetables for compli-

ance, as may be necessary or appropriate to meet the applicable requirements of this Act." §7410(a)(2); *see also* 42 U.S.C. §7407(d)(3)(E)(iii). And to be enforceable, emissions reductions must be quantifiable. That is, a State must be able to ascribe "a specific amount of emissions reductions" to the measures an Implementation Plan uses to demonstrate attainment of the air-quality standards. *State Implementation Plans*, 57 Fed. Reg. 13,498, 13,567 (April 16, 1992). They must also be measurable; a "legal means for ensuring that sources are in compliance with the control measure must also exist in order for a measure to be enforceable." *Id.* at 13,568. Finally, compliance with the air-quality standards is not just a matter of trust. The States must demonstrate through modeling that the combination of restrictions that they impose will ensure compliance with the standards. §7410(a)(2)(K).

After the EPA approves a State Implementation Plan, its terms may be enforced under either state or federal law. *See Korleski*, 681 F.3d at 343. State governments can sue in federal court to enforce violations of State Implementation Plans. So can the federal government. And so can private citizens—the Clean Air Act allows private parties to file citizen suits enforcing the Act's requirements, and the Act's requirements include any state laws incorporated into a State Implemen-

tation Plan. 42 U.S.C. §7604; *cf. Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 241 (1975).

2. Congress did not give the EPA or the States much time to develop the relevant standards and plans. *Train*, 421 U.S. at 68. The Act gave the EPA just thirty days to propose the first set of air-quality standards. 42 U.S.C. §1857c-4(a)(1)(A) (1970). And it gave the States nine months to develop and submit their State Implementation Plans. 42 U.S.C. §1857c-5(a)(1) (1970). Upon submission, the EPA had just four months to approve those plans. §1857c-5(a)(2) (1970).

Many States, in their rush to meet the deadlines, submitted "entire regulatory air pollution programs, including many elements not required by the" Clean Air Act. 85 Fed. Reg. at 73,636. They did so despite the fact that State Implementation Plans are allowed to include *only* environmental laws to be used in achieving the EPA's air-quality standards—laws establishing "enforceable emission limitations and other control measures, means, or techniques … as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the" air-quality standards. §7410(a)(2). But the EPA, in its own rush to meet its own deadlines, approved these state submissions in their entirety. 85 Fed. Reg. at 73,636–37. Thus, instead of including only those state laws that were necessary or appropriate to meet the federal air-quality standards, many of the approved State Implementa-

tion Plans included state-law provisions with "no connection to the purposes for which [State Implementation Plans] are developed and approved, namely the implementation, maintenance, and enforcement" of air-quality standards. *Id.* at 73,637.

Recognizing its mistake, the EPA sought to correct some of its erroneous approvals. One of its first attempts to do so involved local Pennsylvania odor regulations. *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 779 (3d Cir. 1987). Reasoning that the odor regulations had "no significant relationship to the achievement of any" air-quality standard, *id.*, the EPA sought to unilaterally revise Pennsylvania's State Implementation Plan and withdraw its earlier incorporation of those regulations, *see id.* at 782. The version of the Clean Air Act in effect at the time did not allow for such revisions, however. *Id.* at 787. And so the Third Circuit rejected the EPA's revision.

Congress responded quickly, amending the Clean Air Act to give the EPA the authority the Third Circuit held it lacked. As amended, the Act now empowers the EPA to unilaterally correct State Implementation Plans whenever "the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof) … was in error." 42 U.S.C. §7410(k)(6).

3. The EPA exercised its error-correction power in this case. Ohio, like Pennsylvania, submitted an overinclusive State Implementation Plan shortly after the Clean Air Act's passage. The EPA approved that plan several months later and, after this Court vacated that approval, approved it again in 1974. *See Approval and Promulgation of State Implementation Plans; Ohio*, 39 Fed. Reg. 13,539 (April 15, 1974).

Of particular importance here, the as-approved plan included Ohio's "Air Nuisance Rule," which is codified at Ohio Administrative Code §3745-15-07. *See Approval and Promulgation of State Implementation Plans; Ohio*, 49 Fed. Reg. 32,181 (Aug. 13, 1984). But although that rule was included in Ohio's Plan, the Ohio EPA has never relied on that rule when explaining how it intends to achieve or maintain the air-quality standards. *See* 85 Fed. Reg. at 16,309–10. So, in 2020, the EPA proposed amending Ohio's State Implementation Plan to remove the Air Nuisance Rule from the Plan's federally enforceable provisions. *See Air Plan Approval; Ohio; Technical Amendment*, 85 Fed. Reg. 16,309-01 (March 23, 2020). At the time, Ohio was the only State in its region whose State Implementation Plan still included a state-law nuisance rule. *See* Record B-04, JA129.

In its proposed amendment, the EPA noted that it "found no information indicating that [Ohio] has relied on, or ever intended to rely on," the Air Nuisance

rule "for attainment or maintenance" of any air-quality standard. 85 Fed. Reg. at 16,309–10. Ohio's own state-level EPA concurred. *Id.* at 16,310. Because the Rule did not "have a reasonable connection to the attainment or maintenance" of the air-quality standards, the EPA concluded that it erred by including the Rule in Ohio's State Implementation Plan. *Id.*

The EPA finalized its amendment to Ohio's State Implementation Plan several months later. 85 Fed. Reg. 73,636-01. Consistent with its original proposal, the EPA rescinded its earlier approval of the Air Nuisance Rule and removed it from Ohio's approved Plan. *Id.* at 73,640. In response to comments challenging that decision, the EPA noted that the removal of the Rule was consistent with its actions in other cases; "[s]imilar provisions had already been removed from" the approved implementation plans in States neighboring Ohio because those States, like Ohio, "did not rely on those provisions for attainment and maintenance" of the air-quality standards. *Id.* at 73,639.

4. The Sierra Club (which is how this brief refers to the petitioners generally) timely filed a petition for review of the amendment, arguing that the EPA abused its discretion by removing the Air Nuisance Rule from the State Implementation Plan. This Court allowed Ohio to intervene in defense of the EPA's action.

SUMMARY OF ARGUMENT

I. This case presents the question whether the EPA properly removed the Air Nuisance Rule from Ohio's State Implementation Plan. It did.

The Clean Air Act requires States to adopt State Implementation Plans. In these plans, States include the state laws and state regulations that they will use to attain and maintain compliance with the EPA's air-quality standards. *See* §7407(a); §7410(a)(1). In statutory terms, the plans must include "enforceable emission limitations and other control measures, means, or techniques …, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter." §7410(a)(2); *see also* 42 U.S.C. §7407(d)(3)(E)(iii). The EPA has defined "enforceable" limitations as those that are "clear, unambiguous, and measurable." 57 Fed. Reg. at 13,568. As a practical matter, that means that they must also be *quantifiable*. Limitations and measures qualify as "enforceable" for purposes of State Implementation Plans, in other words, only if they are "measurable" and only if the State can ascribe some "specific amount of emissions reductions" to them. *Id.* at 13,567 (defining enforceable and quantifiable).

The Air Nuisance Rule does not fit the bill. It contains two subsections. The first forbids, and deems a "public nuisance," the emission of "any" substance

in an amount that threatens public health or safety. Ohio Admin. Code §3745-15-07(A). The second forbids, and deems a "public nuisance," the emission of odors from various substances, including criteria pollutants. Ohio Admin. Code §3745-15-07(B). Thus, neither establishes any "emission limitations" or "other control measures, means, or techniques" necessary for attaining compliance with the EPA's air-quality standards. §7410(a)(2)(A). Certainly neither subsection creates a *quantifiable* or *enforceable* limitation or control measure, as neither subsection allows for the sort of quantitative analysis that would allow the State to credit it with some "specific amount of emissions reduction" or a "clear, unambiguous, and measurable requirement[]." 57 Fed. Reg. at 13,567–68.

Because the Air Nuisance Rule does not have the characteristics that would justify its inclusion in a State Implementation Plan, the EPA properly removed it from Ohio's Plan.

II. The Sierra Club's contrary arguments all fail. It notes, for example, that plaintiffs sometimes raise nuisance claims in citizen suits filed under the Clean Air Act. *See* Sierra Club Br.31. This, the Sierra Club suggests, shows that the Air Nuisance Rule can be helpful to parties that are seeking to reduce the emission of criteria pollutants. *See id.* This argument does not prove anything relevant to this dispute. The question here is not whether private plaintiffs (or even the government)

can bring nuisance claims against polluters whose nuisance-creating emissions happen also to threaten the attainment (or continued attainment) of air-quality standards. Instead, the question is whether the Air Nuisance Rule constitutes a quantifiable, "enforceable emission limitation[]" or "other control measure[], means, or technique[]" that is "necessary or appropriate" for Ohio's attainment (and continued attainment) of federally approved air-quality standards. §7410(a)(2)(A). As explained, the answer to the latter question is "no." *See* 85 Fed. Reg. at 73,639 ("[U]sing the nuisance rule to achieve criteria pollutant reductions is not equivalent to relying on the rule for [State Implementation Plan] purposes.").

The Sierra Club's remaining arguments are even less compelling. For example, it suggests that the Third Circuit in *Concerned Citizens of Bridesburg* held that rules like the Air Nuisance Rule *do* relate to the air-quality standards, Sierra Club Br.33. It further claims that, under *Bridesburg*, the EPA lacks authority to correct its erroneous approval of Ohio's State Implementation Plan. *Id.* at 39–42. But Sierra Club relies, in part, on a portion of *Bridesburg* that was simply describing one of the parties' arguments, not adopting any rules of law. What is more, while *Bridesburg* did indeed hold that the EPA had limited power to correct errors made in the approval of State Implementation Plans, Congress enacted 42 U.S.C. §7410(k)(6) to give the EPA the power that *Bridesburg* thought the agency lacked.

Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans, 75 Fed. Reg. 82,536, 82,543 (Dec. 10, 2010); *see also Ass'n of Irritated Residents v. EPA*, 790 F.3d 934, 948 (9th Cir. 2015).

The Sierra Club also claims that the EPA should have been required to show that removing the Rule from Ohio's State Implementation Plan would not prevent Ohio from attaining the air-quality standards. Sierra Club Br.42–43. But it never explains how removing a rule that plays no role in ensuring that Ohio complies with the air-quality standards could possibly undermine its compliance with those standards.

Finally, the Sierra Club asserts that the EPA incorrectly concluded that private parties can enforce the Air Nuisance Rule by filing a citizen suit in state court. Sierra Club Br.50–54. To the extent the EPA misconstrued Ohio law, its error was irrelevant to the topic at hand; the question whether private parties can enforce the Air Nuisance Rule in state court has no bearing on whether the Rule belongs in Ohio's State Implementation Plan. In any event, Ohio reads the EPA's final determination as stating that plaintiffs may bring private- (or qualified public-) nuisance claims in state court, *not* as stating that they may bring those claims under the Air Nuisance Rule. *See* 85 Fed. Reg. at 73,639. And that conclusion correctly un-

derstands Ohio law. *See Banford v. Aldrich Chem. Co.*, 126 Ohio St. 3d 210, 2010-Ohio-2470 ¶17.

STANDARD OF REVIEW

The Court may not overturn a final action of the EPA unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. §7607(d)(9)(A), (C); *see also Ky. Res. Council, Inc. v. EPA*, 467 F.3d 986, 990–91 (6th Cir. 2006).

ARGUMENT

I. The EPA correctly removed the Air Nuisance Rule from Ohio's State Implementation Plan.

Ohio's State Implementation Plan should never have included the Air Nuisance Rule. Congress has given the EPA the power to fix such mistakes. §7410(k)(6). Here, the EPA exercised that power. Because its decision to amend Ohio's State Implementation Plan was neither arbitrary, capricious, nor otherwise in violation of the law, this Court should uphold the EPA's action.

A. To set the stage, recall the governing law. The Clean Air Act requires the EPA to establish national air-quality standards. §7409; *Korleski*, 681 F.3d at 343; *see above* 4–5. And the EPA has adopted such standards with respect to six criteria pollutants: carbon monoxide, lead, ozone, particulate matter, nitrogen diox-

ide, and sulfur dioxide. *See* 40 C.F.R. Part 50. While the EPA sets the standards, the States decide in the first instance how to achieve them. They do so by adopting EPA-approved State Implementation Plans. §7410(a)(1). These plans must "include enforceable emission limitations and other control measures, means, or techniques …, as well as schedules and timetables for compliance." §7410(a)(2)(A). Those limitations must ascribe "a specific amount of emissions reductions" to the measures an Implementation Plan uses to demonstrate attainment of the air-quality standards. 57 Fed. Reg. at 13,567. And the "adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases," and other specified requirements. 40 C.F.R. §51.112(a)(1); *see also* §7410(a)(2)(K) (a State must provide air-quality modeling).

But critically for present purposes, not all state-law prohibitions of air pollution belong in a State Implementation Plan. Because a State Implementation Plan is designed to demonstrate compliance with federal air-quality standards, *see* §7410(a)(1), only those state laws on which a State relies when explaining how it intends to comply with those standards may be included in a State Implementation Plan. State-law restrictions that are *not* necessary to ensure compliance with the air-quality standards do not belong in a federally enforceable State Implementation Plan. *See id.* (a State Implementation Plan must provide for the "implementation,

maintenance, and enforcement" of the air-quality standards) and §7410(a)(2)(C) (a State Implementation Plan must assure that the air-quality standards are achieved).

It is true that §7410 never explicitly *forbids* States from including in their Implementation Plans requirements that are not necessary for the implementation, maintenance, or enforcement of the air quality standards. But implicitly, it does. By specifying the purpose of a State Implementation Plan (providing for the achievement of the air quality standards), §7410(a)(1), and by dictating what a plan must contain (enforceable emissions limitations), §7410(a)(2), the statute implicitly prohibits the inclusion of state laws that do neither. Tellingly, Sierra Club never argues otherwise.

Federalism principles confirm this interpretation. The power to regulate nuisances generally, and air pollution specifically, is a traditional *state* power. *See Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667 (1878); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Because State Implementation Plans may be enforced by the federal government, as well as private citizens, interpreting §7410 as allowing Plans to contain requirements unrelated to the achievement of federal air-quality standards would represent a significant intrusion on that power. The statute should not be read that way. In the absence of a clear statement to the contrary, statutes should not be read as "alter[ing] the federal-state framework by permitting

federal encroachment upon a traditional state power," *see SWANCC,* 531 U.S. at 173, and the Clean Air Act contains no such statement. Just the opposite. It specifically preserves the States' primary roles as the regulators of air pollution. *See* §7401(a)(3).

B. Congress has empowered the EPA to amend State Implementation Plans to remove state laws that ought not be included. *See* §7410(k)(6). This case presents the question whether the EPA acted arbitrarily or capriciously by amending Ohio's Plan to remove the State's Air Nuisance Rule. It did not.

The Air Nuisance Rule provides:

> (A) The emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.
>
> (B) The emission or escape into the open air from any source or sources of odors whatsoever that is subject to regulation under Chapter 3745-17, 3745-18, 3745-21, or 3745-31 of the Administrative Code and is operated in such a manner to emit such amounts of odor as to endanger the health, safety, or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

Ohio Admin. Code §3745-15-07.

Subsection (A) does not guarantee quantifiable, concrete, and enforceable reductions in the emission of any of the six criteria pollutants for which the EPA has established air-quality standards. Instead of addressing those pollutants specifically, it generally prohibits as "public nuisance[s]" the release of "any … substances" that "endanger the health, safety, or welfare of the public." Although that broad prohibition can encompass criteria pollutants, it does not regulate the levels at which such pollutants are emitted. Section (B) speaks more directly to some of the pollutants for which the EPA has established air-quality standards; it governs "sources of odors" subject to regulation under Chapter 3745-17, -18, -21, or -31, and those chapters regulate criteria pollutants. But subsection (B) addresses odors, not air-quality standards. And the Clean Air Act does not regulate odors. *See Cate v. Transcontinental Gas Pipe Line Corp.*, 904 F. Supp. 526, 537–38 (W.D. Va. 1995); *see also Charter Twp. of Van Buren v. EQ, Envtl. Quality Co.*, Case No. 97-60076-AA, 1998 U.S. Dist. LEXIS 23739, at *23–*24 (E.D. Mich. Jan. 4, 1998); *Am. Canoe Ass'n v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 46–47 (D.D.C. 2004).

As this description shows, neither subsection of the Air Nuisance Rule "impact[s] the attainment and maintenance" of air-quality standards. *See* 49 Fed. Reg. at 32,181. The Rule does not specifically provide for the "implementation, mainte-

nance, [or] enforcement" of the federal air-quality standards. §7410(a)(1). That alone disqualifies the Rule from having any place in a State Implementation Plan. But the problem is even worse because the Rule does not mandate the type of specific, measurable, and concrete reductions in emissions that state laws must set before they belong in a State Implementation Plan. *See* §7410(a)(2)(A). And without quantifiable emissions reductions there is also no way to comply with the requirement that the adequacy of a State Implementation Plan be demonstrated through modeling. *See* 40 C.F.R. §51.112; *see also* §7410(a)(2)(K). After all, one cannot model the effect of a limitation if one cannot measure the degree to which the limitation will reduce emissions. *Cf. Sierra Club v. EPA*, 375 F.3d 537, 539 (7th Cir. 2004) ("Accurate projections depend on supplying good data to good models.").

Because the Air Nuisance Rule does not mandate any quantifiable and enforceable reductions in emissions, Ohio has never relied on it when describing how it intends to comply with the air-quality standards. As it informed the EPA, it has not relied on the Air Nuisance Rule for the purposes of "planning, nonattainment designations, redesignation requests, maintenance plans, [or] determination of nonattainment areas or their boundaries" under the Clean Air Act. Record B-04, JA129.

The EPA should not have needed the Ohio EPA to tell it that, however. The agency recognized at least as early as 1979 that nuisance rules, like the Air Nuisance Rule, are not intended to ensure compliance with the air-quality standards and therefore do not belong in State Implementation Plans. In 1979, only a few years after it approved the inclusion of the Air Nuisance Rule in Ohio's Plan, the EPA recognized that such approvals were in error. In a memorandum sent to regional EPA offices, the associate general counsel for the Air, Noise and Radiation division of the EPA reminded those offices that "measures to control non-criteria pollutants may not legally be made part of a" State Implementation Plan. He noted that States "may not always differentiate between their regulations to control criteria pollutants and their air pollution control regulations in general." And he cautioned that the EPA should observe that difference even if the States do not. Memorandum, Record B-01, JA012.

Using the error-correction authority Congress granted it under §7410(k)(6), the EPA has been working on removing nuisance and odor provisions similar to Ohio's Air Nuisance Rule from other States' Implementation Plans. *See, e.g.,* 71 Fed. Reg. 13,551-01 (March 16, 2006) (Georgia); 84 Fed. Reg. 45,422 (Aug. 29, 2019) (California); 64 Fed. Reg. 7,790-01 (Feb. 17, 1999) (Michigan); *see also Approval of Revision to the Pennsylvania State Implementation Plan*, 51 Fed. Reg. 18,438

(May 20, 1986) (rescinding approval of Pennsylvania odor regulation). In fact, by the time the EPA finally amended Ohio's Plan, Ohio was the only State in its region with an Implementation Plan that still contained a nuisance provision. *See* Record B-04, JA129.

In sum, the EPA correctly removed the Air Nuisance Rule from Ohio's State Implementation Plan.

II. This Court should reject Sierra Club's arguments for vacating the EPA's amendments to Ohio's State Implementation Plan.

The Sierra Club objects to the EPA's removal of the Air Nuisance Rule from Ohio's approved State Implementation Plan. It claims that Ohio was right to include the Rule in its initial State Implementation Plan, that the EPA was right to approve it, and that the EPA therefore lacks authority under §7410(k)(6) to amend the Plan to remove the Rule. None of Sierra Club's arguments withstands scrutiny, however.

1. The most significant problem with the Sierra Club's brief is that it fails to rebut the basis for the EPA's action. The EPA reasoned that the Air Nuisance Rule does not belong in Ohio's State Implementation Plan because it does not relate to the implementation, maintenance, or enforcement of the air-quality standards, and because Ohio has never relied on the Rule for its State Implementation Plan, nonattainment designations, resignation requests, maintenance plans, or de-

termination of nonattainment areas. *See* 85 Fed. Reg. at 73,637–38; *see also* Record B-04, JA129. The Sierra Club has not identified anything that contradicts that conclusion; it has not provided a single example of a time Ohio relied on the Air Nuisance Rule to demonstrate compliance with any of the air-quality standards.

Instead of addressing the basis for the EPA's action, the Sierra Club responds with a variety of unrelated arguments. First, it asserts that the Air Nuisance Rule aids in the enforcement of the air-quality standards because some citizen-suit plaintiffs have included nuisance claims in their complaints. Sierra Club Br.31. But that has no bearing on the question presented, which is whether the Air Nuisance Rule imposes the type of "enforceable emission limitation[] [or] other control measure[], means, or technique[]" that can be included in a State Implementation Plan. §7410(a)(2)(A). Again, only those state laws that are necessary to ensure compliance with federal air-quality standards belong in a State Implementation Plan. §7410(a)(1). As the EPA noted in its response to comments, "using the nuisance rule to achieve criteria pollutant reductions is not equivalent to relying on the rule for [State Implementation Plan] purposes." 85 Fed. Reg. at 73,639. So the fact that citizen-suit plaintiffs have abated pollution using nuisance claims makes no difference to the question presented.

Further, would-be citizen-suit plaintiffs do not need nuisance rules in order to effectively enforce State Implementation Plans. Every State Implementation Plan must contain "enforceable emissions limitations and other control measures" sufficient to ensure compliance with the air-quality standards and other requirements of the Clean Air Act. §7410(a)(2)(A). Further, permits required by the Clean Air Act must contain enforceable emissions limitations, along with "inspection, entry, monitoring, compliance certification, and reporting requirements" sufficient to "assure compliance with the permit terms and conditions." §7661c(a), (c); *see also* Ohio Admin. Code §3745-31-05(A); *Approval and Promulgation of Air Quality Implementation Plans; Ohio*, 78 Fed. Reg. 11,748-01 (February 20, 2013). Citizen-suit plaintiffs can enforce all of these requirements. And in doing so, they can guarantee compliance with the air-quality standards.

Second, the Sierra Club asserts that the Rule provides a necessary backstop and gap-filling function. Sierra Club Br.30, 33. As just discussed, there is no gap to fill: all State Implementation Plans must include requirements that ensure compliance. By enforcing those provisions, the EPA, the States, and private attorneys general can ensure attainment of air-quality standards. The Sierra Club suggests that the Air Nuisance Rule is needed to ensure that facilities, if they do not continuously monitor their emissions, remain in compliance with the Clean Air Act. Sier-

ra Club Br.33. But the Act specifically states that continuous emissions monitoring is not required as long as "alternative methods are available that provide sufficiently reliable and timely information for determining compliance." §7661c(b). The Sierra Club's suggestion that the Air Nuisance Rule might fill gaps in a State's air-monitoring network is similarly misplaced. The EPA has established detailed requirements for the design and placement of air monitors, *see* 40 C.F.R. §58.10; 40 C.F.R. Part 58, Appendix D, leaving no gap for the Air Nuisance Rule to fill.

In truth, the Sierra Club does not want the Court to fill any gaps. It wants it to expand the Clean Air Act. Citing the Supreme Court's decision in *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994), the Sierra Club notes that the Clean Water Act requires States to adopt broad, narrative standards as a supplement to more specific technology-based limits on the discharge of pollutants. The Clean Air Act, it argues, should be interpreted to do the same. Sierra Club Br.31–32. But the Clean Air Act *does not* do the same: it requires that State Implementation Plans and permits impose quantifiable, enforceable limits. And it requires that those limits be, by themselves, stringent enough to ensure compliance with the air-quality standards. §7410(a)(1); §7661c(a). That is quite different from the Clean *Water* Act. That Act also requires specific, numerical limits on the discharge of pollutants, but it *does not* require that those limits be sufficiently stringent to comply

with the applicable water-quality standards. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, n.12 (1976). For that reason, the Clean Water Act requires the use of qualitative pollution standards. *See id.* "In construing a statute, the words matter." *Korleski*, 681 F.3d at 350. Here, the words of the Clean Water Act and Clean Air Act make clear that only the former incorporates qualitative standards of the sort the Sierra Club would like Ohio to mandate.

Finally, the Sierra Club defends the inclusion of the Air Nuisance Rule in Ohio's State Implementation Plan on the ground that the Clean Air Act permits States to include in their State Implementation Plans restrictions that are more stringent than necessary to ensure compliance with the air-quality standards. Sierra Club Br.36–37 (citing §7416). But just because a State retains its authority to enact laws restricting air pollution does not mean that all of those laws belong in a federally enforceable State Implementation Plan. While a State is free under §7416 to adopt more stringent laws, it still may include those laws in its State Implementation Plan only if they target pollutants for which the EPA has established air-quality standards. *See* §7410(a)(1). In other words, a State can require a greater reduction in criteria pollutants than those mandated by the Clean Air Act, and it can set a more aggressive timeline for compliance with the air-quality standards than would otherwise be required. And because those types of more-stringent re-

quirements provide for the implementation of the air-quality standards, they can be included in a State Implementation Plan. *See Union Electric Co. v. EPA,* 427 U.S. 246, 263–66 (1976). But if a State adopts a restriction that is *unrelated* to the air-quality standards, such as a restriction on odors, that regulation does not belong in a State Implementation Plan.

The Sierra Club takes *Union Electric Company* out of context when it suggests that the Supreme Court has held otherwise. The emissions limitations at issue in that case targeted pollutants for which the EPA had established air-quality standards. *See* 427 U.S. at 251, 263–65. It did not, as here, involve a state-law requirement that was unrelated to the attainment or maintenance of the air-quality standards.

2. The Sierra Club also places heavy reliance on the Third Circuit's decision in *Concerned Citizens of Bridesburg*.

As an initial matter, the Sierra Club misreads one sentence in *Bridesburg* as holding that rules like the Air Nuisance Rule *do* provide for the implementation of the air-quality standards, and that they therefore belong in a State Implementation Plan. Sierra Club Br.33. But the Third Circuit said no such thing. The relevant portion of the opinion says:

> *Petitioners have contended* that the odor regulations do help to regulate air pollutants that are regulated by NAAQS; *petitioners claim* that by at-

> tacking particular periods of high emissions that cause odors, the odor regulations restrict pollutants in ways not done by the other non-odor regulations, which work more through general averages.

836 F.2d at 787 (emphasis added). As the emphasized text shows, the Third Circuit was simply summarizing one of the parties' arguments. It never accepted that argument, however. While the Third Circuit noted that States may include provisions in their Implementation Plans that "go beyond the minimal requirements" of the air-quality standards, it expressly "d[id] not reach" whether Pennsylvania correctly included the specific state law at issue in its State Implementation Plan. *See id.* at 779, 787–88. The Sierra Club is able to give a contrary appearance only by omitting the italicized phrases from its quotes. Sierra Club Br.33.

What is more, *Bridesburg* is irrelevant to this case. It held that the EPA could not unilaterally remove Pennsylvania's odor regulation from the State Implementation Plan. The version of the Clean Air Act in effect at the time required the EPA to first propose that Pennsylvania itself make any necessary revisions. 836 F.2d at 781, 787. The Sierra Club suggests that this lack of statutory authority was not the basis for the Third Circuit's decision. The Third Circuit, it claims, invalidated the EPA's action because the EPA had changed its policy about what types of state laws may be included in an Implementation Plan. Sierra Club Br.41. The Sierra Club is wrong. It was the "purely procedural claim" about the lack of statutory au-

thority, and not any claims about improper changes in policy, that formed the basis for the Third Circuit's decision. 836 F.2d at 784.

In response to the holding in *Bridesburg*, Congress amended the Clean Air Act. Today, §7410(k)(6) "provide[s] the EPA with an avenue to correct its own erroneous actions and grant[s] the EPA the discretion to decide when to act pursuant to the provision." *Ass'n of Irritated Residents*, 790 F.3d at 948; *see also* 75 Fed. Reg. at 82,543. The EPA has exercised that error-correction power here. *See* 85 Fed. Reg. at 73,637.

3. In addition to misunderstanding the relevant case law, the Sierra Club also misunderstands the nature of the EPA's actions related to Ohio's Air Nuisance Rule. It claims that the EPA has repeatedly reapproved the inclusion of the Rule in Ohio's State Implementation Plan. That would be irrelevant even if it were true. For all the reasons addressed above, the Air Nuisance Rule does not belong in the State Implementation Plan. Even if the EPA had repeatedly said otherwise, "the magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020).

In any event, the Sierra Club overstates the magnitude of the EPA's errors. Two of the supposed reapprovals—two letters from the EPA reminding the Ohio EPA about the terms that must be included in major-source permits—do not ap-

prove of anything. The permits about which the letters speak are often called "Title V permits," taking their name from the Section of the Clean Air Act that requires their use. Title V permits must contain terms addressing "all existing federally enforceable requirements applicable to the permitted facility." Ohio Rev. Code §3704.036(K); 42 U.S.C. §7661c(a). The EPA's letters reminded the Ohio EPA that, as long as the Air Nuisance Rule was part of Ohio's State Implementation Plan, Title V permits were required to list that rule as a federally enforceable requirement. *See* Record C-215, Ex.1 and 2, JA146–JA152. The letters thus stand only for the uncontroversial position that all provisions of a State Implementation Plan are federally enforceable unless and until those provisions are revised. They are completely silent about how those revisions must occur. *See id.*

The Sierra Club also notes that, in 1984, the EPA approved minor revisions to the version of the Air Nuisance Rule that had been included in Ohio's State Implementation Plan. But even if the Sierra Club is correct, the most that its argument shows is that the EPA repeated its earlier mistake. That does not mean that it must continue to do so. There is "no reason why [the EPA] should be consciously wrong today because [it] was unconsciously wrong yesterday." *Massachusetts v. United States*, 333 U.S. 611, 639–40 (1948) (Jackson, J., dissenting).

4. The Sierra Club argues that the Air Nuisance Rule cannot be removed from Ohio's State Implementation Plan unless the EPA shows that removing it is consistent with the Clean Air Act's "anti-backsliding" requirements. *See* Sierra Club Br.42–44. There are two such requirements. One prohibits any modification to a State Implementation Plan that "would interfere with any applicable requirement concerning attainment and reasonable further progress … or any other applicable requirement." §7410(l). The second applies in areas that have not attained air-quality standards. It prohibits the modification of control requirements contained in a State Implementation Plan "unless the modification insures equivalent or greater emission reductions" of a pollutant. 42 U.S.C. §7515.

Under either anti-backsliding provision, the relevant question is whether revisions to a State Implementation Plan "will make the air quality worse." *See Ky. Res. Council, Inc.*, 467 F.3d at 995. A State is free to modify the requirements of its State Implementation Plan as long as the modified requirements will result in an equal or greater reduction in emissions. *See id.* at 995–96; §7515. This flexibility reflects "a fundamental premise underlying the Clean Air Act scheme, which is that the states have the primary responsibility for ensuring that the [air-quality standards] are met." *Ky. Res. Council, Inc.*, 467 F.3d at 996.

The anti-backsliding requirements are satisfied here as a matter of law. The Air Nuisance Rule does not require *any* reductions in the pollutants for which the EPA has established air-quality standards. *See* 85 Fed. Reg. at 73,638; Record B-04, JA129. Thus, whether the State Implementation Plan includes the Air Nuisance Rule or not, the emissions reductions it requires remain the same. Removing the Air Nuisance Rule will have no relevant effect on Ohio's ability to attain or maintain the EPA's air-quality standards.

5. The EPA noted in response to comments that facilities located in Ohio are still subject to the Air Nuisance Rule. Removing the Rule from Ohio's State Implementation Plan simply means that the Rule is no longer enforceable in *federal* court. 85 Fed. Reg. at 73,639. The EPA further stated that its action had "no impact on the authority to bring citizen suits in state courts under state law." *Id.*

The Sierra Club criticizes the EPA's reasoning by pointing out that citizens cannot enforce the Air Nuisance Rule in state court. If EPA mean to suggest otherwise, then it was wrong; Ohio law does not permit citizen suits for the purpose of enforcing the Air Nuisance Rule. *See* Ohio Rev. Code §3704.06 (certain laws are enforceable only by the Ohio Attorney General and Director of the Ohio EPA). But it is not clear that is what the EPA meant. It may have instead meant that removing the Air Nuisance Rule from Ohio's State Implementation Plan does not

leave Ohioans without any recourse. And if that is what the EPA meant, then it was correct; citizens in Ohio have at least two ways of combating nuisances caused by air pollution.

First, they can bring nuisance claims in state court; they must simply do so under traditional theories of nuisance. *See Banford*, 126 Ohio St. 3d 210 ¶17 (discussing the elements of a private-nuisance claim); *see also Hager v. Waste Techs. Indus.*, 2002-Ohio-3466 ¶67 n.5 (Ohio Ct. App. 2002); *Brown v. County Comm'rs*, 87 Ohio App. 3d 704, 712–15 (Ohio Ct. App. 1993) (entertaining qualified public- and qualified private-nuisance claims based on alleged violations of the Air Nuisance Rule). Under Ohio law, they can even seek compensation for some of the same types of harms prohibited by the Air Nuisance Rule, including harms caused by "excessive noise, dust, smoke, soot, noxious gases, or disagreeable odors." *Banford*, 126 Ohio St. 3d 210 ¶26 (quotation and citation omitted).

Second, they can ask the Ohio EPA to enforce the Air Nuisance Rule. The Ohio General Assembly has established a verified complaint process by which any person who is "aggrieved or adversely affected" by a violation of Ohio's environmental laws may call that violation to the Ohio EPA's attention. *See* Ohio Rev. Code §3745.08(A). If a citizen files a verified complaint, the Ohio EPA must investigate the complaint's allegations. Ohio Rev. Code §3745.08(B). The Ohio EPA

may conduct a hearing into those allegations and, if it does not, it must "provide an opportunity to the complainant and the alleged violator to attend a conference with the director or the director's delegate concerning the alleged violation." *Id.* Following its investigation, the Ohio EPA may take action against the violator or it may dismiss the complaint. *Id.* Dismissal is a final action that a complainant may appeal. *Coburn v. Williams*, 55 Ohio App. 2d 164, 166–67 (Ohio Ct. App. 1978).

Even if the EPA were wrong, however, and even if Ohio citizens were without any recourse, it would not matter. Only those state laws that are designed to ensure compliance with the air-quality standards belong in a State Implementation Plan. *See* §7410(a)(1). The Air Nuisance Rule does not. That does not change simply because a party might wish to enforce the Rule in a federal forum.

CONCLUSION

The Court should uphold the EPA's removal of the Air Nuisance Rule from Ohio's State Implementation Plan.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume requirements and contains 7,304 words. *See* Fed. R. App. P. 32(a)(7).

I further certify that this brief complies with the typeface requirements of Federal Rule 32(a)(5) and the type-style requirements of Federal Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Equity font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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