ORAL ARGUMENT NOT YET SCHEDULED

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

No. 15-1385 (and consolidated case Nos. 15-1392, 15-1490, 15-1491, 15-1494)

MURRAY ENERGY CORPORATION,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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

PROOF BRIEF OF HEALTH AND ENVIRONMENTAL RESPONDENT-INTERVENORS

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DATED: August 17, 2016

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MURRAY ENERGY CORPORATION, *Petitioner*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Respondent*.	No. 15-1385 (consolidated with Nos. 15-1392, 15-1490, 15-1491, 15-1494)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), American Lung Association, Sierra Club, Natural Resources Defense Council ("NRDC"), and Physicians for Social Responsibility (collectively, "Health and Environmental Intervenors") hereby certify as follows:

(A) Parties, Intervenors and *Amici*

(i) Parties, Intervenors, and *Amici* Who Appeared in the District Court

This case is a petition for review of final agency action, not an appeal from the ruling of a district court.

(ii) Parties to This Case

Petitioner:

15-1385 Murray Energy Corporation

15-1392 Arizona, Arkansas, New Mexico Environmental Department, North Dakota, and Oklahoma

15-1490 Sierra Club, Physicians for Social Responsibility, National Parks Conservation Association, Appalachian Mountain Club, and West Harlem Environmental Action, Inc.

15-1491 Chamber of Commerce of the United States of America, National Association of Manufacturers, American Petroleum Institute, Utility Air Regulatory Group, Portland Cement Association, American Coke and Coal Chemicals Institute, Independent Petroleum Association of America, National Oilseed Processors Association, and American Fuel & Petrochemical Manufacturers

15-1494 Texas and Texas Commission on Environmental Quality

Respondent:

The respondent in all cases is the U.S. Environmental Protection Agency. Also named as a respondent in case Nos. 15-1392, 15-1490, 15-1491, and 15-1494 is Gina McCarthy, in her official capacity as Administrator of the U.S. Environmental Protection Agency (collectively, "EPA").

Intervenors:

Wisconsin, Utah, Kentucky, and Louisiana have been granted leave to intervene on behalf of Petitioners in No. 15-1392. American Lung Association, Sierra Club, Natural Resources Defense Council, and Physicians for Social Responsibility have been granted leave to intervene on behalf of Respondents in Nos. 15-1385, 15-1392, 15-1491, and 15-1494. Chamber of Commerce of the United States of America, National Association of Manufacturers, American Petroleum Institute, Utility Air Regulatory Group, Portland Cement Association, American Coke and Coal Chemicals Institute, Independent Petroleum Association of America, National Oilseed Processors Association, American Fuel & Petrochemical Manufacturers, American Chemistry Council, American Forest & Paper Association, American Foundry Society, American Iron and Steel Industry, and American Wood Council have been granted leave to intervene on behalf of Respondents in No. 15-1490.

(iii) *Amici* in This Case

Institute for Policy Integrity at New York University School of Law has been granted leave to participate as *amicus curiae* in support of Respondents. California Air Resources Board, the states of Massachusetts, New York, Rhode Island, and Vermont, the Delaware Department of Natural Resources and Environmental Control, and the District of Columbia filed a notice of intent to

participate as *amici curiae* in support of Respondents in Nos. 15-1385, 15-1392, 15-1491, and 15-1494. American Thoracic Society and American Lung Association have been granted leave to participate as *amicus curiae* in support of Public Health and Environmental Petitioners in No. 15-1490. National Association of Home Builders has been granted leave to participate as *amicus curiae* in support of Industry and State Petitioners in Nos. 15-1385, 15-1392, 15-1491, and 15-1494.

(B) Circuit Rule 26.1 Disclosure for Health and Environmental Intervenors

See disclosure form filed separately.

(C) Ruling Under Review

Petitioners seek review of the final action taken by EPA at 80 Fed. Reg. 65,292 (Oct. 26, 2015) and titled "National Ambient Air Quality Standards for Ozone."

(D) Related Cases

Health and Environmental Intervenors are not aware of any related cases not already consolidated in this matter.

DATED: August 17, 2016

Respectfully submitted,

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 28(a)(1) and D.C. Circuit Rules 26.1 and 28(a)(1)(A), American Lung Association, Sierra Club, Natural Resources Defense Council, and Physicians for Social Responsibility, make the following disclosures:

American Lung Association

Non-Governmental Corporate Party to this Action: American Lung Association ("ALA").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: ALA is a corporation organized and existing under the laws of Maine. ALA is a national nonprofit organization dedicated to a

world free of lung disease and to saving lives by preventing lung disease and promoting lung health. ALA's Board of Directors includes pulmonologists and other health professionals.

Sierra Club

Non-Governmental Corporate Party to this Action: Sierra Club.

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Natural Resources Defense Council

Non-Governmental Corporate Party to this Action: Natural Resources Defense Council ("NRDC").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Physicians for Social Responsibility

Non-Governmental Corporate Party to this Action: Physicians for Social Responsibility ("PSR").

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: PSR is a corporation organized and existing under the laws of Massachusetts. It is a national nonprofit organization of medical and public health professionals and lay advocates dedicated to promoting peace, strengthening public health and child health, and supporting environmental integrity.

DATED: August 17, 2016

Respectfully submitted,

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

CASAC	Clean Air Scientific Advisory Committee
Dkt	EPA-HQ-OAR-2008-0699
EPA	U.S. Environmental Protection Agency and Gina McCarthy, Administrator
FEV_1	Forced expiratory volume in one second
ISA	Integrated Science Assessment, EPA-HQ-OAR-2008-0699-0405
NAAQS	National ambient air quality standards
PA	EPA-HQ-OAR-2008-0699-0404
ppb	Parts per billion
ppm	Parts per million
RTC	EPA-HQ-OAR-2008-0699-4309

INTRODUCTION

Industry and State Petitioners' arguments are baseless. Three of their four arguments are fully foreclosed by directly on-point precedent from the Supreme Court and this Court on the very same statutory provision at issue here. Most of the fourth is foreclosed by identically directly on-point precedent from this Court, and the remainder is meritless. EPA's decision to strengthen the health- and welfare-protective standards for ozone was not only reasonable, but compelled by overwhelming evidence that ozone is harmful at levels allowed by the prior standards.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in addenda to this brief, the Opening Brief of Public Health and Environmental Petitioners ("Health Opening Br."), and the Joint Opening Brief of Industry Petitioners ("Ind. Br.").

STATEMENT OF THE CASE

American Lung Association, Sierra Club, Natural Resources Defense Council ("NRDC"), and Physicians for Social Responsibility (collectively, "Health and Environmental Intervenors") are national nonprofit groups that advocate for stronger health protections and a cleaner environment for their members and the general public, particularly with regard to air pollution. They oppose the efforts to

undo EPA's overdue strengthening of the ozone standards because the record before EPA demonstrated that ozone pollution below the level of the prior standards harms human health and the environment.

Health and Environmental Intervenors adopt by reference the discussion in the Opening Brief of Public Health and Environmental Petitioners of:

- How ozone, the main component of urban smog, forms, and the serious health effects it causes, including asthma attacks, emergency room visits and hospitalization, and, likely, death, Health Opening Br. 3;
- The first-hand accounts members of the public gave EPA of how severely asthma attacks, which ozone pollution triggers, affect their families by sending them to the hospital because of a "life threatening event," forcing their children and siblings to stay inside or face "asthma attacks every two or three hours" that night, and keeping their children from going to school, *id.* 4-5 (quoting Dkt[1]-4245 at 76-77, 126, JA____-__, ____; Dkt-4247 at 319, JA____);

[1] All "Dkt" references are to document numbers in EPA docket EPA-HQ-OAR-2008-0699 (*e.g.*, "Dkt-4245" means EPA-HQ-OAR-2008-0699-4245).

- The tree-growth loss, visible leaf injury, and related ecosystem-wide damage that ozone pollution has on vegetation and forested ecosystems at levels allowed by the pre-existing standard, *id.* 5;
- The Clean Air Act's requirement that primary ("health") national ambient air quality standards ("standards" or "NAAQS") for pollutants like ozone be set—based solely on protection of health—at a level "requisite to protect the public health," "allowing an adequate margin of safety," *id.* 6-7 (quoting 42 U.S.C. § 7409(b)(1) and citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 465-71 (2001));
- The stronger and more extensive scientific evidence available since EPA's prior (2008) review of the ozone standards—including new controlled human "chamber" studies, which exposed healthy young adults to ozone-contaminated air as they exercised and examined impacts on their respiratory systems—showing harm from ozone at levels as low as 0.060 parts per million ("ppm"), *id.* 8-9; *see also id.* 35-36 (providing more details about chamber studies but noting that they do not generally test sensitive subpopulations like children or people with lung disease);

- The Clean Air Scientific Advisory Committee's ("CASAC's") clear scientific findings that exposure to ozone over an 8-hour period at 0.070 ppm causes adverse health effects, *id.* 11, 31; and
- The calls from leading medical societies and the EPA-chartered Children's Health Protection Advisory Committee for EPA to set a standard more protective than what it selected, *id.* 12.

Further, there is substantial case law rejecting the very same arguments Petitioners raise here. In 1981, this Court upheld the 1979 standards against the argument that EPA had to consider the standards' "attainability," which natural and other background ozone levels might affect. *Am. Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185, 1190 (D.C. Cir. 1981) ("*API*"). In reviewing the 1997 standards, this Court and the Supreme Court confronted the argument that EPA's interpretation of the Clean Air Act's standard-setting provision violated the nondelegation doctrine. The Supreme Court unanimously rejected the argument, reversing this Court's contrary holding. *Whitman*, 531 U.S. at 472-76, *rev'g in relevant part, aff'g in other part Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) ("*ATA I*"). Also unanimously, the Supreme Court agreed with this Court's consistent case law holding that the Act does not authorize EPA to consider the costs of implementing a national ambient air quality standard when EPA sets that standard. *Id.* 465-71; *see, e.g., NRDC v. EPA*, 902 F.2d 962, 972-73

(D.C. Cir. 1990), *vacated in unrelated part by* 921 F.2d 326 (D.C. Cir. 1991). Most recently, this Court rejected challenges to the 2008 health standard, including industry's contention that EPA is "somehow bound by" its findings in prior reviews about the level of protection that is "requisite." *Mississippi v. EPA*, 744 F.3d 1334, 1342-44 (D.C. Cir. 2013). But the Court found that EPA had "violate[d]" the Act by setting the secondary ("welfare") standard without identifying the level of air quality requisite to protect public welfare. *Id.* 1358-62.

SUMMARY OF ARGUMENT

EPA lawfully and rationally concluded that the 2008 health standard was underprotective. This Court has already held in *Mississippi* that EPA need not wait for revolutionarily new scientific evidence before finding a prior standard inadequately protective. Further, the scientific record in fact contained significant new chamber, epidemiological, and animal toxicological studies that justified an even stronger standard than EPA established, as CASAC, the American Thoracic Society, and numerous other scientific and medical groups told EPA.

As well as for the reasons EPA gives, Petitioners' contention that EPA arbitrarily strengthened the welfare-protective standard founders because this Court held in *Mississippi* that the prior welfare standard was illegal and arbitrary. That prior standard therefore had no validity whatsoever, and accordingly, EPA

had no obligation to further justify its rejection of that standard in the instant rulemaking.

Notwithstanding Petitioners' claims, this Court and the Supreme Court have already held that EPA must establish standards based solely on protecting health and welfare and that background ozone levels and implementation costs (however dressed up) are irrelevant and illegal considerations in the standard-setting process.

Were there any doubt that *Whitman* forecloses Petitioners' costs and nondelegation arguments, review of the briefs in that case confirms that industry and allies there raised the arguments Petitioners here advance. Failed in *Whitman*, they fail here, too.

ARGUMENT

I. EPA LAWFULLY AND RATIONALLY FOUND THAT THE 2008 OZONE STANDARDS WERE LESS PROTECTIVE THAN REQUISITE.

Insisting that EPA's decision to strengthen the standards stemmed "main[ly]" from a change in "policy judgment," Industry Petitioners argue (at 36-41) that EPA failed to explain why it "changed the conclusions" it drew from the scientific evidence available to it in 2008. This Court rejected a virtually identical argument by industry petitioners against the 2008 ozone standard. There, like here, they argued that EPA "cannot determine why further risk reduction is 'requisite' without 'putting risk in the context of earlier NAAQS decisions'" and claimed that

"the [later] science added nothing new to the [prior] NAAQS conversation." *Mississippi*, 744 F.3d at 1342-44. This Court rejected those petitioners' argument as "collaps[ing] under the weight of reality." *Id.*

In any event, as discussed below, new studies about the human health impacts of ozone distinguish the record underlying this, the 2015, ozone standard from the record underlying the 2008 ozone standard and support an even more protective standard than EPA set here. Further, contrary to State Petitioners' argument, EPA did not irrationally rely on a single study in finding the 2008 standard underprotective.[2]

As for the secondary standard, in addition to Industry Petitioners' argument's other failings, its basic premise—that the 2008 secondary standard was somehow valid, *see* Ind. Br. 40—is entirely wrong. This Court expressly held that that the 2008 secondary standard did not comply with the Act.

A. The Record Overwhelmingly Supports a Health Standard at Least as Protective as the One EPA Established.

As Industry Petitioners admit, in the 2015 review, EPA considered substantial numbers of new scientific studies that were not available in the 2008 review. Ind. Br. 37 (seeking to dismiss EPA's citation to "new…studies that

[2] As EPA explains (at 53-54), Petitioners waived any arguments against the specific level EPA chose for the standards.

became available after 2008"); *see also* Dkt-4309 ("RTC") 7 ("the [Integrated Science Assessment ("ISA")] considered over 1,000 new studies that have been published since the last review."), JA____. Indeed, both Industry and State Petitioners concede that EPA's decision "relied heavily" on a 2009 study, which EPA obviously could not have considered in 2008. Ind. Br. 38; *accord* State Petitioners' Opening Brief ("State Br.") 12, 18, 50. Industry Petitioners' claim (at 20) that the new evidence did not change the "fundamental scientific understanding" of ozone's harmful health effects, *accord*, *e.g.*, Ind. Br. 2, 37; *see also* State Br. 52, is both irrelevant and wrong.

In rejecting an indistinguishable industry argument about the 2008 ozone standard, this Court held there is no legal requirement for a sea-change in understanding of ozone before EPA can find a more protective standard is requisite: "as the contours and texture of scientific knowledge change, the epistemological posture of EPA's NAAQS review necessarily changes as well; additional certainty about what was merely a thesis might very well support a determination that the line marked by the term 'requisite' has shifted." *Mississippi*, 744 F.3d at 1344; *see also* Ind. Br. 38 (asserting that the "newer studies simply confirmed th[e] expected continuum" that EPA anticipated in 2008).

Moreover, the new evidence here was, in fact, highly significant and justified a standard even more protective than EPA set, as medical experts urged.

EPA had new chamber studies before it, and those studies added significantly to the understanding of exposure to ozone at the 0.060-0.063 ppm and 0.072 ppm levels. Dkt-0404 ("PA") 3-27, 3-58 tbl.3-1 & nn.37-38, JA____, ____. At the 0.060-0.063 ppm levels, multiple new studies showed a statistically significant group mean decrease in lung functioning, statistically significant increased pulmonary inflammation,[3] and up to 16% of the healthy young adult participants experiencing at least 10% lung function decrement. PA 3-12, 3-14, 3-58 tbl.3-1 & nn.37-38, JA____, ____, ____. The study at the 0.072 ppm level revealed a group mean decrease in lung functioning and increase in self-reported respiratory symptoms, with both results being statistically significant. *Id.*, JA____, ____, ____.

Combined with the prior chamber studies of ozone exposure at 0.060 ppm, all this evidence led EPA to conclude that "mean FEV_1[4] is clearly decreased by

[3] In addition, a controlled human exposure study done after the 2008 standard rulemaking for the first time reported an association between lung inflammation and lung function decrements. *See* Dkt-0405 ("ISA") 6-79 (discussing Vagaggini *et al.* (2010) study), JA____. CASAC found this tie notable and suggested such inflammation "may be linked to the pathogenesis of chronic lung disease." Dkt-0188 at 2, JA____.

[4] "FEV_1" is "forced expiratory volume in one second," a measure of lung function.

6.6-h[our] exposures to 60 ppb[5] [ozone] and higher concentrations in subjects performing moderate exercise," and "a considerable fraction of exposed individuals experience clinically meaningful decrements [of greater than 10% FEV_1] in lung function." *Id.* 3-58 to -59 (quoting ISA 6-9, 6-20, JA____, ____), JA____-__; *see also* ISA 6-5 to -13 (providing more details and analysis of chamber studies), JA____-__; ISA 6-16 to -20 (discussing percentage of study subjects who had or are predicted to have at least 10% FEV_1 decrement), JA____-__; Health Opening Br. 36-37 (citing prior rulemakings where EPA and CASAC found 10% FEV_1 decrement was "harmful (or 'adverse') to asthmatics" (quoting *Mississippi*, 744 F.3d at 1349 (citing 73 FR 16,436, 16,454-55 (2008)))). Ozone-related harms were not felt randomly: some of those who had greater lung function decrements—those who were more harmed by exposure to ozone—"consistently experienc[ed] larger than average FEV_1 responses." ISA 6-13, JA____; *see also id.* 6-16 to -17 (discussing "intersubject variability"), JA____-__. Scientists created models based on the new and earlier chamber studies of lung function, and EPA and CASAC respectively found they "marked an advance" and "represent[ed] a significant improvement" in the understanding of how ozone exposure affects lung function. 80 FR 65,292, 65,303/3 (Oct. 26, 2015), JA____; Dkt-0188 at 2, JA____.

[5] To convert parts per billion ("ppb") to ppm, divide by 1,000. Thus, 60 ppb is 0.060 ppm.

Thus, just as the *Mississippi* Court suggested, "the contours and texture of scientific knowledge change[d]" as multiple new chamber studies "reveal[ed] that the 0.060 ppm level produces significant adverse decrements that simply cannot be attributed to normal variation in lung function." 744 F.3d at 1344, 1350.

Further, EPA had more than just the above-discussed new chamber studies examining respiratory effects of ozone exposure. CASAC praised an early draft of the ISA for "demonstrat[ing] that there is substantial new evidence since the EPA completed its 2006 Air Quality Criteria Document." EPA-HQ-ORD-2011-0050-0016 at 1, JA____; *accord id.* 2-3 (discussing how new evidence altered EPA's judgment about causal relationships between ozone exposure and various harmful health effects), JA____-__. Leading medical societies explained how the "significantly stronger scientific and medical evidence available" improved the "scientific and medical understanding of the mechanisms by which exposure to ambient ozone pollution harms human health." Dkt-3863 at 3-4, JA____-__; *accord, e.g., id.* 5-8 (discussing specific new studies about emergency room visits, lung function impairment, cardiovascular harms, reproductive and developmental harms, and mortality), JA____-__.

New epidemiological studies showed that when people in the real world were exposed to ozone—including at levels allowed by the 2008 standard—they had airway inflammation and respiratory symptoms. ISA 2-21, 2-25, 6-56 tbl.6-10,

6-82 to -87, 6-94 to -95, 6-112, 6-161 to -162, JA____, ____, ____, ____-__, ____-__, ____, ____-__; *see also* 80 FR 65,304/2-05/1, /3, JA____-__. A number of such studies also showed that when people were exposed to ozone at levels below the 2008 standard, they were admitted to the hospital, went to the emergency room, or otherwise sought professional medical treatment for respiratory problems. ISA 6-131 to -158, 6-162 to -163, JA____-__, ____-__; *see also* 80 FR 65,306/1-3, JA____. New epidemiological studies consistently linked ozone exposure to death from respiratory causes. ISA 1-6, 2-22, 6-158 to -159, 6-163, JA____, ____, ____-__, ____; *see also* 80 FR 65,306/3-07/1, JA____-__.

Animal and several new controlled human exposure studies suggested that ozone exposure "may lead to the induction and exacerbation of asthma," as well. ISA 6-162, JA____.

Looking at the relationship between ozone exposure and cardiovascular effects, including cardiovascular hospitalizations and emergency room visits, there were new controlled human exposure studies, *id.* 6-166 to -168, JA____-__; *see also* 80 FR 65,308/2, JA____, epidemiological studies, ISA 6-168 to -202, JA____-__; *see also* 80 FR 65,308/1-3, JA____, and animal toxicological studies, ISA 6-203 to -210, JA____-__; *see also* 80 FR 65,308/1-2, JA____. After evaluating all the evidence, old and new, from controlled human exposure, epidemiological, and animal studies, EPA concluded—for the first time—that

ozone likely causes cardiovascular harms and likely kills people. ISA 1-5 tbl.1-1, 1-7 to -8, 2-22, 2-29, 6-210 to -211, 6-261 to -264, JA____, ____-__, ____, ____, ____-__, ____-__; *see also* 80 FR 65,308/2-09/1, JA____-__. Thus, as CASAC and the nation's leading medical societies agreed, *see supra* p.11, Industry Petitioners are wrong that the science was effectively unchanged.

Contrary to State Petitioners' argument (at 50-53), EPA did not rely solely on the Schelegle study's results at 0.072 ppm in concluding that the 0.075 ppm 2008 standard was inadequate to protect public health. Though the study was important, the agency based that decision on a wealth of chamber and epidemiological studies (several discussed above), animal toxicological studies, CASAC's expert scientific judgment, and other factors, like the agency's risk and exposure assessments. 80 FR 65,343/2-47/1, JA____-__. The full record was not only adequate to support EPA's decision that the 2008 standard failed to protect health, but, as medical societies and public health and scientific experts overwhelmingly agreed, supported an even more protective standard than the one EPA adopted. For example, CASAC unanimously recommended EPA strengthen the health standard, and found that "there is substantial scientific certainty of a variety of adverse effects" at 0.070 ppm, a level that EPA's final standard allows to occur every day of every year. Dkt-0190 at 5, 8, JA____, ____; *see also id.* 6, JA____. The American Thoracic Society similarly said that ozone causes adverse

effects at the even lower level of 0.060 ppm. M.B. Rice *et al.*, *Scientific Evidence Supports Stronger Limits on Ozone*, 191 Am. J. Respiratory & Critical Care Med. 501, 501 (2015) ("Since 2006, much more evidence has accumulated that ozone exposures in the range of 60-75 ppb have adverse physiologic effects across the entire age spectrum, from infants to older adults."), JA____. Other leading medical societies, including the American Medical Association, American Academy of Pediatrics, and the American Heart Association, and EPA's Children's Health Protection Advisory Committee called for a 0.060 ppm standard. Dkt-3863 at 1, JA____; Dkt-2720 ex.4 at 2, JA____. The World Health Organization and other countries like Canada have even more protective clean air standards than the 2015 standards. Dkt-2720 at 59 tbl.3, JA____. State Petitioners give no reason why EPA's, CASAC's, the Thoracic Society's, and all these other bodies' judgments are irrational.

B. EPA Had to Establish a New Welfare Standard.

Industry Petitioners argue that the new evidence about the harms ozone causes on vegetation "simply 'strengthened' the prior evidence" and that EPA had an obligation to provide some additional explanation for establishing a different welfare standard than it did in 2008. Ind. Br. 40-41. As well as failing for the reasons EPA gives (at 75-77), *see also supra* pp.6-8 (*Mississippi* rejects premise that "strengthened" evidence does not justify stronger standard), Industry

Petitioners' argument fails because *Mississippi* expressly held that EPA's 2008 welfare standard was illegal and arbitrary because EPA failed to "specify a level of air quality…[that] is requisite to protect the public welfare." 744 F.3d at 1358-62 (quoting 42 U.S.C. § 7409(b)(2); alterations in original). Thus, even if the evidence in 2015 were unchanged from the evidence in 2008 (which Industry Petitioners concede is not the case), and even if a prior standard were legally a touchstone for rationality (an approach this Court has rejected), the prior welfare standard was unlawful and irrational, and thus cannot be an anchoring point for rational analysis.

II. HEALTH- AND WELFARE-PROTECTIVE NATIONAL AMBIENT AIR QUALITY STANDARDS MUST BE SET BASED SOLELY ON THE HEALTH AND WELFARE EFFECTS OF POLLUTANTS IN THE AMBIENT AIR.

It is well-established that the Act requires EPA to set health- and welfare-protective national ambient air quality standards for a pollutant based solely on the health and welfare effects caused by that pollutant in the ambient air, without regard to the sources of the pollutant or any costs of implementing the standards. *E.g.*, *Whitman*, 531 U.S. at 465, 469; *ATA I*, 175 F.3d at 1040-41, *aff'd in relevant part sub nom. Whitman*, 531 U.S. 457; *NRDC*, 902 F.2d at 972-73; *NRDC v. EPA*, 824 F.2d 1146, 1157, 1159 (D.C. Cir. 1987) (*en banc*); *API*, 665 F.2d at 1185; *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148-50 & n.39 (D.C. Cir. 1980).

Industry and State Petitioners' arguments about background ozone levels, *see* Ind. Br. 3-6, 22-31; State Br. 19-44, and consideration of non-air impacts, *see* Ind. Br. 31-36; *see also* State Br. 48-49, run afoul of this governing case law and the statute, and blatantly reprise arguments that this Court and the Supreme Court have already rejected. Their arguments have no more merit this time. Injecting cost and other non-health concerns into the standard-setting process would flout the plain language of the statute and severely undermine the effectiveness of the national ambient air quality standard program that Congress established as "the engine that drives nearly all of Title I of the [Act]" and that Congress enacted as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution." *Whitman*, 531 U.S. at 468; *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

A. The Act Bars EPA from Considering Background Air Pollution Levels and the Non-Air Impacts of Mitigating Air Pollution When It Sets Standards.

This Court has long rejected Petitioners' argument that EPA must consider "attainability"—an issue that encompasses background air pollution levels—when it sets national standards. In 1981, *API* expressly rejected Houston's argument that "because natural factors make attainment impossible," the 1979 ozone standard

was arbitrary.[6] 665 F.2d at 1185. Further, in that case, the American Petroleum Institute (a petitioner here) contended EPA wrongly failed to consider or docket comments about "natural organic emissions from vegetation," which the petitioner claimed "related to the issue of whether 'attainment of the proposed standards would be precluded in most areas of the nation by natural background levels of ozone resulting in part from natural hydrocarbon emissions.'" *Id.* 1190 (emphasis added). The Court rejected that contention, agreeing that "the question of attainability is not relevant to the setting of ambient air quality standards under the Clean Air Act." *Id.* As this Court later explained, "[i]t is only health effects relating to pollutants in the air that EPA may consider." *NRDC*, 902 F.2d at 973 (emphasis in original). The origins of the harmful ozone do not change those health effects. Thus, Petitioners' arguments here are foreclosed.

Petitioners' efforts to distinguish this binding case law are unavailing. State Petitioners assert (at 32-33) that because Houston is not a state, the (erroneous) argument that § 7407(a) requires that standards be achievable by measures a single state can take somehow could not have been addressed. They identify no legal or logical basis for this argument, nor is there any. Similarly, Industry Petitioners contend (at 26-27) that *API* "decided only that Houston's particular circumstances

[6] As well as being legally lacking, the argument was also factually wrong: as discussed *infra* p.27, EPA recently found that Houston attained the 1979 standard.

were not a basis for vacating a national standard," but that because now purportedly "numerous areas" have similar circumstances, *but see* Brief for Respondent EPA ("EPA Br.") 117, *API* does not control.

Industry Petitioners doubly misread *API*. First, as State Petitioners acknowledge (at 32), the Court held both that "[a]ttainability and technological feasibility are not relevant considerations in the promulgation of national ambient air quality standards" and that, "[f]urther, the agency need not tailor national regulations to fit each region or locale." *API*, 665 F.2d at 1185. Second, the Court "also note[d] that…Congress is aware that some regions are having difficulty in meeting the national standards," and that, as a solution, Congress enacted Part D of Title I of the Act, which provides requirements for nonattainment areas. *Id.* 1185-86 (emphasis added; citing 42 U.S.C. §§ 7501 *et seq.* (Supp. III 1979)); *see also id.* 1190 (holding that issue of whether "natural background levels of ozone" prevent attainment "in most areas of the nation" is not relevant to establishment of national standards (emphasis added)).

When areas continued to have problems attaining the ozone standard, Congress again provided a comprehensive solution: Subpart 2 of Part D. *See South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 886-88 (D.C. Cir. 2006), *amended in other part*, 489 F.3d 1245 (D.C. Cir. 2007). Subpart 2 classifies all ozone nonattainment areas based on how badly out of attainment they are and

gives the worst-polluted areas more time to come into attainment, while requiring them to implement progressively more stringent controls. *Id.* 887-88. Areas that fail to attain timely are "bumped up" to the next higher classification, providing them more time. *Id.* Congress further balanced health protection and attainability concerns when it carefully chose circumstances in which isolated "rural transport" areas can escape the tougher controls and in which states can escape sanctions when they cannot create a plan to timely come into attainment. 42 U.S.C. § 7511a(h), (j). Similarly, Congress enacted measures to provide relief for areas that truly cannot attain due to emissions from outside the country or exceptional events. *Id.* §§ 7509a(a)-(b), 7619(b). Congress also required states to reduce pollution from within their borders that causes or significantly contributes to air pollution problems in other states, and gave states tools to seek to abate interstate pollution problems. *Id.* §§ 7410(a)(2)(D)(i)(I), 7426, 7506a; *see also id.* § 7511c (creating ground-rules for "Ozone transport regions" to address ozone pollution resulting from out-of-state emissions). Thus, contrary to Industry Petitioners' argument, Congress provided the solution for areas that have trouble attaining ozone standards, and that solution does not include allowing EPA to alter the purely health- and welfare-protective basis the Act requires for setting the

standards. That Petitioners dislike Congress's choices[7] does not make the ozone standard unlawful or arbitrary.

Nor does Industry Petitioners' reliance (at 27-28) on dicta from a portion of *ATA I* that was reversed by the Supreme Court and on statements from EPA's lawyers before the Supreme Court in 2000 help them overcome *API*. That portion of *ATA I* addressed nondelegation, speculated about a statutory reading, *see* 175 F.3d at 1036, and was reversed, *Whitman*, 531 U.S. at 472-74. Further, it is well-established that an agency's lawyers cannot themselves adopt a statutory interpretation as justification for administrative action—the agency itself must. *E.g.*, *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015) ("*Chenery* principle applies to *Chevron* statutory analysis"); *Verizon v. FCC*, 740 F.3d 623, 658-59 (D.C. Cir. 2014). In any event, such a reading of the Act would be unlawful, as confirmed by this Court's precedent.

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[7] *See* State Br. 33-44 (complaining about Clean Air Act provisions Congress enacted to address pollution caused by "exceptional events," pollution in "rural transport areas," and pollution originating abroad); *see also* Ind. Br. 30-31 (adopting State Petitioners' argument). State Petitioners discuss (at 4-5) an area in New Mexico with ozone pollution they say stems from Texas or Mexico, but they fail to discuss several of the Act's provisions that offer New Mexico (and the area's residents) relief from such air pollution. *See, e.g.*, 42 U.S.C. §§ 7410(a)(2)(D)(i)(I) (interstate transport), 7426 (same), 7509a(a)-(b) (international transport), 7511a(j) (when there is a "multi-state" ozone nonattainment area, state can escape sanctions for inability to demonstrate attainment that if state shows other state's failure to implement measures was "but for" cause of inability).

Still seeking to escape *API*'s controlling holding, Industry Petitioners also wrongly rely on *American Trucking Associations v. EPA*, 283 F.3d 355, 379 (D.C. Cir. 2002) ("*ATA III*"). Ind. Br. 27-28; *see also* State Br. 46. Given the Clean Air Act and the preexisting controlling decisions from this Court and the Supreme Court, that case cannot and does not say EPA can set the underprotective standard Petitioners seek because of concerns about background ozone levels. *ATA III* also only discusses natural, "nonanthropogenic" background ozone, *see* 283 F.3d at 377, whereas Petitioners include as "background" ozone resulting from foreign countries—or sometimes from other U.S. states. *See, e.g.*, Ind. Br. 23; State Br. 4-5, 10.

Moreover, the weight of *ATA III*'s statement about background ozone's relevance to health standards is questionable for three reasons. First, the Court found the "[m]ost convincing" reason for EPA's rejection of a more protective 0.07 ppm standard was not consideration of background, but the lack of "any human clinical studies" below 0.08 ppm. *ATA III*, 283 F.3d at 379 (emphasis in original). Second, no party argued EPA irrationally or illegally rejected that more protective standard. Contrary to Petitioners' incorrect assertions, State Br. 46; Ind. Br. 8, the Court resolved no challenge that the ozone standard was insufficiently protective. *See, e.g.*, *ATA III*, 283 F.3d at 362 (describing how "Environmental Petitioners" challenged only the particulate matter standards as "too lenient").

Third, no party in that case appears to have contested whether EPA could consider background ozone levels. The reasons for not adopting a 0.07 ppm standard and the permissibility of considering background ozone were accordingly not squarely at issue. *See Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006) ("For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated.").[8]

Thus, contrary to State Petitioners' argument (at 30-31) that EPA misread *ATA III*, at most, *ATA III* stands only for the proposition that EPA may consider a potential standard's relative proximity to natural background levels in some areas, but only when EPA is considering alternative potential standards that satisfy the Act's requirement that the standard protect all populations against adverse effects. Because the 2008 standard does not satisfy that statutory requirement, that potential reading of *ATA III* simply is not relevant here. To the extent *ATA III*, 283 F.3d at 379, is inconsistent with *API*, *API* controls because it is the older case. *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1045 (D.C. Cir. 2011)

[8] *ATA III*'s discussion of background particulate matter levels and their impacts on visibility is inapposite because, as the Court explained, Congress created a separate program to mitigate visibility impacts. 283 F.3d at 375.

("when a conflict exists within our own precedent, we are bound by the earlier decision.").

Fundamentally, Petitioners' arguments about attainability would make the health-protective national standards the Clean Air Act calls for into standards that are not health-driven, but instead lowest-common-denominator standards: the lowest level that all areas can attain, even if other areas can do better and even if widespread adverse health effects persist throughout the nation. That is antithetical to the foundational principle of the Clean Air Act's national ambient air quality standards: Congress put health protection first. *See, e.g.*, *American Lung Ass'n v. EPA*, 134 F.3d 388, 388-89 (D.C. Cir. 1998); *Lead Indus.*, 647 F.2d at 1149. The Supreme Court explained that Congress saw its "first responsibility" as "not the making of technological or economic judgments or even to be limited by what is or appears to be technologically or economically feasible. Our responsibility is to establish what the public interest requires to protect the health of persons." *Union Elec.*, 427 U.S. at 258 (quoting 116 Cong. Rec. 32,901-02 (1970) (remarks of Sen. Muskie)) (emphasis added); *see also Lead Indus.*, 647 F.2d at 1149 n.37 (relying on *Union Electric* to support holding that § 7409 bars consideration of costs and feasibility in setting standards). Congress thus chose to have the Clean Air Act drive technological development to protect public health against air pollution. *E.g.*, *Lead Indus.*, 647 F.2d at 1149; *see also* Brief of State Amici ("State Amici Br.") 9-

12 (describing how "new and innovative control measures" have reduced emissions).

Thus, in §§ 7408-7409, Congress expressly directed EPA how to establish health- and welfare-protective national ambient air quality standards—by putting health and welfare first everywhere in the nation. Petitioners' claim that § 7407(a) "alter[s] the fundamental details" of the standard-setting process by requiring that standards be attainable by the lowest-common-denominator area is unsupportable: Congress "does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468; *see* EPA Br. 114-16. Further, Petitioners' claim that standards must be attainable by the lowest-common-denominator area's state cannot be squared with Congress's provision of both a detailed, comprehensive regulatory program to bring areas with harmful ozone levels into attainment with the ozone standard and carefully crafted, limited exemptions from some pollution-control requirements when an area can show that its ozone pollution stems from uncontrollable external factors, be they natural, foreign, or domestic.[9]

[9] Industry Petitioners claim (at 34 & fig.1) the ozone standard "will dramatically increase the number of areas designated nonattainment for the ozone NAAQS," but their cited support relies on a "spatial interpolation" method for estimating ozone levels that EPA has never used and has never suggested it will use. *See* RTC 301 ("the fundamental basis for designating an area as nonattainment for the [ozone] NAAQS is the presence of one or more…monitors with data showing violations of the NAAQS."), JA____. Air pollution is a serious problem, but Industry exaggerates.

Industry Petitioners rely heavily (at 31-33) on Justice Breyer's solo concurrence in *Whitman*, but that non-precedential opinion provides them no support. Justice Breyer agreed that technical and economic feasibility—the types of considerations Petitioners claim EPA must address—were not permissible considerations in EPA's standard-setting. *Whitman*, 531 U.S. at 490-92 (Breyer, J., concurring). He simply said that standards need not eliminate all risk, *id.* 494-95, and that EPA "may" consider "comparative health risks," *id.* 495. As an example of such risks, he gave the requirement to consider the health benefits of ozone in the ambient air—a far cry from the indirect harms Industry claims will result from meeting the standards. *Id.* And, here, contrary to Industry's claim (at 28-29), the known adverse effects of ozone, not merely risks, required EPA to make the ozone standards more protective. *See supra* pp.7-14 (discussing science).

Petitioners' claims of economic harms from more protective standards are not only barred by case law, they are also wrong. History shows the Clean Air Act has worked in substantially cutting air pollution without harming the economy. Pollution has fallen and economic growth has continued. *See, e.g.*, Dkt-2720 at 274-75, JA____-__; Dkt-1869 at 3 (summarizing existing and projected benefits of Clean Air Act), JA____.[10] The Clean Air Act prevents illness and death. *See* Dkt-

[10] S*ee also* https://gispub.epa.gov/air/trendsreport/2016/#econ_growth_cleaner_air_ (from

footnote continues on next page…

1422 at 3 (EPA projects that by 2020, just the 1990 Amendments to the Act will prevent 230,000 deaths and 2.4 million asthma attacks), JA____.[11] The Clean Air Act thus substantially benefits the country. *See, e.g.*, Dkt-1422 at 3 (discussing past ($21 trillion) and projected future ($2 trillion) net monetized benefits of Clean Air Act), JA____.[12] History has proven "wrong again and again" the "forecasts of economic doom" from stronger clean air protections. Dkt-2720 at 274 n.756 (quoting Lisa P. Jackson, Admin'r, EPA, Remarks on the 40th Anniversary of the Clean Air Act, As Prepared (Sept. 14, 2010), https://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/7769a6b1f0a5bc9a8525779e005ade13!OpenDocument, JA____-__), JA____; *accord* Dkt-1422 at 2-3 (describing past "hyperbolic language" that was not borne out in reality), JA____-__; *see also* State Amici Br. 9-13 (describing ways states

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…footnote continued from previous page
1970-2014, emissions of the six pollutants most directly limited by national ambient air quality standards down 70%, and gross domestic product up nearly 250%), JA____.

[11] *See also* https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act-1990-2020-second-prospective-study (describing results of peer-reviewed study of Clean Air Act's benefits and costs), JA____.

[12] *See also* https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act#sect812studies (linking to multiple studies of costs and benefits of Clean Air Act).

have secured reductions of ozone-forming pollutants at significantly lower cost than initially expected).

In specifically arguing that it is impossible for certain areas to come into attainment, the doomsayers have a record of crying wolf, too. Though Houston claimed in *API* that natural factors would keep it from ever attaining the 1979 ozone standard, EPA recently found that Houston has in fact attained that standard. 80 FR 63,429, 63,430/1 (Oct. 20, 2015), JA____; 80 FR 49,970, 49,972/1-3 (Aug. 18, 2015), JA____.

In any event, as EPA explains (at 29-33, 100-05), the effect of background ozone levels on attainability is overstated.[13] EPA explained that, "at most," "there are infrequent instances, almost exclusively in rural locations in the intermountain west, where the revised NAAQS might be exceeded, in large part, but not exclusively, due to levels of background [ozone]." RTC 342, JA____. Congress provided realistic, workable relief for such instances, *see supra* pp.18-20; EPA Br. 105-11; State Amici Br. 17-20, but declined to authorize willy-nilly exemptions that would undermine health protection. Further, EPA provided comprehensive responses to the technical arguments Petitioners press here, including an analysis

[13] EPA understates the level of overstatement. Though EPA says (at, *e.g.*, 101) areas can have ozone levels above 0.070 ppm three times annually without violating the standards, in reality, areas can exceed 0.070 ppm dozens of times in a year and still attain the standards. *See* Health Opening Br. 20-22.

showing that anthropogenic domestic emissions, rather than the types of emissions Petitioners mostly focus on, drive ozone levels on high ozone days. RTC 345-46, JA____-__; *see also id.* 342-49 (addressing other comments), JA____-__. Petitioners do not and cannot provide any lawful or rational basis under the Clean Air Act to justify adoption of a standard that endangers the health of the public, particularly those most at risk from ozone pollution, based on theoretical claims of isolated problems with attainability.

B. Petitioners Are Recycling Old Arguments About Costs and Nondelegation That the Supreme Court Rejected in *Whitman*.

The Supreme Court in *Whitman* has already squarely rejected Petitioners' arguments that the Act requires EPA to consider "the overall adverse economic, social, and energy impacts of the standards," Ind. Br. 31-36. The Court rejected the argument that implementation cost-caused effects could even be considered in setting standards because "[t]hat factor is both so indirectly related to public health and so full of potential for canceling the conclusions drawn from direct health effects that it would surely have been expressly mentioned in §§ [74]08 and [74]09 had Congress meant it to be considered." *Whitman*, 531 U.S. at 469 (emphasis in original); *see also id.* 466-67 (though implementation of standards "might produce health losses sufficient to offset the health gains achieved in cleaning the air," Congress accounted for this through other Clean Air Act provisions); Brief of the

Institute for Policy Integrity as Amicus Curiae 27-30 (multiple studies cast doubt on notion that regulatory costs negatively affect health).

Likewise, *Whitman* expressly rejected State Petitioners' arguments (at 44-50) that § 7409(d) (or EPA's interpretation thereof) unconstitutionally lacks an intelligible principle. The Court held that "[w]hether the statute delegates legislative power is a question for the courts," so the agency's interpretation of the Act cannot raise nondelegation concerns, and further held that § 7409 "fits comfortably within the scope of discretion permitted by" the Court's nondelegation precedent. *Whitman*, 531 U.S. at 473, 476. Neither set of Petitioners identifies any valid basis for departing from those clear Supreme Court holdings about costs and nondelegation.[14]

Review of the briefing in *Whitman* confirms that EPA is correct (at 120) that Industry Petitioners here merely rename the "costs" ruled out in *Whitman* as "overall adverse…impacts." Industry parties themselves said in *Whitman* that they were there arguing that EPA must consider precisely the types of impacts Industry Petitioners focus on here: "Congress intended that EPA exercise its public health risk management judgment based on consideration of the **overall impact of its decision on society**." Appalachian Power Co. Resp. Br. ("Power Co. *Whitman*

[14] Neither argues that *Whitman* was wrongly decided, and any such argument raised for the first time in their reply brief would be waived.

Resp.") 34, *Whitman v. Am. Trucking Ass'ns*, No. 99-1257 (U.S.) (emphasis added), JA____. Indeed, various parties argued to the Supreme Court that EPA must consider broad impacts beyond just the "costs of implementation." *See, e.g.*, Appalachian Power Co. Resp. Br. in Support of Cross-Pet'rs ("Power Co. *Whitman* Pet. Br.") 2-5, 22-25, 30-31, *Am. Trucking Ass'ns v. Whitman*, No. 99-1426 (U.S.) (arguing that EPA must consider "broad impacts" or "indirect health, environmental and economic effects"), JA____-__, ____-__, ____-__; ATA Cross-Pet'rs Br. ("ATA *Whitman* Pet. Br.") 26-28, *Am. Trucking*, No. 99-1426 (U.S.) (summarizing argument and characterizing D.C. Circuit case law), JA____-__; *id.* 37-39 (arguing that EPA must consider "personal comfort and well-being" in setting primary standards), JA____-__; Ohio Br. in Support of Cross-Pet'rs ("Ohio *Whitman* Pet. Br.") 2, 14-16, *Am. Trucking*, No. 99-1426 (U.S.) (arguing that EPA must consider "cost or other factors" and "social, economic and environmental costs"), JA____, ____-__; ATA Reply Br. ("ATA *Whitman* Reply") 6-8, *Am. Trucking*, No. 99-1426 (U.S.) (arguing that EPA must "consider competing factors including costs" (emphasis added)), JA____-__; Appalachian Power Co. Reply Br. ("Power Co. *Whitman* Reply") 20 & n.45, *Am. Trucking*, No. 99-1426 (U.S.) (arguing that EPA "must address…the cost to society (e.g., health, environmental or economic costs)" and "overall costs to society"), JA____. The Court found that the "text of § [74]09(b), interpreted in its statutory and historical context and with

appreciation for its importance to the [Act] as a whole," foreclosed all these arguments about costs. *Whitman*, 531 U.S. at 471. Thus, those arguments cannot be successfully resuscitated here.

Whitman also saw no merit in the argument, resurrected here by Industry Petitioners (at 33), that § 7409(d)(1)'s requirement that EPA revise the standards "as may be appropriate" mandates EPA to "take into account the adverse socioeconomic and energy impacts of a standard." In *Whitman*, industry petitioners similarly argued that this same language, in the same provision, required EPA to take into account "impacts resulting from alternative attainment strategies," including "the 'public health, welfare, social, economic, or energy effects which may result.'" Power Co. *Whitman* Pet. Br. 39-42, JA____-__. These arguments made no headway with the Court. Thus, examination of the briefs in *Whitman* confirms that Industry Petitioners' arguments here were raised, and the Supreme Court found them wanting.

Industry Petitioners seek (at 32-33 n.15) to distinguish *Whitman* as not addressing "broader impacts" of standards, just the "costs of implementation." Even if they were correct, this is rather like a child being denied a piece of candy and instead claiming the right to the whole candy store (but perhaps not that single piece of candy). As EPA explains (at 120-26) and as explained above, Industry

Petitioners' argument is meritless in the face of the Supreme Court and D.C. Circuit's holdings and the Act itself.

For their part, State Petitioners baldly seek to relitigate *Whitman*'s holding about nondelegation. *See* State Br. 50 (calling for "a reevaluation of the constitutionality of Section [74]09(d)"). Again, review of the *Whitman* briefs confirms their arguments were raised and rejected. Here, State Petitioners claim (at 18, 46, 49) that EPA must identify a "principled boundar[y] on how low a NAAQS should go," and that such considerations as achievability, "explaining any departures from prior standards," or considering costs in the guise of health would provide such a constraint and keep the Act constitutional. In *Whitman*, industry and its allies also argued that such a constraint was legally necessary and that cost-benefit analysis would provide it and keep the Act constitutional. *See, e.g.*, ATA Resp. Br. ("ATA *Whitman* Resp.") 7-14, 21-25, *Whitman*, No. 99-1257 (U.S.), JA____-__, ____-__; Power Co. *Whitman* Resp. 2 n.2, JA____; ATA *Whitman* Pet. Br. 1, 25-26, 50, JA____, ____-__, ____; Ohio *Whitman* Pet. Br. 3-5, 7, JA____-__, ____; ATA *Whitman* Reply 3, 7-8, JA____, ____-__; *see also ATA I*, 175 F.3d at 1034 (holding Act unconstitutional because EPA purportedly failed to give "any determinate criteria for drawing lines"), *rev'd in relevant part sub nom. Whitman*, 531 U.S. 457. As well as rejecting the argument that the nondelegation doctrine relates in any way to how EPA interprets the Act, *see supra* p.29, the

Whitman Court also expressly rejected the argument that the Act needed to "provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'" 531 U.S. at 475 (quoting *ATA I*, 175 F.3d at 1034; alteration in original).

Even more egregiously, State Petitioners make the same argument that the Act's text requires EPA to consider more than just direct health effects of air pollution, relying on exactly the same case and exactly the same "authoritative" definition of "public health" that industry relied on in *Whitman*. *Compare* State Br. 48-49 (in arguing that EPA wrongly ignored costs, citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), and relying on "authoritative public health treatise" by "Winslow," published in 1951, for definition of "public health"), and *id.* at xii (identifying Winslow's publication), *with, e.g.*, ATA *Whitman* Pet. Br. 33-34 (in arguing that EPA must consider costs, citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), and relying on "authoritative public health definition" by "Winslow," published in 1951), JA____-__, *and* ATA *Whitman* Resp. 21 (citing ATA *Whitman* Pet. Br. 33-37, JA____-__, in arguing EPA must consider "competing factors including costs"), JA____. The *Whitman* Court saw no merit in that argument, finding that such a definition made no sense in context; the only meaning of public health that made sense was "the primary definition of the term: the health of the public." 531 U.S. at 465-66.

Since 2001, the Constitution has not changed. The Act has not changed in relevant part. The costs and nondelegation arguments have not changed, either. The result, thus, does not change: the Act bars consideration of costs, however Petitioners dress them up, and the Act's standard-setting provisions are constitutional.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

DATED: August 17, 2016

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing **Proof Brief of Health and Environmental Respondent-Intervenors** contains 7,368 words, as counted by counsel's word processing system, and thus complies with the applicable word limit established by the Court.

DATED: August 17, 2016

/s/Seth L. Johnson
Seth L. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2016, I have served the foregoing **Proof Brief of Health and Environmental Respondent-Intervenors** on all registered counsel through the Court's electronic filing system (ECF).

/s/Seth L. Johnson
Seth L. Johnson

STATUTORY ADDENDUM

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Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
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Part A. Air Quality and Emissions Limitations (Refs & Annos)

42 U.S.C.A. § 7426

§ 7426. Interstate pollution abatement

Currentness

(a) Written notice to all nearby States

Each applicable implementation plan shall--

(1) require each major proposed new (or modified) source--

(A) subject to part C of this subchapter (relating to significant deterioration of air quality) or

(B) which may significantly contribute to levels of air pollution in excess of the national ambient air quality standards in any air quality control region outside the State in which such source intends to locate (or make such modification),

to provide written notice to all nearby States the air pollution levels of which may be affected by such source at least sixty days prior to the date on which commencement of construction is to be permitted by the State providing notice, and

(2) identify all major existing stationary sources which may have the impact described in paragraph (1) with respect to new or modified sources and provide notice to all nearby States of the identity of such sources not later than three months after August 7, 1977.

(b) Petition for finding that major sources emit or would emit prohibited air pollutants

Any State or political subdivision may petition the Administrator for a finding that any major source or group of stationary sources emits or would emit any air pollutant in violation of the prohibition of section 7410(a)(2)(D)(ii) of this title or this section. Within 60 days after receipt of any petition under this subsection and after public hearing, the Administrator shall make such a finding or deny the petition.

(c) Violations; allowable continued operation

Notwithstanding any permit which may have been granted by the State in which the source is located (or intends to locate), it shall be a violation of this section and the applicable implementation plan in such State--

(1) for any major proposed new (or modified) source with respect to which a finding has been made under subsection (b) of this section to be constructed or to operate in violation of the prohibition of section 7410(a)(2)(D)(ii) of this title or this section, or

(2) for any major existing source to operate more than three months after such finding has been made with respect to it.

The Administrator may permit the continued operation of a source referred to in paragraph (2) beyond the expiration of such three-month period if such source complies with such emission limitations and compliance schedules (containing increments of progress) as may be provided by the Administrator to bring about compliance with the requirements contained in section 7410(a)(2)(D)(ii) of this title or this section as expeditiously as practicable, but in no case later than three years after the date of such finding. Nothing in the preceding sentence shall be construed to preclude any such source from being eligible for an enforcement order under section 7413(d) of this title after the expiration of such period during which the Administrator has permitted continuous operation.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 126, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 123, 91 Stat. 724; amended Nov. 16, 1977, Pub.L. 95-190, § 14(a)(39), 91 Stat. 1401; Nov. 15, 1990, Pub.L. 101-549, Title I, § 109(a), 104 Stat. 2469.)

Notes of Decisions (13)

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Current through P.L. 114-219.

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United States Code Annotated
Title 42. The Public Health and Welfare
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Part D. Plan Requirements for Nonattainment Areas
Subpart 1. Nonattainment Areas in General (Refs & Annos)

42 U.S.C.A. § 7506a

§ 7506a. Interstate transport commissions

Currentness

(a) Authority to establish interstate transport regions

Whenever, on the Administrator's own motion or by petition from the Governor of any State, the Administrator has reason to believe that the interstate transport of air pollutants from one or more States contributes significantly to a violation of a national ambient air quality standard in one or more other States, the Administrator may establish, by rule, a transport region for such pollutant that includes such States. The Administrator, on the Administrator's own motion or upon petition from the Governor of any State, or upon the recommendation of a transport commission established under subsection (b) of this section, may--

(1) add any State or portion of a State to any region established under this subsection whenever the Administrator has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the standard in the transport region, or

(2) remove any State or portion of a State from the region whenever the Administrator has reason to believe that the control of emissions in that State or portion of the State pursuant to this section will not significantly contribute to the attainment of the standard in any area in the region.

The Administrator shall approve or disapprove any such petition or recommendation within 18 months of its receipt. The Administrator shall establish appropriate proceedings for public participation regarding such petitions and motions, including notice and comment.

(b) Transport commissions

(1) Establishment

Whenever the Administrator establishes a transport region under subsection (a) of this section, the Administrator shall establish a transport commission comprised of (at a minimum) each of the following members:

(A) The Governor of each State in the region or the designee of each such Governor.

(B) The Administrator or the Administrator's designee.

(C) The Regional Administrator (or the Administrator's designee) for each Regional Office for each Environmental Protection Agency Region affected by the transport region concerned.

(D) An air pollution control official representing each State in the region, appointed by the Governor.

Decisions of, and recommendations and requests to, the Administrator by each transport commission may be made only by a majority vote of all members other than the Administrator and the Regional Administrators (or designees thereof).

(2) Recommendations

The transport commission shall assess the degree of interstate transport of the pollutant or precursors to the pollutant throughout the transport region, assess strategies for mitigating the interstate pollution, and recommend to the Administrator such measures as the Commission determines to be necessary to ensure that the plans for the relevant States meet the requirements of section 7410(a)(2)(D) of this title. Such commission shall not be subject to the provisions of the Federal Advisory Committee Act (5 U.S.C. App.).

(c) Commission requests

A transport commission established under subsection (b) of this section may request the Administrator to issue a finding under section 7410(k)(5) of this title that the implementation plan for one or more of the States in the transport region is substantially inadequate to meet the requirements of section 7410(a)(2)(D) of this title. The Administrator shall approve, disapprove, or partially approve and partially disapprove such a request within 18 months of its receipt and, to the extent the Administrator approves such request, issue the finding under section 7410(k)(5) of this title at the time of such approval. In acting on such request, the Administrator shall provide an opportunity for public participation and shall address each specific recommendation made by the commission. Approval or disapproval of such a request shall constitute final agency action within the meaning of section 7607(b) of this title.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 176A, as added Nov. 15, 1990, Pub.L. 101-549, Title I, § 102(f)(1), 104 Stat. 2419.)

Notes of Decisions (1)

42 U.S.C.A. § 7506a, 42 USCA § 7506a
Current through P.L. 114-219.

End of Document

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part D. Plan Requirements for Nonattainment Areas
Subpart 2. Additional Provisions for Ozone Nonattainment Areas (Refs & Annos)

42 U.S.C.A. § 7511c

§ 7511c. Control of interstate ozone air pollution

Currentness

(a) Ozone transport regions

A single transport region for ozone (within the meaning of section 7506a(a) of this title), comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the Consolidated Metropolitan Statistical Area that includes the District of Columbia, is hereby established by operation of law. The provisions of section 7506a(a)(1) and (2) of this title shall apply with respect to the transport region established under this section and any other transport region established for ozone, except to the extent inconsistent with the provisions of this section. The Administrator shall convene the commission required (under section 7506a(b) of this title) as a result of the establishment of such region within 6 months of November 15, 1990.

(b) Plan provisions for States in ozone transport regions

(1) In accordance with section 7410 of this title, not later than 2 years after November 15, 1990 (or 9 months after the subsequent inclusion of a State in a transport region established for ozone), each State included within a transport region established for ozone shall submit a State implementation plan or revision thereof to the Administrator which requires the following--

(A) that each area in such State that is in an ozone transport region, and that is a metropolitan statistical area or part thereof with a population of 100,000 or more comply with the provisions of section 7511a(c)(2)(A) of this title (pertaining to enhanced vehicle inspection and maintenance programs); and

(B) implementation of reasonably available control technology with respect to all sources of volatile organic compounds in the State covered by a control techniques guideline issued before or after November 15, 1990.

(2) Within 3 years after November 15, 1990, the Administrator shall complete a study identifying control measures capable of achieving emission reductions comparable to those achievable through vehicle refueling controls contained in section 7511a(b)(3) of this title, and such measures or such vehicle refueling controls shall be implemented in accordance with the provisions of this section. Notwithstanding other deadlines in this section, the applicable implementation plan shall be revised to reflect such measures within 1 year of completion of the study. For purposes of this section any stationary source that emits or has the potential to emit at least 50 tons per year of volatile organic compounds shall

be considered a major stationary source and subject to the requirements which would be applicable to major stationary sources if the area were classified as a Moderate nonattainment area.

(c) Additional control measures

(1) Recommendations

Upon petition of any State within a transport region established for ozone, and based on a majority vote of the Governors on the Commission [1] (or their designees), the Commission [1] may, after notice and opportunity for public comment, develop recommendations for additional control measures to be applied within all or a part of such transport region if the commission determines such measures are necessary to bring any area in such region into attainment by the dates provided by this subpart. The commission shall transmit such recommendations to the Administrator.

(2) Notice and review

Whenever the Administrator receives recommendations prepared by a commission pursuant to paragraph (1) (the date of receipt of which shall hereinafter in this section be referred to as the "receipt date"), the Administrator shall--

(A) immediately publish in the Federal Register a notice stating that the recommendations are available and provide an opportunity for public hearing within 90 days beginning on the receipt date; and

(B) commence a review of the recommendations to determine whether the control measures in the recommendations are necessary to bring any area in such region into attainment by the dates provided by this subpart and are otherwise consistent with this chapter.

(3) Consultation

In undertaking the review required under paragraph (2)(B), the Administrator shall consult with members of the commission of the affected States and shall take into account the data, views, and comments received pursuant to paragraph (2)(A).

(4) Approval and disapproval

Within 9 months after the receipt date, the Administrator shall (A) determine whether to approve, disapprove, or partially disapprove and partially approve the recommendations; (B) notify the commission in writing of such approval, disapproval, or partial disapproval; and (C) publish such determination in the Federal Register. If the Administrator disapproves or partially disapproves the recommendations, the Administrator shall specify--

(i) why any disapproved additional control measures are not necessary to bring any area in such region into attainment by the dates provided by this subpart or are otherwise not consistent with the [2] chapter; and

(ii) recommendations concerning equal or more effective actions that could be taken by the commission to conform the disapproved portion of the recommendations to the requirements of this section.

(5) Finding

Upon approval or partial approval of recommendations submitted by a commission, the Administrator shall issue to each State which is included in the transport region and to which a requirement of the approved plan applies, a finding under section 7410(k)(5) of this title that the implementation plan for such State is inadequate to meet the requirements of section 7410(a)(2)(D) of this title. Such finding shall require each such State to revise its implementation plan to include the approved additional control measures within one year after the finding is issued.

(d) Best available air quality monitoring and modeling

For purposes of this section, not later than 6 months after November 15, 1990, the Administrator shall promulgate criteria for purposes of determining the contribution of sources in one area to concentrations of ozone in another area which is a nonattainment area for ozone. Such criteria shall require that the best available air quality monitoring and modeling techniques be used for purposes of making such determinations.

CREDIT(S)

(July 14, 1955, c. 360, Title I, § 184, as added Nov. 15, 1990, Pub.L. 101-549, Title I, § 103, 104 Stat. 2448.)

Notes of Decisions (1)

Footnotes

1 So in original. Probably should not be capitalized.

2 So in original. Probably should be “this”.

42 U.S.C.A. § 7511c, 42 USCA § 7511c

Current through P.L. 114-219.

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