ORAL ARGUMENT HELD ON DECEMBER 16, 2024

Case No. 24-1050 and Consolidated Cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

COMMONWEALTH OF KENTUCKY, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petitions for Review of Action by Environmental Protection Agency

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RESPONDENTS' MOTION FOR VACATUR

ADAM R.F. GUSTAFSON
Principal Deputy Assistant Attorney General

Of Counsel:
ISABELLA SMITH
U.S. Environmental Protection Agency
Office of General Counsel

ROBERT N. STANDER
Deputy Assistant Attorney General

SARAH IZFAR
ZOE B. PALENIK
Trial Attorneys
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, DC 20044
(202) 532-3050
Sarah.izfar@usdoj.gov

Counsel for Respondents

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GLOSSARY

Act	Clean Air Act
EPA	United States Environmental Protection Agency
$\mu g/m^3$	Micrograms per cubic meter
NAAQS or standard	National Ambient Air Quality Standard
$PM_{2.5}$	Fine particulate matter (particles with a diameter less than 2.5 micrometers)
PM_{10}	Coarse particulate matter (particles with a diameter less than 10 micrometers)
RTC	Response to Comments
Rule	Reconsideration of the National Ambient Air Quality Standards for Particulate Matter," 89 Fed. Reg. 16202 (Mar. 6, 2024)

INTRODUCTION

In March 2024, for the first time in nearly fifty years, EPA finalized a purported "reconsideration" of a national ambient air quality standard (NAAQS or standard), a central component of the Clean Air Act. It did so based on a novel interpretation of the statute and without the "thorough review" of the underlying air quality criteria and related standards required by the Act. *See* "Reconsideration of the National Ambient Air Quality Standards for Particulate Matter," 89 Fed. Reg. 16202 (Mar. 6, 2024) (Rule). EPA announced its intent to proceed with this regulatory shortcut only months after it had completed a thorough review of the air quality criteria and NAAQS for particulate matter. The result was an unlawful tightening of the annual standard for fine particulate matter ($PM_{2.5}$) from 12.0 $\mu g/m^3$ to 9.0 $\mu g/m^3$, without the rigorous, stepwise process that Congress required. EPA now confesses error and urges this Court to vacate the Rule before the area designation deadline of February 7, 2026.

For decades, EPA has interpreted section 109(d)(1) of the Act to require a thorough review of all aspects of the air quality criteria and related standards before revising a NAAQS. *See* Declaration of Aaron Szabo ¶¶ 9-11, 14-15, 17-21, Ex. A. Until 2024, each time EPA has revised a particulate matter standard it has conducted a thorough review of the relevant air quality criteria and related standards for the relevant pollutant. *Id*.

The Rule took a new approach, asserting for the first time in a final rule that EPA may partially "reconsider" a NAAQS outside of a thorough review by "supplementing" the prior review with a limited selection of additional studies and revising the NAAQS on that basis alone. *Id*. ¶¶ 36-38. EPA conceded that this limited analysis was not a thorough review. *Id*.

EPA also took the position that, in deciding whether to revise a NAAQS on a voluntary basis outside the thorough review process, it could not consider the costs associated with its discretionary action. The result was a standard, considered in isolation, that imposed extraordinary costs without the scientific rigor Congress required before imposing such costs in the ordinary course. *Id*. ¶ 26.

In this litigation, EPA initially defended the Rule, arguing that the second sentence of section 109(d)(1) independently authorizes EPA to revise a NAAQS at any time without first initiating and completing the thorough review required under the first sentence of section 109(d)(1). At oral argument, however, the panel proposed a different source of standalone revision authority, located in section 109(b). *See* 42 U.S.C. § 7409(b), (d). That provision was not the basis asserted in the Rule, and EPA has never attempted to bypass section 109(d)(1) by relying solely on section 109(b). Szabo Decl. ¶ 40. To view section 109(b) that way

contradicts decades of agency practice and improperly reads section 109(d)'s requirements out of the statute.

EPA has concluded that the position it advanced earlier is erroneous. The best reading of section 109(d)(1) is that EPA must complete a thorough review of the underlying criteria and corresponding standards before deciding to revise a standard. That follows from the text of section 109(d)(1) and its surrounding provisions, including section 108, which requires that criteria reflect the "latest scientific knowledge," and section 109(b), which provides that standards are "based on" the underlying criteria. *See* 42 U.S.C. §§ 7408, 7409(b). Revising a standard without a full review of the underlying criteria or related standards is not a thorough review. Moreover, the second sentence of 109(d)(1) must be read in context with the first and cannot dispense with the thorough review requirement for revising a standard.

Because EPA based its action on an erroneous interpretation of the statute and exceeded its authority by revising the standard without initiating and completing a thorough review, this Court should vacate the Rule. *Id.* § 7607(d)(9)(C).

In the alternative, EPA exercised any discretionary authority it may have had unreasonably by refusing to consider the costs associated with undertaking such a

revision mid-cycle. The Court should therefore vacate the Rule because EPA failed to consider an important aspect of the problem. *Id.* § 7607(d)(9)(A).

BACKGROUND

A. Statutory background

The Act requires that EPA establish NAAQS to protect public health and welfare. *Id.* § 7409(b). EPA promulgates the standards in accordance with the substantive and procedural requirements of sections 109 and 307(d). *See id.* §§ 7409, 7607(d).

Two sections govern the establishment and revision of the NAAQS. Section 108 directs EPA to identify and list certain air pollutants and then to issue air quality criteria for those pollutants. *Id.* § 7408. Air quality criteria must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air, in varying quantities." *Id.* § 7408(a)(2). Then, section 109 directs the Administrator to propose and promulgate "primary" and "secondary" NAAQS "based on such criteria" for the relevant pollutants. *Id.* § 7409(b). Section 109(b) defines primary standards as standards, "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety,

are requisite to protect the public health." *Id*. This provision also states that primary standards "may be revised in the same manner as promulgated." *Id.*

Under section 109(d)(1), EPA must complete a "thorough review" of the underlying air quality criteria and related NAAQS "at five-year intervals." *Id.* § 7409(d)(1). After completing this review, EPA "shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section [108] and subsection (b) of [section 109]." *Id.* The second sentence of section 109(d)(1) provides that EPA "may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph." *Id.*

Revising a standard triggers various statutory obligations for States, EPA, and regulated parties. As of the revision's effective date, permit applicants (including those with pending applications) must demonstrate that any new or modified major stationary source will not cause, or contribute to, a violation of the standard. *Id.* § 7475. Within one year of promulgation, States must identify and submit to EPA initial designations of whether areas in their jurisdictions meet the standard. *Id.* § 7407(d)(1)(A) (*e.g.*, designations of attainment, nonattainment, and unclassifiable). Generally, within two years EPA shall promulgate final designations. *Id*. § 7407(d)(1)(B). Within three years, States must submit revised plans that provide for implementation, maintenance, and enforcement of the

standard. *Id.* § 7410(a)(1). Ultimately, the Act contemplates that implementing a revised standard involves a long and resource-intensive process.

Once an area is designated nonattainment, EPA cannot "rela[x]" the applicable NAAQS unless it promulgates controls "not less stringent than the controls applicable to areas designated nonattainment before such relaxation." *Id.* § 7502(e). For that reason, the statute's textual requirements for revising the NAAQS bear particular importance.

B. Regulatory and procedural background

EPA first promulgated standards for particulate matter in 1971 and has completed five "thorough review[s]" to date under section 109(d)(1). Szabo Decl. ¶¶ 8-21. In 1997, EPA decided to maintain separate criteria and standards for fine particulate matter, $PM_{2.5}$, and coarse particulate matter, PM_{10}. *Id.* ¶ 12. EPA revised certain NAAQS for $PM_{2.5}$ in 2006 and 2012, and in 2020 retained the existing NAAQS following a thorough review. *Id.* ¶¶ 15-21; *see also* 89 Fed. Reg. at 16208. Across these actions, EPA consistently followed its position that any revised standard "necessarily entails the thorough additional review of criteria as contemplated in Section 109(d)(1) of the Clean Air Act" and "would be based on, and announced concurrently with, the final revised criteria document." 44 Fed. Reg. 56730, 56731 (Oct. 2, 1979) (initiating first review). Until 2024, EPA had never revised the particulate matter standards without relying on its section

109(d)(1) authority and completing a thorough review of the air quality criteria. Szabo Decl. ¶¶ 36, 38.[1]

Since 2008, EPA has completed the thorough review of air quality criteria by drafting and finalizing an Integrated Science Assessment that examines peer-reviewed literature, published since the previous review cycle, on all identifiable effects of the pollutant on public health or welfare. 89 Fed. Reg. at 16207-08. In 2020, EPA completed a thorough review, which included reviewing an Integrated Science Assessment completed in 2019 (the 2019 Assessment), and issued a final decision explaining that the Administrator would retain the existing primary and secondary PM_{10} and $PM_{2.5}$ standards. 85 Fed. Reg. 82684 (Dec. 18, 2020) (2020 Rule), JA1256.[2] That decision was therefore based on the available scientific evidence and data pertinent to the air quality criteria, as well as the Advisory Committee's advice and public comment. *Id*.

In January 2021, Executive Order 13,990 (now rescinded) ordered a review of the 2020 Rule. Szabo Decl. ¶ 22. A few months later, EPA announced that it

[1] EPA once proposed to "reconsider" and revise a NAAQS outside the "thorough review" process, but President Obama and OIRA Administrator Cass Sunstein instructed EPA not to finalize the reconsideration rule due to concerns regarding the "regulatory costs and burdens" associated with such a mid-cycle reconsideration. *See* Letter from Cass R. Sunstein, Administrator, OIRA, to Lisa P. Jackson, Administrator, EPA (Sep. 2, 2011), available at: https://obamawhitehouse.archives.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf.

[2] Petitions challenging the 2020 Decision are currently in abeyance pending the Court's decision in this case. *California v. EPA*, No. 21-1014 (D.C. Cir.).

would undertake a limited "reconsideration" of the 2020 Rule focused on key scientific topics.[3] *Id*. ¶ 23. To that end, the agency developed a "supplement" to the 2019 Assessment (the 2022 Supplement) and a revised policy assessment. *Id*. The 2022 Supplement selected and analyzed several new studies on a targeted basis covering only part of the scientific literature supporting the 2020 Rule. *See* 2022 Supplement at ES-i, 1-2, JA1845, 1849.

Importantly, EPA admitted that the 2022 Supplement did not "represent [a] full multidisciplinary evaluation of evidence" for the underlying air quality criteria. *See* 2022 Supplement at ES-i, JA1845. Thus, EPA's 2022 Supplement did not "satisfy the EPA's obligation to periodically complete a thorough review of the air quality criteria." Response to Comments (RTC) at 121, JA2800; *see also* 89 Fed. Reg. at 16212. EPA explained that there were other effects related to the air quality criteria, such as respiratory effects, reproductive and developmental effects, and nervous system effects, that were not updated in this partial reconsideration of the 2020 thorough review. RTC at 73, 121, JA2800, 2752. Instead, EPA purported to evaluate a limited set of new studies, in conjunction with the full body

[3] *See* Press Release, EPA, EPA to Reexamine Health Standards for Harmful Soot that Previous Administration Left Unchanged (June 10, 2021) available at: https://www.epa.gov/newsreleases/epa-reexamine-health-standards-harmful-soot-previous-administration-left-unchanged.

of information from the 2019 Assessment, to inform its partial reconsideration. RTC at 121, JA2800; *see also* 89 Fed. Reg. at 16213.

EPA then determined that the annual primary $PM_{2.5}$ standard was inadequate and issued the challenged Rule. *Id*. at 16203. This final action triggered multiple implementation activities, including stationary source air permitting obligations and an initial area designations process described in 42 U.S.C. § 7407(d), to be followed by additional implementation requirements. Szabo Decl. ¶¶ 27-33

Several petitioner groups challenged the Rule. Numerous groups intervened on EPA's behalf. Oral argument was held in December 2024, but the litigation has been held in abeyance following the change in administration and during the lapse in appropriations, with motions to govern due within ten days of the restoration of appropriations. ECF No. 2139392. EPA is filing this motion in lieu of a motion to govern.

STANDARD OF REVIEW

Under the Clean Air Act, 42 U.S.C. § 7607(d)(9), the Court may reverse the Rule if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." An agency action is arbitrary and capricious if, among other things, the agency "entirely failed to consider an important aspect of the problem" or does not "examine the relevant data and

articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

In deciding questions of statutory interpretation, "[c]ourts must exercise their independent judgment," but "[c]areful attention to the judgment of the Executive Branch may help inform that inquiry." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024). Indeed, where the Executive Branch has given contemporaneous construction to statutory language and consistently maintained that interpretation, its views—though not dispositive—are accorded more weight. *Id*. at 386. Ultimately, to resolve the meaning of disputed statutory language, a court shall adopt the interpretation that, "after applying all relevant interpretive tools, [it] concludes is best." *Loper Bright*, 603 U.S. at 400.

ARGUMENT

I. EPA lacks statutory authority to revise standards absent a thorough review.

The Court should vacate the Rule. The NAAQS are central to the Act, and the consequences of a revision are significant. EPA exceeded its authority in selectively revising a NAAQS without the "thorough review" of underlying criteria and related standards required by section 109(d)(1). EPA thus agrees with the Petitioners' arguments on this issue. Industry Br. at 24-28, ECF No. 2079902; Industry Reply Br. at 4-14, ECF No. 2079909. And EPA withdraws its brief taking a contrary position. EPA Response Br. at 35-45, ECF No. 2079971.

A. Section 109(d)(1) requires EPA to complete a thorough review before revising a NAAQS.

This case turns on whether EPA must revise a NAAQS pursuant to section 109(d)(1) or, rather, can revise whenever and however it wants so long as it also completes a five-year thorough review on a separate track. Section 109(d)(1) requires EPA to complete a "*thorough* review" of both "the criteria published under [section 108] *and* the [NAAQS] promulgated under this section" before revising the NAAQS. 42 U.S.C. § 7409(d)(1) (emphases added). That is the only reading that ensures consideration of the "latest scientific knowledge" on the public health or welfare effects of a pollutant as required for section 108 air quality criteria, *id.* § 7408, before deciding whether and how to revise the related NAAQS "based on such criteria" under section 109(b), *id.* § 7409(b)(1)–(2). Here, where EPA compiled only a limited supplement to the 2019 Assessment, and the agency conceded during the rulemaking that such a limited supplement did not comprise a full review of the criteria and standards, the agency did not comply with the statutory requirements of section 109(d)(1).

When it added section 109(d) to the Act in 1977, Congress specified a single path—and the only path—by which EPA may revise a standard: complete a thorough review of both the air quality criteria and the related standards for the relevant pollutant. This mechanism "displace[s]" any "inherent reconsideration authority" for EPA to revise or reconsider an existing standard. *Ivy Sports Med.,*

LLC v. Burwell, 767 F.3d 81, 86 (D.C. Cir. 2014). "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001)).

And while section 109(d)(1)'s second sentence authorizes EPA to revise a standard earlier or more often than at "five-year intervals" as required by the first sentence, it does not dispense with the thorough review requirement. 42 U.S.C. § 7409(d)(1). Specifically, EPA "may review and revise [air quality] criteria or promulgate new standards earlier or more frequently than required under this paragraph." *Id*. "[T]hose words must be read and interpreted in their context, not in isolation." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) (internal quotation marks omitted). Here, the Act's use of the word "review" in the second sentence of section 109(d)(1) refers to the thorough review specified in the first sentence. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("The reference to 'the pay or compensation' in the last clause of § 111 must, in context, mean the same 'pay or compensation' defined in the first part of the section."). In addition, the reference to "under this paragraph" in the second sentence is a signal that the provision's constituent parts are intended to work together. *See id*.; *see also* Industry Br. at 25-26; Industry Reply at 10-13.

Indeed, section 109(d)(1) uses the word "review" only twice: Once in the first sentence to prescribe the thorough review required to revise the standards, and again in the second sentence to describe the review that EPA may conduct to revise the standards before its five-year deadline, that is, more often than at "five-year intervals." 42 U.S.C. § 7409(d)(1). It would have been odd for Congress to use "review" in the second sentence as an authorization to ignore the kind of review specified only one sentence earlier and to undertake some other, undefined, review process.

Thus, while EPA has authority under the second sentence to revise the standards more frequently than every five years, in doing so it must still meet the thorough review requirement in the first sentence. This interpretation is the most natural reading of the provision, which gives meaning to the thorough review requirement that Congress explicitly imposed.

The Act's structure further supports this reading. Revising a NAAQS triggers cascading and significant obligations many years after EPA revises a standard:

- States must submit initial air quality designations to EPA within one year of a standard's promulgation, and EPA must finalize designations within two years of promulgation. 42 U.S.C. § 7407(d)(1)(B)(i).

- Within three years of a standard's promulgation, States must submit plans to EPA providing for "implementation, maintenance, and enforcement" of the standard in their jurisdictions. *Id.* § 7410(a)(1).
- States that have designated nonattainment areas generally must develop plans addressing that nonattainment eighteen months after designation. *Id.* § 7513a(a)(2).

It follows that any revisions of the NAAQS are subject to the guardrail of completing a thorough review. Allowing ad hoc and partial review "would severely disrupt this complex and delicate administrative scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984).

That is how EPA consistently read the statute for decades. *See* Szabo Decl. ¶ 38 (explaining that for all five particulate matter reviews to date, EPA completed review of the criteria before deciding to revise the NAAQS). Indeed, EPA declines to base NAAQS revisions on "[r]ecent studies available after completion of criteria review," pursuant to the Agency's "long-standing practice of basing NAAQS decisions on studies and related information included in the pertinent air quality criteria and available for [Advisory Committee] review." 62 Fed. Reg. 38652, 38662 & n.15 (July 18, 1997); *see also* Szabo Decl. ¶¶ 15, 18, 20-21 (quoting similar language in 2006, 2012, and 2020).

The Rule was inconsistent with EPA's past practice. EPA has never attempted to rely solely upon the second sentence of section 109(d)(1) as its source of authority to revise a standard. *See id.* ¶ 39. While EPA has revised standards sooner than the prescribed five-year cycle (though never for $PM_{2.5}$), it did so via the required thorough review. *Id.* ¶¶ 36, 38.

Given the consequences of any revision, the thorough review process is critical to the statute's design. Just as the statute mandates a complex series of implementation actions and retains certain implementation actions even if a standard is later relaxed, so, too, does it require that EPA engage in a thorough review of all relevant information before triggering implementation by revising a standard. Reading section 109(d) as EPA's exclusive source of revision authority is the best way to "interpret the statute as a symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted); *see also United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

B. Section 109(b) does not provide standalone revision authority.

At oral argument, the Court asked whether section 109(b) provides separate reconsideration authority. 42 U.S.C. § 7409(b); *see, e.g.*, Hr'g Tr. at 7:22-13:6, Ex. B. It does not. Section 109(b)(1)'s first sentence describes the requirements for setting a primary NAAQS. And the second sentence provides that standards

"may be revised in the same manner as promulgated," which speaks to the procedure of promulgation (e.g., notice and comment rulemaking).[4] 42 U.S.C. § 7409(b)(1).

In 1977, Congress overhauled the NAAQS-revision process by revamping section 109 of the Act. *See* Pub. L. No. 91-604, 84 Stat. 1676, 1679–80 (1970). Before 1977, section 109 governed the *procedure* of revising a standard, but the *substantive* authority to revise the standards was part of the agency's inherent authority to review a prior decision. *See id.*; *see also* Industry Br. 25. But before EPA revised its initial standards, Congress amended the Act to add the substantive requirement in subsection (d) that EPA "complete a thorough review of the [air quality] criteria . . . and the . . . standards" and setting out mandatory period reviews at "five-year intervals." 42 U.S.C. § 7409(d)(1); *see also id.* § 7409(d)(2) (tying Advisory Committee review to the same periodic cycle). Section 109(d)(1) now covers the waterfront.

Two principles of statutory interpretation command that section 109(b) does not overcome section 109(d)(1)'s "thorough review" requirement. First, section 109(d)(1) post-dates 109(b). Congress's 1977 amendment must be given meaning. "When Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Van Buren v. United States*, 593 U.S. 374, 393

[4] No party disputed this at oral argument. *See* Hr'g Tr. at 7:24-9:14.

(2021) (quoting *Ross v. Blake*, 578 U.S. 632, 641-42 (2016)). If EPA could choose to revise a standard solely under section 109(b)(1), the Agency would have a blank check to circumvent the substantive review requirements Congress later added in section 109(d)(1). *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). Congress could not have intended an earlier-in-time provision to nullify a later one.

Second, section 109(d) imposes substantive review requirements—the review must be "thorough" and include both "criteria … and … the [NAAQS]"—before standards may be revised. 42 U.S.C. § 7409(d)(1). These specific review requirements govern the general. *Genus Med. Techs. LLC v. FDA*, 994 F.3d 631, 638 (D.C. Cir. 2021); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645–46 (2012). The "general-specific canon is particularly appropriate where, as here, the provisions at issue are 'interrelated and closely positioned' as 'parts of the same statutory scheme.'" *Genus Med. Techs.*, 994 F.3d at 638 (quoting *RadLAX Gateway Hotel*, 566 U.S. at 645). Thus, section 109(d)(1) governs the scope of EPA's NAAQS-revision authority.

This interpretation is consistent with EPA's longstanding practice. Since the 1977 amendments, EPA has never used section 109(b) as an independent source of revision authority separate and apart from 109(d). Szabo Decl. ¶ 40. Even in the

Rule, EPA acknowledged that reconsideration "does not itself satisfy the EPA's obligation to periodically complete a thorough review" but insisted that its truncated scientific analysis should suffice in this context. *See* RTC at 121–22, JA2800-2801; *see also* 89 Fed. Reg. at 16206, 16211–13.

Even if the reference to revising the NAAQS in section 109(b) were not procedural, there would be no conflict between section 109(b) and section 109(d), and the two provisions are easily harmonized. Section 109(d) requires that standards be promulgated only after a thorough review of the air quality criteria. 42 U.S.C. § 7409(d)(1). Section 109(b) requires that revisions occur "in the same manner as promulgated." *Id*. § 7409(b). Put together, revisions to the standards require the same manner of review of the air quality criteria on which the standards were based when promulgated—a thorough review.

II. EPA unreasonably ignored costs when deciding whether to undertake a discretionary mid-cycle review.

In the alternative, EPA erred in refusing to consider the costs associated with its discretionary mid-cycle review. This was an important aspect of the problem before the Agency, and EPA thus agrees with certain of the Petitioners' arguments on this issue. Industry Br. at 28-32; Industry Reply Br. at 15-19, ECF No. 2079909. EPA withdraws its brief taking a contrary position. EPA Resp. Br. at 45-48, ECF No. 2079971.

The second sentence of section 109(d)(1) provides that EPA "may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph." 42 U.S.C. § 7409(d)(1). Even if that sentence conferred separate authority to revise a NAAQS—and it does not, *supra* Arg. I—its language gives EPA broad discretion to decide whether and when to "promulgate new standards" more frequently than at five-year intervals. The sentence does not identify factors EPA should consider in deciding *whether* to perform such a voluntary revision, nor does it cross-reference sections 108 or 109(b). Nothing prevents EPA from considering the costs of undertaking the earlier review. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 219 (2009) (concluding that where EPA enjoys discretion in making a statutory determination, EPA may weigh the costs and benefits of the exercise of its discretion); *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 38 (D.C. Cir. 2009). Reasoned agency decision-making ordinarily includes consideration of costs unless a statute precludes such consideration, and so, EPA's refusal to consider such costs was unreasonable. *Michigan v. EPA*, 576 U.S. 743, 753 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions").

If EPA conducts a mid-cycle review under such a permissive authority, the costs of doing so are a permissible, and indeed relevant, consideration.

Implementation of the NAAQS is a complex process, which generates significant costs and reliance interests among States, local governments, and regulated parties. Szabo Decl. ¶¶ 26-33. Indeed, if the statute permitted a less-than-thorough review, that discretionary, mid-cycle NAAQS revision may be especially "problematic in view of the fact that a new assessment, and potentially new standards, will be developed in the relatively near future" when the next five-year review occurs.[5] Because a less-than-thorough mid-cycle review will not reset the five-year review cycle, EPA should take into account, among other things, (1) the impact of the change where regulated entities and States may still be in the process of complying with prior NAAQS; (2) whether steps that may be required to comply with a mid-cycle NAAQS change will interrupt the existing compliance schedule; (3) when the next five-year review cycle must be completed; and (4) the potential disruptive effects of requiring States and regulated sources to comply with a new NAAQS that may soon be superseded when the next through review concludes.

Here, EPA undertook its discretionary revision only months after finalizing its last mandatory review. Szabo Decl. ¶ 23. The results of EPA's review caused disruption to the State, local actors, and the regulated community, and yet did not relieve EPA of its next obligation to complete a five-year mandatory thorough review. RTC at 121, JA2800; Szabo Decl. ¶¶ 26-33.

[5] *See* Letter from Cass R. Sunstein, to Lisa P. Jackson, *supra* n.1, at 1.

Before concluding that revision was warranted, EPA should at least have considered the distinct costs associated with revising the NAAQS mid-cycle. EPA's disregard of this relevant factor was arbitrary and capricious because it was unreasonable for EPA to read an exercise of discretionary authority as an invitation to ignore a relevant factor like cost. *See State Farm*, 463 U.S. at 43; *Michigan*, 576 U.S. at 753.

III. Vacatur is appropriate because EPA exceeded its statutory authority and failed to consider a relevant aspect of the problem.

EPA acknowledged the 2022 Supplement did not satisfy the thorough review requirement under section 109(d)(1). 89 Fed. Reg. at 16203; RTC at 121, JA2800. Because EPA lacks the statutory authority to revise a standard without conducting a thorough review, the Court should vacate the Rule. Alternatively, vacatur is appropriate because EPA failed to consider an important aspect of the problem by refusing to consider the costs associated with its mid-cycle revision.

Under the Act, "the court may reverse any such action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. § 7607(d)(9). Whether to vacate the Rule depends on "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988

F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted). Both factors favor vacatur.

First, the seriousness of the error turns in part on whether the agency can correct the error on remand. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1051 (D.C. Cir. 2021). When, as here, an agency lacks statutory authority to have taken the challenged action, there is "no possibility" the agency could "find an adequate explanation" on remand. *Waterkeepers Chesapeake v. FERC*, 56 F.4th 45, 49-50 (D.C. Cir. 2022); *see supra* Argument I; *see also Air All. Hous. v. EPA*, 906 F.3d 1049, 1066 (D.C. Cir. 2018) (vacating rule because it exceeded EPA's statutory authority). And because EPA no longer intends to defend the Rule, there is no serious possibility that EPA would adopt the same approach on remand even if it could do so. *See* Szabo Decl. ¶ 6 (stating that EPA no longer intends to defend the Rule); *cf. Limnia, Inc. v. Dep't of Energy*, 857 F.3d 379, 386 (D.C. Cir. 2017) ("In general, a voluntary remand request made in response to a party's APA challenge may be granted only when the agency intends to take further action with respect to the original agency decision on review.").

Second, vacatur of the unlawful Rule now, before additional statutory obligations come into effect as soon as February 2026, would prevent disruption and unnecessary additional burdens to regulated parties and EPA alike. Although the 2024 Rule is in effect, the most significant implementation efforts, including

area designations and state implementation plan review, have not yet occurred. Szabo Decl. ¶¶ 28-31. Under the Rule, EPA must issue designations in February 2026 based on its unlawful standards. *See* 42 U.S.C. § 7407(d)(1)(B). But if the 2024 Rule were vacated, the 2020 Rule, which retained the 2012 NAAQS, would go back into effect. *See* 85 Fed. Reg. at 82684, JA1256. Reinstatement of the 2020 Rule would essentially preserve the status quo, relieving EPA of the obligation to make designations in furtherance of an unlawful standard and preventing significant new regulatory obligations from taking effect following such designations. *Cf. Am. Equity Inv. Life Ins. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2010). Vacatur would thus leave in place standards that EPA concluded were "requisite to protect public health, with an adequate margin of safety, from effects of $PM_{2.5}$ in ambient air" based on EPA's most recent thorough review of the particulate matter standards and air quality criteria. 85 Fed. Reg. at 82685, JA1257.

CONCLUSION

For the foregoing reasons, the Court should grant EPA's motion to vacate the Rule.

Dated: November 24, 2025.

Respectfully submitted,

/s/ *Sarah Izfar*

ADAM R.F. GUSTAFSON
Principal Deputy Assistant Attorney General
ROBERT N. STANDER
Deputy Assistant Attorney General
SARAH IZFAR
ZOE B. PALENIK
Trial Attorneys
Environmental Defense Section
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 532-3050
Sarah.izfar@usdoj.gov

Counsel for Respondents

Of Counsel:

ISABELLA SMITH
Attorney
U.S. Environmental
Protection Agency

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 27 because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains 5,199 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ *Sarah Izfar*
SARAH IZFAR

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2025, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Sarah Izfar

Exhibit A

ORAL ARGUMENT HELD ON DECEMBER 16, 2024

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

COMMONWEALTH OF KENTUCKY, ET AL., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.	Case No. 24-1050 and consolidated cases

DECLARATION OF AARON SZABO

I, Aaron Szabo, under penalty of perjury, affirm and declare that the following statements are true and correct to the best of my knowledge and belief, and are based on my own personal knowledge or on information contained in the record of the United States Environmental Protection Agency (EPA) or supplied to me by EPA employees under my supervision.

1. I am the Assistant Administrator for the United States Environmental Protection Agency Office of Air and Radiation (OAR), which is located at 1200 Pennsylvania Avenue, NW, Washington D.C. 20460.
2. Prior to joining EPA, I served as a federal civil servant, first at the Nuclear Regulatory Commission, where I worked on nuclear power plant issues and

regulations, and then at the White House Office of Information and Regulatory Affairs, where I worked on major climate and air regulations. I continued my career civil service as the Senior Counsel at the Council on Environmental Quality, where my role expanded to include the National Environmental Policy Act and federal sustainability issues. I hold degrees in economics, government, and politics from the University of Maryland, College Park, and a law degree from George Washington University Law School.

3. OAR is the EPA office with primary responsibility for administration of the Clean Air Act. As the Assistant Administrator for OAR, I serve as the principal advisor to the Administrator on matters pertaining to air and radiation programs and am responsible for managing these programs, including: policy development and evaluation; development of emissions standards; policy guidance and overview; and technical support and evaluation of regional air and radiation program activities.

4. Through my role as Assistant Administrator for OAR, I am familiar with the development and implementation of EPA programs, policies, and regulations under the Clean Air Act. As part of my duties, I oversee the development and implementation of regulations, policy, and guidance under sections 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408–09, including air quality

criteria and primary and secondary National Ambient Air Quality Standards (NAAQS) for particulate matter (PM).

5. The purpose of this declaration is to provide the Court with context, history, and factual assertions in support of the EPA's contemporaneously filed confession of error and motion for vacatur.

6. Upon review of the final rule entitled "Reconsideration of the National Ambient Air Quality Standards for Particulate Matter," 89 Fed. Reg. 16202 (March 6, 2024) ("2024 Rule"), and the associated regulatory process, the EPA no longer seeks to defend the 2024 Rule and has asked the Department of Justice to file a motion confessing error and seeking vacatur of the 2024 Rule.

7. The EPA maintains air quality criteria for pollutants that must reflect the latest scientific knowledge regarding adverse impacts on public health and welfare. 42 U.S.C. §7408(a). After issuing criteria for a pollutant, the EPA promulgates two types of NAAQS: primary and secondary. "Primary" NAAQS—the type at issue in this litigation—are set "based on such criteria" at a level that the Administrator judges to be "requisite" to protect the "public health." *Id.* § 7409(b)(1). "Secondary" NAAQS are set "based on such criteria" at a level that the Administrator judges to be "requisite" to protect the "public welfare." *Id.* § 7409(b)(2). This declaration is primarily

focused on the PM primary standards, since that is the subject of this litigation.

8. The EPA first established NAAQS for PM in 1971 (36 Fed. Reg. 8186, April 30, 1971), based on an air quality criteria document prepared by a predecessor agency component in 1969. The primary standards consisted of a 24-hour standard set at 260 $\mu g/m^3$ and an annual standard set at 75 $\mu g/m^3$.

9. In October 1979, the EPA announced the first periodic review of the air quality criteria and NAAQS for PM by publishing its "decision to revise the criteria documents for particular matter … underlying the [PM NAAQS]" and to propose and promulgate revisions to the NAAQS as appropriate based on the revised criteria (44 Fed. Reg. 56730, October 2, 1979). The Agency noted that any "[s]uch revision necessarily entails the thorough additional review of criteria as contemplated in Section 109(d)(1) of the Clean Air Act," and that "[i]f any revised standards are to be proposed, they would be based on, and announced concurrently with, the final revised criteria document" (*id.* at 56731).

10. In July 1987, the EPA promulgated revised PM NAAQS after multiple rounds of public comment on the revised criteria document and, subsequently, on the proposed rule (52 Fed. Reg. 24634, July 1, 1987). The

Agency detailed "[t]he process by which" it had "reviewed the original criteria and standards for particulate matter under section 109(d)" and explained how that process culminated in the final revisions (*id.* at 24635-37). Based on a review of the revised criteria, the final rule lowered the 24-hour primary standard to 150 µg/m^3 and the annual primary standard to 50 µg/m^3.

11. In April 1994, the EPA announced its plans for the second periodic review of the air quality criteria and NAAQS for PM, and in 1997 promulgated revisions to the NAAQS (62 Fed. Reg. 38652, July 18, 1997). The Agency explained that it began the review "by announcing its intention to develop a revised Air Quality Criteria Document for [PM]" (*id.* at 38654) and that it had "announced its proposed decision to revise the NAAQS for PM" two years later "based on the air quality criteria for PM" (*id.*). In finalizing the revised NAAQS, the EPA rejected arguments that it should base the standards on studies released after the criteria update or delay the rulemaking to account for such studies. Citing "section 109(d) of the Act," the EPA explained that it had not relied on such studies "based on its long-standing practice of basing NAAQS decisions on studies and related information included in the pertinent air quality criteria and available for CASAC review" (*id.* at 38662), and specifically noted this "longstanding

interpretation was strengthened by new legislative enactments enacted in 1977" as part of the addition of section 109(d) (*id.* at 38662 n.15).

12. The 1997 final rule addressed the fine ($PM_{2.5}$) and coarse (PM_{10}) fractions of PM separately for the first time. For $PM_{2.5}$, the primary standards were lowered to an annual standard of 15.0 $\mu g/m^3$ and a 24-hour standard of 65 $\mu g/m^3$. To continue to address the health effects of the coarse fraction of PM, the EPA retained the existing primary annual PM_{10} standard and revised the form of the primary 24-hour PM_{10} standard to be based on the 99th percentile of 24-hour PM_{10} concentrations at each monitor in an area.

13. In May 1999, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld the EPA's decision to establish distinct $PM_{2.5}$ standards and to regulate coarse particle pollution separately, but vacated the particular 1997 PM_{10} standards selected by the Agency. *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999). Pursuant to the D.C. Circuit's decision, the EPA subsequently removed the vacated 1997 PM_{10} standards, and the pre-existing 1987 PM_{10} standards remained in place (65 Fed. Reg. 80776, December 22, 2000).

14. In October 1997, the EPA published its plans for the third periodic review of the air quality criteria and NAAQS for PM (62 Fed. Reg. 55201, October 23, 1997). The Agency explained that "[a]s with all NAAQS reviews, the

purpose is to update the criteria and to determine whether it is appropriate to revise the standards in light of new scientific and technical information" (*id.*). The EPA anticipated developing a revised criteria document, providing for extensive peer review and public comment, and proposing any appropriate revisions when the criteria document was finalized (*id.* at 55202).

15. In October 2006, the EPA promulgated revisions to the primary NAAQS for PM based on a review of the revised criteria and after extensive public input (71 Fed. Reg. 61144, October 17, 2006). The Agency again reaffirmed its "view that NAAQS decisions are to be based on scientific studies and related information that have been assessed as a part of the pertinent air quality criteria" (*id.* at 61148). The EPA lowered the 24-hour $PM_{2.5}$ primary standard to 35 $\mu g/m^3$ and retained the existing annual $PM_{2.5}$ primary standard of 15.0 $\mu g/m^3$. With respect to PM_{10}, the EPA retained the 24-hour standard of 150 $\mu g/m^3$ and revoked the annual standards.

16. In February 2009, the D.C. Circuit remanded the primary annual $PM_{2.5}$ standard for additional explanation on health protection. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009). The EPA responded to the remand in its next review of the PM NAAQS, which was initiated in 2007.

17. In June 2007, the EPA initiated the fourth periodic review of the air quality criteria and NAAQS for PM by issuing a call for information (72 Fed. Reg. 35462, June 28, 2007). The Agency again explained that "Section 109(d) requires periodic review and, if appropriate, revision of existing air quality criteria," and that "EPA is then to revise the NAAQS, if appropriate, based on the revised air quality criteria" (*id.*).

18. In January 2013, the EPA promulgated revisions to the primary NAAQS for PM based on its review of the updated air quality criteria (78 Fed. Reg. 3086, January 15, 2013). The Agency again reaffirmed its "longstanding interpretation" that "NAAQS decisions are to be based on scientific studies and related information that have been assessed as part of the pertinent air quality criteria," which was "strengthened by new legislative requirements enacted in 1977" (*id.* at 3095). The EPA revised the annual $PM_{2.5}$ standard to 12.0 $\mu g/m^3$ and retained the 24-hour $PM_{2.5}$ standard of 35 $\mu g/m^3$. For the primary PM_{10} standard, the EPA retained the 24-hour standard to continue to provide protection against effects associated with short-term exposure to thoracic coarse particles (*i.e.,* $PM_{10-2.5}$).

19. In December 2014, the EPA announced the initiation of the fifth periodic review of the air quality criteria and NAAQS for PM and issued a call for information (79 Fed. Reg. 71764, December 3, 2014). On April 14, 2020,

the EPA proposed to retain the primary $PM_{2.5}$ and PM_{10} standards without revision based on the results of an integrated science assessment finalized in 2019 after peer review and public comment, which reviewed the criteria and scientific developments since the last review (85 Fed. Reg. 24094, April 30, 2020).

20. In December 2020, the EPA finalized its decision to retain the existing primary $PM_{2.5}$ and PM_{10} standards (85 Fed. Reg. 82684, December 18, 2020). The Agency again reaffirmed its "longstanding interpretation"—"strengthened by new legislative requirements enacted in 1977"—that "NAAQS decisions are to be based on scientific studies and related information that have been assessed as a part of the pertinent air quality criteria" (*id.* at 82690).

21. The EPA concluded based on a review of the criteria and the 2019 integrated science assessment that the suite of primary $PM_{2.5}$ standards were requisite to protect public health with an adequate margin of safety and should be retained. The EPA also judged it appropriate to retain the primary PM_{10} standard to provide the requisite degree of public health protection against exposures, regardless of location, source of origin, or particle composition (*id.* at 82725).

22. In 2021, Executive Order 13990 directed review of certain agency actions (86 Fed. Reg. 7037, January 25, 2021). An accompanying fact sheet provided a non-exclusive list of agency actions that agency heads should review in accordance with that Executive Order, including the 2020 Particulate Matter NAAQS Decision.

23. On June 10, 2021, the Agency announced its decision to "reconsider" the 2020 PM NAAQS final action. The Agency announced that, in support of the reconsideration, it would develop a partial supplement to the 2019 integrated science assessment and a revised policy analysis, drafts of which would be reviewed by the CASAC. The draft supplement was released in September 2021 (86 Fed. Reg. 54186, September 30, 2021), and the final supplement was released in May 2022 after CASAC. For the health effects evidence, the supplement focused on studies from the U.S. and Canada for the health effects evidence for which the 2019 integrated science assessment concluded a causal relationship (*i.e.*, short- and long-term $PM_{2.5}$ exposure and cardiovascular effects and mortality) and studies that addressed key scientific topics for which the literature had evolved since the 2020 PM NAAQS review was complete. The draft policy assessment was released in October 2021 (86 Fed. Reg. 56263, October 8, 2021), and the final policy assessment was released in May 2022 after CASAC review.

24. In January 2023, the EPA proposed to revise the annual $PM_{2.5}$ standard and to retain the primary 24-hour $PM_{2.5}$ standard and the primary 24-hour PM_{10} standard (88 Fed. Reg. 5558, January 27, 2023). In March 2024, the EPA promulgated a final rule lowering the primary annual $PM_{2.5}$ standard from 12.0 $\mu g/m^3$ to 9.0 $\mu g/m^3$ and retaining the other standards as proposed.

25. In support of the 2024 Rule, the EPA prepared an illustrative analysis of the potential costs associated with the decision to lower the primary annual $PM_{2.5}$ standard to 9.0 $\mu g/m^3$ titled "Regulatory Impact Analysis for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter" (RIA). The EPA expressly stated in the 2024 Rule that it did not rely on the RIA or consider cost in deciding to revise the annual PM2.5 standard (89 Fed. Reg. at 16373). The RIA used national scale emissions, controls, and cost information to examine illustrative state and local level attainment of the revised annual $PM_{2.5}$ standard in 2032. The estimated costs reported in the RIA are associated with the control devices themselves and do not include the costs to the EPA, States, or localities of implementing the NAAQS or the costs of revising and implementing permit and permit conditions beginning on the effective date of the 2024 Rule.

26. The RIA estimated that control devices necessitated by the 2024 Rule would cost $590 million in 2017 dollars (approximately $780 million in 2025

dollars assuming an average annual inflation rate of 3.55%) each year. This estimate did not fully account for all the emissions reductions needed to attain the revised standard, and therefore was likely an underestimate of actual cost. Furthermore, citing technical limitations, the RIA did not account for indirect economic impacts on the entire economy from the illustrative control strategy, so therefore acknowledged that there may be additional costs to the economy that are not captured in the estimate. Commenters presented alternative analyses suggesting that EPA had significantly underestimated the costs of the rule, which, according to one analysis, were projected to be up to $9.1 billion." (Comments of the NAAQS Regulatory Review & Rulemaking Coalition, Attach. 3, EPA-HQ-OAR-2015-0072-2361, JA2481 (Mar. 28, 2023)).

27. The EPA's decision to revise the primary annual $PM_{2.5}$ standard triggered the Clean Air Act's complex implementation provisions and related statutory deadlines for action.

28. Upon promulgation of a revised NAAQS, States and the EPA must initiate the process for designating areas as meeting or not meeting the revised NAAQS, along with the areas nearby that may be contributing to nonattainment of the NAAQS. The timeline for initial area designations began with promulgation of the revised primary annual $PM_{2.5}$ standard. In

accordance with CAA section 107(d)(1), not later than 1 year after promulgation of a revised NAAQS, States must submit to EPA their determinations regarding whether EPA should designate areas within the state as nonattainment, attainment, or unclassifiable. If EPA disagrees with a State, the Agency notifies States of intended modifications in advance and invites an opportunity to respond. Under CAA section 107(d)(1)(B)(i), the EPA generally must promulgate final designations for all areas no later than 2 years after a revised NAAQS is promulgated, although this timeline may be extended for up to one year if there is "insufficient information to promulgate the designations." The EPA's revision of the primary annual $PM_{2.5}$ standard in the 2024 Rule triggered an obligation to finalize area designations by a default deadline of February 7, 2026.

29. In determining designations, the EPA evaluates each area on a case-by-case basis, considering the specific facts and circumstances unique to the area to support initial area designations and associated boundary decisions. The EPA has historically used area-specific analyses to support nonattainment area boundary determinations by evaluating factors such as air quality data, emissions and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries. The EPA makes designations decisions based on complete, quality-assured, certified air quality data in the EPA's Air

Quality System. The EPA typically looks to monitoring data from existing $PM_{2.5}$ Federal Equivalent Methods and Federal Reference Methods sites to determine violations of the NAAQS. Air agencies may flag air quality data for certain days in the Air Quality System due to potential impacts from exceptional events (*e.g.*, events such as prescribed fires on wildland, wildfires, or high wind dust storms). Accordingly, for purposes of initial area designations, an air agency may submit to the EPA an exceptional events demonstration with supporting information and analyses for each monitoring site and day the air agency claims the EPA should exclude from design value calculations for designations purposes. *See* 40 CFR 50.1, 50.14, 51.930.

30. Within 18 months of the effective date of area designations, any State in which a nonattainment area is located must submit a SIP revision that meets CAA requirements (*see* 42 U.S.C. § 7513a(a)(2)). All areas initially designated nonattainment for $PM_{2.5}$ are classified as Moderate areas (*see* 42 U.S.C. § 7513(a)). The EPA previously estimated that developing a SIP revision for $PM_{2.5}$ Moderate nonattainment areas costs each State $585,900 per nonattainment area in 2015 dollars (or approximately $800,000 in 2025 dollars assuming an average annual inflation rate of 3.17%). For more information, please see the draft Information Collection Request Supporting Statement for the $PM_{2.5}$ NAAQS State Implementation Plan Requirements

Rule (EPA, DRAFT Information Collection Request Supporting Statement for the PM2.5 National Ambient Air Quality Standards State Implementation Plan Requirements Rule, EPA-HQ-OAR-2013-0691-0068 (Mar. 23, 2015), https://www.regulations.gov/document/EPA-HQ-OAR-2013-0691-0068).

31. Sections 110(a)(1) and 110(a)(2) of the CAA direct each State to develop and submit to the EPA a plan that provides for the implementation, maintenance, and enforcement of the NAAQS. CAA section 110(a)(1) requires that each State make a new SIP submission within 3 years of promulgation of a revised primary NAAQS for approval into the existing SIP to assure that the SIP meets the applicable requirements for such revised NAAQS. This type of SIP submission is commonly referred to as an "infrastructure SIP." The EPA's revision of the primary annual $PM_{2.5}$ standard in the 2024 Rule triggered States' obligations to develop and submit these infrastructure SIPs for approval no later than February 7, 2027. Under CAA section 110(k)(2), the EPA must generally review and issue a decision on SIP submissions within one year after the submissions are deemed complete.

32. The Clean Air Act contains preconstruction review and permitting programs applicable to new major stationary sources and major modifications of existing major sources, which is frequently called the new source review

program (NSR). The new source review program requirements vary based on whether the construction is occuring in areas designated attainment, nonattainment, or unclassifiable. In attainment and unclassifiable areas, the applicable NSR requirements are called Prevention of Significant Deterioration (PSD). In nonattainment areas, the NSR requirements are called nonattainment new source review (NNSR). Until the EPA completes area designations for the 2024 $PM_{2.5}$ NAAQS, new source review provisions applicable under an area's current designation for the prior $PM_{2.5}$ NAAQS applies. If an area is designated nonattainment for the1997, 2006, or 2012 $PM_{2.5}$ NAAQS, nonattainment new source review requirements will apply (*see* 40 CFR 51.166(i)(2) and 52.21(i)(2)). If an area is designated as attainment or unclassifiable for all three prior $PM_{2.5}$ NAAQS, the PSD requirements apply. Among other things, the PSD program requires a new major stationary source or a major modification to apply the "best available control technology" (BACT) to limit relevant emissions and to conduct an air quality impact analysis to demonstrate that the proposed major stationary source or major modification will not cause or contribute to a violation of any NAAQS or PSD increment (*see* 42 U.S.C. § 7475(a)(3) and (4); 40 CFR 51.166(j) and (k), 52.21(j) and (k)).

33. Upon the effective date of the revised primary annual $PM_{2.5}$ NAAQS in the 2024 Rule, the PSD program demonstration required under CAA section 165(a)(3) must include the revised NAAQS. This additional requirement increases the burden on any permit applicant subject to these provisions beyond those that were in effect as a consequence of the EPA's prior PM NAAQS revisions, most recently the 2012 $PM_{2.5}$ NAAQS.

34. The EPA has previously attempted to provide by rule that sources with pending PSD permit applications at the time of the effective date of the revised NAAQS need not demonstrate compliance with the revised NAAQS to obtain a permit, in recognition of the disruptive effects of a mid-process change. In August 2019, however, the D.C. Circuit vacated that provision in the PSD rules for the 2015 ozone NAAQS (*see Murray Energy Corp. v. EPA*, 936 F.3d 597, 627 (D.C. Cir. 2019)). Accordingly, the 2024 Rule's revision of the $PM_{2.5}$ NAAQS required any pending PSD permit applicants to revise their applications, including applications that may have been pending for quite some time and that were in the late stages of the approval process. This disruption in the application process threatens further delays, may require additional modeling and analyses, and may result in the imposition of additional controls and therefore previously unexpected costs.

35. In the 2024 Rule, the EPA conceded that the limited information added in the integrated science assessment supplement finalized in 2022, was not itself a thorough review. The EPA "acknowledge[d] that the ISA Supplement does not itself satisfy the EPA's obligation to periodically complete a thorough review of the air quality criteria" (Response to Comments ("RTC") at 121, JA2800; *see also* 89 Fed. Reg. at 16212). The EPA further conceded that the 2024 action did not satisfy the requirement in CAA section 109(d)(1) to complete a thorough review of the standards every five years. The EPA stated that review of the PM standards "should still be completed within five years of the most recent complete review, which concluded in 2020" (RTC at 121, JA2800).

36. The process followed to revise the primary annual $PM_{2.5}$ standard in the 2024 Rule through a partial "reconsideration" of the previous "thorough review" was unprecedented and departed markedly from the longstanding practice utilized in finalizing prior NAAQS revisions. The EPA purported to "supplement" the prior review completed in 2020 with a limited and narrow review of additional studies on some, but not all, areas impacting NAAQS review. Following this limited and narrow supplement, EPA flipped its ultimate determination in 2020, reached after a "thorough review" of the air quality criteria and related standards, on the appropriate level for the primary

annual $PM_{2.5}$ standard. In doing so, the EPA for the first time finalized a rule that reconsidered and substantially revised a NAAQS outside of the "thorough review" prescribed by statute.

37. The 2024 PM NAAQS reconsideration process did not comprise a "thorough review." Under CAA section 109, the EPA must first conduct a "thorough review" of underlying air quality criteria and standards before deciding whether to revise a NAAQS. The combination of a prior thorough review, and a limited update of only some air quality criteria, cannot meet the requirement for a "thorough review." If that were to be the case, EPA could serially issue supplemental assessments, combine them with a prior thorough review, and continually revise standards. That cannot be what Congress envisioned when providing EPA with a statutory command to do a thorough review of standards every five years.

38. Prior to the 2024 Rule, the EPA consistently took the position that, pursuant to CAA section 109(d) and the surrounding provisions in section 108 and 109(d), the Agency must complete a review of and revisions to the air quality criteria before proposing any appropriate revisions to the NAAQS. The Agency reaffirmed this position in 2020, including by discussing the EPA's longstanding practice for considering claims that studies released in the final stages of a "thorough review" should be considered (85 Fed. Reg. at

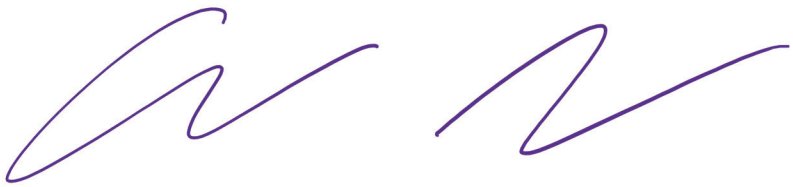
82690). Citing its 1993 decision on whether to revise the ozone NAAQS, the EPA reiterated that "'new' studies may sometimes be of such significance that it is appropriate to delay a decision in a NAAQS review and to supplement the pertinent air quality criteria so the studies can be taken into account" (*id.* at 82961 (citing 58 Fed. Reg. 13003, 13013-14, March 9, 1993)). Under those circumstances, the EPA has sometimes "reopen[ed] the air quality criteria" for supplementation before proceeding to repropose and finalize a decision on NAAQS revision within the same thorough review (*id.*) Thus, although thorough reviews sometimes involve multiple rounds of analysis prior to completion, the 2024 rule was an unusual departure from the body of practice in which the EPA understood its decision must reflect all the considerations under section 109(d).

39. Prior to 2024, the EPA never relied on the second sentence of section 109(d)(1), standing alone and apart from the first sentence of 109(d)(1), as an independent source of authority to revise the NAAQS.

40. To date, including in the 2024 Rule, the EPA never asserted that 109(b) alone authorized revising the NAAQS without also referencing 109(d). To my knowledge, this issue was raised for the first time at the oral argument for this case before the D.C. Circuit on December 16, 2024 (*see, e.g.*, Hr'g Tr. at 7:22-13:6).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 24, 2025, in Washington, D.C.



Aaron Szabo
Assistant Administrator, Office of Air and Radiation
U.S. Environmental Protection Agency

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF KENTUCKY, ET AL., Petitioners,	:	
v.	:	No. 24-1050, et al.
ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, Respondents.	:	

Monday, December 16, 2024
Washington, D.C.

The above-entitled action came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGE Millett, Childs and Ginsburg

APPEARANCES:

ON BEHALF OF THE PETITIONERS:

ELBERT LIN, ESQ.

JACOB M. ABRAHAMSON, ESQ.

ON BEHALF OF THE RESPONDENTS:

SARAH A. BUCKLEY, ESQ.

ALEXANDRA L. ST. ROMAIN, ESQ.

ON BEHALF OF THE STATE INERVENORS:

JONATHAN A. WIENER, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE DEPUTY CLERK: Case No. 24-1050, et al. Commonwealth of Kentucky, et al., Petitioners v Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the U.S. Environmental Protection Agency. Mr. Lin for the Industry Petitioners, Mr. Abrahamson for the State Petitioners, Ms. Buckley for the Respondents, Parts I and II of EPA's Brief, Ms. St. Roman for the Respondents, Parts III and IV of EPA's Brief, and Mr. Wiener for the State Intervenors.

JUDGE MILLETT: You may.

ORAL ARGUMENT OF ELBERT LIN, ESQ.

ON BEHALF OF THE PETITIONERS COMMONWEALTH OF KENTUCKY, ET AL.

MR. LIN: Good morning. May it please the Court, Elbert Lin on behalf of the Industry Petitioners. I am sharing time today with Mr. Abrahamson from the Kentucky AG's Office, but only I plan to do rebuttal for our side and hope to reserve three minutes for that purpose.

With my opening time, I'd like to focus on the question of EPA's authority and begin with some important table-setting. Specifically, I think the briefing has both sharpened and narrowed the dispute over EPA's authority. Although there was substantial briefing over

the first sentence of 109(d)(1), particularly the meaning of the word appropriate, everyone agrees that it's not before this Court. EPA has acknowledged that this action was not premised on any authority granted by that sentence and, thus, cannot and does not seek to defend the action on that ground.

What remains is EPA's claim that it has either implicit authority or authority granted by the second sentence of 109(d)(1) to reconsider a NAAQS determination without conducting a thorough review to, quote, "Of the air quality criteria or, frankly, any review at all," that's at page 42 of their brief, "In its discretion at any time." Among other problems, we think that claimed authority which EPA itself admits is a question of first impression simply does not exist.

Now if I could start first, I'd start with the claim that EPA has implicit authority to reconsider NAAQS decisions. As a threshold matter, it's not clear to us that EPA is really relying on this authority. It says a number of times in its brief that it is relying on the second sentence, the authority of the second sentence of Section 109(d)(1); and I think that's because, as this Court has explained in a series of cases, Congress can displace an agency's implicit reconsideration authority and it can do that where Congress creates a statutory

mechanism capable of rectifying a mistaken action or sufficient to that test. That's the American Methyl case.

JUDGE CHILDS: Well, you seem to, well, obviously over, despite your cycle, there's a thorough review required.

MR. LIN: Yes, Your Honor.

JUDGE CHILDS: You agree with that? And then you seem to agree that EPA can conduct an off-cycle review, you just disagree with how it is to come to that determination?

MR. LIN: That is correct, Your Honor.

JUDGE CHILDS: Okay, but --

MR. LIN: Yes.

JUDGE CHILDS: -- but think about it this way, too. Under your theory, you believe the off-cycle review has to have a thorough review?

MR. LIN: Correct, Your Honor, yes.

JUDGE CHILDS: Okay. But if you already have to go through almost five years of conducting a thorough review just to potentially set a new standard, and then you're also going to say that on an off-cycle review you need a thorough review, that timing issue doesn't seem to really work out because it already takes so many years just to get to the new standard.

MR. LIN: I understand, Your Honor. I think

there's a practical question of how long a thorough review may or may not, may or may not take. I mean let's say it took two years. You could do an off-cycle review that takes another two years and then you could, could pick up, you know, another five-year one.

JUDGE MILLETT: Has that ever happened in history?

MR. LIN: Afterwards.

JUDGE MILLETT: Has there ever --

MR. LIN: They've often been, been slower than five years.

JUDGE MILLETT: Have they ever been --

MR. LIN: Not that I'm aware of, Your Honor.

JUDGE MILLETT: Oh, so that's not a realistic reading? I mean --

MR. LIN: But I --

JUDGE MILLETT: -- eventually not?

MR. LIN: Yeah. Yes, Your Honor, but I, but I do think that the text, that's what the text requires. I think that's what Congress had in mind. I mean if we, if we go to the, the second --

JUDGE MILLETT: What does the second sentence in 7-409(b)(1) mean?

MR. LIN: I think everyone agrees there that that's about the, that's the one about the manner, Your

Honor? I think everyone agrees that's about requiring notice and comment. EPA says that itself.

JUDGE MILLETT: Well, but it certainly says it can be revised --

MR. LIN: Yes, Your Honor, it --

JUDGE MILLETT: -- if a manner is promulgated.

MR. LIN: Yes, Your Honor.

JUDGE MILLETT: Properly promulgated. Notice the rulemaking?

MR. LIN: Yes, notice and --

JUDGE MILLETT: That certainly happened here.

MR. LIN: Yes, yes, and we're not contesting that there was no notice and comment.

JUDGE MILLETT: Right. So, so, the revision of the standards here fully comported with 7-409(b)(1)?

MR. LIN: With the requirements of 409, oh, 109(b)(1), yes; but, but as EPA says in their brief --

JUDGE MILLETT: And it doesn't require anything like thorough or anything else, or revisions, it's just the same, it's talking about the manner, what you have to do when you're revising these next, primary next standards here?

MR. LIN: Correct, Your Honor, yes.

JUDGE MILLETT: It doesn't say thorough?

MR. LIN: No, it doesn't. It --

JUDGE MILLETT: It just says same manner, which was complied with. So, why isn't that the end of the story?

MR. LIN: Because we believe that that, and I think EPA agrees with that, that that is an additional requirement. So, I think they, they don't, they don't look for, look to that provision for authority because I think they agree with us if you look at page 34 of their brief, that that is about a re-notice and comment requirement. It does not grant them the discretion they're looking for. They haven't argued that that provision is what gives them the authority. They say what gives them the authority is the second sentence of 109(d)(1). Again, I think the reason for that is they --

JUDGE MILLETT: Well, just, I just want to understand one thing. So, (d)(1) did not come in, was not in the statute originally? It came in in --

MR. LIN: Correct, Your Honor.

JUDGE MILLETT: -- '77 or '79, right?

MR. LIN: Yes.

JUDGE MILLETT: Okay. So, between '70, sorry, so, '79 or '77? My brain is not remembering which year the (d)(1) came in.

MR. LIN: I, I don't remember either, Your Honor, I'm sorry.

JUDGE MILLETT: Oh, it looks like '77. Okay. So, prior to that time, did they have no authority? They could revise at any time?

MR. LIN: Yes, Your Honor, they --

JUDGE MILLETT: Frame.

MR. LIN: -- they, I think, well, so they have the implicit authority to reconsider.

JUDGE MILLETT: No, I'm, under (b)(1), so prior to '77 --

MR. LIN: Yes.

JUDGE MILLETT: -- amendment when (d)(1) comes in --

MR. LIN: Yes.

JUDGE MILLETT: -- they had the obligation to promulgate for our present purposes, primary NAAQS; and they had the authority to revise them at any time as long as they did it in the same manner, notice and comment rulemaking, that's correct?

MR. LIN: Yes, Your Honor.

JUDGE MILLETT: So, if this were a 1976 case, what they did here would be perfectly lawful? j

MR. LIN: I think the, in the period between, that we're talking about before 109(d)(1) came in, they would have had the implicit authority to reconsider.

JUDGE MILLETT: When you keep saying implicit,

it's explicit, it's right here. It can be, they may be revised as long as done in this manner. That's not implicit, that's explicit in the statutory text of (b), (b)(1). If I'm not articulating between (b) and (d), let me know, B as in boy one.

MR. LIN: Of course, Your Honor.

JUDGE MILLETT: Okay.

MR. LIN: So, I guess I would give you --

JUDGE MILLETT: Is that right, if it were, so for 1976, this would all be perfectly lawful?

MR. LIN: If it were 1976, this would be fine because they did notice and --

JUDGE MILLETT: For (b)(1)? Okay.

MR. LIN: -- but this, they did notice and comment.

JUDGE MILLETT: So, what in (d)(1) tells us that it was taking away that authority from (b)(1) because that's not normally how we read subsequent legislation?

MR. LIN: Well, I think there's two answers to that, Your Honor, and the first one is that I think, again, I don't think, that's the way EPA reads it. I think --

JUDGE MILLETT: No. We're told, well, it doesn't matter how they read statutes anymore. So --

MR. LIN: I agree.

JUDGE MILLETT: -- at least from my, from my, from my viewpoint.

MR. LIN: That is correct, Your Honor, but they are still bound by Chenery and they are still bound --

JUDGE MILLETT: I think that's a very open question, so, whether Chenery applies to a basic question of statutory authority as opposed to decision-making. So --

MR. LIN: I think that's fair, Your Honor, but I don't think that that question has been raised in this case. I think they, they are --

JUDGE MILLETT: I'm just asking you just as a textual matter, so let's put aside what they said or not said, just reading the statute upfront textually, they had the authority to do what they did here under (b)(1) full stop. (d)(1) doesn't say anything about taking away that authority.

MR. LIN: No, Your Honor, I don't think it took --

JUDGE MILLETT: Why should we read it to confound that authority by putting an impossible framework that you said never, has never worked, inconceivable, it's not like it's getting easier, it's probably getting harder over time, in a work?

MR. LIN: Your Honor, I guess --

JUDGE MILLETT: And there's nothing in the text that tells me about that.

MR. LIN: Yes, Your Honor, and so my, my second answer, other than Chenery, is I would say I don't, we don't read 109(d)(1) as taking away what (b) was referring to. I think it adds additional requirements.

JUDGE MILLETT: What, why, it doesn't, I mean this is your argument from your reply brief that the second sentence doesn't talk about standards, other than new standards. It doesn't talk about revising standards. It talks about revising criteria. And, of course, when you revise criteria, you would then go to (b)(1) to revise the standards, would you not? I mean this was your argument in your reply brief that the second sentence that they're relying on doesn't talk about revising standards.

MR. LIN: That is correct, Your Honor.

JUDGE MILLETT: Okay.

MR. LIN: Right.

JUDGE MILLETT: So --

MR. LIN: It doesn't.

JUDGE MILLETT: -- then, so it's, can't all be altering the authority to revise standards under (b)(1).

MR. LIN: Well, the way we read the second sentence is that it is not an independent grant of authority; that it is tied to the first sentence of

109(d)(1); and that that, that grant of the, that the ability to revise more often than every five years incorporates all the requirements and powers that are discussed in the first sentence of 109(d)(1) and I think --

JUDGE GINSBURG: So --

MR. LIN: -- yes, Your Honor?

JUDGE GINSBURG: -- I'm not sure I understand how this works as you explain it. What's an example, first of all, of a criteria? What's it look like?

MR. LIN: Of an air quality criteria?

JUDGE GINSBURG: Yeah.

MR. LIN: The way EPA explains it is it's really, it's a document that talks about the scientific studies and --

JUDGE GINSBURG: That's good enough.

MR. LIN: Yes.

JUDGE GINSBURG: And from that, they arrive at the standards that they deem sufficient to meet the statutory margin of error?

MR. LIN: Yes, Your Honor.

JUDGE GINSBURG: Now this argument, your reply brief is, is, at 14 says look at the statute, right? The second sentence talks about reviewing and revising the criteria --

MR. LIN: Yes, Your Honor.

JUDGE GINSBURG: -- as discussed. We're promulgating new standards, right?

MR. LIN: Yes.

JUDGE GINSBURG: But here we have the Agency revising the standard?

MR. LIN: That's right.

JUDGE GINSBURG: Not revising a criterion and not promulgating a new standard?

MR. LIN: Yes, it's revising existing standards.

JUDGE GINSBURG: Now you, you, you surface this, which seems like a very sensible observation, a starting point; but then diminished it, I guess, to say it as being not the better interpretation in your view. Why is that?

MR. LIN: We don't think that it, Congress would have written the second sentence in that paragraph that just addressed those three things, reviewing criteria, revising criteria and promulgating new standards.

JUDGE GINSBURG: Even though that's the way it's written?

MR. LIN: Yes. We think that those, we think that those nine words that we're talking about --

JUDGE GINSBURG: Yeah.

MR. LIN: -- are really just statutory shorthand for the much more complex mouthful that is in the first

sentence. The Supreme Court recognized in the Kellogg Brown & Root case that Congress will sometimes use statutory shorthand as a succinct way to address, to refer to something that is much lengthier and much more complex. In that first sentence, it says that every five years EPA shall conduct a thorough review of the air quality criteria and the standards, and then it shall review, revise them, you know, has maybe appropriated --

JUDGE GINSBURG: And so, I take it then the second sentence and what you say about the second sentence eon page 14 is not your alternative argument?

MR. LIN: No, our, our, our argument, we're, we are saying --

JUDGE GINSBURG: It's not your alternative argument?

MR. LIN: Yes, if this Court disagrees with us that the two sentences are interlinked and that the second sentence is merely a statutory shorthand reference that modifies the timing requirements, we were saying if you think they can be, be coupled, then it does not give EPA the authority they are asking for. But we don't think that is the way you should read it. We think the best reading of those two sentences is that, one, it's simply referring back to the other and making sure that it's clear that EPA has the authority to, to do what's required

in that first sentence more often than --

JUDGE GINSBURG: You're going to live and die on the first sentence, live or die on the first sentence?

MR. LIN: We believe that the first sentence is what, what imposes requirements on their, on their revision; and so, and we think the question before this Court, which is what EPA has said, is do they have independent authority granted by the second sentence of 109(d)(1)? That is the only basis on which they have defended their rule.

And so, I think if this Court -- yes, I'm sorry, Your Honor.

JUDGE MILLETT: All right. I'm going to step one --

JUDGE GINSBURG: Well, just it seemed to me that the, the interpretation you surfaced on page 14 of the reply brief suggests that, that if the Agency determines that there are, that there's new science and so on, it can revise the criteria or wait. In other words, if there's a 5-year period of repose, okay, new things may came, come along, revisions may occur after two years, but the standard can't be changed until the fifth year. So, there's some repose for the Industry?

MR. LIN: Yes, Your Honor, I that is, that is one way of, we think if you're going to decouple the two

sentences, that is the only reading of the second sentence that make sense which is that in between the 5-year periods that can review and revise the criteria, they could promulgate new standards if there's some new criteria pollutant, right, for which there has been no --

JUDGE GINSBURG: That's not --

MR. LIN: -- no pre-existing standard; but as the revision of existing standards, that is governed by --

JUDGE MILLETT: Then it is definitely nullifying (b)(1) and, yet, the words, the sentence that you are putting so much weight on doesn't talk anywhere, as you argued in your reply brief, does not talk about revising standards. It only talks about new standards. And so, it's not only that you want us to read this as a shorthand for the very long sentence that preceded it; but then we also have to write-in review and revise criteria or standards, or promulgate new standards; and, and, on top of reading that in, we have to say that was meant to vesicate, nullify the plain text of (b)(1). I mean there was no reason to put standards in the second, revision of standards there because they already had that authority under (b)(1), but they needed to have the ability to look at the criteria. And then once they found criteria, they found that suddenly something is toxic and killing people, and they need to address it right away, the notion they

have to sit around waiting three years because Congress somehow implicitly nullified the authority to act and revise standards under (b)(1) seems quite an extraordinary statutory interpretation exercise.

MR. LIN: Here is my answer to (b)(1), Your Honor. I don't read (b)(1) as a grant of the authority to revise. I think it is, it is imposing a requirement on the manner in which the revision can occur.

JUDGE MILLETT: Okay. But why would you prescribe a, why in 1970 would they say how they can revise them if they couldn't revise them?

MR. LIN: I think the revision authority was implicit.

JUDGE MILLETT: But --

MR. LIN: As this Court has --

JUDGE MILLETT: -- I don't, may be revised and here's how. Why is that not the better reading of the sentence? I don't understand why they would have an explicit condition on an implicit authority. And if I read may be revised as, they may be revised and here's how, isn't that the more natural reading than to assume that they went explicitly to tell them how to do something they weren't even sure they had the authority to do?

MR. LIN: I don't think so, Your Honor. I mean, so if I could --

JUDGE MILLETT: Uh-huh.

MR. LIN: -- take a step back again? I think Congress understood that EPA has the authority to revisit what it has done before. I think this Court recognized that. That's in the implicit authority cases that I've discussed in American Methyl v. New Jersey. It's when Congress recognized that promulgating NAAQS standards, EPA could revise them. I think what it was saying in 109(b)(1) is it says they may be revised in this manner. I think it's --

JUDGE MILLETT: Uh-huh.

MR. LIN: -- just talking about the manner in which that can be done and it is requiring the same manner which is the notice and comment that was prescribed in 109 here.

JUDGE CHILDS: But if you go to 109(d)(1) and look at the last sentence, the administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph. You're not giving any context to timing.

MR. LIN: Well, I think, I'm sorry if I'm not understanding your question, Your Honor. I think the earlier, more frequently in the second sentence of 109(d)(1) is referring to the five-year intervals that are discussed in the first sentence of 109(d)(1). I think

everyone agrees on that.

JUDGE CHILDS: But, okay, but it says review and revise in that last sentence?

MR. LIN: Yes, it is talking about reviewing and -- it says review and revise criteria --

JUDGE CHILDS: Uh-huh.

MR. LIN: -- or promulgate new standards; and so, as I was discussing with Judge Ginsburg, I think what that, there's two potential ways --

JUDGE CHILDS: But, but the point of revising the criteria is to promulgate essentially a new standard or revise the standard?

MR. LIN: Yes, Your Honor, except -- so, I think there's two ways to read that second sentence, right? The first is that it is, I think as we contend, it is a shorthand in reference to all the, all the stuff that's discussed in the first sentence. That first sentence talks about four potential actions, a revision, the review of criteria, the revision of criteria, the revision of standards and promulgating new standards, four things, right, reviewing criteria, revising criteria, revising existing standards and promulgating new standards. So, one way to read the second --

JUDGE CHILDS: Promulgating a standard is based on criteria.

MR. LIN: Yes, Your Honor.

JUDGE CHILDS: Okay. So, you're skipping over when you say revision of standard, without looking at the criteria.

MR. LIN: No, Your Honor, I'm, I'm sorry. I'm just trying to, I'm just trying to parse whether the two are focused on the text of the second sentence because I think, again, I mean there's two ways to read the two sentences in 109(d)(1). One is that they are coupled and one is that they are decoupled. EPA's position is that they are decoupled. Our position is that they are coupled. I think the reason, and what I'm, what I'm trying to get at is when you look at the first sentence, it talks about four potential actions, reviewing criteria, revising criteria, reviewing existing standards and promulgating new standards. As I was discussing with Judge Ginsburg, the second sentence only talks about three of those things, reviewing criteria, revising criteria and promulgating new standards.

And so, one way to read those two sentences is that they are independent and they don't, they're not coupled together. If that's true, the second sentence only grants authority to do three things: Review criteria, revise criteria and promulgate new standards. If you're taking a strict textual interpretation, which is

what the EPA wants to do, you are stuck with just those three actions in the second sentence.

JUDGE MILLETT: Which makes perfect sense because there's already a separate statutory authority in the same section for revising the standards?

MR. LIN: Your Honor, if you, if, if you read 109(b)(1) as granting the authority to revise, I think when Congress legislates, they understand that the Agency has the ability to revise what they have done previously; and I think all 109(b)(1) was doing is dictating the manner in which that revision may be done, not granting the authority because I think the authority was present as an implicit matter; and I think all it was doing in 109(b)(1) was saying --

JUDGE MILLETT: Couldn't be present? I mean this is the original statute of 1970. There wouldn't have been any implicit at the time Congress wrote this sentence. This was creating the authority. May be revised, may be revised.

MR. LIN: Yes, but, Your Honor, I think, I mean every case --

JUDGE MILLETT: Your best case, the language like this, that something may be done in a manner is only explicit as to the manner, but implicit to whether it may be done at all.

MR. LIN: I don't have a case for you, Your Honor. What I have --

JUDGE MILLETT: A grammatical example in plain English in which may be revised in a manner, or may be, pick your other verb, in the manner doesn't give you both the authority to do the thing that you may do, as well as telling you how to do it.

MR. LIN: Well, I think, I think the best, the best textual answer to you, Your Honor, would be that you would say may be revised and done so in, in, in this manner. I think the fact that there is --

JUDGE MILLETT: We just don't ding Congress for not putting lower words in because it's, those are unneeded words. Maybe revise or manner, right?

MR. LIN: My two best answers for you, Your Honor, are, one, that is not the authority that EPA has claimed here.

JUDGE MILLETT: Like how or may be repaired, I tell the auto mechanic, my car may be repaired in the same manner it was originally designed and I leave my car. That does not mean they have to sit around wondering if they can actually repair the car.

MR. LIN: Your Honor, I think, again, it starts from what is the, what is the premise that we're starting from? Did, did EPA have authority to revise as an

implicit --

JUDGE MILLETT: Manner.

MR. LIN: -- manner or not? And I think, I --

JUDGE MILLETT: I don't know. No, I'm, I'm sorry, I don't think we're -- I'm, maybe I'm just clearly misunderstanding something here. I'm starting from 1970, original statute, which has not been amended. And if I'm reading it as explicitly granting them the authority to revise standards, and it's the only way to explain why in (d)(1) they left, you said there's four things in the first sentence, three in the second, which one did they leave out? Revised standards.

MR. LIN: Provision. Provision.

JUDGE MILLETT: Which is already addressed here and it makes perfect sense for the purpose of this statute. As Judge Childs was saying, imagine they're able to revise the criteria as thoroughly as you want and they discover suddenly a new toxic pollutant that is killing people.; and you're reading of this statute that you propose, despite its public health animating force, would be that EPA would have to sit around wringing its hands for two or three years going this is horrible, this is horrible, there's nothing we can do because we can't yet revise the standard. If we did revise it, we would know how to do it in notice and comment; but we, Congress

hadn't told us we can do it.

MR. LIN: So --

JUDGE MILLETT: That's right, it says unnatural reading of the statute.

MR. LIN: -- to, to your hypothetical as to whether there's a new toxic pollutant, I think then they would be promulgating a new standard. So, we'd be talking about something --

THE COURT: So, newly-discovered something is not a --

MR. LIN: -- a newly discovered --

JUDGE MILLETT: -- new consequence here?

MR. LIN: -- effect, yes, would be, would be your hypothetical.

JUDGE MILLETT: I'm sorry. I guess I'm not a scientist at all.

MR. LIN: Let me try this for you. I think if Congress had enacted the Clean Air Act in 1970 had not included may be revised in a manner and promulgated, in, in, in the same manner as promulgated, EPA would have the authority to revise because I think --

JUDGE MILLETT: Can you say that one more time?

MR. LIN: Let's say --

JUDGE MILLETT: Because they hadn't had the second --

MR. LIN: -- let's say we, let's say we strike one, that sentence that you and I have been discussing, may be revised in the manner, same manner as promulgated.

JUDGE MILLETT: Uh-huh.

MR. LIN: If that was not there, EPA would still have the authority to revise existing standards. And the reason for that is that as this Court has said, when Congress grants EPA the authority to do something --

JUDGE MILLETT: Uh-huh.

MR. LIN: -- it also has the implicit authority to reconsider it.

JUDGE MILLETT: Uh-huh.

MR. LIN: That's what this Court said in the American Methyl case. That's what this Court said in the New Jersey case, in Ivy Sports by itself, if, if we didn't have that sentence, they would have had the authority to revise a standard that they promulgated. So, that, I think, is where were starting from; and then so, that, if, if they already have the implicit authority, the way I understand that sentence is it wasn't Congress granting it, it was putting --

JUDGE MILLETT: Why do I --

MR. LIN: -- restricting the manner.

JUDGE MILLETT: -- I understand that's your rationale. How do I know Congress just wanted to be

explicit? Sometimes Congress, it is not uncommon to find in the U.S. Code Congress granting authorities, giving powers that agencies would implicitly have, right?

MR. LIN: Yes, Your Honor, yes.

JUDGE MILLETT: Some people in --

MR. LIN: Yes, yes, right, no, Congress is not --

JUDGE MILLETT: And, and so, we got words here.

MR. LIN: -- is not always particularly clear.

JUDGE MILLETT: That's the only thing that explains why they didn't bother to put revised standard up here in (d)(1), otherwise it's just, it's, because you can't do your shorthand. I mean basic statutory construction says we cannot do your shorthand. That second sentence brings in everything from the first sentence because then we would have to say that a revised standard, the standard is either covered by criteria, which we know it's not because there's specialized terms in the statute; or it would have to say a revised standard is covered by a new standard, but we know that's not true because these are specialized words in the statute. So, there's nowhere under your reading to put all of the first sentence in the second sentence because we would, at a minimum, would have to take over advising standards.

MR. LIN: Your Honor, I think the way you would

do it is you would understand that those nine words are a shorthand referring --

JUDGE MILLETT: But when they, when, when they don't shorthand, when, we could do that if Congress used one generalized word, the foregoing powers, something like that. But as you said, it would be, it must seem strange when Congress said, I'm discussing four things, and then does another sentence and says, okay, now as to three of those things, here's an additional provision. And we have pretty settled statutory construction principles that when Congress deliberately includes and excludes language, even less closer than this, sentences right next to each other, we assume it was intentional.

MR. LIN: Yes, Your Honor, I understand that. I do think that the Supreme Court has recognized that you can have shorthand. I get that this is a, perhaps, a less than artful form of shorthand. Here's the, here's --

JUDGE MILLETT: It would be in the, the contradiction of that well-established statutory construction principle, the one Congress includes, intentionally omits, omits language that it included in the sentence right before it that we assume that that was intentional, correct?

MR. LIN: I think that's right, Your Honor; but I, but, again, so, so we don't think 109, and I would be

the first to admit to you, I don't think 109(d)(1) is drafted in the way that I necessarily would have drafted it, but that's the best way that I could --

JUDGE MILLETT: Well, the benefit of hindsight.

MR. LIN: That's the best way that I can make sense of the two, two sentences. And, and, Your Honor, if I could add one other point? If you take the position, if you agree with the position that EPA is taking, which is that they can revise existing standards at any time and that they have this free-wheeling authority, Your Honor, if you read it into 109(b)(1), they can just, it's just a grant of authority to revise. There's no requirement --

JUDGE MILLETT: I know, but it's not just a grant of authority revised. It has to be done in the same manner as, it has to go through notice and comment, which is --

MR. LIN: Yes, Your Honor.

JUDGE MILLETT: -- a pretty common check on --

MR. LIN: It has to go through --

JUDGE MILLETT: -- Agency --

MR. LIN: Yes.

JUDGE MILLETT: -- authority and power.

MR. LIN: Of course, it does. It has to go through notice and comment; but what it does not require is the thorough review of the air quality criteria. And

the EPA itself has argued here that they think they have the authority, they have the power to revise and revisit a NAAQS standard without even reviewing the air quality criteria at all. And to Judge Childs' point, they have also said and acknowledged at multiple points that the air quality criteria is the scientific basis for the standard. So, their contention here is that they have this independent authority to revise the standards at any time without even looking at the air quality criteria. That doesn't make any sense.

JUDGE GINSBURG: Wait a minute, what do you mean by --

JUDGE CHILDS: That's a distinction.

JUDGE GINSBURG: -- by independent? What do you mean, independent authority? They're anchoring it in the second sentence.

MR. LIN: I'm sorry, Your Honor, I --

JUDGE GINSBURG: I said they're claiming an independent authority. Independent of what?

MR. LIN: Oh, I'm sorry. They're claiming independent of the requirement to review, to do a thorough review --

JUDGE GINSBURG: Right. And they're basing it --

MR. LIN: -- of their --

JUDGE GINSBURG: -- on the second sentence?

MR. LIN: And they're basing it on the second sentence. They're not basing it on 109(b).

JUDGE GINSBURG: Second sentence, to your point, doesn't talk about revising standards.

MR. LIN: That's right, Your Honor; but, but what I was responding to, Judge Millett, is, is if you read 109(b) as a grant of the authority to revise existing standards, it does include a notice and comment requirement; but it does not require them to do a review or a thorough review of the air quality criteria. And as they have said themselves --

JUDGE MILLETT: Well, they didn't explain, I mean part of their notice and comment process is going to be reasonably explaining based on substantial evidence why they're making this change; and the statute is pretty clear they're going to have to look to criteria. In fact, in this case, they did have some intervening criteria. But it also would allow the Agency to do, we, as you said, we even implicitly allow agencies to go, do and go, whoops, either, whoops, we completely misunderstood something, there's a health effect, a serious health effect that can be, but is not being addressed, we just misgauged, miscalculated; or we have had intervening studies come in in the last two years that changed the

calculus dramatically and we need to, to, to promote health which is our, our mission here. We need to impose a new, revised standard, not a new standard, I guess, a revised standard and we don't think Congress wants us to wait three more years while people are dying. And they'll have to explain it and, and people will challenge that and say whether they properly explained why they're doing this, correct? So, I don't -- it's not some free-ranging authority to do whatever they want and make things up disconnected from real evidence about health impacts. I'm not sure what I understand the concern to be. I mean I think the reality of trying to say they have to do what they can't even do often in five-year intervals, in less than five-year intervals. And does everyone admit there's no evidence that they were even able to do that before Congress put this (d)(1) into the statute? And that just paralyzes the Agency from reacting to new health information. So, that's sort of our alternative reading. It reads the second sentence to become an empty letter because it is inadministrable.

MR. LIN: I think it's a recognition that when Congress required the thorough review in 109(d)(1), what it wanted to do was make sure that EPA was looking at all the available science and that one administration of the other was not simply choosing the scientific evidence that

it thought was most relevant to the decision it wanted to make. That's how we understand the point of 109(d)(1) was Congress wanted to, to put that restriction on EPA to make sure that it looked at everything before --

JUDGE MILLETT: Once you've already done, you've just finished your five-year review, you have collected an awful lot of information, and then new information, and they all have to establish that it's credible and substantial evidence to support change, all of those; but let's assume when it passes all those markers and it warrants immediate adjustment to an existing standard, there's no reason Congress would say, you have to go revise and look at everything all over again. You just did it. You're working. You've got the baseline and that baseline, the structure of the statute says that baseline holds for five years.

MR. LIN: Well --

JUDGE MILLETT: And, but if you get new information on top of that, then you can revise the standard, revise the criteria, do new standards.

MR. LIN: Yes, Your Honor, and I think you and I are in agreement that we're talking about the new information. Like I think when you do, when you do a new, thorough review --

JUDGE MILLETT: On top of a baseline.

MR. LIN: But --

JUDGE MILLETT: You got the --

MR. LIN: Wait.

JUDGE MILLETT: -- baseline from this comprehensive review. This is like if you need to update your dissertation, you have to start all over again, do all your research again and rewrite the entire dissertation. No one would say that.

MR. LIN: I don't think that's --

JUDGE MILLETT: You update it.

MR. LIN: I don't think that's how a thorough review would work even in the five-year intervals. I don't think you go back and throw out everything that was done.

JUDGE MILLETT: So, it would be a different thorough review than what you do in the first sentence? The second sentence thorough review would be a different review than --

MR. LIN: Well, a full review, right. So, like if we could sort of walk through, you know, how one of these things might work. So, let's say you've done your five-year thorough review and so you have your updated air quality criteria in light of whatever you did in 2000, just to pick a year, right? And then new information comes out between 2000 and 2002. To do another thorough

review doesn't mean you just throw all the work from 2000 in the trashcan, right? I mean there is, a document has been prepared; the evidence has been reviewed; and EPA doesn't have to redo the, a review of all the science that existed before 2000. It has to review the science from 2000 and 2002, but what the thorough review requires is that look at all of the science from 2000 to 2002, not --

JUDGE MILLETT: You're going to get, that's, that's just a simple -- you can take care of that in notice and comment rulemaking challenges. If they ignored relevant evidence that's in the record of contrary science they didn't consider, that's a valid basis for a challenge. That's, that, that fits right within the notice and comment rulemaking limitation on revising standards.

MR. LIN: Your Honor, that's --

JUDGE MILLETT: As I, as I read thorough, tell me if I'm wrong, as I read thorough, thorough review here, every five years they have to look at all the criteria, is that correct?

MR. LIN: They have to look at all, all the, all the science for the air quality criteria, Your Honor.

JUDGE MILLETT: For all the criteria? All the science for all the criteria, at least since the prior one?

MR. LIN: Yes, Your Honor.

JUDGE MILLETT: Or --

MR. LIN: Yes.

JUDGE MILLETT: Right?

MR. LIN: All the science.

JUDGE MILLETT: Okay. But you're saying now if we take thorough review down into the second sentence, they don't have to review all the science for all the criteria? Thorough here means, it sounds like thorough in the first sentence has this comprehensiveness meaning and the thorough you want in the second sentence has a target, a more --

MR. LIN: Oh.

JUDGE MILLETT: -- a more colloquial meaning of --

MR. LIN: No, no, I understand.

JUDGE MILLETT: -- you know --

MR. LIN: I understand your question, Your Honor.

JUDGE MILLETT: -- roll up your sleeves and --

MR. LIN: No, I, I don't think it's different because I don't think even in the first sentence that it's requiring EPA to go back, and I don't mean this pejoratively, right --

JUDGE MILLETT: Uh-huh.

MR. LIN: -- but to the, to the beginning of time and look at all that science again. I mean I think --

JUDGE MILLETT: I'm not saying that, I'm sorry.

MR. LIN: Right. There's been a lot of work that's been done --

JUDGE MILLETT: Sure. I'm not saying --

MR. LIN: -- in the last --

JUDGE MILLETT: -- that. What I'm saying is the first sentence means, thorough means not just diligent and hard-working --

MR. LIN: Yes.

JUDGE MILLETT: -- but it means all the criteria?

MR. LIN: In, in, well, in, for our purposes, it means all of the science --

JUDGE MILLETT: No, no, no, I'm just, in, in sentence one, do they and, again, tell me if I'm wrong, if five-year reviews, are they obligated to review information for all of the criteria, all underlying NAAQS?

MR. LIN: Yes, Your Honor.

JUDGE MILLETT: NAAQS?

MR. LIN: Yes, every --

JUDGE MILLETT: Okay.

MR. LIN: -- five years they are required to do

that.

JUDGE MILLETT: So, thorough there, I had read thorough there to mean comprehensive, all of the NAAQS, all of the criteria of, that are, I'm sorry, all of the criteria that underly all of the existing NAAQS. Maybe if there's any new ones you're thinking about, too. That wouldn't be a review, though, it would be an initial look. You surely got to review all of the criteria for all of the existing NAAQS. Certainly, you can start with the prior five-year marker, but you've got to do all of them. The thorough here means not just hard-working, it means comprehensive?

MR. LIN: It does, although that is not the point of dispute here between its right.

JUDGE MILLETT: No, no, but then if you want to bring thorough down into the second sentence, they would only be able to review all the criterion. It says review and revise criteria, not criterion, singular, this is criteria plural, they would have to look at all of the criteria, otherwise thorough is changing, is losing that comprehensive meaning in step, in sentence one and becoming just the hard-working and diligent reading in sentence two.

MR. LIN: I think there's another reading of thorough review which I think is --

JUDGE MILLETT: Okay.

MR. LIN: -- the reading that everybody here agrees on. That's --

JUDGE MILLETT: Oh.

MR. LIN: -- with respect to one particular criterion, one particular NAAQS; and thorough there, so say for this PM2.5 in particular --

JUDGE MILLETT: Uh-huh.

MR. LIN: -- it has its own criteria. I think the dispute between the parties is does thorough review require looking at all of the science since, you know, that's developed since the last one for that particular criteria or not. EPA's position and, and, and admission here is that they did not look at all of the new science since the 2020 decision that they want to reconsider. Instead, they --

JUDGE MILLETT: So, what, what was your reading, your, your desire to take thorough down to the second sentence and to write in revised standards? What would that give you that you're not already going to get from notice and comment rulemaking and judicial review under arbitrary, capricious, substantial evidence standards under (b)(1)?

MR. LIN: I think the difference would be it would require EPA to, to go through all of the science.

It would put, it puts the burden on the Agency to look at all of the science and not just impose a, a screening criteria, which is what they did here. They said here are the only studies that we're going to look at and only those studies; and that's what we think --

JUDGE MILLETT: What was the screening criteria?

MR. LIN: It's pretty lengthy, but I can point you to the, to the page on the record.

JUDGE MILLETT: Just, can you give me a plain English summary?

JUDGE GINSBURG: You don't need thorough for that. The EPA takes care of it.

JUDGE MILLETT: Oh.

MR. LIN: Well, think the problem with the difference that's, I think it's the same question, right, that, that Judge Millett is asking is what's the difference between an arbitrary and capricious review --

JUDGE MILLETT: And substantial --

MR. LIN: -- of their review, right, versus a requirement that they do a thorough review; and I think the difference is where does the, where does the initial burden fall? I mean they have to go out and look at all of the scientific evidence and actually, you know, lay eyes on it and review it, and do an analysis, and figure out how that applies.

JUDGE MILLETT: I'm sure it doesn't mean, you know, they can make some judgment as to, well, there should be, be some sort of cracker box things out there that they know they have to look at everything or every single piece that's written by everybody that's duplicative there. So, and the way this works, I mean that's what they're supposed to do in their, in their rulemakings under notice and comment, and substantial evidence review. And then what, what happens is parties come in and go, you missed one, you missed this one and it's really important. You missed this one that's really important. They do have this obligation to do good government work, but the whole point of notice and comment rulemaking is that you invite the public to help that and let us know if we missed anything; and so, and you come. And so, I don't, I still don't understand how the outcome is going to be any different.

MR. LIN: Your Honor, I think the difference is that it puts the burden on, on the public. If we haven't gone out and canvassed, if we haven't found a particular study, they can say, well, those studies weren't brought to our attention --

JUDGE MILLETT: Well, I think --

MR. LIN: -- and so --

JUDGE MILLETT: -- if we say we, here's, here's

what we, here's what we could find. And now if they say, we chose only to look at, you know, Ph.D. dissertations from Cambridge, then someone could go, well, that, that's not a reasonable restriction. But if they say, here's what we found and that's, and we assume good faith by the Agency, I assume you're not attacking that; and if they have an explicit, if there's, if you're concerned about some explicit criterion here that limited, you artificially limited the review, that's, you don't even have to come back with a study, although it would be helpful to show some prejudice from your asserted harm; but, you know, you can, you can point out what they did was arbitrary by, by narrowly focusing the review. But if they've got everything they could find and you, you don't have any ideas of something they missed, then you're going to fail on your other standard.

MR. LIN: So, two answers. I have the cite for you. It's --

JUDGE MILLETT: Uh-huh.

MR. LIN: -- 89 Fed. Reg. 16, 212, and that's where they set out their criteria for their admittedly less than thorough review. Your Honor, my --

JUDGE MILLETT: And the words said admittedly less than thorough?

MR. LIN: Well, they say a number of times,

excuse me, including the response to comments, so, first of all, they say in their brief --

JUDGE MILLETT: Sorry, I'm trying to get to it.

MR. LIN: -- page 30, "EPA did not purport," --

JUDGE MILLETT: All right. Hang on one --

MR. LIN: I'm sorry, Your Honor.

JUDGE MILLETT: -- let me get to the right tab here. Okay. All right.

MR. LIN: In their brief at page 30, they say, "As Industry Petitioners note, in reviewing and revising the air quality criterion standards in the final rule, EPA did not purport to complete the thorough review of all aspects of the air quality criteria."

JUDGE MILLETT: Right, it was focused on health, it was health concern?

MR. LIN: It, it focused on only certain science. And RTC --

JUDGE MILLETT: Certain science or certain problem?

MR. LIN: Certain science and that gets to the criteria that I pointed to at 16, 212.

JUDGE MILLETT: Okay.

MR. LIN: At JA-2800, which is the response to comments, page 121, they say, "EPA acknowledges that the ISA supplement does not satisfy EPA's obligation to

complete a thorough review.

JUDGE MILLETT: That's just a legal argument. They weren't doing --

MR. LIN: Well, I think it's an admission that they didn't do the thorough review that they understand to be required by the statute.

JUDGE MILLETT: Is it your position that if you were, if the way you could challenge what they did was challenge, notice, notice and comment review, judicial review of their notice and comment process, that you would not be able to make that exact same argument and that there's anything that would prevent it from succeeding if you were to establish the materiality of the air?

MR. LIN: I think that there's a higher burden on them under this, this statutory --

JUDGE MILLETT: Is there anything that would prevent you from prevailing on that exact same argument through judicial review of notice and comment rulemaking?

MR. LIN: We would have had to have found scientific studies, I think, to, to explain why we think the limitation is arbitrary and capricious. I think there's a --

JUDGE MILLETT: Well, tell me the Agency set-up from there what, if there's something in their language that you think gives up the game right there. If not, if

it was legalese about we're not doing first sentence, we're doing second sentence, or we're doing (b)(1), whichever --

MR. LIN: Right.

JUDGE MILLETT: -- it was legalese and that's less concerning. But if you, if you can't show some prejudice, I mean either way you're coming to judicial review on this, right? And so, I just, I don't understand what the, how the outcome will be materially different given that thorough in the second sentence sounds to me like it just means they have to have considered all relevant evidence and studies, right? At the end of the day, that's what you're saying, you, no one is arguing they have to consider irrelevant or one-off sort of crazy, Looney Tune views; but if they've got, if there's, if they have to consider all relevant studies, and if you, even if they said we've, we've done as thorough review as we can, if you wanted to challenge that, you're going to have to find, you're going to have to tell them and then you're going to have to tell the Court. I mean you're going to have to go through the same set of judicial review process of alerting them through notice and comment rulemaking and then challenging it in court. It's the exact same thing.

MR. LIN: Yes, Your Honor, I think if they had agreed, if they had, if they had agreed that they had a

requirement to do a thorough review, then our complaint would be that what they did was not sufficient and it would be an arbitrary and capricious sort of substantial evidence type challenge to the quality of the thorough review that they did. But the claim that they have here is that they don't have to do a review at all and we think that goes a step too far. And, and I think it comes back, Your Honor, to --

JUDGE MILLETT: No, that's not what they did here and if --

MR. LIN: No, but, but that is the authority that they claim and it gets back to the second sentence where they say, we have the authority under the second sentence of 109(d)(1) to do a revision of existing NAAQS standards without doing a review of air quality criteria at all. That authority --

JUDGE MILLETT: At all, they didn't say at all.

MR. LIN: They do say at all, 41, page 41 to 42 of their brief, that is a quote, it says --

JUDGE MILLETT: Okay. Where in the record do they say at all? That's not the, that may be the lawyer's --

JUDGE GINSBURG: This is regarding the criterion, pre-existing criterion, correct?

MR. LIN: Yes, Your Honor.

JUDGE GINSBURG: They don't have to deal with that.

MR. LIN: Well, what the, what the statement in the brief is, is that we could revise the existing standards without review of the air quality criteria at all. And so --

JUDGE MILLETT: And that's not going to happen in this case?

JUDGE GINSBURG: Well, if they have new data, why not?

MR. LIN: Their, their assertion is that that is the, that is the power that the second sentence of 109(d)(1) grants them; and so --

JUDGE MILLETT: In this case, they, in fact, looked at new information?

MR. LIN: They looked at some new information.

JUDGE MILLETT: And new criteria?

MR. LIN: Yes, yes, Your --

JUDGE MILLETT: New information?

MR. LIN: -- Honor, they did; but, again --

JUDGE MILLETT: You don't have to, well, that's fine, we don't have to say they get everything they want in their brief. I mean we're doing the statutory construction here.

MR. LIN: And, but where I was going, Your

Honor, before is I think it comes back to and, Your Honor, if you think it's important to consider the, the continued validity of Chenery, that is something that I think the parties should brief; but I think that under established Supreme Court doctrine that this Court has followed repeatedly, you have to hold the Agency to their reasons that they have chosen, the grounds they have chosen to defend the rule on. And the ground they have chosen to the defend the rule on here is that the second sentence of 109(d)(1), that sentence alone grants them the power to revise the existing standards at any time without reviewing the air quality criteria at all, page 42 of their brief. That is EPA's position.

Your Honor, I, I, I think we've had a very useful and interesting discussion about lots of other potential statutory bases. I don't think those change the outcome here, but those are not the bases that on which they have relied. They have not pointed to 109(b) as a grant of authority. They have not tried to rely on the first sentence.

JUDGE MILLETT: They've got it 20, 20 something times in their brief, (b)(1).

MR. LIN: Yes, but --

JUDGE MILLETT: It's listed many times even.

MR. LIN: Agreed, but at page 30 they say, they

talk about the second sentence of, of Section 109(d)(1) and they say, "It is that authority on which EPA," as an initial matter, "EPA here exercised the authority of the second sentence of Section 7409(d)(1)." That's page 50. Pages 29 to 30, "The second sentence of Section 7409(d)(1) states that EPA may," and then it quotes the language. It was that authority that EPA relied on to revise the PM2.5 standards. I think they're stuck with the choices that they made.

JUDGE MILLETT: I thought you were talking about the existence of statutory authority, but we also have harmless error, right? If, if, if one, I know you, you have your, let's imagine that the second sentence of (b)(1) said exactly as you want to write it. They have the authority to revise criteria, we'll make it even easier for, for the purposes of this typo, whenever they find it reasonably necessary to do so and, but they must promulgate it in the same manner as, or they must do so in the same manner originally promulgated. So, it's both authority, yeah, but it could not be clear that it's both authority --

MR. LIN: Right. Right.

JUDGE MILLETT: -- and process for you and for some reason they just never cited it. Is it your position, given we have harmless error analysis, and given

that we're in Loper Bright world, but it really doesn't matter how they read the statute. Your argument is that they, you want, you want this rule vacated?

MR. LIN: Yes, Your Honor.

JUDGE MILLETT: Absence of statutory authority to be enacted? Your position is that even under that statute, because I know we have a --

MR. LIN: Yes, Your Honor.

JUDGE MILLETT: -- there's a question about how to read (b)(1), your position is that --

MR. LIN: They are, they are stuck with what they argued -- I have, I have two answers for you on that, Your Honor. Yeah. So, one, I understand, Your Honor, the, the theoretical argument as to why Chenery may not be good law after Loper. I've thought about it myself for some time; but, again, I don't think that, and I think if, if you want to go there, that would be opening a whole can of worms that I think the parties should have an opportunity to brief. But I think as the law currently stands, they are stuck with the statutory authority that they cited and that; and then the second argument as to harmless error, Your Honor, the Clean Air Act has its own limitations on harmless error. 307(d)(9) says that harmless error under the Clean Air Act is limited to procedural errors and not issues of authority. So, I, I

don't think you can apply that here.

JUDGE GINSBURG: I hesitate to prolong this. The discussion of the second sentence begins on page 29 where the, where the Agency says, "That basic principle," referring back to their argument about reconsideration and inherent authority to reconsider, "Would provide sufficient authority, as it did here, but here EPA has more," and that's the second sentence. So, they're not relying solely on the second sentence. They could be completely wrong about the second sentence and it would not matter if they have this and they're required to reconsider.

MR. LIN: If they have the inherent authority by --

JUDGE GINSBURG: Yeah.

MR. LIN: -- which we --

JUDGE GINSBURG: Right.

MR. LIN: -- which we didn't, which we didn't --

JUDGE GINSBURG: And we spent all this time --

MR. LIN: -- get to.

JUDGE GINSBURG: on the second sentence.

MR. LIN: Yes, Your Honor.

JUDGE GINSBURG: And you're trying to pin them on that in the sense of saying that that's what they rely on, that's their argument. Well, that's their alternative

argument.

MR. LIN: So, so, two answers to that, if I may, Your Honor? The first is they do say that; but then if you go on, if you turn the page to page 30 --

JUDGE GINSBURG: Yeah.

MR. LIN: -- it says, "It was that authority that EPA relied on to revise the PM2.5 standard." So, they do make, they do make the implicit authority argument. It's not --

JUDGE GINSBURG: That, that doesn't erase their, their whole discussion of authority to reconsider.

MR. LIN: That's fair, Your Honor.

JUDGE GINSBURG: I don't know which brief, which we have not discussed at all, but I think that's what we discussed as well.

MR. LIN: We have. Well, and, and if I could --

JUDGE GINSBURG: We can hear from the Agency.

MR. LIN: Your Honor, on the implicit authority point, I think American Methyl governs there and it says that if, if you have a congressional statute that is capable of, of doing essentially what a reconsideration could do, then Congress has --

JUDGE GINSBURG: That's a fair argument, but we haven't gotten into it.

MR. LIN: Thank you, Your Honor.

JUDGE CHILDS: And your Chenery argument, real quick, the rule does quote 109(b) in the opening paragraph, though.

MR. LIN: Yes, Your Honor, but they, it doesn't, it doesn't ever argue that, that, doesn't make the argument that 109(b) provides it this authority; and, and in the briefs, they clearly do not ever make that argument; and I think that, you have to rely on the Government's own, own reading of the decisions that they made.

JUDGE CHILDS: But not of the statute?

MR. LIN: I think if they've chosen one statute or provision over another, oh, not of, yes, not how to read the statute, of course. Loper says that, that it's for this Court to determine. Thank you, Your Honor.

JUDGE MILLETT: We'll, and we'll give you some time for rebuttal after all this.

MR. LIN: Thank you.

ORAL ARGUMENT OF JACOB M. ABRAHAMSON, ESQ.
ON BEHALF OF THE PETITIONERS COMMONWEALTH OF KENTUCKY, ET AL.

MR. ABRAHAMSON: Thank you, Your Honors, and may it please the Court, Jacob Abrahamson for the Commonwealth of Kentucky, State Petitioners.

In acknowledging it failed to conduct a thorough

review here, EPA lays bare the consequences of its interpretation of Section 109(d), a major regulatory decision, one that Congress designed to be driven by updated science is subject to quick reconsideration based on changed judgments alone. I'd like to use the remainder of Petitioner's opening time to discuss why EPA failed to justify its decision to revise the NAAQS after this voluntary reconsideration.

I think the best starting point is to work backwards from EPA's decision to place less weight on the uncertainties that were present in 2020 and ask whether that, that explanation was reasoned under FCC (indiscernible).

So, again, the best starting point is JA-237, Final Order, page 16276, EPA makes clear that a lot of work is being done by its recognition that there are uncertainties and limitations, but judging that it's appropriate to place less weight on those uncertainties than that administrator placed on them in reaching --

JUDGE MILLETT: Because they got new information, would that be unreasonable to, things are, things are rarely perfectly certain in science; so, but if they got new information that reduced uncertainty, would that be unreasonable?

MR. ABRAHAMSON: I, in, in, in general, I think

the answer is, no, that there's, there's a world where new information that reduces uncertainty, it could be reasonable to rely on that information, but --

JUDGE MILLETT: And, and if we read their decision as including that uncertainty had been reduced in a relevant amount, then that would be permissible?

MR. ABRAHAMSON: I think on, under an arbitrary and capricious analysis, that, that, yes, there, it could be permissible; but we're, we're disputing --

JUDGE MILLETT: Well, and so, so the fight here is whether we read their decision as concluding that uncertainty was reduced in a materially relevant way, or to the change in standards? That's what this debate is about?

MR. ABRAHAMSON: Yes, I --

JUDGE MILLETT: Okay.

MR. ABRAHAMSON: -- that's right, Your Honor. And so, I think if we look to the specific, what new evidence EPA offered in the specific uncertainties that it dealt with, this Court can look into whether, whether its explanation was reasonable.

The two pieces of new information that, I think, are doing the most work are new epidemiological studies that EPA added to its, in the supplemental ISA here and new accountability studies.

JUDGE MILLETT: We also have to start from in 2020, the Agency recognizing that it was itself uncertain whether the NAAQS, that it was, not setting, sticking with, retaining was sufficient to protect the blackout. Okay. So, that's the baseline we start from.

MR. ABRAHAMSON: Yeah.

JUDGE MILLETT: That's part of the baseline we're starting with.

MR. ABRAHAMSON: That's part of the baseline we start from, yes, Your Honor.

JUDGE MILLETT: So, we're even unsure in 2020, unsure in the, the opposite way from what the outcome you want which is like we're not sure we should be sitting on this same number, but we're doing it for now. So, and then they come along with some more studies that strengthen the concern about health effects, morbidities, cardiovascular consequences.

MR. ABRAHAMSON: And I think that, that --

JUDGE MILLETT: And that was, was irrational for them to act because --

MR. ABRAHAMSON: And I think the last part of, of what you said is, is where part of this debate is because in 2020, EPA looked at these studies and said that it pointed out that they cannot allow and identify specific levels, there are increasing uncertainties at

lower PM2.5 concentrations. And here in 2024 at JA-210, it identified, it, it, the same, the same basic uncertainties. And as a way of resolving them, I think it did two, looked at two places to do most of the work. That's by adding --

JUDGE MILLETT: And there's no rule to eliminate uncertainty to be reasonable that would be, we've said that would be impossible.

MR. ABRAHAMSON: Yeah, of course not, Your Honor; and I, I don't think --

JUDGE MILLETT: I recognize that that would be impossible. So, the question is really, shifts.

MR. ABRAHAMSON: Uh-huh. The question is whether the uncertainties in 2024 are different than the uncertainties that were present in 2020. And, and what we submit is that the uncertainties here were, were not, were not different in that --

JUDGE MILLETT: But you agree that there were additional studies that further documented the risk and showed that a different vax standard, I mean the, they plotted the whole thing out and found out that at different, the way they always calculated which vax standard to adopt the reasonable margin of safety, that they had new, new dots on the chart.

MR. ABRAHAMSON: Uh-uh.

JUDGE MILLETT: And that changed which one was now the one from which the referral point for setting the standard.

MR. ABRAHAMSON: Well, so --

JUDGE MILLETT: You haven't attacked that study or any of these studies they considered as irrational or unreasonable, or improper considerations.

MR. ABRAHAMSON: No, Your Honor, just, just the way the EPA relied on them here and that, and --

JUDGE MILLETT: Okay. But did it rely on them in any way that it hasn't always relied on standards and that is on these, sorry, excuse me, studies, and that is to gain the information, find, you find reasoned studies and you plot out sort of where their numbers are; what, where these studies are setting the possible air quality standard; and then they work from the lowest, from the lowest one and sort of round down a little bit?

MR. ABRAHAMSON: Well, that's not the approach that EPA took in 2020 because what it --

JUDGE MILLETT: I understand that, but that's what they've done every other time?

MR. ABRAHAMSON: Yes.

JUDGE MILLETT: Okay.

MR. ABRAHAMSON: But, but I think, though, when it's, when we're in --

JUDGE MILLETT: That is what they've done every time except 2020 when they recognized they were uncertain whether they really should be sticking with the number.

MR. ABRAHAMSON: And, and, I think that this isn't like every other time because this is a reconsideration and it's not simply, you know, I think when, when we look to cases like the Mississippi case, all, I mean this Court has several cases and, and, that are after a thorough max review, EPA, I don't want to say a clean slate, but it's certainly working from a new slate in that it's conducted, this full, thorough review; and I think this Court rightly defers in that situation and says EPA's obligation when it's simply revising on the, on the schedule that Section 109(d)(1) sets out doesn't have to also do the work of, of finding every problem with the last NAAQS that it set. But when EPA is, is revising, I think it does, it doesn't raise the bar, but it requires EPA to answer the question of why, what they got wrong the last time around. And part of what --

JUDGE MILLETT: I wouldn't say wrong. This is not a question of wrong. This is a question of we made one decision based on information we have and now we have new information and that changes the decision. That doesn't mean the prior one was wrong. We base it, we base decisions, you know, off and on records presented to us

that different records might require different outcomes, but that's just how the system works.

MR. ABRAHAMSON: Yeah, and I, and I, that was, that was not the, not the right word to use. I, I should say that it has to --

JUDGE GINSBURG: Updated.

MR. ABRAHAMSON: Updated or simply, yeah, updated is, is, is, I think, the right word, Your Honor. And then, and what EPA did in 2020 was acknowledge --

JUDGE MILLETT: It has to be updated or it's just that the, there's a higher volume of different information?

MR. ABRAHAMSON: I, I think the problem here is that there was not a higher volume of different information.

JUDGE MILLETT: I'm asking the question whether it has, they have to find it was outdated, or they simply have to find that we now have a higher volume of information pointing in another direction?

MR. ABRAHAMSON: I think that could be another, another reasons, too.

JUDGE GINSBURG: It sounds like outdated to me, but okay.

JUDGE MILLETT: All right. Thank you very much.

MR. ABRAHAMSON: Thank you, Your Honors.

JUDGE MILLETT: Otherwise, I'm going to feel outdated.

ORAL ARGUMENT OF SARAH A. BUCKLEY, ESQ.

ON BEHALF OF THE RESPONDENTS ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

MS. BUCKLEY: Good morning, Your Honors, and may it please the Court, Sarah Buckley for EPA. I'll be addressing Parts I and II of our brief which encompass EPA's authority to revise the standards as it did here, and it's lack of authority to consider costs and related factors. My colleague, Ms. St. Romain, will then address Parts III and IV, which encompass the record support for the change. With us at counsel table is David Orlin of EPA's Office of General Counsel.

So, starting with authority, I think that our disagreement with Petitioners boils down to this. What is subsection (d)(1) meant to do? In our view, (d)(1) instructs EPA to regularly canvass the science, and then to update its criteria and revise its standards consistent with that science. That's the first sentence.

In the interim, however, if EPA has reason to update its criteria or revise its standards, it certainly may do so. That's the second.

JUDGE MILLETT: Hang on.

MS. BUCKLEY: Yes?

JUDGE MILLETT: No, the second sentence is, you can certainly review and revise your criteria, but it doesn't say revise standards, (b)(1) says that. Can you tell me why I'm wrong to think that you have the authority under (b)(1) to revise standards as long as you go through the notice and comment rulemaking?

MS. BUCKLEY: Absolutely, Your Honor. I think, one, I think you are correct to read (b)(1) as indicating that Congress conferred that, of course.

JUDGE MILLETT: Indicating or stating?

MS. BUCKLEY: Well, stating, Your Honor.

JUDGE MILLETT: Those are different things.

MS. BUCKLEY: Right.

JUDGE MILLETT: Do you think the authority is only implicit?

MS. BUCKLEY: No, no, Your Honor.

JUDGE MILLETT: Or may be revised as anything other than authority, but I'm being told that nobody else reads it that way.

MS. BUCKLEY: No, no, Your Honor. I think, I think it's useful to look at that and, and note that it does state that EPA may revise in the same manner promulgating, as promulgated.

JUDGE MILLETT: So, if you have authority under

sentence two to review and revise criteria and say that --

MS. BUCKLEY: Yes.

JUDGE MILLETT: -- disclose, I need to make a change for health purposes, then you would go to authority to do that revision?

MS. BUCKLEY: You could go to (b)(1), Your Honor, but I would say EPA's action here is also properly invoking (d)(1); and I think I'll try to cut right to this, promulgate new standards issue. I think the best way to read what EPA did here in revising the standard was that it was promulgating a new standard. I think you can see that by looking at the header of (d), which explicitly says it is about reviewing and revision of criteria and standards.

JUDGE MILLETT: Was that, was that heading part of the statute itself or was it added by the codifiers as a part of the public law?

MS. BUCKLEY: That is a good question, Your Honor. I don't have the answer to that, but I would be happy to follow-up on that.

The other way, the other way that we know that what EPA did here was promulgating a new standard in revising the suite of standards that apply to particulate matter is that the former standard, the then operative standard from 2013, still resides in the CFR. The 2013

standard still is at 40 CFR 50.18. The new standard for 2024 is at 40 CFR 50.20. The new standard analyzes the, the whole attainment and implementation process to meet that new standard; but the attainment obligations for the old standard remain. So, if any locality, states or localities have not yet attained 2013, they may still have obligations to continue to put control measures directed at that standard, even as they have new obligations about this standard.

JUDGE GINSBURG: So, a new standard, as you're using the term, can be just an updated standard? It doesn't have to be the first time this criteria has been regulated?

MS. BUCKLEY: Yes, Your Honor, and I think another reason to think that is, again, new standards are governed by subsection (a) of 109. And not only are they governed by, to subsection (a) of 109, but I think as Mr. Lin pointed out, EPA would have to go through a whole process of 108 to designate air quality criteria for a new pollutant before it could be promulgating an air quality standard for that pollutant.

So, I think it's instructive to look back at the statutory history, as you were doing, Judge Millett, and note that, yes, prior to 1977, (d)(1) didn't exist. We had (a) and we had (b) that had that same sentence, such

primary standards may be revised in the same manner as promulgated.

So, when Congress added (d)(1), what do we think Congress was doing?

JUDGE MILLETT: I just want, there's not much briefing about implicit authority. I'm just confused then as to why that's all there if reading (b)(1) is explicit.

MS. BUCKLEY: I think that, perhaps, all of the parties got a little wrapped around the axel of subsection (d) because that is the argument that was raised in comments and is raised here. The argument that we understand Petitioners to have been making was that the existence of (d) displaces authority; and so, we focused our briefing on explaining, no, this is not displacing any authority. That's not a proper way to read that text. And also, not only does the first sentence of (d)(1) not displace it, we have the second sentence in there that's Congress saying, don't read the requirement in the first sentence to prohibit your action more frequently as needed.

JUDGE GINSBURG: So, you read the second sentence as being, essentially, a license to proceed without a thorough review?

MS. BUCKLEY: Yes, Your Honor, and I think --

JUDGE GINSBURG: What kind of a review is that,

somewhere between thorough and slap-dash, what is it?

MS. BUCKLEY: Right. I think that it's not fair to characterize what EPA did here or the authority that EPA thinks it has as to be to revise standards in a slap-dash fashion. Perhaps making more concrete what EPA thinks the thorough review is could be helpful. When EPA undertakes a thorough review, it starts by canvassing all of the databases of scientific literature searching for evidence on all of the different health effects that are covered in the criteria that --

JUDGE GINSBURG: I mean it's just revising a standard without going through a thorough review? Then what?

MS. BUCKLEY: Well, and so, then that creates the document, the integrated science assessment that's the embodiment of the air quality criteria. When it then makes a decision whether to revise a standard, it has to go and review that document, and that's what EPA did here. The requirement to go and review that document is found in 109(b)(1) itself that says that the standards have to be based on the air quality criteria. The EPA here explicitly said that it was basing its action here on the thorough review of air quality criteria completed in 2020 as supplemented in 2022. That's at JA-164 and 163, or 73 in the preamble; and also in the response to comments at

2800.

JUDGE GINSBURG: But the thorough review took place at the criteria level, right?

MS. BUCKLEY: Yes.

JUDGE GINSBURG: And the standard derived from that when being revised can relate back to, can re-read, let's say, the criteria document and any new studies without revising, without a thorough review of that material?

MS. BUCKLEY: Yes, Your Honor. I think a way to think about this is every five years EPA has to publish a new edition of the criteria. In the interim, if there is a significant new development, say we're talking about a case book and Loper Bright comes down, you can go in and revise that chapter on Chevron and you don't have to canvass all of these other charges.

JUDGE MILLETT: Pocket part?

MS. BUCKLEY: I'm sorry?

JUDGE MILLETT: This is the pocket part?

MR. ABRAHAMSON: This is the pocket part, yes, recall back to law school. So, and that is what, what EPA did here. There was, in, in reviewing and going and initiating a review proceeding to determine whether the standards did, indeed, meet the health standard of (b)(1), EPA was aware that there was new science on the health

effects that EPA found had the most strong causal linkage to exposure to particulate matter. And so, it did a mini-thorough review, one might say. It went and it canvassed that scientific literature or anything new on the mortality and cardiovascular effects.

JUDGE GINSBURG: That's not a review of the criteria?

MS. BUCKLEY: It's reviewing the underlying science. So, yes. So, EPA went, looked back at the record, said we're not sure that this standard is requisite to protect public health at an adequate margin of safety. We would like to initiate a proceeding to potentially reconsider that.

At the outset of that proceeding, EPA said, well, our air quality criteria in our 2020 policy decision to retain really turned on these particular health effects; and we've been told by Petitioners, who have filed petitions for reconsideration, that there are, there's new studies on this very important health effect.

JUDGE GINSBURG: Reconsideration was of the criteria document, not of the standard?

MS. BUCKLEY: I suppose it was a reconsideration of the standard --

JUDGE GINSBURG: Yeah.

MS. BUCKLEY: -- and in the course of that

proceeding, the criteria document was revised by the issuance of the supplement, yes, Your Honor. And, and EPA focused its review on those health effects.

JUDGE MILLETT: What's the difference between reconsideration and revised?

MS. BUCKLEY: I don't think there is a difference, Your Honor. I think that if, again, we're, we're getting really stuck on this term reconsideration as if it comes with technical meaning and I'm not sure that it does. If EPA had said, we're going to look back at our decision, determine whether it's meeting any statutory --

JUDGE MILLETT: Review statutory reconsideration?

MS. BUCKLEY: Review.

JUDGE MILLETT: You do have the authority to review?

MS. BUCKLEY: Yes, Your Honor.

JUDGE MILLETT: Is there a difference between review and reconsider?

MS. BUCKLEY: I --

JUDGE MILLETT: I assume if you're going to do review and revise, somewhere in there you, after you review it and you decide to reconsider by revising it?

MS. BUCKLEY: Right. I think that --

JUDGE GINSBURG: You put another dog on the

table when you're talking about reconsideration which is neither review, nor revise.

MS. BUCKLEY: I suppose that it is a different word, Your Honor, but it results in the same proceeding as reviewing and then revising. Again, I don't think that putting a lot of technical --

JUDGE MILLETT: Well, review and revise --

MS. BUCKLEY: I'm sorry?

JUDGE MILLETT: -- is umbrella a word for review and revise?

MS. BUCKLEY: Umbrella, a word for, I think it's an umbrella word for EPA believing that a decision may have been wrong and wanting to begin --

JUDGE MILLETT: I don't think, I mean the only way they're going to figure out it's wrong, they got to go back and review?

MS. BUCKLEY: Exactly.

JUDGE MILLETT: And that review, presumably, will inform decision to revise?

MS. BUCKLEY: Yes.

JUDGE MILLETT: And so, together, that's the, that's just how courts think about reconsideration.

MS. BUCKLEY: Yes.

JUDGE MILLETT: But --

MS. BUCKLEY: I think, I think that's spot-on.

JUDGE MILLETT: -- well, a term for review and revise? Or I've been trying to figure out --

MS. BUCKLEY: Yes.

JUDGE MILLETT: -- how you're claiming an additional power or whether it's just you're using it as an umbrella term for review and revise?

MS. BUCKLEY: Using an umbrella term, Your Honor, not claiming an independent power here. The power is all derived from 109.

JUDGE MILLETT: So, you don't think anything more than review and revise?

MS. BUCKLEY: No, Your Honor. No.

JUDGE CHILDS: Then the distinction between promulgating new standards and revising existing standards, what is your distinction there?

MS. BUCKLEY: I don't have a black and white answer on that; and, obviously, a lawyer never wants to say that the presumption of superfluity is just a presumption. But I don't see anywhere else in the statute that Congress has given different import to revise standards versus promulgate new standards. It could be that a more minor change to standards would constitute a revision and a more significant change would constitute new standards; but, again, I think here the best way to look at what EPA did was it created a new standard that

states now have to comply with as they still have to develop plans to implement after attainment designations are made.

JUDGE MILLETT: Is there a difference between describing it that way and saying you revised the existing standard? Is there any, what's the difference between saying we created a new standard and we revised the existing standard to increase the obligation?

MS. BUCKLEY: Beyond that word, Your Honor, I don't think there is. I suppose EPA could have, but notably did not here actually reach back into that CFR and, you know, nunc pro tunc change the standard that was applicable at some earlier point; but that's not what EPA did here. The standard is applicable, you know, starting in --

JUDGE MILLETT: I don't think there's any argument that this is a --

MS. BUCKLEY: Right.

JUDGE MILLETT: -- forward-looking rule --

MS. BUCKLEY: Right.

JUDGE MILLETT: -- a whole different --

MS. BUCKLEY: Uh-huh.

JUDGE MILLETT: -- problem.

JUDGE CHILDS: And you've given consideration before to actually revising standards, but have you used

the word reconsideration during those times?

MS. BUCKLEY: In, in previous proceedings, EPA has announced that it would reconsider standards, although it has never finalized a reconsideration by revising. It has, however, frequently reopened the air quality criteria and then revised the air quality criteria.

JUDGE CHILDS: And the point of my question is to think about the consistency of your term, you know --

MS. BUCKLEY: Uh-huh.

JUDGE CHILDS: -- that says through line, through prior practices.

MS. BUCKLEY: Right. Right. EPA has consistently used the term reconsideration not to have some independent meeting, but to prompt or invoke its authority, a proceeding under 109, 109(b), 109(d).

JUDGE GINSBURG: Oh, that's helpful. I'm going to ask a question in which I've never asked in 38 years at the bench, but I'm driven to it by despair. Is there any legislative history on this?

MS. BUCKLEY: Oh, there certainly is, Your Honor, not very lengthy, but I will say this. Initially, 109(d)(1) was in the House Bill for, that became the 1977 amendments. The House Bill's version, which Petitioners cite in the footnote of their brief, actually called for a review and revision every two years. In the conference,

though, the Senate didn't have a comparable version and the conference, the Senate stated the following, and the Conference Report states the following. "The Senate concurs on the House amendments with the following modification. The first review shall be completed in 1980. Subsequent reviews are required every five years, but the administrators authorize to conduct review of existing ambient standards more frequently than every five years and is expected to revise standards whenever available information justifies a revision." So --

JUDGE GINSBURG: That's more coherent than the statue.

MS. BUCKLEY: Indeed. And, and, honestly, Your Honor, the fact that that second sentence was added in the conference might also explain this disconnect between the revision.

JUDGE GINSBURG: It's a mess.

MS. BUCKLEY: Yes. I think what that shows is that you have, the House was pushing towards very frequent updates and reviews, again, to make sure that these standards are doing their job of focusing our regulatory efforts of protecting public health. The Senate said, wait, we can slow that down, but we are not trying to displace EPA's ability to respond to new information and ensure that our standards are meeting the public health

standard set up in (b)(1).

JUDGE MILLETT: Is there legislative history for the second sentence in (b)(1)?

MS. BUCKLEY: Not that I'm aware of, Your Honor. I would like to just quickly address the costs argument and note that all, the cost argument and the attainability argument is really focused on this idea that there's an analytical distinction between a decision whether to revise the standards and what level to revise the standards to; and I think that analytical distinction is a mirage because if you're ever considering whether to retain a standard, you're necessarily asking yourself the question, is this standard meeting the statutory standard? Is this standard requisite to protect public health with an adequate margin of safety? And at that point, you're considering the level of the standard and you're engaged in precisely the forbidden exercise that the precedence of this Court and the Supreme Court have said that we can't do. And besides that, I'll note that this Court in American Trucking Association, one, recognized that there is no analytical distinction between a promulgation of standards under (b)(1) or (d)(1). So --

JUDGE GINSBURG: The grounds on which we were not reversed?

MS. BUCKLEY: Exactly, Your Honor.

JUDGE MILLETT: If my colleagues have no further questions?

MS. BUCKLEY: Thank you. I'll turn the podium over to Ms. St. Romain.

ORAL ARGUMENT OF ALEXANDRA L. ST. ROMAIN, ESQ.

ON BEHALF OF THE RESPONDENTS ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

MS. ST. ROMAIN: Good morning, Your Honors, and may it please the Court, Alex St. Romain on behalf of EPA. Today I will address Petitioner's record-based arguments covered in Sections III and IV of our brief.

So, at issue today is whether the EPA administrator reasonably determined that a 9 microgram per cubic meter standard for primary annual PM2.5 was requisite to protect public health. And the answer to that question is a resounding, yes.

The at-issue criteria which is comprised of both the 2019 science assessment and the 2022 supplement demonstrate consistently strong linkages between PM2.5 concentrations well-below 12 micrograms per cubic meter and negative health effects like mortality, cardiovascular effects, respiratory effects, cancer and nervous system effects.

JUDGE MILLETT: Why did the Agency choose not to

look at some other health effects like on reproductive?

MS. ST. ROMAIN: Yeah, the reason the Agency chose to limit the health effects is looking at, in the 2022 supplement, is that it looked at the health effects that drove the EPA's staff level conclusion in 2019 to, which was a conclusion that the science called into question adequacy of the standard. The health effects the EPA focused on were those where EPA had the strongest evidence that there was a clear linkage between those health effects and PM2.5 concentration; and other health effects like respiratory effects, the linkage between PM2.5 exposure and those health effects is a bit weaker.

JUDGE CHILDS: Do we need to resolve that the science has actually changed in order for you to get to a revision?

MS. ST. ROMAIN: No, Your Honor, and that's for two reasons. First, is that the statute says that whether a standard is requisite to protect the public health with an adequate margin of safety is left to the, it's a determination as left to the judgment of the administration. And that means that different administrators could reach different conclusions based on the same evidence. And that is aligned with this Court's conclusions in Mississippi and in Murray Energy. In those cases, petitioners were arguing that there was presumption

of validity given to EPA's past standards. And this Court rejected that presumption and explained that such a presumption, which resulted in a situation where EPA is bound by flaws or errors in past standards; and, instead, the question before the Court is the one I started with today, is EPA's decision here reasonable?

Now I will say that this wasn't a situation where EPA was just looking at the same record and reaching a completely different result. EPA explained that there were clear differences between the 2020 record and here that prompted its decision to revise the standard. EPA explained, and this is at JA-237 in the preamble, how uncertainty has changed and the facts that uncertainties changed decreased the magnitude of uncertainties and increased the administrator's confidence in the results of epidemiologic studies.

The uncertainties changed in two main ways. So, first, there were additional studies that controlled for confounding factors. Now there, these, these studies, the controls for confounding factors, they, they, so, let's, let's use actually, sorry, let's use an example because I think this is particularly helpful. So, one health effect that has a strong linkage to PM2.5 exposure is cardiovascular effects; but we all know that cardiovascular effects like heart attacks can cause,

because of, can be caused by PM2.5 concentration, or it can be caused by lifestyle, smoking, underlying health conditions. These new studies in the 2022 supplement controlled for those confounding factors, took them into consideration and still showed very strong linkages between PM2.5 concentrations and cardiovascular effects like, like heart attacks; and that gave the administrator confidence, the administrator explained, to, in the results of the epidemiologic studies.

Another big change between this record and this, the 2022 supplement, and the 2019 criteria document were the addition of new accountability studies. Now accountability studies are those studies that look at a policy intervention that decreases PM2.5 concentrations to see if PM2.5-associated health effects also decreased. We provided an example in our brief of replacing manual tollbooths with E-ZPass tollbooths, but to provide an example that was in the 2022 supplement, there was one study that looked at the effect of retiring power plants. And the study showed that when the power plants retired, PM2.5 concentrations in that area decreased from around 10 micrograms to around 7 micrograms; and with that decrease, there was also a decrease in hospitalizations resulting from cardiovascular illness. So, again, these sorts of studies gave the administrator more confidence in the

results of the epidemiologic studies.

JUDGE CHILDS: Just thinking about a --

MS. BUCKLEY: Yeah?

JUDGE CHILDS: -- question asked of your co-counsel earlier. The EPA has revised criteria off-cycle, but then chose not to revise the standards. What's the reason for that?

MS. ST. ROMAIN: You know, I think that, ultimately, what that tells us is that EPA's decision to reopen criteria and consider whether it's appropriate to revise standards is not predetermined. EPA, as we note at page 80 of our brief, on at least half a dozen occasions since the Clean Air Act was amended, EPA has gone about reopening the criteria in the exact same manner as it did here for the exact same reasons. It's presented with new information that's sufficiently important to the administrator's determination of whether the current standard is requisite to protect the public health. And the administrator reopens the criteria, or the EPA reopens the criteria so that CASAC, the public and, ultimately, the administrator can consider that new science in determining whether the standard is, in fact, requisite to protect the public health.

JUDGE MILLETT: Have you done a thorough review in those cases?

MS. ST. ROMAIN: In some, in, most of, most of those cases, EPA has recently done a thorough review or has, is in the middle of a thorough review and has completed its criteria document. So, in those cases, they're really aligned with this case where EPA just reviewed all of the relevant science, but is presented with new particularly important science that it thinks it should consider in determining whether the standard is requisite. I see my time is up. In sum, EPA's decision to revise the primary annual PM2.5 standard to 9 micrograms was reasonable and supported by the robust record evidence. For this reason, and those discussed in our brief, we respectfully request that you deny the petitions for review. Thank you.

JUDGE MILLETT: Thank you, counsel. Okay, Mr., Mr. Lin, you're doing rebuttal for, for both, both the Petitioners and well give you three minutes.

MR. LIN: Your Honor, I think --

JUDGE MILLETT: Oh, I still got, I apologize.

MR. LIN: (Indiscernible).

JUDGE MILLETT: I'm, I apologize. Thank you.

ORAL ARGUMENT OF JONATHAN A. WIENER, ESQ.

ON BEHALF OF THE STATE INVERVENORS

MR. WIENER: Good morning, Your Honors. Jonathan Wiener for State Intervenors. I'd like to take a

step back and try to address the dogs on the table, or some of them.

JUDGE MILLETT: Dogs on the table?

MR. WIENER: Maybe I misheard.

JUDGE GINSBURG: For reconsideration.

MR. WIENER: Yes, the, the, the issue of --

JUDGE MILLETT: Dogs?

MR. WIENER: Yeah. Of, of what we are calling what EPA did here. I think the easiest way of thinking about it is what EPA reconsidered is its decision in 2020 to leave the standards in place, then revised the PM NAAQS standards generally and did so by setting a new standard as, when co-counsel explained. Whatever term we are using, EPA has authority to do that, to take the action that it took here, and it's well-recognized that EPA has reconsideration authority for its Clean Air Act rules, as this Court said in Clean Air Act Council. 109(b) makes clear that EPA has authority to revise NAAQS standards and 109(d) makes clear that it has authority to, to promulgate new standards.

In Section 109(d) is not a roadblock to what EPA did here and I think there's been a lot of discussion about that. I just wanted to point out one more, I think, important textual reason that's true; and that's the word and in the, in the first sentence. So, when a court, I'm

sorry, when the thorough, when EPA is conducting a thorough review required by the first sentence, it's a thorough review of criteria and standards together. The second sentence does not say criteria and standards, it says review and revise criteria, or promulgate new standards. So, what that means is that EPA can promulgate a new standard without reopening every aspect of the criteria, including aspects of the criteria that may not be relevant to the, the standard in question.

And I do want to point out that this is not, what EPA has done here is not novel. It has reconsidered its NAAQS standards in the past. We pointed out some examples in our brief. This is not unlimited. EPA cannot ignore the previous criteria when it is setting a new standard. It has to look at them and we, I want to provide a couple of the, of quick citations to examples from here where, examples from the 2020 record that make, we think make clear that EPA needed to reconsider and that's the draft, sorry, the policy assessment from 2020 and the Independent Particulate Matter Review Panel.

And I think the last thing I wanted to point out is that there is no Chenery problem here and, and that's because whatever we are calling what, what EPA did, EPA has relied on all of these authorities in, in its, in its rulemaking. And if I can just point out some, some places

in the JA, 2797 and 2801, this is in the response to comments document, EPA relies on its general and implicit authority to send and revise, to revise NAAQS standards.

In the same document at JA-2799, it invokes 109(b) for authority to revise NAAQS standards, not --

JUDGE CHILDS: What about the State's own reliance interests? Does that 5-year slap go, just kind of generally intent that they expect that the, there will be no revisions?

MR. WIENER: That's EPA's position. I don't think you need to reach that here because the Petitioners haven't identified any reliance interests tied to the 2020 decision and under the, the Solenex case, EPA is not, not required to, to review those.

JUDGE CHILDS: So, then what's your position with the harmless error argument because you had that as kind of an independent argument?

MR. WIENER: I, I think there are a couple different harmless errors that this Court can rule on.

JUDGE CHILDS: Do we need to reach it?

MR. WIENER: No, I don't think you need to reach the argument that is in our brief that the, you know, had, basically had EPA said petition granted somewhere in its preamble about our petitions for reconsideration, that all this would be beside the point because everything would

have, would have turned out the same. You don't need to address that. There are plenty of other harmless errors here that have already been discussed, including that Petitioners had many, many opportunities to point to things that EPA didn't look at or should have considered and didn't. There were many notice and comment opportunities. There were, and, and in the briefing, in the comments and today nobody has said there was something that EPA missed, or something that EPA ignored that would have changed the outcome.

And, again, what, whatever EPA called what it was doing here, it, it had authority to do it. So, take your pick of the harmless errors, I, I think.

JUDGE MILLETT: Thank you very much, counsel.

MR. WIENER: Okay.

JUDGE MILLETT: I apologize.

MR. WIENER: Oh, thank you.

JUDGE MILLETT: Now, Mr. Lin, you may have three minutes.

REBUTTAL ARGUMENT OF ELBERT LIN, ESQ.

ON BEHALF OF THE PETITIONERS COMMONWEALTH OF KENTUCKY, ET AL.

JUDGE MILLETT: May I ask, is, is counsel correct that when you say you're concerned about they're limiting, opposing counsel has said, concerned about the

Agency not doing a thorough review, that they've left some science out, do you have anything they left out that's been harmful that you can point to, or that simply that you wanted them to do the first dig?

MR. LIN: Sure. So, I can point you to a couple studies. If I could just find it in my notes?

JUDGE MILLETT: Admitted in the record?

MR. LIN: It is. It's, it's not in the JA, but it is in the, it is in the underlying Agency record.

JUDGE MILLETT: Okay.

MR. LIN: And so, it's, if you look at the gradient comments, I can read you the cite, you'll probably need it.

JUDGE MILLETT: Okay.

MR. LIN: It's, yeah, EPA HQ ORD and it's a bunch of numbers, 201408590077 at page 6, two studies were discussed, the Goodman Study and the Zoo Study --

JUDGE MILLETT: Uh-huh.

MR. LIN: -- in response to the ISA draft ISA supplement.

JUDGE MILLETT: Uh-huh.

MR. LIN: There was no response to those studies.

JUDGE MILLETT: Uh-huh.

MR. LIN: As to why they didn't consider them.

Now we don't think, Your Honor, that --

JUDGE MILLETT: Did you argue those in your brief here? Those haven't been raised by anything?

MR. LIN: We didn't, we didn't point to those specifically.

JUDGE MILLETT: And the Petitioners?

MR. LIN: Huh? No, not in the briefs; and the reason is because we don't, as we've discussed already, Your Honor, we don't think that, that there should be a prejudice or a harmless error analysis here both because 307(d)(9) doesn't permit it, you can only look at procedural harmless errors; but also because, as we've discussed, the, the authority that they claim here is not, again, they have, they're not saying we acted under the first sentence. We were required to do a thorough review. What we did was good enough to survive arbitrary and capricious. Their argument is we didn't have to do it at all. That's the question that's before this Court.

I did have a couple quick points that I wanted to get to. I think the first is that my friend from the Government's argument eviscerates the distinction between revising existing standards and promulgating these standards. I, I don't think she offered an example of what revising an existing standard would be. I think under her argument, everything would be promulgating these

standards. If you look at Section 109, it talks, it uses the two different words to talk about two different things. Promulgation is always used with respect to new standards for pollutants that don't already have a standard. That's 109(a). That's, Your Honor, the 109(b) that we've talked about, right, which just says, may revise in a manner that is the same as, as the standards was promulgated. Those words have to have meaning. They're different words.

The second point I wanted to make --

JUDGE MILLETT: Sorry to interrupt, I, I didn't want --

MR. LIN: I'm sorry, Your Honor.

JUDGE MILLETT: -- I'm willing to let you make your second point across, but do we know if promulgate new standard is used elsewhere in the, in your, or is this really the only place we would look at for what's --

MR. LIN: I don't have, I don't, I don't know that off the top of my head; but I do think, I mean I, you know, I think it's not, when it says not only promulgates, it's promulgate new standards, I think it might be different if it just said promulgates standards; but it specifically says promulgate new standards.

JUDGE MILLETT: Okay. I'm sorry, your second point?

MR. LIN: My, so, the second, I had just three really quick points. The second is that, Your Honor, you extended the invitation to the Government to rely on (b)(1). I don't think she accepted it or pointed to a place in the record where they made that argument. They are relying on (d)(1) and implicit authority, Judge Ginsburg, for, for what they have done here; and I don't think either of those holds up.

On the question of, of whether to reconsider and how to reconsider as to whether that's a mirage, I don't think it's a mirage to say that there's two different steps in, in a reconsideration. I think just as an example, if you look at 307(d)(7), which is the standard in the Clean Air Act for mandatory reconsideration, that sets forth specific things that you look at to determine whether to reconsider. And then as this Court recognized in Clean Air Act, Clean Air Council v. Pruitt, it's a separate question as to how you reconsider. So, so, I don't think that we have a debate over whether costs should go into the first part or not; but I think the, the principle that there's a distinct, that there's a two-step process, I don't think that that's made up.

And then, finally, Judge Ginsburg, on the legislative history, there's very little and as, as my friend pointed out, I do think it's ambiguous at best. I

mean it says that they should revise as, as justified; but that doesn't address whether the thorough review requirement applies before you do the revision.

JUDGE MILLETT: Thank you, very much to --

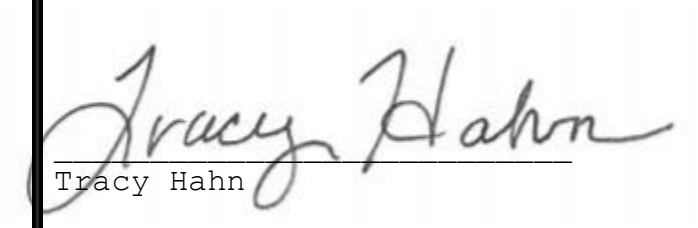
MR. LIN: Thank you, Your Honor.

JUDGE MILLETT: -- all counsel. The case is submitted.

(Whereupon, the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Tracy Hahn

January 23, 2025
Date

eScribers, LLC