ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1172

AMERICAN LUNG ASSOCIATION, *et al.*,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

Petition for Review of Final Administrative Actions of the
United States Environmental Protection Agency

MOTION FOR SUMMARY VACATUR OR, IN THE ALTERNATIVE, FOR STAY PENDING JUDICIAL REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

The following is a glossary of acronyms and abbreviations used in this motion:

NAAQS	National ambient air quality standards
ppb	Parts per billion

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners challenge the Environmental Protection Agency's illegal and arbitrary delay of action mandated by the Clean Air Act to protect people from ground-level ozone, a dangerous and widespread air pollutant. EPA itself has found that ozone causes deaths, hospitalizations, asthma attacks, emergency room visits, and other serious harms, and that the existing federal limit on its concentration in the outdoor air is inadequate to protect public health. Yet, in a preemptory action involving no public participation and only cursory explication, EPA recently extended its deadline for promulgating initial area air quality designations for the 2015 national ambient air quality standards ("standards" or "NAAQS") for ozone. 82 FR 29,246 (June 28, 2017), Ex.1; *e.g.*, Letter from Scott Pruitt, Adm'r, EPA, to Doug Ducey, Gov. of Ariz., at 1, Ex.2 ("Delay Letter").[1] Under the Act, such designations are the essential step that triggers statutory obligations to implement measures to protect public health and welfare.

The Designations Delay defers urgently needed cleanup of harmful ozone pollution that threatens people across the nation. EPA has estimated that compliance with the standards will—each year—save hundreds of lives, prevent

[1] As explained below, the June 28 Notice followed letters sent June 6, with both announcing EPA was extending the deadline for promulgating initial area designations by one year. We refer to these documents announcing the delay collectively as the "Designations Delay."

230,000 asthma attacks in children, avoid hundreds of hospitalizations and emergency room visits, and prevent 160,000 missed school days for children. EPA, EPA-452/R-15-007, *Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone* at ES-16, tbl.ES-6 (2015), Ex.12 ("RIA"); *see also id.* ES-2 to -3. Substantial death and suffering will thus inevitably result from the Designations Delay.

The Designations Delay is illegal and irrational. The statutory provision that EPA seized upon as ostensible ground for delaying implementation of the 2015 standards applies only where EPA "has insufficient information" to promulgate designations for one or more areas. 42 U.S.C. § 7407(d)(1)(B)(i). But EPA's Designations Delay is devoid of any showing that the copious information already before the agency is somehow "insufficient." Indeed, EPA did not even attempt such a showing. Instead, EPA tried to convert § 7407(d)(1)(B)(i) into a blanket authorization for delay on a broad mishmash of policy grounds irrelevant to the adequacy of information for designations, such as a desire to revisit the 2015 ozone standards themselves and alleged challenges in complying with the standards. Such concerns are untethered from § 7407(d)(1)(B)(i), the sole statutory authority EPA cited for its action.

Because EPA's Designations Delay is clearly unlawful and arbitrary, and because this unlawful deferral of the October 1, 2017, deadline for completing

designations is dangerous to public health, summary vacatur is appropriate. In the alternative, EPA's Designations Delay should be stayed pending judicial review. In light of the severe health threats at stake, Petitioners further request that the case be expedited.[2]

BACKGROUND

I. OZONE SERIOUSLY HARMS HUMAN HEALTH.

Ozone, the main component of urban smog, is a corrosive air pollutant that inflames the lungs and constricts breathing. *See Am. Trucking Ass'ns v. EPA*, 283 F.3d 355, 359 (D.C. Cir. 2002) ("*ATA*"); EPA-HQ-OAR-2008-0699-0405 ("ISA") 2-20 to -23 tbl.2-1, Ex.14. It causes asthma attacks, emergency room visits, hospitalizations, deaths, and other serious health harms. *E.g.*, 80 FR 65,292, 65,308/3-09/1 (Oct. 26, 2015), Ex.11; EPA-HQ-OAR-2008-0699-0404 ("PA") 3-18, 3-26 to -29, 3-32, Ex.13; ISA 2-16 to -18, 2-20 to -24 tbl.2-1. Ozone can harm healthy adults, but others are more vulnerable. *See* 80 FR 65,310/1-3. Because their respiratory tracts are not fully developed, children are especially vulnerable to ozone pollution, particularly when they have elevated respiratory rates, as when playing outdoors. *E.g.*, PA 3-81 to -82. People with lung disease and the elderly also have heightened vulnerability. *See* 80 FR 65,310/3. People with asthma suffer

[2] Petitioners requested EPA administratively stay the Designations Delay on July 5. Exs.16-19. EPA has not acted on that request.

more severe impacts from ozone exposure than healthy individuals do and are more vulnerable at lower levels of exposure. *Id.* 65,311/1 n.37, 65,322/3.

II. THE CLEAN AIR ACT PRESCRIBES A CAREFULLY-DESIGNED PROGRAM FOR CONTROLLING OZONE POLLUTION.

Bringing the entire country expeditiously into compliance with health- and welfare-protective air quality standards forms the driving "heart" of the Clean Air Act. *Alabama Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1980). EPA must set "primary" and "secondary" standards for pollutants like ozone to protect public health and welfare, respectively. 42 U.S.C. §§ 7408(a), 7409(a)-(b). It must review and, as appropriate, revise these standards at least every five years. *Id.* § 7409(d)(1). In setting and revising them, EPA is barred from considering the costs and technological feasibility of implementing the standards. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 & n.4 (2001); *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981).

After EPA sets a standard, the implementation process begins, which, as relevant to this case, starts with initial area air quality designations. *See ATA*, 283 F.3d at 358-59. States and Tribes first submit recommended designations, and then, "as expeditiously as practicable," but at the latest within two years of promulgating a standard, EPA "shall promulgate the designations of all areas (or portions thereof) submitted" by states and Tribes as either violating the standard

("nonattainment" areas) or meeting the standard ("attainment" areas). 42 U.S.C. § 7407(d)(1)(A)-(B); *see also id.* §§ 7601(d)(1), 7602(d).[3] The Act specifies the relevant considerations for making designations by specifically defining each type of area. For example, nonattainment areas are those that "do[] not meet (or that contribute[] to ambient air quality in a nearby area that does not meet)" a standard for a pollutant. *Id.* § 7407(d)(1)(A)(i). The Act provides only one condition under which EPA may extend its deadline for promulgating designations—when it "has insufficient information to promulgate the designations." *Id.* § 7407(d)(1)(B)(i) ("Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.").

For nonattainment areas, Congress created a detailed program to ensure that air quality will attain ozone standards by specified deadlines ("attainment deadlines"). *Id.* §§ 7410(a), (c), 7502; *see also id.* §§ 7511-7511f (provisions specific to ozone nonattainment areas). Each state must adopt a "state implementation plan" that, for nonattainment areas, includes all the requirements Congress crafted for such areas. *Id.* § 7410(a)(2)(I).

[3] There is a third designation—an "unclassifiable" area, which is "any area that cannot be classified on the basis of available information as meeting or not meeting" the standard—which is treated for regulatory purposes as an attainment area. *See* 42 U.S.C §§ 7407(d)(1)(A)(iii), 7471; *see also Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 145 (D.C. Cir. 2015) (describing "unclassifiable" designation).

Crucially, the Act-required attainment deadlines are keyed to the date of designation. *See NRDC v. EPA*, 777 F.3d 456, 465-69 (D.C. Cir. 2014). The requirements—and deadlines—for states to adopt the specific programs Congress mandated to control harmful emissions in nonattainment areas similarly depend on the areas being designated nonattainment. *See, e.g.*, 42 U.S.C. §§ 7502(b), (c), 7503 (general planning requirements for nonattainment areas kick in when area is designated nonattainment), 7511a(a)(2)(C) (requiring "new source review" permitting programs that require new and modified major factories and power plants in nonattainment areas to install state-of-the-art emission controls and compensate for emission increases with greater offsetting reductions), 7511a(b)(2) (requiring emission control on certain types of existing sources in certain nonattainment areas), 7511a(c)(2)(A) (for certain nonattainment areas, requiring plans demonstrating attainment of standard by applicable attainment deadline).

Simultaneously with their designation, ozone nonattainment areas must be classified based on the severity of their ozone pollution levels. *Id.* § 7511(a)(1) tbl.1. The higher the classification, the longer the area has to come into attainment, but the more stringent the controls it must adopt. *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 887 (D.C. Cir. 2006), *amended in other parts* 489 F.3d 1245 (D.C. Cir. 2007). If an area fails to attain timely, EPA must reclassify it to a higher classification, triggering stronger pollution control requirements. *Id.* 887-88

EPA's promulgation of nonattainment designations is thus essential to triggering the Act's nonattainment provisions and bringing about the attendant health and environmental benefits. Simply put, delay of designations delays the stronger pollution controls Congress mandated to protect people in communities with unhealthy air.

III. EPA FINDS THE 2008 STANDARDS INADEQUATE AND PROMULGATES STRONGER STANDARDS.

EPA revised the ozone standards most recently on October 1, 2015, strengthening them by tightening the maximum 8-hour level of ozone allowed in the ambient air to 70 parts per billion (ppb), down from the 75 ppb allowed under the 2008 standards. 80 FR 65,292/1, 65,452/2; 73 FR 16,436, 16,436/1 (2008). After a lengthy and detailed review process, EPA determined that the 2008 standards were inadequate to protect public health and welfare. 80 FR 65,342/2-47/1, 65,389/1-90/2. Important parts of the extensive record showed that healthy young adults experienced adverse health effects with ozone exposures at levels allowed by the 2008 standards and linked ozone levels allowed by those standards to hospital visits, deaths, and other serious health harms. *Id.* 65,343/1-44/3, 65,346/2-3. In a 15-city study, EPA estimated that tens of thousands of children would still face dangerous ozone exposures even after the 2008 standards were met. *Id.* 65,344/3-47/1. EPA's independent scientific advisors likewise

unanimously found the 2008 standards were not strong enough to protect public health and welfare. *Id.* 65,346/2, 65,381/3.

Multiple parties filed petitions in this Court challenging the 2015 standards, some arguing they were overly stringent, and others that they were insufficiently protective. *See Murray Energy v. EPA*, No. 15-1385 *et al.* (D.C. Cir.). Shortly before the scheduled oral argument in those consolidated cases, EPA sought to postpone it based on the agency's stated desire for time to determine whether to reconsider the 2015 standards. EPA Mot. to Continue Oral Argument 5-6, *Murray Energy*, No. 15-1385 (D.C. Cir. Apr. 7, 2017). The Court held the case in abeyance, but the standards have not been stayed and remain in effect. Order, *Murray Energy*, No. 15-1385 (D.C. Cir. Apr. 11, 2017).

EPA's revision of the standards on October 1, 2015, meant its mandatory deadline for issuing designations is October 1, 2017. *See* 42 U.S.C. § 7407(d)(1)(B)(i). The Act prescribes a step-by-step process for promulgating designations. States must first submit recommended designations to EPA within one year of standards' promulgation. *Id.* § 7407(d)(1)(A). EPA may modify a recommended designation, but must first provide the state 120 days' notice and give the state an opportunity to rebut the proposed modification. *Id.* § 7407(d)(1)(B)(ii).

EPA, states, and Tribes have already undertaken the steps that traditionally have enabled EPA to meet prior designation deadlines. All the states and several Tribes submitted designation recommendations to EPA.[4] The states and Tribes formulated these recommendations with guidance from EPA regarding what kind of information the agency needed to make the final designations. For example, drawing on its experience with past ozone standards, EPA promulgated a memorandum further describing the process for developing designations. Memorandum on Area Designations for the 2015 Ozone National Ambient Air Quality Standards, from Janet McCabe, Acting Ass't Adm'r, to Reg'l Adm'rs (Feb. 25, 2016), Ex.10 ("Memorandum").[5] Among other things, EPA explained that it bases designations on air quality monitoring data—measurements of the amount of ozone actually present in the air at stations that sample the ambient air in locations consistent with EPA regulations. Memorandum 3; *see Miss. Comm'n*, 790 F.3d at 147 (upholding designations that used this approach for 2008 ozone standards). "After identifying each monitor that indicates a violation of the 2015

[4] https://www.epa.gov/ozone-designations/2015-ozone-standards-state-recommendations; https://www.epa.gov/ozone-designations/2015-ozone-standards-tribal-recommendations.

[5] EPA also proposed a rule that would govern implementation of the 2015 standards. 81 FR 81,276 (Nov. 17, 2016). The comment period on that rule closed February 13, 2017. 81 FR 91,894, 91,894/1-2 (Dec. 19, 2016).

ozone NAAQS in an area, the EPA will determine which nearby areas contribute to the violation(s)" based on five factors used in prior designations. Memorandum 5-7 (factors are "air quality data, emissions and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries," with other factors potentially relevant for specific areas); *see Miss. Comm'n*, 790 F.3d at 149, 158-59 (same factors applied for initial area designations for 2008 standards).

EPA explained that states would base designation recommendations on certified, quality-assured air quality monitoring data for 2013-15 (the years needed to calculate the official air quality statistic—"design value"—to assess compliance with the standards for 2015), with preliminary data for 2016 perhaps factoring in. Memorandum 2-4. EPA expected to base designations on the 2016 design value, which use 2014-16 data. *Id.* The 2015 design values, as measured at every air quality monitor in the country, were available in July 2016,[6] and EPA regulations required full, accurate, and quality-assured data for 2016 by May 1, 2017. 40 C.F.R. § 58.15; *see also* Memorandum 3 (explaining regulations).

[6] https://www.epa.gov/sites/production/files/2016-07/ozone_designvalues_20132015_final_07_29_16.xlsx.

IV. EPA ABRUPTLY DELAYS IMPLEMENTING THE NEW STANDARDS.

Without notice or public input, EPA extended its deadlines for promulgating designations by a year. First, on June 6, 2017, it sent identical four-paragraph letters to state governors so informing them. Exs.2-5; *see also* EPA, *Administrator Extends Deadline for Area Designations for 2015 Ozone Standards* (as updated June 7, 2017), Ex.6 (stating that EPA extended designations deadline "[i]n a letter to Governors"); EPA, *EPA to Extend Deadline for 2015 Ozone NAAQS Area Designations* (June 6, 2017), Ex.7 (press release announcing extension). The Delay Letter asserts potential concern about various purported "issues that could undermine…compliance efforts," and that the delay gives "the Agency time to complete its review" of the 2015 standards, but nowhere explains why the information it already has is inadequate to promulgate designations. Delay Letter 1.

EPA subsequently announced its delay action in the Federal Register. 82 FR 29,246 ("Notice"). The Notice's single-paragraph explication for the Designations Delay rehashes similar claims as the Delay Letters, but with some minor variations. It first baldly claims that because of various "issues regarding the 2015 ozone NAAQS and its implementation," EPA "cannot assess whether [the Administrator] has the necessary information to finalize designations." 82 FR 29,247/2. It also contends that because of the ongoing review of the standards, EPA lacks sufficient information to promulgate designations. *Id.* 29,247/3. EPA

again provides no explanation of what specific information it lacks to allow it to promulgate designations.

ARGUMENT

I. THE DESIGNATIONS DELAY IS UNLAWFUL AND ARBITRARY AND SHOULD BE SUMMARILY VACATED.

The Designations Delay is flagrantly illegal and arbitrary.[7] EPA relied solely on a narrow Clean Air Act provision that allows EPA to delay nonattainment designations by up to one year only when it "has insufficient information to promulgate the designations." 42 U.S.C. § 7407(d)(1)(B)(i). But EPA nowhere identified any insufficiency of information of the sort that, under the statute, is the sole permissible basis for a delay. The factors EPA cited are extraneous to the statutory criterion, instead addressing EPA's desire to reconsider the standards and to examine compliance issues. EPA also failed to explain why, assuming it had explained what relevant information was lacking for any area, it was delaying designations for the entire country for an entire year, despite the Act's mandate for expeditious designation promulgation.

EPA's attempt to convert a narrow statutory provision into a broad authorization for delay is contrary to the plain, limited language of the Act and

[7] This Court must set aside EPA actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

would thwart Congress's framework for deadline-driven attainment of health standards. Because EPA's Designations Delay is clearly unlawful, arbitrary, and dangerous to public health, and particularly given the imminent October 2017 statutory deadline for EPA to complete the designations, summary vacatur is appropriate. *See Clean Air Council v. EPA*, No. 17-1145, slip op. 10-11 (D.C. Cir. July 3, 2017).

A. EPA Has Not Satisfied the Statutory Requirements for Delaying Designations.

EPA does not even attempt to tether its purported rationale for the Designations Delay to the statutory prerequisite for such action—insufficient information to allow it to make designations. EPA has up to two years to promulgate designations, with the sole basis for extending that deadline (for up to a year) being where EPA "has insufficient information to promulgate the designations." 42 U.S.C. § 7407(d)(1)(B)(i). Under the Act, the only bases for making designations are whether an area fails to meet the standards (a simple numerical comparison based on data EPA has) and whether it contributes to another area's failure to meet the standards: if an area meets either condition, it is a nonattainment area; otherwise, it is an attainment area. *Id.* § 7407(d)(1)(A)(i)-(ii) (defining "nonattainment" and "attainment" area). The information needed to promulgate designations is thus information about air quality at monitoring sites

and information about what areas affect air quality in nearby areas with monitors that violate the standards. *See id.* § 7407(d)(1)(A)(i)-(iii).[8] Yet EPA illegally seeks to justify the Designations Delay based on considerations unrelated to these factors. *See Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) ("EPA must ground its reasons for action or inaction in the statute.").

EPA centrally relies on the irrelevant fact that it is reviewing the standards themselves, closing the Notice by saying:

> We also note that new agency officials are currently reviewing the 2015 ozone NAAQS rule. The Administrator has determined that in light of the uncertainty of the outcome of that review, there is insufficient information to promulgate designations by October 1, 2017.

82 FR 29,247/3. The Agency says that, "[a]s part of the review process," it is examining purported "issues that could undermine associated compliance efforts," which are background ozone levels,[9] ozone originating abroad, and "exceptional events demonstrations."[10] Delay Letter 1 (emphasis added); *accord* 82 FR 29,247/2

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[8] *See also* Memorandum 3-7 (describing EPA's intended practice); *Miss. Comm'n*, 790 F.3d at 147, 149, 158-59 (describing EPA's historical practice).

[9] EPA uses the term "background" to mean ozone pollution caused by natural phenomena anywhere or by human-caused emissions outside the United States. 80 FR 65,328/1 ("U.S. background" means ozone "that would exist even in the absence of any manmade emissions within the United States").

[10] "Exceptional events" are certain events that were shown to clearly cause exceedances of standards but were "not reasonably controllable or preventable"

(citing most of the same issues as ones EPA is "evaluating…regarding the 2015 ozone NAAQS and its implementation"). EPA frames the Designations Delay as purportedly justified "[i]n light of the analyses currently underway at the agency." 82 FR 29,247/3. But, though EPA is free to engage in such analyses, review of the standards and supposed compliance-related considerations is wholly divorced from the sufficiency of the information about actual air quality conditions that is relevant to making designations under these still-effective standards. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

Indeed, Congress required EPA to review standards at least every five years, 42 U.S.C. § 7409(d)(1), so Congress cannot possibly have meant to include such reviews as a justification for one-year delays. Otherwise, EPA could halt the "engine that drives nearly all of Title I of the [Clean Air Act]" by repeatedly revising and then reviewing standards, *Whitman*, 531 U.S. at 468. This interpretation cannot be reconciled with the Act. *See id.* 485 (rejecting as unreasonable statutory interpretation that would allow EPA to "abort[]" ozone nonattainment provisions of Clean Air Act "the day after [provisions were] enacted"); *South Coast*, 489 F.3d at 1248 (rejecting as "absurd" statutory

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and "caused by human activity that is unlikely to recur at a particular location or a natural event." 42 U.S.C. § 7619(b). Data resulting from such events may be excluded from air quality monitoring data used to determine if an area violated the standards. *Id.*

interpretation that would allow EPA to take trivial actions and "avoid ever implementing" Act-mandated pollution controls).

Moreover, EPA cannot base a delay on mere speculation that it might have insufficient information. 82 FR 29,247/2-3 (claiming EPA cannot determine if it has "necessary," "sufficient information to finalize designations" because of review). Congress required EPA to promulgate designations "as expeditiously as practicable" and authorized delay only where EPA rationally finds the information is actually "has" is inadequate to make designations. 42 U.S.C. § 7407(d)(1)(B)(i). EPA's assertion here that it might have inadequate information is not such a finding. *See In re Harman Int'l Indus. Sec. Litigation*, 791 F.3d 90, 103 (D.C. Cir. 2015) (pointing out "important difference between warning that something 'might' occur and that something 'actually had' occurred" (emphasis in original)); *see also Moncrieffe v. Holder*, 133 S. Ct. 1678, 1688 & n.8 (2013) (rejecting analysis that looks at what "could have" or "would have" happened, not what did happen). Because EPA has not found the information it has is insufficient, it cannot lawfully or rationally grant itself an extension under § 7407(d)(1)(B)(i). *See Chamber of Commerce v. SEC*, 412 F.3d 133, 143-44 (D.C. Cir. 2011) (where Congress requires agency to make certain assessment, agency must do so).

EPA also says it seeks more time to "consider completely all designation recommendations provided by state governors…and to rely fully on the most

recent air quality data." Delay Letter 1; *see also* 82 FR 29,247/2-3 (claiming EPA needs time to consider such materials because of (statutorily irrelevant) review of "issues regarding the 2015 ozone NAAQS and its implementation"). But those excuses do not relate, nor do they even claim to relate, to the sufficiency of the information EPA possesses. EPA raises no concern about the sufficiency of the designation recommendations or any concern about the sufficiency of the air quality data before it. Because EPA's decision "rests on reasoning divorced from the statutory text," it is unlawful and arbitrary. *Massachusetts*, 549 U.S. at 532-33; *see NRDC v. EPA*, 777 F.3d at 468-69 (where EPA "explanation lacks any grounding in the statute," it is unlawful).[11]

B. EPA's Purported Justifications for the Delay Are Arbitrary and Unlawful.

"Where, as here, Congress has delegated to an administrative agency the critical task of assessing the public health and the power to make decisions of national import in which individuals' lives and welfare hang in the balance, that agency has the heaviest of obligations to explain and expose every step of its reasoning." *American Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998).

[11] Even if the statute were not so unambiguous, EPA's attempt to import factors irrelevant to the adequacy of information would be due no deference, as it did not adopt that reading through any formalized or well-considered process. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

Here, EPA has not explained how the information it has is insufficient to promulgate designations. Nor has it explained how the purported "issues" implicated by its review of the 2015 standards relate to the adequacy of the information it has for making designations. EPA identifies no way in which "background ozone levels" or "international transport" are relevant to designations, nor can it. 82 FR 29,247/2; *see supra* p.14, n.9 (EPA defines "background" as ozone resulting from anything other than human-caused emissions within the United States). Indeed, the Act specifically deals with international transport at the post-designation stage, during actual implementation. *See* 42 U.S.C. § 7509a(a)-(b). Addressing it at the designation stage would thus conflict with Congress's careful implementation design. EPA's speculation that it might find new approaches for states to comply with the standards is utterly irrelevant to the issue of whether communities are currently meeting or violating the standards. 82 FR 29,247/2-3 (discussing new "Ozone Cooperative Compliance Task Force" (emphasis added)). The Designations Delay is thus arbitrary.

Even if EPA's stated bases for wanting more time were statutorily relevant, its reliance on them here was arbitrary. EPA claimed it cannot even tell if the information it has is insufficient, *id.* 29,247/2, but it has provided no explanation, much less a rational one, about why it cannot assess the information it has when it has all the information the statute and its own guidance say EPA needs. *See supra*

pp.9-10; Letter from Dannel Malloy, Gov. of Conn., to Scott Pruitt, Adm'r, EPA, at 3 (June 20, 2017) ("There is nothing missing from past information used by EPA to designate areas after previous revisions to the ozone NAAQS."), Ex.9.

Also, EPA has already had months to consider the designation recommendations the states provided—all but one were submitted by mid-October 2016. *See* https://www.epa.gov/ozone-designations/2015-ozone-standards-state-recommendations. The last one was submitted in March 2017, but it is three sentences long, with the only substantive sentence consisting of the recommendation that EPA designate the same areas nonattainment under the 2015 standards as it did under the 2008, with the same boundaries. Letter from Larry Hogan, Gov. of Maryland, to Cecil Rodrigues, Acting Regional Adm'r (Mar. 23, 2017), https://www.epa.gov/sites/production/files/2017-05/documents/md_recommendations.pdf. It is hardly credible for EPA to claim it requires an entire year to "consider completely" information it has had for months.

As well as being irrelevant, EPA's claim that, because of the review of issues regarding the standards, it needs more time to consider "exceptional events impacting designations" as part of considering the state recommendations, 82 FR 29,247/3, is unsupported. EPA identifies no rational connection between the review and the level of consideration needed for such exceptional events. Nor does EPA cite any specific instances where attainment designations hinge on timely

submitted, yet unresolved claims of exceptional events. Even if there are such claims, EPA fails to show it lacks adequate information to resolve them before the October 1 designations deadline. Even after the announcement in April 2017 of the review, EPA swiftly fully processed and granted an exceptional event petition dated April 14, 2017. EPA-HQ-OAR-2017-0223-0004 (granting petition via letter dated May 30, 2017), Ex.8. Thus, the record evidence contradicts EPA's claim that it needs more time, rendering the claim arbitrary. *See Nat'l Lime Ass'n v. EPA*, 233 F.3d 625, 634-35 (D.C. Cir. 2000).

Nor does EPA's claim about needing time to "rely fully on the most recent air quality data," Delay Letter 1, have any record basis. Those data were due to be certified by May 1, 2017, a month before EPA decided to extend the deadline and five months before the October 1 designation deadline. 40 C.F.R. § 58.15. EPA has provided no explanation why those periods are inadequate. To the contrary, EPA has previously made ozone designations only two months after receiving certified data. *See* 77 FR 30,088, 30,091/3, 30,095/2 (2012) (EPA finalized some designations on Apr. 30, 2012, using data certified by Feb. 29, 2012); *see also Miss. Comm'n*, 790 F.3d at 157-58. Thus, as well as failing to claim that it actually lacks the most recent air quality data, EPA has not made any rational claim that it lacked time to consider that information. *See Sorenson Comms. v. FCC*, 755 F.3d

702, 709 (D.C. Cir. 2014) (rule is arbitrary and capricious where it "is not only unsupported by the evidence, but contradicted by it").

Further, EPA's generic desire to consider new information cannot be reconciled with the Act's requirement that EPA promulgate designations "as expeditiously as practicable," with delay allowed only where the information EPA "has" is "insufficient," 42 U.S.C. § 7407(d)(1)(B)(i). EPA here contravenes Congress's command by delaying designations without explaining why the existing information is insufficient. EPA itself has recognized that it cannot keep waiting for new information instead of making designations, explaining during the designations process for the 2008 standards that "'[n]ew technical data become available on a regular basis,'" so "delay 'to consider such new information would result in a never-ending process in which designations are never finalized.'" *Miss. Comm'n*, 790 F.3d at 158 (quoting letter from EPA Administrator) (alteration in original). In an analogous circumstance, where a statute required EPA to use the "best available evidence," this Court has already held that "EPA cannot reject the 'best available' evidence simply because of the possibility of contradiction in the future by evidence unavailable at the time of action—a possibility that will always be present." *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1290-91 (D.C. Cir. 2000) (emphasis in original). So too here: EPA's preference to wait for more evidence is inconsistent with the Act and arbitrary.

C. Even If Some Delay Could Be Justified for Some Areas, EPA Has Not Justified the Across-the-Board One-Year Delay It Granted Itself.

Even if some information for some areas were insufficient—a claim EPA has not made or supported—EPA has not explained why a one-year extension for all areas is justified. The Act instructs EPA to make designations "as expeditiously as practicable," and the length of any extension beyond the two-year outer deadline is limited to being "up to one year." 42 U.S.C. § 7407(d)(1)(B)(i) (emphasis added). Thus, a one-year extension is not a default: it is an outer bound, with EPA obligated to move as quickly as practicable to promulgate designations. Here, EPA has given no explanation why a full year's extension is rationally justified anywhere, let alone for every single area of the nation. That is arbitrary. *See American Lung*, 134 F.3d at 392. Further, because EPA failed to address the statutory requirement to designate as expeditiously as practicable, the Designations Delay is unlawful and arbitrary. *See Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

EPA claims that its review of certain issues relating to the standards and their implementation, like background ozone levels, international transport of ozone pollution, and exceptional events, affects its ability to make designations. 82 FR 29,247/2-3. Even if that were true—and it patently is not, *see supra* pp.14-15—EPA has not explained why those issues are relevant over every square inch of the

nation. To the contrary, EPA identified no specific area where any such issue precluded rational designations.

Far from claiming that background ozone levels are high enough to matter for regulatory purposes everywhere in the country, EPA has made clear that "the locations that are most strongly influenced by background [ozone] are relatively limited in scope, i.e., rural areas in the intermountain western U.S." EPA-HQ-OAR-2008-0699-4309 at 347 (EPA Response to Comments on establishment of 2015 standards). The same holds for international transport. 80 FR 65,328/2. Nor does the Designations Delay identify any specific area where designation hinges on an unresolved claim that exceedances of the standards resulted from exceptional events, much less that such claims exist for every area of the nation. EPA has thus failed to explain why it chose to delay designations for the entire country. *See, e.g.*, *Sorenson Comms.*, 755 F.3d at 709.

If EPA lacked sufficient information for certain areas, EPA arbitrarily failed to consider its time-tested alternative to a national delay. In prior designations, EPA has issued designations for certain areas while deferring designations for others for which it lacked sufficient information. For example, in making designations under the 2012 particulate matter standards, EPA extended its deadline for 10 specific areas where it had insufficient monitoring data "to determine whether the areas are meeting or are not meeting the [standards]," and

an additional year would give it those data, but EPA promulgated designations for the rest of the country, for which it had data or for which an additional year's worth of data would still be insufficient. 80 FR 2206, 2207/3 (Jan. 15, 2015); *see also* 75 FR 71,033, 71,035/3-36/1 (2010) (similar for designations under 2008 lead standard). Assuming there were some (unexplained) factual basis for EPA's concerns about the completeness of its information, it was arbitrary for EPA not even to consider the option of making some designations but deferring others. *E.g.*, *State Farm*, 463 U.S. at 46-48 (agency failure to consider reasonable alternative renders its action arbitrary); *Del. Dep't of Nat. Res. v. EPA*, 785 F.3d 1, 17-18 (D.C. Cir. 2015) (where EPA failed to consider "reasonable alternatives" to uniform national rule, "its action was not rational and must, therefore, be set aside").

II. IN THE ALTERNATIVE, THE COURT SHOULD STAY THE DESIGNATIONS DELAY.

If the Court does not summarily vacate the Designations Delay, it should stay EPA's action pending merits review. A stay's issuance depends on balancing four factors: (1) petitioners' likelihood of success on the merits; (2) whether petitioners will suffer irreparable harm without a stay; (3) whether a stay will substantially harm other parties; and (4) the public interest. D.C. Cir. R.18(a)(1); *see, e.g.*, *League of Women Voters v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). As

discussed above, the Designations Delay is clearly illegal and arbitrary, meaning the first factor strongly favors Petitioners. As discussed below, so do the other three.

A. The Designations Delay Will Irreparably Harm Petitioners.

Unless this Court summarily vacates the Designations Delay, judicial review in this case will mostly likely extend well beyond October 1, 2017, the date by which, under the Act, EPA must promulgate designations. Without a stay pending judicial review, Petitioners' members face a substantial likelihood of irreparable harm resulting from the Designations Delay.

By delaying designations, EPA delays pollution controls required by the Act to curb ozone levels EPA agrees are unsafe in communities where Petitioners' members live, work, and enjoy recreation. Such communities include areas currently designated as attainment under the 2008 standards but whose ozone levels violate the 2015 standards; because of the Designations Delay, they will not be timely designated nonattainment and thus will lack the anti-pollution protections that a nonattainment designation would accord them. *See supra* pp.6-7; Berman Decl. ¶¶ 17-34, Ex.23; Craft Decl. ¶ 14, Ex.27. These important protections include measures states adopt into their implementation plans to limit emissions of ozone-forming chemicals sufficiently for the area to come into attainment, as well as attainment deadlines, nonattainment new source review for

new or modified major sources of pollution, like factories and power plants, and pollution controls for large existing plants.

These delays will irreparably harm Petitioners' members by prolonging their exposure to ozone levels EPA has found cause deaths, asthma attacks in children, emergency room visits, hospitalizations, and other serious health harms. RIA at ES-16 tbl.ES-6; *see also id.* ES-2 to -3. The attached Declarations, Exs.20-46, demonstrate the human impacts of these harms. Krystal Henagan is a member of Petitioners Environmental Defense Fund and Sierra Club living in San Antonio, a city with ozone levels that violate the 2015 standards, but is designated attainment under the 2008 standards. Henagan Decl. ¶¶ 1-2, 4, Ex.34; Berman Decl. ¶ 19. She struggles with her 8-year-old son's asthma, which is controlled by four medications, and which has been "life threatening" in the past. Henagan Decl. ¶¶ 5-9, 12. Her son regularly must go to the doctor—12 visits in 2017 alone—and "he has missed countless school days due to poor air quality exacerbating his asthma," days during which Ms. Henagan must stay home and care for him. *Id.* ¶¶ 7-12. She fears he will suffer asthma attacks or that she "would need to rush him to the hospital due to his inability to breathe." *Id.* ¶ 8.

Rhonda Anderson, a Sierra Club member living and working in Detroit (also a city with ozone levels that violate the 2015 standards, but designated attainment under the 2008 standards, Berman Decl. ¶ 19), a grandmother, and a senior with

asthma, describes how, even as an adult, she has had to go to the hospital because of her asthma, and her daughters and granddaughters have similarly had to go (both as adults and as children). Anderson Decl. ¶¶ 4-6, Ex.21. She describes the trauma of going to the emergency room because of a child's asthma attack:

> Often, I have spent no less than 4 hours waiting, all the while wondering when my child will be able to see the doctor. Once we are called, we get sent to a second crowded room with breathing machines, and every station is filled with a child having an asthma attack. It is very stressful and there is nothing that can take my mind off the fact that I have a sick child that I cannot help.

Id. ¶ 6. Family members and others she knew have died from asthma attacks. *Id.* ¶ 8.

Other declarants further detail how the health harms ozone causes affect them. Nsedu Obot Witherspoon, a member of the American Public Health Association, has a seven-year-old son with asthma. Witherspoon Decl. ¶ 5, Ex.46. He endured "his first bad asthma attack at just three years old," so bad that when they got to the doctor,

> they said his oxygen levels were so low that we had to leave our car and go immediately to the ER in an ambulance. This was one of the scariest moments of my life. He was hospitalized for two nights. He was again hospitalized at the age of four.

Id. Even now, despite "a rigorous asthma management plan with frequent check-ups at the pediatrician's office," "his asthma acts up…frequently…when air quality is bad." *Id.* ¶ 6. "[H]e often has to slow down or sit out on high air pollution days,"

instead of playing outside or walking or hiking with his siblings and parents. *Id.* ¶¶ 3-4, 7.

Petitioners' members living, working, and recreating in areas attaining the 2008 standards, but with ozone levels that violate the 2015 standards routinely find their ability to breathe impaired (*see, e.g.*, Anderson Decl. ¶¶ 4-5; Brock Decl. ¶ 5 (Atlanta area), Ex.24; Einzig Decl. ¶¶ 3-5 (Baltimore), Ex.30; *see also* Berman Decl. ¶¶ 19, 22-23) and their ability to work and their children's ability to attend school impeded (*see, e.g.*, Einzig Decl. ¶ 8; Henagan Decl. ¶¶ 6-7). Because of their health concerns, they must refrain from outdoor activities they would otherwise enjoy. *See, e.g.*, Seal Decl. ¶ 10 (San Antonio), Ex.41; Einzig Decl. ¶ 7. Petitioners have tens of thousands of other members residing in such areas. *See* Stith Decl. ¶ 10, Ex.42; Berman Decl. ¶¶ 19, 22 & attach.1.

Because the attainment deadlines run from the date of designation, *see supra* p.6, the ozone pollution levels in these areas will be allowed to remain at dangerously elevated levels for an additional year because of EPA's year-long Designations Delay unless this Court stays EPA's unlawful action. *See* Craft Decl. ¶ 14. Petitioners' members living in such areas, who experience severe harms to their health and wellbeing because of ozone pollution, will thus be harmed both by the delay in mandatory pollution reductions and by the additional year that they will have to endure dangerous ozone levels.

Even in areas violating both the 2008 and 2015 standards, the Designations Delay means Petitioners' members there will receive neither the benefits of pollution reductions designed to drive compliance with the new, more protective 2015 standards nor the benefit of actual compliance with those standards as soon as they would absent the Designations Delay. For example, Jane Reardon, a nurse and member of Petitioner American Lung Association's board, lives and works in Hartford County, Connecticut, caring for patients "who are hospitalized as a result of respiratory ailments," including "many…patients…older than 65, like [her]." Reardon Decl. ¶¶ 1, 5-6, Ex.39; *see also id.* ¶ 7 (describing activities she engages in outdoors near her home, thus exposing her to dangerous ozone pollution). Hartford County violates both the 2008 and 2015 standards. *Id.* ¶¶ 1, 5; Berman Decl. ¶¶ 17, 30. As a result of the Designations Delay, implementation of the 2015 standards in Hartford County will be delayed a year, and the area's attainment deadline will, too, thus endangering her health and her patients' health. Reardon Decl. ¶ 8; *see also* Lyon Decl. ¶¶ 4-5 (describing how patients in Philadelphia with lung disease must miss medical appointments because poor air quality causes symptoms to flare up). Accordingly, the harms described above affect even more of Petitioners' members.

These human health harms resulting directly from EPA's Designations Delay are irreparable, for ultimate success on the merits cannot undo them: no

court order can enable EPA to raise the dead, undo asthma attacks, reverse a hospitalization, or restore a missed day in the classroom or at work. *See Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Petitioners' members, their families, and, for medical professionals, their patients have demonstrated heightened vulnerability to ozone pollution and already experience serious harms from it. The harms to them absent a stay are "likely," as well as "certain and great," "actual and not theoretical," "beyond remediation," and so "imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters*, 838 F.3d at 6-8; *see also Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1307-08 (1976) (Rehnquist, J., in chambers) (finding "irreparable harm" where lower court stay of motor vehicle safety standards would delay "for a year or more" "[e]ffective implementation…of the congressionally mandated" program to "reduce traffic accidents and deaths and injuries").

Likewise, the Designations Delay is substantially likely to cause irreparable environmental harms, including to places Petitioners' members use and enjoy. *See* Kodish Decl. ¶¶ 2-6, 9-14, Ex.35; Toher Decl. ¶¶ 3-8, Ex.43. Ozone damages vegetation and forested ecosystems, causing or contributing to widespread stunting of plant growth, tree deaths, visible leaf injury, reduced carbon storage, and damage to entire ecosystems. PA 5-2 to -3; ISA 9-1; 80 FR 65,370/1-2, 65,377/3. EPA acknowledges that, "[i]n terms of forest productivity and ecosystem diversity,

ozone may be the pollutant with the greatest potential for region-scale forest impacts." RIA 7-3. Such widespread vegetation and ecosystem losses are irreparable, as they cannot "be adequately remedied by money damages" and are of "permanent or at least of long duration." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

In short, without a stay pending judicial review, EPA will delay initial area designations beyond what the statute allows, making for a longer period of time that Petitioners' members will be exposed to excessive amounts of air pollution that causes them serious harms. There can be "no do over and no redress" later, *League of Women Voters*, 838 F.3d at 9, for the irreparable health and environmental harms that Petitioners' members (and the broader public) are virtually certain to experience absent a stay.[12]

B. A Stay Will Not Harm Other Parties.

As the agency responsible for the proper execution of the Clean Air Act, EPA cannot be substantially harmed by a stay that would prevent it from giving effect to an illegal and arbitrary action. *See Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 615 (D.C. Cir. 1980) ("consequences [that] are no

[12] For similar reasons, Petitioners have standing to challenge the Designations Delay. *See* Declarations.

different from [agency's] burdens under the statutory scheme" "do not constitute substantial harm for the purpose of delaying injunctive relief").

Moreover, a stay would not prevent EPA from reviewing the 2015 standards or their implementation. The Act plainly contemplates that EPA will implement ozone standards even as it reviews them. Indeed, the Act puts the ozone standards on an implementation schedule that can last up to 20 years, while requiring EPA to review standards at least every 5 years. *Whitman*, 531 U.S. at 485 ("Congress knew" EPA could review ozone standards at any time, but still established implementation framework "reaching…far into the future") (discussing 42 U.S.C. §§ 7409(d)(1), 7511(a), and 7511a). Thus, EPA would not experience harm from this Court's staying the Designations Delay.

C. The Public Interest Strongly Favors Staying the Designations Delay.

EPA projects that compliance with the 2015 standards will realize significant health benefits. Outside of California, EPA estimates that compliance with the standards will result in upwards of 600 lives saved, over 250 heart attacks avoided, about 1,000 hospital admissions or emergency room visits prevented, 230,000 asthma attacks in children prevented, and 160,000 school loss days for children averted each year. RIA at ES-16 tbl.ES-6. The economic value of these benefits substantially outweighs the costs of achieving them. *Id.* ES-15 tbl.ES-5. In

making its estimate of public health benefits, EPA assumed designations would be completed in late 2017. *See id.* ES-2 to -3. These health benefits would come on top of the public health gains from achieving the 2008 standards and from several other pollution reduction requirements EPA put in place around the time it finalized the 2015 standards. *Id.* 6-1 ("The benefits…are estimated as being incremental to attaining the existing standard of 75 ppb…. These estimated benefits are incremental to the benefits estimated for several recent rules….").

These protections are already years overdue. EPA's deadline for reviewing and revising the 2008 standards fell in March 2013. *See* 42 U.S.C. § 7409(d)(1) (five-year review cycle); 73 FR 16,436 (standards promulgated in March 2008). EPA acted over 18 months late, and only after being sued (a suit in which it requested still more time to finalize its review and revision of the 2008 standards). Order 1-2, *Sierra Club v. EPA*, No. 13-cv-2809 (N.D. Cal. Apr. 30, 2014) (rejecting timeframe EPA sought for finishing rulemaking). Delaying the designations will cause serious harm to the breathing public and to the environment. *See supra* pp.25-31; Craft Dec. ¶ 14 (delaying designations will "lead to a longer period of inaction before measures to abate health-harming ozone are undertaken in these heavily impacted areas," resulting in "delayed attainment and more exposure to ground-level ozone," resulting in "more asthma attacks, hospitalizations, emergency room visits, and premature deaths in those areas").

On the other side of the ledger, industry and states are not cognizably harmed by having to comply with the ozone implementation program Congress enacted. *See, e.g.*, *League of Women Voters*, 838 F.3d at 12 ("There is generally no public interest in the perpetuation of unlawful agency action."). Moreover, history shows this country can have both economic growth and air pollution reductions. *See, e.g.*, https://gispub.epa.gov/air/trendsreport/2016/#econ_growth_cleaner_air_ (over 1970-2015, emissions of the six pollutants most directly limited by national ambient air quality standards decreased 71%, and gross domestic product increased nearly 250%), Ex.15.

The public interest thus strongly favors staying the Designations Delay. The Designations Delay means that Congress's carefully-refined ozone nonattainment provisions will not engage as quickly as EPA assumed in its regulatory analysis. The pollution reductions they are specifically designed to assure will not occur as quickly, either. Thus, without a stay, compliance with the standards will be delayed, and Congress's promise to all residents of this country that they will have safe air to breathe will go unfulfilled even longer than it already has. Significant numbers of lives will be needlessly worsened or lost as a result. Such an outcome flouts the public interest and the purpose of the Clean Air Act. *Union Elec. v. EPA*, 427 U.S. 246, 256 (1976) (Clean Air Act is "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution").

CONCLUSION

For the foregoing reasons, Petitioners respectfully request summary vacatur of the Designations Delay or, in the alternative, a stay of the Designations Delay and expedited review, *see* D.C. Cir., *Handbook of Practice and Internal Procedures* 33 (Jan. 26, 2017).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and 27(d)(2) and D.C. Circuit Rule 18(b), that the foregoing **Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review** contains 7,760 words, as counted by counsel's word processing system, and thus complies with the 7,800 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2010** using **size 14 Times New Roman** font.

DATED: July 12, 2017

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2017, I have served the foregoing **Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review** on all registered counsel through the court's electronic filing system (ECF) and by email.

/s/Seth L. Johnson
Seth L. Johnson