No. 18-60606

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; and SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency,

Respondents.

BRIEF OF RESPONDENT-INTERVENORS ENVIRONMENTAL DEFENSE FUND AND SIERRA CLUB

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioners: State of Texas; Greg Abbott, Governor of Texas; Texas Commission on Environmental Quality.

2. Counsel for Petitioners State of Texas; Gregg Abbott, Governor of Texas; and Texas Commission on Environmental Quality: Ken Paxton, Attorney General of Texas; Jeffrey C. Mateer, First Assistant Attorney General of Texas; Kyle D. Hawkins, Solicitor General; Bill L. Davis, Assistant Solicitor General; David J. Hacker, Special Counsel for Civil Litigation; Craig James Pritzlaff, Assistant Attorney General.

3. Petitioner-Respondent Intervenor: Sierra Club. Sierra Club is a non-profit organization that maintains an open membership invitation to organizations, businesses, individuals, and the public in general. Accordingly, Sierra Club consists of many individual members. Sierra Club does not have any parent companies, and no publicly-held company owns a 10% or greater interest in Sierra Club.

4. Counsel for Sierra Club: Joshua D. Smith with Sierra Club; David Baake with Baake Law, LLC.

5. Respondents: U.S. Environmental Protection Agency; Andrew Wheeler, Administrator, U.S. Environmental Protection Agency.

6. Counsel for Respondents U.S. Environmental Protection Agency and Andrew Wheeler: William Barr, Attorney General of the United States; Jeffrey Bossert Clark, Assistant Attorney General; Jonathan D. Brightbill, Deputy Assistant Attorney General; Perry M. Rosen, U.S. Department of Justice; Seth Buchmaum, U.S. Environmental Protection Agency.

7. Respondent-Intervenor: Environmental Defense Fund ("EDF"). EDF is a non-profit organization that maintains an open membership invitation to organizations, businesses, individuals, and the public in general. Accordingly, EDF consists of many individual members. EDF does not have any parent companies, and no publicly-held company owns a 10% or greater interest in EDF.

8. Counsel for EDF: Peter Zalzal and Rachel Fullmer with EDF; Sean Donahue with Donahue, Goldberg & Weaver, LLP.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Rule 28.2.3, Intervenor-Respondents Environmental Defense Fund and Sierra Club respectfully request that the Court hold argument in this case. At issue is whether the U.S. Environmental Protection Agency is required, under the Clean Air Act, to designate Bexar County, Texas as being in "nonattainment" with the health-based 2015 National Ambient Air Quality Standard for ozone pollution when Texas's own undisputed, state-certified air monitoring data shows that air quality in the area, in fact, does not meet the health-based standard. As a result, Texas residents are exposed to unhealthy air, increased risks of respiratory illness, and even premature death. Petitioners respectfully submit that oral argument would assist the Court with the complex legal issues and the voluminous evidentiary record in this case.

RECORD REFERENCES

This brief cites to the record using the following format: "C.I. XXXX at Y," with XXXX referring to the final four digits of the "Document ID" number on EPA's October 9, 2018 Certified Index ("C.I.") (ECF Doc. 00514674116), and Y referring to the pinpoint page number.

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JURISDICTIONAL STATEMENT

This Court lacks jurisdiction over a portion of Texas's claims. In Section I.B of the Argument in its opening brief, Texas challenges EPA's regulations for evaluating and determining whether an area "meets" the health-based 2015 ozone National Ambient Air Quality Standard ("NAAQS") —*i.e.*, whether the area is in attainment with the NAAQS. *See* 80 Fed. Reg. 65,458 (Oct. 26, 2015), codified at 40 C.F.R. pt. 50, App. U. Texas Br. at 22-28. EPA finalized those regulatory requirements in 2015. Because Texas's claim is, in reality, a challenge to EPA's 2015 regulations governing the determination of whether monitored air quality meets the NAAQS, the state was required to bring those claims in the D.C. Circuit Court of Appeals within 60 days of publication of those regulations in the Federal Register. 42 U.S.C. § 7607(b)(1). Texas failed to do so, and therefore the state's claims in in section I.B of its Opening Brief are time-barred and should be dismissed. *See* Texas Br. at 22-28.

Although the Courts of Appeal have jurisdiction over the remainder of Texas's claims, as explained in Sierra Club's opening brief (Sierra Club Br. at 27), venue is proper in the D.C. Circuit Court of Appeals because the area designations at issue are part of a "nationally applicable regulation," and a final action that is, in fact, based on a determination of nationwide scope and effect. *See* 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

1. Under the Clean Air Act, 42 U.S.C. § 7407(d)(1)(A), did EPA properly designate Bexar County, Texas as being in nonattainment with the health-based 2015 ozone National Ambient Air Quality Standard where Texas's own undisputed, state-certified air monitoring data shows that air quality in the area, in fact, does not meet the health-based standard?

2. Under the Clean Air Act's judicial review provision, *id* at § 7607(b), does this Court lack jurisdiction over Texas's arguments that are, in effect, challenges to EPA's 2015 ozone NAAQS regulations governing the evaluation and determination of whether an area meets the health-based ozone standard, where the state failed to raise any such challenge in the D.C. Circuit Court of Appeals within 60 days of publication of the 2015 rule?

INTRODUCTION

The Clean Air Act's National Ambient Air Quality Standards ("NAAQS") program requires the EPA Administrator to designate as "nonattainment" any area of the country with air quality that "does not meet" the standard that EPA has determined is required to protect public health. 42 U.S.C. § 7407(d)(1)(A)(i). For all areas that do not meet this minimum safeguard for ambient air quality, the NAAQS program requires state or local agencies to plan and implement measures that will achieve "permanent and enforceable reductions" of pollution and clean up unhealthy air before EPA can redesignate that area as in "attainment" with the standard. *Id.* at § 7407(d)(3)(E).

Bexar County, Texas, home of the City of San Antonio and nearly two million Texans, is one such nonattainment area, with air quality that is unsafe to breathe. Indeed, Texas does not dispute that its own certified, quality-assured monitoring data demonstrates that Bexar County's air quality does not meet EPA's minimum health-based standard for ground-level ozone pollution. Almost a year after agreeing with EPA on this basic point, however, Texas now urges this Court to ignore the plain language of the Clean Air Act and reverse EPA's nonattainment designation based on speculative and unenforceable future pollution reductions. Texas's request for special and unlawful treatment would allow the State to avoid implementing enforceable measures to restore healthy air, and it would expose the residents of Bexar County to

additional, harmful levels of ozone pollution. The court should reject Texas's unlawful approach and uphold EPA's lawful nonattainment designation for Bexar County.

STATEMENT OF THE CASE

I. THE OZONE NAAQS AND HUMAN HEALTH

Ground-level ozone, the primary component of urban smog, is a harmful pollutant formed by the reaction of volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx") in the atmosphere in the presence of sunlight. 80 Fed. Reg. 65,292, 65,302-04 (Oct. 26, 2015). Power plants, industrial sources, and motor vehicles are among the largest sources of those precursor pollutants. *Id.* Exposure to ozone, for even short time periods, is linked to significant human health impacts, including the aggravation of asthma attacks, cardiovascular and respiratory failure, and even premature death. *Id.* Children, the elderly, and adults with asthma are particularly at risk. *Id.* at 65,304.

To protect against these significant public health threats, Congress directed EPA to adopt National Ambient Air Quality Standards ("NAAQS") for ozone, "the attainment and maintenance of which . . . are requisite to protect the public health" with an adequate margin of safety. 42 U.S.C. § 7409(b)(1). In 2015, EPA issued a new eight-hour ozone standard that is more protective of human health than the old standard.[1]

[1] 80 Fed. Reg. at 65,453 (codified at 40 C.F.R. § 50.19).

Implementation of the revised 2015 NAAQS will deliver substantial health benefits for nearly two million Texans who live in Bexar County. C.I. 0357 at 4. Indeed, a recent study—conducted by a utility industry consulting firm using an EPA-approved modeling platform—concluded that compliance with the 2015 ozone NAAQS in the San Antonio area would, each year, save hundreds of millions of dollars in avoided public health costs, premature deaths, and lost work and school days. C.I. 0356, Ex. A at 2-3.[2]

II. IMPLEMENTATION OF THE NAAQS

Ensuring compliance with health-protective ambient air quality standards is the "heart" of the Clean Air Act. *Ala. Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1979). To that end, EPA is required to "designate" all areas of the country as either meeting or failing to meet the standard "as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised [NAAQS]"—in this case, by October 2017. 42 U.S.C. § 7407(d)(1)(B)(i).

Specifically, the Act requires EPA to designate an area as being in "nonattainment" if it "does not meet" the NAAQS (*i.e.*, is in violation of the health-

[2] National implementation of the standard would, every year, prevent hundreds premature deaths, prevent 230,000 asthma attacks in children, and prevent 160,000 missed school days for children each year, resulting in $5.8 billion dollars in avoided public health costs and lost productivity. C.I. 0357 at 2.

based standard). 42 U.S.C. § 7407(d)(1)(A)(i). An attainment area is "any area" that currently "meets" the standard. *Id.* § 7407(d)(1)(A)(ii).[3]

Although the Clean Air Act requires each state to submit a list of "*initial* designations," 42 U.S.C. § 7407(d)(1)(A) (emphasis added), the statute provides that the EPA "*Administrator* shall promulgate" the final designations for each area of the country. *Id.* § 7407(d)(1)(B) (emphasis added). And the Clean Air Act gives EPA broad authority to review the state's recommended designations and "make such modifications as the Administrator deems necessary . . . ." *Id.* § 7407(d)(1)(B)(ii). Accordingly, the Clean Air Act "establishes a two-step process" in which Governors make initial recommendations and then the Administrator "make[s] such modifications as the Administrator deems necessary." C.I. 0364 at 1-2; *see also Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 145-46 (D.C. Cir. 2015) ("states submit *recommended* '*initial* designations' to EPA," but the Act "*gives EPA discretion to change a state's recommended designation*, *to alter a state's proposed designation*, geographic area, or both . . . .") (emphasis added).

To inform the area designation process and ensure the attainment and maintenance of the NAAQS, the Clean Air Act requires EPA to establish, and the states to operate, air quality monitoring networks. To ensure analytically consistent air quality measurements throughout the country, the collection and evaluation of air

[3] EPA may designate an area "unclassifiable" if it "cannot be classified on the basis of available information as meeting or not meeting" the NAAQS. *Id.* § 7407(d)(1)(A)(iii).

monitoring data is subject to rigorous and nationally-applicable technical standards. *See, e.g.,* 40 C.F.R. pt. 50, Apps. I, P, and U (establishing nationally uniform methods for calibrating, measuring, interpreting, and evaluating monitoring data and meteorological conditions). Although EPA regulations govern the installation and operation of the monitors, the states are responsible for collecting, evaluating, certifying, and reporting air quality data in the state.

In those areas where EPA or the states have installed certified air quality monitors,[4] the ozone "standard is met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average [ozone] concentration is less than or equal to 0.070 ppm [*i.e.*, 70 ppb], as determined in accordance with" EPA regulations. 40 C.F.R. § 50.19(b). Conversely, if the same monitoring data shows exceedance of the NAAQS, the area "does not meet" the NAAQS, and must be designated as being in nonattainment. C.I. 0061 at 3-5; 42 U.S.C. § 7407(d)(1)(A); *see also* 40 C.F.R. pt. 50, App. U § 4(a).

In 2015, EPA initiated a nationally-applicable rulemaking to designate every area of the country as either attainment, nonattainment, or unclassifiable with the

[4]Many rural areas of the country do not have air quality monitors, EPA Br. at 11, leaving "significant gaps" in EPA's and the state's ability to identify exposure to "elevated ambient [ozone] levels in smaller communities located outside of the larger urban" areas like San Antonio. *See* C.I. 0357 at 13 (quoting 74 Fed. Reg. 34,525, 34,528-530 (July 16, 2009)). Indeed, the record demonstrates that although oil and gas exploration and production activities outside of San Antonio are responsible for significant ozone-causing pollution, there are no monitors in those areas to measure the extent of those pollution impacts. C.I. 0357 at 12; C.I. 0356 at 19-21.

2015 ozone NAAQS. As part of that process, EPA issued Designation Guidance that set out a uniform, iterative process by which EPA and the states were required to evaluate and determine nonattainment designations throughout the country.[5] At the first step of the analysis, if an area has state-certified air quality monitoring data that shows a violation of the standard, EPA must designate the area as nonattainment. C.I. 0061, Attach. 3 at 4-5. If a certified monitor is violating the standard, EPA proceeds to the remaining steps to determine whether emissions from any nearby areas "contribute" to violations of the standard; if they do, these areas must also be designated as nonattainment *See* C.I. 0061.[6]

EPA's final area designations determine the types of enforceable pollution reduction measures states must include in their state implementation plans ("SIPs"). If an area is designated "nonattainment," the state must implement a plan that includes permanent and enforceable pollution reductions and emission limits necessary to ensure attainment of the NAAQS "as expeditiously as practicable," but no later than specified statutory deadlines. *Id.* §§ 7502, 7503, 7511-7511a.

[5] Although EPA makes its ozone designations on a case-by-case basis, the agency must evaluate and determine nonattainment consistently throughout the country. *Catawba Cnty. v. EPA*, 571 F.3d 20, 40-41 (D.C. Cir. 2009).

[6] To determine whether an area contributes to current violations of the standard at a certified monitor, EPA and the states must consider air quality data, emissions and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries. *See generally* C.I. 0061.

III. SAN ANTONIO DESIGNATIONS

Under the Clean Air Act, states were required to submit area designation recommendations to the EPA for the 2015 ozone NAAQS by October 1, 2016. In its initial submissions for the San Antonio area,[7] Texas "recommended" that EPA designate Bexar County as nonattainment because two of the regulatory monitors in that county showed violations of the standard, based on the most recent data available—2013 to 2015. C.I. 0046 at B-1. Texas has never asserted that its monitoring data was inaccurate. Because the surrounding counties do not have certified regulatory monitors, Texas recommended designating all of those counties as "unclassifiable/attainment." *Id.* at A-1.

Nearly a year later, on September 27, 2017, Texas submitted a letter urging EPA not to move forward with the nonattainment designation for Bexar County, to "allow the state more time to show that additional data and considerations" warranted an attainment designation. C.I. 0214 at 2. On January 19, 2018, EPA sent a letter to the Governor of Texas asking whether he intended the September 27, 2017 letter to serve as a revision to the state's initial recommendations. C.I. 0436.

On February 28, 2018, Texas responded, again urging the EPA to designate Bexar County as attainment. Again, Texas did not dispute the accuracy of the monitoring data demonstrating that Bexar County was not meeting the NAAQS. Nor

[7] The greater San Antonio area at issue includes Atascosa, Bandera, Bexar, Guadalupe, Comal, Kendall, Medina, and Wilson counties.

did Texas assert that Bexar County was in attainment. In fact, the report attached to Texas's February 28, 2018 submission conceded that Bexar County was "in violation" of the NAAQS. C.I. 0297, App. A at ii, v, 1-3. In support of its revised recommendation, Texas cited its predicted air quality improvements over the next five to ten years, based on unenforceable and speculative future emission reductions, such as the planned retirement of a coal-fired power plant and anticipated vehicle emission improvements. Texas also urged EPA to revise the Bexar County designation due to concerns about the potential economic impacts of a nonattainment designation. C.I. 0297.

On May 1, 2018, Texas certified its 2017 data in accordance with federal regulations. Using the most recent, three-year period of state-certified data available (i.e., 2015-2017), Texas's monitoring data again demonstrated violations of the ozone NAAQS at two of the three regulatory monitors in Bexar County: the Camp Bullis and Northwest monitors. 83 Fed. Reg. 36,136, 35,139 (July 25, 2018); C.I. 0428 at 22-23. The same two monitors also showed violations of the NAAQS using 2014-2016 monitoring data. Texas does not dispute the accuracy of that monitoring data. Because two of the regulatory monitors in Bexar County show violations of the 2015 ozone standard, EPA designated the county as being in nonattainment. 83 Fed. Reg. at 35,139.

SUMMARY OF ARGUMENT

Under the plain language of the Clean Air Act, EPA is required to designate as "nonattainment" any area that "does not meet" the NAAQS, which are set at the level necessary to protect public health and welfare from harmful air pollution. 42 U.S.C. § 7407(d)(1)(A)(i). Texas concedes that, based on its *own* certified and quality-assured monitoring data, air quality in Bexar County does not meet the health-based NAAQS for ozone pollution. *See* Texas Br. at 7. Accordingly, the Clean Air Act unambiguously required EPA to designate Bexar County as a nonattainment area.

Texas's claims to the contrary are fundamentally incompatible with the text and structure of the Clean Air Act. First, contrary to Texas's appeal to "cooperative federalism," Texas Br. at 2, the specific provisions of the Clean Air Act at issue make clear that it is EPA—*not* Texas—that is ultimately responsible for making, modifying, and promulgating the final designations for all areas of the country as the agency "deems necessary." 42 U.S.C. § 7407(d)(1)(B)(ii). Texas itself has repeatedly recognized as much. *See, e.g.*, C.I. 0364 at 1-2.

Second, Texas wrongly asserts that EPA must disregard unambiguous statutory requirements (and the equally unambiguous factual evidence of unhealthy air quality in Bexar County) and instead designate Bexar County as attainment based on the state's modeling, which purports to show that air quality *might* attain the NAAQS at some point in the future. But Texas's speculative predictions about future attainment, based on inherently *uncertain and unenforceable* future pollution reductions, provide no

legal basis for removing protections that the Clean Air Act guarantees for communities that are *currently* exposed to unhealthy levels of smog pollution.

Indeed, at its core, the NAAQS program is designed to ensure that the state has enforceable pollution controls and an enforceable plan for achieving attainment "as expeditiously as practicable." *See e.g.*, 42 U.S.C. §§ 7502, 7511(a). Texas's flawed approach turns these provisions on their head, and would give Texas alone a free pass to violate national air quality standards.

In a final, and flawed, attempt to avoid the plain requirements of the Clean Air Act, Texas argues that the statute does not really mean what it says. Relying on the Dictionary Act, Texas contends that EPA must designate Bexar County as being in attainment because the area "will meet" the NAAQS "by the time it would have to do so" under the applicable statutory attainment deadline—in this case, by 2021. Texas Br. at 23, 26. But the plain language and structure of the Clean Air Act forecloses such an approach; and Texas has waived the argument, in any event.

Texas's claims are inconsistent with the plain language of the Clean Air Act and unsupported by the state's own undisputed, quality-assured monitoring data demonstrating that Bexar County does not meet the NAAQS. This Court should reject Texas challenge and uphold EPA's nonattainment designation of Bexar County.

STANDARD OF REVIEW

This Court may set aside EPA's designation decisions only if they are arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with the Clean Air Act and implementing regulations. *See* 42 U.S.C. § 7607(d)(9). Agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When reviewing EPA's interpretations of statutory terms within an Act it is charged with administering, a court must first ask if Congress "has directly spoken to the precise question at issue," and if so, the reviewing court must "give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc.,* 467 U.S. 837, 842-43 (1984).

ARGUMENT

I. EPA WAS REQUIRED TO DESIGNATE BEXAR COUNTY AS NONATTAINMENT.

The plain language of the Clean Air Act's designation provisions, 42 U.S.C. § 7407(d)(1)(A)(i), requires an area to be designated as nonattainment if it "does not meet" the relevant air quality standard. Texas concedes that, based on its own certified monitoring, two of the three regulatory monitors in Bexar County do not meet the

NAAQS. *See* Texas Br. at 7 ("ground-level ozone in Bexar County exceeded 70 ppb in 2013, 2014, and 2015"). That is all that is necessary to resolve this case. Indeed, Texas itself recognized initially that it was required to designate Bexar County as a nonattainment area because it "does not meet" the NAAQS. C.I. 0046. Texas's novel arguments for avoiding what the law requires are without merit.

A. Texas's Revised Recommendation that Bexar County be Designated Attainment was Entitled to No Deference.

As discussed, Texas initially recognized that Bexar County does not meet the ozone NAAQS, and recommended that EPA designate it as nonattainment. *Id.* Although Texas does not dispute that air quality in Bexar County *still* violates the standard, the state now contends that is revised recommendation is entitled to deference, with EPA limited to the "ministerial task" of promulgating the state's designation. Texas Br. at 20. Texas is simply wrong.

EPA, not the state, has the sole authority to promulgate final area designations. The statutory text makes plain that the state's role in the designation process is advisory. Within one year after the promulgation of a NAAQS, states "submit to [EPA] a list" of initial recommended designations. 42 U.S.C. § 7407(d)(1)(A). EPA must then review the state's recommendations, make any changes it "deems necessary," and then "promulgat[e]" final designations. *Id.* § 7407(d)(1)(B)(ii). While the states play a key role in this process, their recommendations have no legal effect on their own; only EPA can "promulgate" final designations. Indeed, Texas has

repeatedly recognized that initial designations are nothing more than "recommendations" to EPA. *See*, *e.g.,* C.I. 0046 at 1 (initial Sept. 30, 2016 "recommendation"); C.I. 0297 at 1, 3; C.I. 0298, Attach. at 1-3 (Feb. 28, 2018 letter regarding Dallas, Houston, and El Paso area "recommendations"); C.I. 0364 at 1-2 (Letter from Hon. Greg Abbott to former EPA Administrator Scott Pruitt "recommending" that EPA designate Bexar County as being in attainment).

The structure of the Act confirms the plain meaning of the designation provisions. Indeed, EPA's final designations—not the state's recommendations—trigger statutory deadlines for developing state plans and implementing enforceable pollution reductions that shall attain the NAAQS "as expeditiously as practicable," but no later than certain fixed statutory deadlines. *See* 42 U.S.C. §§ 7501-7504, 7506, 7507-7509a, 7511-7511f. Texas's reading of the Act is inconsistent with the structure of those provisions.

Given that a state's initial designation recommendations have no legal effect, courts have consistently rejected the contention that they are entitled to any substantive deference. In *Catawba County v. EPA,* 571 F.3d 20 (D.C. Cir. 2009), petitioners in the D.C. Circuit argued that EPA's reliance on an EPA guidance memorandum to guide the drawing of final area designation boundaries "'deprived states of the deference to which their designations were entitled' under section 107(d)." *Id.* at 40. The court recognized that EPA may "owe[] the states a measure of *procedural* deference under section 107(d) . . . [and thus] EPA must wait its turn before

it makes any individual county designations." *Id.* at 40 (emphasis in original). However, the court found that the Agency owed no substantive deference to "initial designations."

> To the extent petitioners think that EPA owes the states a measure of substantive deference under section 107(d)(1) . . . we disagree. Though EPA may, of course, go along with states' initial designations, it has no obligation to give any quantum of deference to a designation that it "deems necessary" to change.

Id. [8]

Most states—and, as EPA points out, even the state of Texas—have consistently espoused a similar understanding of the statute, regularly characterizing their initial list of designations, as Texas Governor Greg Abbott did here, as "recommendations" to the Agency. *See e.g.,* C.I. 0046 at 1; EPA Br. at 44-47. EPA's past practice also treats state designations as "proposals," and the Agency generally invites public comment on proposed designations, as it did in San Antonio. It would be a meaningless formalism to seek public comment on a state designation that is as

[8]In litigation concerning EPA's 2008 ozone designations, Texas likewise challenged the agency's authority to modify Texas's initial designation recommendations. *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 165 (D.C. Cir. 2015). There, however, Texas took the position—opposite to the reading it now advances—that section 7407(d)'s authorization for EPA to modify initial designations was unconstitutional, in part, because of the "boundless override discretion" afforded to the agency. *See* States Br. at 48, *Miss. Comm'n on Envtl. Quality v. EPA*, No. 12-1309 (D.C. Cir. filed Mar. 21, 2014), ECF Doc. 1484843. The D.C. Circuit rejected Texas's arguments, affirming EPA's authority to modify an initial recommendation whenever a state's recommended designation does "not meet the statutory requirements or [is] otherwise inconsistent with the facts or analysis deemed appropriate by the EPA." *Miss. Comm'n,* 790 F.3d at 185 (citing 2008 Designations Rule, 77 Fed. Reg. 30,088, 30,090 (May 21, 2012)).

final as Texas claims its recommended designations to be. As the relevant court decisions, EPA's decades-long policy, and Texas's own submittals make clear, the states make *recommended* area designations, and EPA reviews and issues the final designations it "deems necessary" to meet the requirements of the Act. 42 U.S.C. § 7407(d)(1)(B).[9]

B. It Was "Necessary" for EPA to Modify Texas's Recommendation and Designate Bexar County as Nonattainment.

Texas contends that it was unlawful for EPA to modify its attainment recommendation, because such modification was not strictly "necessary" within the meaning of section 42 U.S.C. 7407(d)(1)(B)(ii). Texas is mistaken.

The Clean Air Act, EPA's implementing regulations, and the agency's Designation Guidance make clear that it was, in fact, necessary for EPA to modify Texas's recommendation and designate Bexar County as nonattainment. As an initial matter, in amending the Clean Air Act in 1990, Congress provided that "[e]ach area designated nonattainment for ozone" would be classified as marginal, moderate,

[9] None of the cases Texas cites require a different conclusion. Indeed, Texas misleadingly cites to the dissenting opinion in *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461 (2004) (Texas Br. at 21-22), a case which dealt with an entirely different statutory provision than the one at issue here. In any event, the Supreme Court's majority there recognized that the Clean Air Act vests EPA with broad "supervisory authority" to review whether a state's decisions are "reasonably moored to the Act's provisions," and to modify a state's pollution control determinations "as necessary." *Id.* at 474, 484-85, 501. The nonattainment provisions at issue here likewise vest EPA with broad discretion to modify a state's recommended area designations whenever the agency "deems" it necessary. 42 U.S.C. § 7407(d)(1)(B)(ii).

serious, severe, or extreme based on its design value (a value derived from current monitoring data). 42 U.S.C. § 7511(a)(1). EPA's binding regulations confirm that interpretation. *See* 40 C.F.R. § 50.19 (the 2015 ozone NAAQS "is met" at a monitoring station when its design value "is less than or equal to 0.070 ppm, as determined in accordance with appendix U to this part"); *see also* 40 C.F.R. pt. 50, App. U (explaining that a "site fails to meet" the ozone NAAQS if it has recorded a design value greater than 0.070 ppm).[10] EPA's nationally-applicable Designation Guidance similarly makes clear that the agency "*must* designate an area nonattainment if [the area] has an air quality monitor that *is* violating the standard." C.I. 0428 at 1 (emphasis added). Judicial decisions evaluating EPA's ozone designations have similarly rested on the assumption that EPA must designate an area as nonattainment "if a single monitor from the area showed a NAAQS violation." *Miss. Comm'n*, 790 F.3d at 158–59.

Applying its binding regulations and national guidance in a uniform manner, as EPA is required to do, it was necessary to modify Texas's factually unsupportable recommendation. Indeed, it is undisputed that two certified monitors in Bexar County recorded design values greater than 0.070 ppm, and therefore the county "fails to meet" the ozone NAAQS. 40 C.F.R. pt. 50, App. U. It would have been unlawful for EPA to ignore that undisputed monitoring data or depart from its regulations by

[10] Texas never challenged EPA's regulatory requirements for determining whether an area "meets" the ozone NAAQS, and cannot do so here. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 754 (5th Cir. 2011).

designating Bexar County as attainment. *See, e.g.*, *United States v. Gutierrez*, 443 Fed. Appx. 898, 903 (5th Cir. 2011) ("It is an unremarkable proposition that an agency must follow its own regulations.") (citation and internal quotation marks omitted).[11]

Promulgating an attainment designation for Bexar County would have been unlawful for another reason. To withstand arbitrariness review, EPA must, among other things, "show that it treated *similar counties* similarly." *Miss. Comm'n*, 790 F.3d at 171 (emphasis in original; internal citations omitted). In EPA's national designation rulemaking, every area of country that had a monitor showing a violation received a nonattainment designation.[12] According special treatment for Bexar County would have been quintessentially arbitrary and capricious decision-making. In sum, EPA's decision to modify Texas's recommendation was not only reasonable, but mandatory.

[11] As discussed, Texas also unsuccessfully challenged EPA's modification of its recommendations for the 2008 ozone NAAQS. In that case, the D.C. Circuit affirmed the reasonableness of EPA's decision to modify an initial recommendation whenever a state's recommended designation that does "not meet the statutory requirements or [was] otherwise inconsistent with the facts or analysis deemed appropriate by the EPA." *Miss. Comm'n*, 790 F.3d at 185.

[12] El Paso County, Texas also had violating monitors, but EPA designated the area as being in attainment under the exceptional events provision of the Act, 42 U.S.C. § 7619. Texas did not submit such a petition for San Antonio.

C. EPA Appropriately Declined to Rely on Texas's Projections of Future Compliance with the Standard.

Texas's contention that EPA should have designated Bexar County as attainment based on future modeling showing that the county *might*[13] attain the NAAQS without regulatory intervention is contrary to the plain statutory language, as well as the structure and purpose of the NAAQS program.

First, as described above, the statute speaks in present tense, requiring EPA to designate as in nonattainment any area "that does not meet" the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i); *see also United States v. Marsh*, 829 F.3d 705, 709 (D.C. Cir. 2016) ("Congress's use of the present tense matters."). And as explained further below, *infra* Section I(D), Texas fails to show that this language permits, let alone requires, EPA to ignore current, undisputed violations of the standard based on modeling of future, hypothetical emission levels.

Second, the Clean Air Act's structure demonstrates that Congress intended for states to improve air quality by establishing "permanent and enforceable" emission reductions. 42 U.S.C. § 7407(d)(3)(E). Texas's argument requires ignoring several operative sections of the NAAQS program, including the requirements for "redesignation" of an area once compliance with the standard is reached. 42 U.S.C. §

[13] Texas's modeling report concedes that Bexar County is "in violation" of the 2015 NAAQS, and even predicts that it will continue to violate through at least 2020, using data from 2010-2014 and a 2012 base modeling year. *See* C.I. 0297 at 4-5, App. at 4-6 (Table 4-4).

7407(d)(3). That provision would be superfluous if a state could avoid designation by predicting future attainment.

Indeed, if a state wishes to redesignate a nonattainment area based on air quality improvements, it is not enough to show that the area "will attain" the NAAQS. The state must demonstrate that the area "has attained" the NAAQS and that "the improvement in air quality is due to permanent and enforceable reductions in emissions." 42 U.S.C. § 7407(d)(3)(E)(i)&(iii). It would be incongruous for Congress to require permanent and enforceable emission reductions before allowing a state to redesignate an area that is *currently attaining* the NAAQS, while allowing a state to avoid designating an area that is *currently violating* the NAAQS based only on non-binding assurances of future compliance.

Finally, Texas's argument is inconsistent with the very purpose of the NAAQS program. Congress carefully designed the NAAQS program to require areas with unhealthy air quality to take specific steps to ensure mandatory and enforceable pollution reductions and to restore healthy air "as expeditiously as practicable." *See, e.g.*, 42 U.S.C. §§ 7502, 7511(a), 7511a. However, Texas's argument supposes that Congress tacitly provided an alternative pathway whereby states could entirely avoid these detailed requirements, simply by predicting they would acheive the NAAQS by some future date. Such a reading is antithetical to the design of the NAAQS program, fails to ensure that binding pollution reduction measures are in place, and would

render irrelevant entire portions of the NAAQS program. 42 U.S.C. § 7511(a)(1); 40 C.F.R. § 51.1303.

D. Nothing in the Dictionary Act Undermines the Clean Air Act's Command that an Area that "Does Not Meet" the NAAQS Be Designated "Nonattainment."

The Clean Air Act mandates that EPA designate an area as in nonattainment if it "does not meet" the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i). Further, an area "that meets" the NAAQS may be designated as in attainment. *Id.* § 7407(d)(1)(A)(ii). Although Texas admits that these provisions are drafted in the "present-tense," Texas Br. at 16, it relies on the Dictionary Act to argue that an area that is not currently attaining the NAAQS may nonetheless be designated as attainment, as long as it "will meet" the NAAQS "by the time it would have to do so" under the applicable statutory attainment deadline—in this case, by 2021. Texas Br. at 23, 26.

This argument fails for multiple reasons. First, this argument constitutes an untimely, collateral attack on EPA's regulations. In 2015, following notice-and-comment rulemaking, EPA promulgated a regulation providing that the eight-hour ozone NAAQS is "met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest maximum 8-hour average [ozone] concentration (i.e., design value) is less than or equal to 0.070 ppm, as determined in accordance with appendix U to this part." 40 C.F.R. § 50.19(b). As explained above, these regulations require EPA to designate Bexar County as nonattainment. *See supra*

Section I.B. To the extent Texas believes these regulations are invalid, it was required to challenge them within 60 days of promulgation in the D.C. Circuit Court of Appeals. 42 U.S.C. § 7601(b)(1). It did not do so.[14] Accordingly, it is precluded from asserting that argument here. *See Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 754 (5th Cir. 2011) (holding that the Court lacked jurisdiction over EPA's incorporation, in a 2008 rule, of decisions the agency made in 2003, because challenges to the 2003 rule were time-barred under the Clean Water Act); *see also Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 426-27 (D.C. Cir. 2011) (rejecting as time-barred petitioners' challenge to a 2009 rule on the ground that EPA first adopted the challenged approach in 1997).[15]

Second, as discussed in EPA's initial brief, EPA Br. at 59-61, Texas waived its Dictionary Act argument by failing to present it to EPA during notice-and-comment rulemaking.

Texas also ignores other statutory language that would require Bexar County to be designated as non-attainment *even if the Dictionary Act were applied.* Section

[14] Although Texas did challenge some aspects of the 2015 ozone NAAQS rule, it failed to challenge EPA's methodology for determining whether an area meets the NAAQS. *See* State Pet'rs Opening Br. at 22, 26, *Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir.) (final brief filed Sept. 26, 2016), ECF Doc. 1637822.

[15] Courts sometimes permit "as applied" challenges to a regulation after the timeframe for challenging the regulation has passed, but federal courts lack jurisdiction where, as here, petitioners did not claim that EPA has misapplied its long-standing regulations, but instead argued that the policies announced in the earlier regulations were themselves unlawful. *Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1112-16 (D.C. Cir. 2009).

107(d)(1)(A)(ii) allows an area to be designated as attainment only if it (a) "meets" the NAAQS and (b) is not "an area identified in clause (i)"—i.e., an "area that does *not* meet" the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(ii) (emphasis added). As discussed, Texas does not dispute that Bexar County is not meeting the 2015 ozone NAAQS. Even if Texas were correct that section 7407(d)(1)(A)(ii) could be construed as identifying areas that "meet *or will meet*" the NAAQS, Texas Br. at 23, the provision still would not apply to Bexar County, which is "an area identified in clause (i)."[16]

Texas's proposed reading is also flatly inconsistent with the Clean Air Act's statutory structure. The statute identifies three, mutually exclusive categories: (i) areas that "do[] not meet" the NAAQS, which must be designated "nonattainment," (ii) areas not "identified in clause (i)" that "meet[]" the NAAQS, which may be listed "attainment," and (iii) unclassifiable areas, which cannot be classified as meeting or not meeting the NAAQS. Under Texas's proposed interpretation, the first and second categories collapse whenever an area's status is expected to change. For example, suppose an area currently meets the NAAQS, but all available information indicates that the area will exceed the NAAQS in the near future. The area would be both an area that "does not [or will not meet]" the NAAQS for purposes of section 107(d)(1)(A)(i) and an area "that meets [or will meet]" the NAAQS under section

[16] Applying Texas's interpretation of the Dictionary Act to subsection (i) would change nothing. Any area that does not currently meet the NAAQS will also be an area "that does not meet *or will not meet*" the NAAQS.

107(d)(1)(A)(ii). In short, Texas's novel interpretation is foreclosed by the structure of section 107(d).

II. EPA CONSIDERED AND APPROPRIATELY REJECTED TEXAS'S FLAWED MODELING.

As explained, the Clean Air Act unambiguously requires EPA to designate an area as nonattainment if certified monitoring demonstrates that the area currently "does not meet" the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i). But even if EPA could rely on Texas's modeling of hypothetical and unenforceable future pollution reductions, EPA properly rejected it here.

As an initial matter, Texas fails to cite any portion of the record supporting its assertion that EPA "refused even to consider" the state's modeling. Texas Br. at 29, 30. And there is none. To the contrary, EPA's 2015 Designation Guidance makes clear that "source apportionment results *will be* considered as just one part of an overall assessment of the potential nonattainment area boundaries." C.I. 0061 Attachment 3 at 12 (emphasis added). In fact, EPA has consistently relied on source-apportionment modeling to evaluate *current* air quality conditions; and courts have upheld that approach. *See, e.g., Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1181-82 (9th Cir. 2012) (upholding EPA's use of modeling to predict noncompliance with NAAQS).[17] By contrast, it is *Texas* that has argued that "[a]ctual monitored air

[17] Although Courts have upheld EPA's use of modeling to predict future violations of the NAAQS, *Republic Steel Corp. v. Costle,* 621 F.2d 797, 805 (6th Cir.1980).Texas does

quality data . . . is the only reliable data for making designation determinations" under 42 U.S.C. § 7407—a position wholly at odds with its argument here.[18]

In any event, Texas's modeling report confirms that the Bexar County is currently "*in violation*" of the NAAQS. C.I. 0297, App. A at ii, v, and 1-3. And contrary to Texas's misleading assertions, the record makes clear that EPA did, in fact, appropriately consider the state's modeling. Indeed, EPA's Technical Support Document describes the state's source-apportionment modeling results at length, and then concludes (correctly) that the modeling supports a nonattainment designation for Bexar County. C.I. 0428 at 20-22 (noting that Texas's modeling "provides a relative indication of the impact of emission from various sources in the area," and makes clear that sources in Bexar County contribute 82-84% of the emissions responsible for ozone exceedances). EPA's TSD further notes that Texas's modeling relied on 2012 emissions data and projects emissions ozone levels for years 2017, 2020 and 2023, *id.* at 20, instead of using the three most-recent consecutive years, as required by EPA regulations.

Moreover, instead of rebutting its own certified monitoring date showing *current* violations of the NAAQS, Texas's modeling projects future air quality conditions based on a variety of speculative and unenforceable pollution reductions. As EPA

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not cite, and neither EDF nor Sierra Club are aware of, any authority for ignoring actual, ongoing monitored violations of the NAAQS based on modeling of future, hypothetical emissions.

[18] *See* Status Report Ex. 1 at 6, *Texas v. U.S. EPA*, No. 17-60088 (5th Cir. filed Apr. 12, 2018), ECF Doc. 00514427584.

recognized, this includes anticipated "plans to retire a large emissions source," and other unenforceable and optimistic pollution reductions. C.I. 0427 at 11.[19] Given the uncertainty of those hypothetical pollution reductions, it was reasonable for EPA to designate Bexar County as nonattainment based on present, unchallenged monitoring data. Without including those emissions reductions as part of an "enforceable" state implementation plan, as required by the Clean Air Act, e.g., 42 U.S.C. § 7410(a)(2)(A), there is no guarantee that Texas's predicted air quality improvements will ever come to pass.

Texas later admits that EPA addressed its modeling, Texas Br. at 30 (citing EPA TSD), but suggests that EPA insufficiently explained its reasons for rejecting the modeling. But as long as EPA's reasons for rejecting Texas's modeling are supported by the administrative record, the agency's determination should be upheld, even if there are alternate findings that also could be supported by that record. *See Arkansas v. Oklahoma*, 503 U.S. 91, 112–13 (1992). The court's primary inquiry should center on whether EPA "engaged in reasoned decisionmaking" in rejecting Texas's argument. *United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985) (citation and quotation marks

[19] Despite a rapidly expanding San Antonio population center, Texas also predicts a 60-75% decrease in vehicle emissions between 2017 and 2023, which appears to be based solely on unenforceable potential heavy-duty truck idling restrictions, electric vehicle adoption, and federal fuel efficiency standards, the stringency of which EPA is currently reevaluating. *See* C.I. 0356 at 13-14. Similarly, despite a steady increase in oil and gas production in the nearby Eagle Ford over the last several years, Texas predicts "constant" production and emission levels from oil and gas sources through 2023. *Id.*; *see also* C.I. 0297, App. A at iv, 3-8 to 3-10, 3-24 to 3-25.

omitted). Here, EPA acknowledged Texas's modeling, but determined that the statute does not require it to look to future predictions of attainment in the face of present, unchallenged monitoring data.

At bottom, Texas would prefer that EPA designate Bexar County as attainment, based on the state's speculative modeling projection that the area might, in several years, come into compliance with the health-based ozone standard. As explained, the plain statutory language forecloses that approach. Nonetheless, EPA considered Texas's modeling, identified several technical problems with it, and explained why the modeling did not alter the agency's conclusion. EPA's response to Texas's modeling was reasonable.

CONCLUSION

The Court should deny Texas' petition for review.

Respectfully submitted this 29th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2019, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will send notification of said filing to the attorneys of the record who have consented to electronic service.

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CERTIFICATIONS UNDER ECF FILING STANDARDS AND CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R.25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I certify that this brief contains 6,868 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2 and as counted by counsel's word processing system, and thus complies with the applicable word limit established in the Order granting the briefing schedule which was entered on October 26, 2018 (ECF No. 00514699423).

Dated: March 29, 2019

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