

Nos. 26-277, 26-298

In the Supreme Court of the United States

COMMONWEALTH OF KENTUCKY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

*On Petitions for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit*

**BRIEF OF *AMICI CURIAE* REPRESENTATIVE
BRETT GUTHRIE AND MEMBERS OF CONGRESS
IN SUPPORT OF PETITIONERS**

THOMAS R. MCCARTHY
Counsel of Record
JOSHUA DAVID JONES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

October 2, 2026

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. Whether EPA has the power to revise National Air Ambient Quality Standards without a “thorough review” of “the latest scientific knowledge” is an issue of great national importance.....	5
A. NAAQS revisions have massive impacts	6
B. Congress imposed a “thorough review” requirement on NAAQS revisions amidst concerns about the integrity of EPA’s scientific analysis.....	7
C. The EPA has long understood the limits that Congress placed on its power to revise NAAQS	11
D. The EPA admitted that it transgressed Congress’s limits by revising a NAAQS without a thorough review.	12
II. The D.C. Circuit misinterpreted Section 109 of the Clean Air Act.....	14
A. The first sentence of Section 109(d)(1) authorizes EPA to revise NAAQS only after a “thorough review” of the latest science.....	15

B.	The second sentence of Section 109(d)(1) clarifies only that EPA may act earlier or more often—it does not gut the careful limits Congress imposed on EPA	16
C.	The D.C. Circuit’s misapplication of the omitted-case canon eviscerated the limit Congress imposed on EPA’s NAAQS revision authority.....	17
D.	The D.C. Circuit’s application of the omitted-case canon read an elephant into a mousehole	19
E.	Carrying the panel’s application of the omitted-case canon to its conclusion would prohibit EPA from revising NAAQS off-cycle at all	21
III.	The Court should grant the petitions because the D.C. Circuit’s holding allowing EPA to revise NAAQS at any time without a thorough review risks destabilizing the U.S. economy....	23
CONCLUSION		27

TABLE OF AUTHORITIES

	Page
Cases	
<i>Ala. Ass’n of Realtors v. DHS</i> , 594 U.S. 758 (2021).....	17
<i>All. of Nurses for Healthy Env’ts v. Zeldin</i> , 2026 WL 2078145 (N.D. Cal. July 17)	24, 26
<i>Bates v. United States</i> , 522 U.S. 23 (1997).....	17
<i>Biden v. Nebraska</i> , 600 U.S. 477 (2023).....	19
<i>EPA v. EME Homer City Generation, L.P.</i> , 572 U.S. 489 (2014).....	23
<i>Ethyl Corp. v. EPA</i> , 541 F.2d 1 (D.C. Cir. 1976) (en banc).....	8
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	20
<i>Home Depot U.S.A., Inc. v. Jackson</i> , 587 U.S. 435 (2019).....	18
<i>Kentucky v. EPA</i> , 179 F.4th 963 (D.C. Cir. 2026)	4, 7, 12, 17, 18, 19, 22, 26
<i>Learning Res., Inc. v. Trump</i> , 607 U.S. 229 (2026).....	21
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024).....	21

<i>Ohio v. EPA</i> , 603 U.S. 279 (2024).....	24
<i>S. Coast Air Quality Mgmt. Dist. v. EPA</i> , 882 F.3d 1138 (D.C. Cir. 2018).....	26
<i>Sierra Club v. Costle</i> , 657 F.2d 298 (D.C. Cir. 1981).....	5
<i>Train v. NRDC, Inc.</i> , 421 U.S. 60 (1975).....	6
<i>Util. Air Regul. Grp. v. EPA</i> , 573 U.S. 302 (2014).....	4, 20
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022).....	20
<i>Whitman v. Am. Trucking Ass'ns</i> , 531 U.S. 457 (2001).....	3, 5, 6, 20, 25
Statutes	
23 U.S.C. §109	24
42 U.S.C. §7407	6, 22, 24
42 U.S.C. §7408	6, 8, 15
42 U.S.C. §7409	3, 6, 12, 15, 16, 21, 22, 26
42 U.S.C. §7410	7, 24
42 U.S.C. §7502	26
42 U.S.C. §7506	22, 24
42 U.S.C. §7602	7
42 U.S.C. §7607	12
Pub. L. No. 91-604 (Dec. 31, 1970)	8
Pub. L. No. 95-95 (Aug. 7, 1977)	8

Regulations

Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558 (Jan. 27, 2023)	7
Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16202 (Mar. 6, 2024)	7, 24
Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 82684 (Dec. 18, 2020)	12

Other Authorities

7 Staff of S. Comm. on Env't & Pub. Works, 95th Cong., <i>A Legislative History of the Clean Air Act Amendments of 1977</i> , (Aug. 1978).....	10, 12
ANTONIN SCALIA & BRYAN A. GARNER, <i>READING LAW: THE INTERPRETATION OF LEGAL TEXTS</i> (2012).....	17, 18
122 CONG. REC. 7070 (1976).....	8, 9
EPA, <i>Supplement to the 2019 Integrated Science Assessment for Particulate Matter</i> , EPA/600/R-22/028 (May 2022)	13
<i>From Gridlock to Growth: Permitting Reform Under the Clean Air Act: Hearing before the Subcomm. On Env't of the H. Comm. on Energy and Com.</i> , 119th Cong. (2025).....	25
James E. McCarthy, Cong. Rsch. Serv., RL33807, <i>Air Quality and Sound Science: What Role for CASAC?</i> (2008)	10

Off. of Air Quality Plan. & Standards, EPA, EPA-452/R-24-019, <i>Overview of the Environmental Protection Agency’s Process for Reviewing the National Ambient Air Quality Standards</i> (Dec. 2024).....	11, 12, 13
Richard Lattanzio, Cong. Rsch. Serv., R44840, <i>Cost and Benefit Considerations in Clean Air Act Regulations</i> (2017)	6
<i>Short-Circuiting Progress: How the Clean Air Act Impacts Building Necessary Infrastructure and Onshoring American Innovation: Hearing before the Subcomm. On Env’t of the H. Comm. on Energy and Com., 119th Cong. (2025)</i>	25
Staff of H. Comm. on Sci. & Tech., 94th Cong., <i>The Environmental Protection Agency’s Research Program with Primary Emphasis on the Community Health and Environmental Surveillance System (CHESS): An Investigative Report</i> (Nov. 1976)	10
<i>The Conduct of the EPA’s “Community Health and Environmental Surveillance System” (CHESS) Studies: Joint Hearing Before the Subcomm. on the Env’t & the Atmosphere of the H. Comm. on Sci. & Tech. and the Subcomm. on Health & the Env’t of the H. Comm. on Interstate & Foreign Com., 94th Cong. (1976)</i>	9
W.B. Rood, <i>EPA Study—The Findings Got Changed</i> , L.A. TIMES, Feb. 29, 1976	9

INTEREST OF *AMICI CURIAE*¹

Amici are Representatives duly elected to serve in the United States Congress, in which the Constitution vests all legislative powers. As elected members of Congress, *amici* have strong institutional interests in protecting Congress's power to enact legislation and set appropriate limits on agency action, including with respect to national ambient air quality standards. *Amici* are:

Representative Brett Guthrie of Kentucky,
2nd Congressional District

Representative Rick Allen of Georgia,
12th Congressional District

Representative Troy Balderson of Ohio,
12th Congressional District

Representative Andy Barr of Kentucky,
6th Congressional District

Representative Julie Fedorchak of North Dakota,
At-Large Congressional District

Representative Craig Goldman of Texas,
12th Congressional District

Representative H. Morgan Griffith of Virginia,
9th Congressional District

Representative Diana Harshbarger of Tennessee,
1st Congressional District

¹ Pursuant to this Court's Rule 37.6, counsel for *amici* certifies that this brief was not authored in any part by counsel for any party and that no person or entity other than *amici* or their counsel made a monetary contribution to fund its preparation or submission. *Amici* timely notified the parties of this filing.

Representative Erin Houchin of Indiana,
9th Congressional District

Representative Nick Langworthy of New
York, 23rd Congressional District

Representative August Pfluger of Texas,
11th Congressional District

Representative Hal Rogers of Kentucky,
5th Congressional District

Representative Randy Weber of Texas,
14th Congressional District

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the Clean Air Act (CAA), Congress gave the Administrator of the Environmental Protection Agency (EPA) the vast and consequential authority to promulgate and revise National Ambient Air Quality Standards (NAAQS). Congress amended the CAA in 1977, requiring EPA to perform a “thorough review” of the latest science before revising a NAAQS. This Court previously considered the process for establishing a NAAQS under CAA Section 109(b), holding that EPA must set NAAQS without regard to their implementation costs. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 486 (2001). The two questions before the Court now are (1) whether EPA must obey Congress’s mandate in CAA Section 109(d)(1) to conduct a “thorough review” of the latest scientific evidence when it revises these monumental regulations off-cycle and (2) whether EPA should consider costs and attainability when exercising its discretion to issue these regulations earlier than required. While *amici* urge the Court to take up both questions, this brief focuses on the first.

In Section 109(d)(1) of the CAA, Congress requires the Administrator to conduct a “thorough review” of NAAQS and their underlying criteria at five-year intervals. 42 U.S.C. §7409(d)(1). Based on that thorough review, the Administrator sets or revises NAAQS and criteria “as may be appropriate.” *Id.* In 2020, as part of a normal periodic review, EPA conducted a thorough review and decided to maintain both the annual and 24-hour primary and secondary standards for fine

particulate matter (PM_{2.5}). In 2024, however, EPA issued an off-cycle revision without conducting a thorough review, which resulted in a reduction of the annual primary standard from 12 µg/m³ to 9 µg/m³.

A panel of the U.S. Court of Appeals for the District of Columbia Circuit excused EPA’s failure to conduct a “thorough review” and its decision to impose more stringent regulations despite an incomplete scientific record. *Kentucky v. EPA*, 179 F.4th 963, 975-78 (D.C. Cir. 2026). The panel employed the omitted-case canon to conclude that while EPA must conduct a thorough review every five years, the absence of the word “thorough” in the second sentence of Section 109(d)(1) means EPA may forgo a thorough review anytime it revises NAAQS off-cycle. *Id.* at 976-78. But the plain language of the statute does not permit EPA to dispense with a thorough scientific review simply because it decides to revise a NAAQS off-cycle, or sooner than every five years. Nor does it permit a court “to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy.” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). The panel’s reasoning is further undercut by the fact that carrying its application of the omitted-case canon to its logical conclusion would mean EPA lacks *any* authority to revise NAAQS off-cycle.

If the court’s opinion is permitted to stand, the revised PM_{2.5} NAAQS will exceed the safeguards Congress put in place when it amended the CAA to require review of the NAAQS and result in significant, unrecoverable implementation costs for States and busi-

nesses across the country. The Court should grant certiorari to reverse the D.C. Circuit and ensure EPA does not transgress the careful limits Congress placed on its authority.

ARGUMENT

I. Whether EPA has the power to revise National Air Ambient Quality Standards without a “thorough review” of “the latest scientific knowledge” is an issue of great national importance.

The CAA relies on a system of cooperative federalism to regulate air quality, and the NAAQS are the foundation of this system. The EPA has established NAAQS for six common air pollutants, and States are primarily responsible for regulating emissions from stationary sources such as power plants and factories through permitting and other requirements and strategies. As Petitioner the Commonwealth of Kentucky explains, “[f]ew, if any, federal regulatory regimes touch more lives than the air-quality standards that EPA sets under the Clean Air Act.” Ky.Pet.1. The power to set NAAQS forms “the centerpiece of the [CAA].” *Sierra Club v. Costle*, 657 F.2d 298, 315 n.23 (D.C. Cir. 1981); *see also Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001) (Section 109(b)(1) “and the NAAQS for which it provides are the engine that drives nearly all of Title I of the CAA”). Indeed, the power to set NAAQS is so great that this Court was called upon to consider whether its delegation violated the Constitution. *Id.* at 472-76.

NAAQS revisions impose massive costs on American industry. One study estimated that the cost of complying with the regulations made under the 1990 CAA Amendments was \$65 billion per year. Richard Lattanzio, Cong. Rsch. Serv., R44840, *Cost and Benefit Considerations in Clean Air Act Regulations* 15 (2017). But EPA is not permitted to take these costs into account when setting the NAAQS. *Whitman*, 531 U.S. at 486. Instead, Congress has mandated that EPA conduct a “thorough review” of the latest scientific evidence before revising the NAAQS. 42 U.S.C. §7409(d)(1); *id.* §7408(a)(2). Section 109(d)(1) mandates that EPA conduct this review at least every five years. *Id.* §7409(d)(1). It also permits EPA to do so more often. *Id.* Nothing in that provision permits the EPA to evade the thorough-review requirement simply by regulating more often.

A. NAAQS revisions have massive impacts.

Through NAAQS revision authority, EPA “tak[es] a stick to the States” and imposes a “comprehensive planning task of the first magnitude.” *Train v. NRDC, Inc.*, 421 U.S. 60, 64, 68 (1975). Within one year of a NAAQS revision, all fifty States must gather data on air quality and emissions and designate every region within their territory as in “attainment,” “nonattainment” or “unclassifiable.” 42 U.S.C. §7407(d)(1)(A). This process alone can cost States “millions of dollars and thousands of hours of staff time.” Ky.Pet.14.

States must also craft complex and stringent State Implementation Plans (SIPs) that impose strict compliance obligations on any stationary “source of an air

pollutant.” 42 U.S.C. §§7410(a), 7602(z). These plans include emissions limits, permitting requirements, and compliance schedules, *id.* §§7410(a)(1)-(2)(A), and cost the States millions of dollars per year to carry out, Chamber.Pet.9. The EPA itself initially estimated that the cost of the illustrative control strategies applied toward its new PM_{2.5} NAAQS would be \$390 million in 2032. Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 88 Fed. Reg. 5558, 5688 (Jan. 27, 2023) (to be codified at 40 C.F.R. pts. 50, 53, 58). The EPA revised its final cost estimate upward the following year, to \$590 million. Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16202, 16373 (Mar. 6, 2024) (codified at 40 C.F.R. pts. 50, 53, 58). And these are conservative, partial estimates. As EPA acknowledged, these estimated costs “do not fully account for all the emissions reductions needed to reach the final and more stringent alternative standard levels for some standard levels analyzed.” *Id.*

In short, the consequences of a NAAQS revision are extensive for the communities and States that *amici* represent. This is why forty-one States joined this litigation. *Kentucky v. EPA*, 179 F.4th 963, 967-69 (D.C. Cir. 2026).

B. Congress imposed a “thorough review” requirement on NAAQS revisions amidst concerns about the integrity of EPA’s scientific analysis.

Congress amended the CAA in 1970 to require the establishment of NAAQS, Pub. L. No. 91-604 (Dec.

31), and amended the law again in 1977 to require EPA, by 1980 and at five-year intervals thereafter, to complete a “thorough review” of the NAAQS and to revise them as appropriate, Pub. L. No. 95-95 (Aug. 7). Although the term “thorough review” is not defined in the CAA, Congress required EPA to base air quality criteria on “the latest scientific knowledge.” 42 U.S.C. §7408(a)(2).

There have been concerns with the scientific analysis underpinning EPA’s CAA regulations since the beginning. In 1976, the D.C. Circuit upheld a controversial EPA regulation reducing lead in gasoline in a 5-4 en banc decision. *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc). Three of the dissenting judges noted that the EPA Administrator had acted “in reliance primarily on data only partially analyzed by his own staff” and “not commented on according to the prescribed procedure or by the most knowledgeable parties.” *Id.* at 111 (Wilkey, J., dissenting). These dissenters characterized EPA’s resulting regulation as “Hamlet-like, a blind stab through a curtain of ignorance, inflicting anguish, but ... not rationally solving any problem.” *Id.*

Congress also took a microscope to EPA’s scientific judgments in the lead-up to the 1977 amendments. In March 1976, Congressman Barry Goldwater, Jr. took to the House floor with a development on the “great debate raging since 1970 over the validity of the air quality standards for sulfur oxides.” 122 CONG. REC. 7070 (1976) (statement of Rep. Barry Goldwater, Jr.), <https://perma.cc/FL6D-6UPM>. Explaining that there had been “many in both industry and the scientific

community ... question[ing] the validity of the reports and research,” Representative Goldwater quoted from a recent Los Angeles Times article that alleged an EPA scientist “systematically distorted” reports from a major EPA research program “in an effort to prove that pollution from sulfur-bearing fuels had an adverse impact on health.” *Id.* (quoting W.B. Rood, *EPA Study—The Findings Got Changed*, L.A. TIMES, Feb. 29, 1976). This and another report triggered a congressional hearing and investigation. *The Conduct of the EPA’s “Community Health and Environmental Surveillance System” (CHESS) Studies: Joint Hearing Before the Subcomm. on the Env’t & the Atmosphere of the H. Comm. on Sci. & Tech. and the Subcomm. on Health & the Env’t of the H. Comm. on Interstate & Foreign Com.*, 94th Cong. (1976) 1, (statement of Rep. Paul G. Rogers).

The EPA Administrator acknowledged that such allegations “impugn[ed] the integrity of the entire EPA research program and regulatory actions.” *Id.* at 83 (statement of Russell E. Train, Adm’r, EPA). And although the hearing produced “general agreement that no basis existed to question the integrity or scientific honesty of the project leader,” the subsequent investigative committee report concluded that the study’s methodological errors were so severe that they “render[ed] [the study] useless for determining what precise levels of specific pollutants represent a health hazard.” Staff of H. Comm. on Sci. & Tech., 94th Cong., *The Environmental Protection Agency’s Research Program with Primary Emphasis on the Community Health and Environmental Surveillance*

System (CHESS): An Investigative Report 1, 12 (Comm. Print Nov. 1976).

This report in turn led to a statutory requirement that a Scientific Advisory Board “review all scientific information on which air quality standards are based.” James E. McCarthy, Cong. Rsch. Serv., RL33807, *Air Quality and Sound Science: What Role for CASAC?* 5 (2008). “The process of establishing NAAQS, in Section 109 of the Clean Air Act, was also amended in the Clean Air Act Amendments of 1977, ... adding two major dimensions”: the thorough-review requirement and the creation of an independent scientific review committee, the Clean Air Scientific Advisory Committee (CASAC). *Id.* When Congressman Rogers—who co-chaired the hearing on the integrity of EPA’s scientific analysis—discussed the “thorough review” requirement, he explained he hoped it would “take care of any fears [his] colleagues might have concerning the accuracy of the primary standards in question.” 7 Staff of S. Comm. on Env’t & Pub. Works, 95th Cong., *A Legislative History of the Clean Air Act Amendments of 1977*, at 6160 (Comm. Print Aug. 1978) (statement of Rep. Paul Rogers). The House committee report explained that it adopted this requirement “[b]ecause of the admitted need for greater research, the importance of the [NAAQS], the controversy over the standards, and the Committee’s desire for continued independent scientific review of the [EPA’s] exercise of judgment.” *Id.* at 6704 (reprinting H.R. Rep. No. 94-1175, at 155 (1976)).

C. The EPA has long understood the limits that Congress placed on its power to revise NAAQS.

From the passage of these reforms until the challenged revision, EPA conducted a thorough review when promulgating or revising a NAAQS as required under Section 109(d)(1). *See* EPA Mot. for Vacatur (Doc. 2147050) at 1, *Kentucky*, 179 F.4th 963 (“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.”). And from at least 2008 until this instance, EPA began every NAAQS revision by conducting three assessments: (1) an Integrated Science Assessment (ISA), which provides “a comprehensive assessment of the current scientific literature on health and welfare effects associated with the presence of the pollutant in the ambient air” and “forms the scientific foundation for each NAAQS review”; (2) a Risk/Exposure Assessment (REA), which draws on the ISA to “develo[p] quantitative assessments of exposure and/or risk of health and/or welfare effects”; and (3) a Policy Assessment (PA), which “evaluates the policy implications of information from the ISA and quantitative exposure/risk analyses to frame policy options” for the Administrator’s consideration. Off. of Air Quality Plan. & Standards, EPA, EPA-452/R-24-019, *Overview of the Environmental Protection Agency’s Process for Reviewing the National Ambient Air Quality Standards* at 2-3, 2-4, 2-9 (Dec. 2024), <https://perma.cc/KQ9Q-KGKU>.

Each of these documents is subject to CASAC review and public comment. *Id.* at 2-9. Congress required that CASAC’s seven members must include “at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.” 42 U.S.C. §7409(d)(2)(A). Congress intended for CASAC to aid not only the Administrator and Congress, “but also the courts in judicial review of any [NAAQS].” *A Legislative History, supra*, at 6705. If the Administrator does not follow CASAC’s recommendations, he must explain himself in writing. 42 U.S.C. §7607(d)(3).

This robust process belies the D.C. Circuit’s claim that there is “no evidence the Congress intended to limit the Administrator’s ... revision authority” when it imposed the “thorough review” requirement. *Kentucky*, 179 F.4th at 976. The requirement was clearly meant—and, just as importantly, understood by EPA—as a meaningful check on the agency’s power to revise NAAQS, both during the required five-year reviews and in any discretionary review the Administrator conducts.

D. The EPA admitted that it transgressed Congress’s limits by revising a NAAQS without a thorough review.

In 2020, after completing a thorough review, EPA left the 12.0 $\mu\text{g}/\text{m}^3$ standard in place. Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 82684, 82684-85 (Dec. 18, 2020). But in 2024, it did an about-face, tightening the primary annual limit to 9.0 $\mu\text{g}/\text{m}^3$ based on the 2020

record and a partial supplement that, by EPA’s own account, “does not itself satisfy the EPA’s obligation to periodically complete a thorough review of the air quality criteria.” EPA, Responses to Significant Comments on the 2023 Proposed Rule for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (Docket No. OAR-2015-0072) (“RTC”) at 121; Chamber.Pet.App.485a.

The EPA did not come to this conclusion after performing “a comprehensive assessment of the current scientific literature on health and welfare effects associated with the presence of the pollutant in the ambient air.” *Overview of the Environmental Protection Agency’s Process*, *supra*, at 2-3. Rather, from the start, EPA’s ISA Supplement admitted that it “does not represent a full multidisciplinary evaluation of evidence that results in the formation of weight-of-evidence conclusions (i.e., causality determinations).” EPA, *Supplement to the 2019 Integrated Science Assessment for Particulate Matter*, EPA/600/R-22/028, at ES-i (May 2022), <https://perma.cc/HL57-GNJQ>.

The EPA’s admissions continued apace once litigation ensued. In briefing before the D.C. Circuit in 2024, EPA initially conceded this was “the first time a proceeding described by EPA as a ‘reconsideration’ ha[d] resulted in revised standards.” EPA Br. (Doc. 2070774) at 79, *Kentucky*, 179 F.4th 963. By the following year, EPA was filing its own motion to vacate the rule, “confess[ing] error” and acknowledging that in “finaliz[ing] a purported ‘reconsideration’ of a [NAAQS]” for “the first time in nearly fifty years,” it had proceeded “based on a novel interpretation of the

statute” and “without the rigorous, stepwise process that Congress required.” EPA Mot. for Vacatur, *supra*, at 1. The EPA also acknowledged that “[t]he 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” because that reading comports both with Section 109(d)(1) “and its surrounding provisions, including section 108, which requires that criteria reflect the ‘latest scientific knowledge.’” *Id.* at 3. The EPA correctly recognized that in revising the PM_{2.5} NAAQS without a thorough review, it had “exceeded [the] authority” Congress granted. *Id.*

II. The D.C. Circuit misinterpreted Section 109 of the Clean Air Act.

The D.C. Circuit nevertheless disregarded EPA’s confession of error and misinterpreted Section 109 to allow EPA to revise NAAQS without the thorough review Congress required. According to the D.C. Circuit, the first sentence of Section 109(d)(1) can be decoupled from the second. So instead of the second sentence merely giving EPA authority to revise more frequently than every five years, the second sentence also permits EPA to regulate on an abbreviated scientific record. The D.C. Circuit supported its misreading by selectively applying the omitted-case canon and by invoking a provision of the statute, Section 109(b)(1), that EPA never purported to rely on.

A. The first sentence of Section 109(d)(1) authorizes EPA to revise NAAQS only after a “thorough review” of the latest science.

Section 109(d)(1)’s first sentence authorizes EPA to revise NAAQS, but only after a “thorough review” of the latest science. It states that:

No later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section [1]08 of this title and the [NAAQS] promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate....

42 U.S.C. §7409(d)(1).

Thus, the plain language of Section 109(d)(1) authorizes EPA to revise a NAAQS only after the Administrator completes a “thorough review.”

The EPA’s longstanding practice confirms that reading of the text. As explained above, EPA has long understood Section 109(d)(1) to require a “thorough review” before revising a NAAQS. *Supra* Section I(C). This “thorough review” is required to guarantee that NAAQS are revised only in accordance with “the latest scientific knowledge.” 42 U.S.C. §7408(a)(2).

B. The second sentence of Section 109(d)(1) clarifies only that EPA may act earlier or more often—it does not gut the careful limits Congress imposed on EPA.

Section 109(d)(1)’s second sentence provides: “The Administrator 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). On its face, this sentence does not discuss anything other than the timing or frequency of EPA action. It makes no mention of the process for revision, the standard to be used in such revision, or any alteration of the “thorough review” described in the preceding sentence.

Thus, the text of Section 109(d)(1)’s second sentence simply clarifies that while EPA *must* review (and if appropriate, revise) NAAQS criteria and standards at least every five years, it *may* review and revise them earlier or more often. Regardless of whether a revision takes place after five years or after four years and eleven months, nothing in the text of the second sentence permits EPA to sidestep the typical constraints the CAA imposes on the NAAQS process, including the thorough-review requirement.

C. The D.C. Circuit’s misapplication of the omitted-case canon eviscerated the limit Congress imposed on EPA’s NAAQS revision authority.

The D.C. Circuit avoided this straightforward textual reading by misapplying the omitted-case canon. In so doing, it eliminated an important limit Congress placed on EPA’s authority to revise NAAQS. But the text is not ambiguous. And even if it were, “the sheer scope of the [EPA’s] claimed authority under § [109(d)(1)] would counsel against [the D.C. Circuit’s] interpretation.” *Ala. Ass’n of Realtors v. DHS*, 594 U.S. 758, 764 (2021).

The omitted-case canon states that “[n]othing is to be added to what the text states or reasonably implies.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 93 (2012). Put simply, “a matter not covered is to be treated as not covered.” *Id.* So “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (cleaned up).

But the D.C. Circuit wasn’t comparing language in different sections, or even—as its cited authority suggested—language in neighboring subprovisions. See *Kentucky*, 179 F.4th at 976-77 (citing a case that compared the criminal elements of 18 U.S.C. §1344(2) with those of §1344(1)). Rather, the court was comparing the language of a short, clarifying, and referential sentence to the language of the sentence immediately

preceding it in the same subprovision. The D.C. Circuit thus erred by myopically focusing on the second sentence’s omission of the word “thorough” before “review.” *Id.* That reading violates the fundamental principle that “[t]he text must be construed as a whole.” Scalia & Garner, *supra*, at 167; *see also Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 441 (2019) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”) (cleaned up). The D.C. Circuit read a single sentence addressing a discrete topic (timing) to gut the significant safeguard the subprovision as a whole imposes. In the D.C. Circuit’s view, nothing in the statute prevents EPA from regulating pursuant to an off-cycle “unthorough review” based on an incomplete scientific record immediately after an on-cycle “thorough review.” So according to the D.C. Circuit, Congress handcuffed the agency and at the same time handed over the key.

That is not how this Court interprets statutes. If permitted by the text, an interpretation that “furthers rather than obstructs the [text’s] purpose should be favored.” Scalia & Garner, *supra*, at 63 (presumption against ineffectiveness). “[I]t is no more the court’s function to revise by subtraction than by addition,” or to adopt an “interpretation that renders [a provision] pointless.” *Id.* at 174, 176 (presumption against surplusage). The D.C. Circuit’s interpretation of the second sentence of Section 109(d)(1) cannot be correct because it renders the “thorough review” requirement of the first a dead letter.

The D.C. Circuit claims its reading does not give EPA free rein because the agency is still subject to the CAA’s “reasoned decisionmaking” requirement. *Kentucky*, 179 F.4th at 978. But the fact EPA is still subject to other, more general CAA requirements does not ameliorate the fact that the D.C. Circuit has read the thorough-review requirement out of Section 109(d)(1). The D.C. Circuit’s reading permits EPA to issue revised NAAQS based on something less than a thorough review, in direct contravention of Section 109(d)(1)’s plain text.

In short, the second sentence of Section 109(d)(1) “is no more than it appears to be: a humdrum” clarification on timing. *Biden v. Nebraska*, 600 U.S. 477, 499 (2023). “Rather than implicitly granting the [Administrator] authority to [revise NAAQS] at will, it simply” allows the Secretary to undertake the Congressionally approved process earlier or more frequently than the first sentence requires. *Id.*

D. The D.C. Circuit’s application of the omitted-case canon read an elephant into a mousehole.

The D.C. Circuit’s novel application of the omitted-case canon was also erroneous because it read one ancillary sentence of one subprovision to bless EPA’s discovery of a previously unheard-of flexibility to regulate. But this Court has repeatedly recognized that Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not ... hide elephants in mouseholes.” *Whitman*, 531 U.S. at 468; *see also West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (noting that Congress

does not “typically use oblique or elliptical language to empower an agency to make a ‘radical or fundamental change’ to a statutory scheme”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (expressing “confiden[ce] that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”).

To be sure, Congress granted EPA the power to set NAAQS. But there are at least two indications that Congress did not grant the agency the power to do so without a thorough review in the second sentence of Section 109(d)(1). The first is the magnitude of the asserted power. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative *expansion* in EPA’s regulatory authority without clear congressional authorization.”) (emphasis added). And the second is the late-breaking nature of the asserted power. Section 109(d)(1) has been on the books for nearly half a century, yet EPA invoked authority to conduct a less-than-thorough review during an off-cycle revision just a few years ago. Until this case, EPA has always conducted a thorough review before revising a NAAQS. That is significant because this Court has stressed that it looks skeptically on an agency’s claims “to [have] discover[ed] in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy.’” *Id.*

The EPA’s “longstanding practice” “can inform a court’s determination of what the law is.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386 (2024) (cleaned up). So “it is ... telling that in [Section

109(d)(1)]’s half century of existence, no [Administrator] has invoked the [provision]” to revise a NAAQS off-cycle without a thorough review. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 245 (2026) (op. of Roberts, C.J.) (cleaned up). In sum, “the lack of historical precedent for the [EPA’s cursory, off-cycle revision], coupled with the breadth of authority that the [agency] ... claim[ed], is a telling indication that the [revision] extend[ed] beyond the [Administrator]’s legitimate reach.” *Id.* at 245-46 (cleaned up).

E. Carrying the panel’s application of the omitted-case canon to its conclusion would prohibit EPA from revising NAAQS off-cycle at all.

The D.C. Circuit’s decision rests upon a mistaken application of the omitted-case canon. The most significant omission in the second sentence of Section 109(d)(1) is not the lack of “thorough” before “review,” but rather the lack of any reference to the Administrator’s ability to “revise” standards. The second sentence states only that the Administrator may “review and revise *criteria*”—what standards are based on—or “promulgate *new* standards.” 42 U.S.C. §7409(d)(1) (emphasis added). The first sentence, by contrast, discusses both the “revisio[n]” of “standards promulgated under this section” and the “promulgat[ion]” of “new standards.” *Id.* The D.C. Circuit’s failure to appreciate the distinction between the revision of existing NAAQS and the promulgation of initial NAAQS is especially notable because the CAA repeatedly differentiates between “new” and “revised” standards. *See, e.g.*, 42 U.S.C. §7407(d)(1)(A)-(B); *id.* §7506(c)(6).

Thus, applying the omitted-case canon consistently would strip EPA of authority to revise NAAQS off-cycle altogether.

The D.C. Circuit attempted to avoid this contradiction by claiming EPA’s revision authority also flows from Section 109(b)(1). *Kentucky*, 179 F.4th at 975-76. But EPA never purported to ground its newfound authority to conduct less-than-thorough, off-cycle revisions in Section 109(b)(1). And for good reason. That section provides only that NAAQS “may be revised in the same manner as promulgated.” 42 U.S.C. §7409(b)(1). The “same manner as promulgated” language in Section 109(b) appears to be a reference to notice-and-comment rulemaking. *See id.* §7409(a)(1)(B)-(a)(2). Section 109(b)(1) thus requires EPA to go through notice-and-comment rulemaking whether EPA is promulgating or revising primary standards. But this language could also be further confirming that the overall *process* for revising a NAAQS must be the same as that for promulgating a NAAQS, which includes a thorough review. *See* EPA Mot. for Vacatur at 15-18 (pointing out that “if the reference to revising NAAQS in section 109(b) [is] not procedural,” putting Section 109(b)(1) and (d)(1) together means “revisions to the standards require the same manner of review ...—a thorough review”). Either way, Section 109(b)(1) does nothing to displace the thorough-review requirement of Section 109(d)(1). Certainly, EPA has never argued that it need not conduct a thorough *on-cycle* review simply because it went through notice and comment.

Happily, there is no need for this Court to make sense of or grapple with the consequences of the D.C.

Circuit’s tortured logic. The Court can simply look at the CAA as a whole and apply the plain meaning of Section 109(d)(1): The Administrator “shall” conduct a “thorough review” before promulgating or revising a NAAQS, regardless of whether he acts every five years (as he must) or sooner (as he may).

III. The Court should grant the petitions because the D.C. Circuit’s holding allowing EPA to revise NAAQS at any time without a thorough review risks destabilizing the U.S. economy.

The Court should grant the petitions. First, the D.C. Circuit has exclusive jurisdiction over any challenge to a NAAQS, so no further percolation is possible. And second, if allowed to stand, the D.C. Circuit’s decision will result in staggering, permanent implementation costs based on something other than a review of the latest scientific knowledge.

Under the D.C. Circuit’s holding, EPA can revise NAAQS at will, without any adherence to the requirements in Section 109(d)(1), and leave the States and communities represented by *amici* to absorb the costs. *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014) (a revised NAAQS “shifts the burden to States to propose plans adequate for compliance with the NAAQS”). “Once EPA sets a new standard, the clock starts ticking.” *Ohio v. EPA*, 603 U.S. 279, 283 (2024). States must submit their initial attainment designations within a year; EPA must promulgate its own attainment designations within three years; and States must submit implementation plans within three years. 42 U.S.C. §§7407(d)(1)(A)-(B),

7410(a)(1). Those clocks are running now, as a district court has confirmed by ordering the EPA Administrator to complete his designations by February 6, 2027. *All. of Nurses for Healthy Env'ts v. Zeldin*, 2026 WL 2078145, at *16 (N.D. Cal. July 17).

The effects of a revised NAAQS do not stop there. The CAA stipulates that no federal “department, agency, or instrumentality” “shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan.” 42 U.S.C. §7506(c)(1). Nor may a federal agency fund a “transportation plan, program, or project” that fails to conform to any applicable implementation plan. *Id.* §7506(c)(2). Federal support for highway construction also depends on compliance with implementation plans. *See* 23 U.S.C. §109(j) (directing the Secretary of Transportation to issue guidelines assuring that highways are constructed “consistent with any approved plan for ... the implementation of a [NAAQS]”). These restrictions apply to nonattainment areas one year after designation. 42 U.S.C. §7506(c)(5)-(6); 89 Fed. Reg. at 16372.

Amici have heard firsthand about the enormous costs of implementing a revised NAAQS and how the 2024 revision at issue here will limit the ability of the EPA, States, and Tribes to permit construction of new manufacturing, energy production, and infrastructure. *See Short-Circuiting Progress: How the Clean Air Act Impacts Building Necessary Infrastructure and Onshoring American Innovation: Hearing before the Subcomm. on Env't of the H. Comm. on Energy and*

Com., 119th Cong. (2025), and *From Gridlock to Growth: Permitting Reform Under the Clean Air Act: Hearing before the Subcomm. on Env't of the H. Comm. on Energy and Com.*, 119th Cong. (2025).

The EPA's own (partial) estimate of the cost of the illustrative control strategies applied toward its new PM_{2.5} NAAQS in 2032 rose from \$390 million to \$590 million in just a year. *Supra* Section I(A). The Commonwealth of Kentucky expected designations alone to cost it \$250,000 and leave seventeen of its counties in nonattainment. Initial Br. for State Pet'rs (Doc. 2058290) at 18-19, *Kentucky*, 179 F.4th 963. Indiana expected thirty-four counties to be so designated, and Texas, ten, with 120 pending permits affected. *Id.* at 19-20. Many of these nonattainment areas would be "first-time designees, requiring training, outreach, and increased compliance costs." *Id.* at 19; *see also* Ky.Pet.15.

Truly, NAAQS "affect the entire national economy." *Whitman*, 531 U.S. at 475. And the decision below allows this economic disruption based on a record EPA itself acknowledges "does not ... satisfy the EPA's obligation to periodically complete a thorough review of the air quality criteria." RTC at 121, Chamber.Pet.App.485a.

What's more, some effects will turn out to be permanent even if a proper, thorough review later causes EPA to relax the NAAQS. By statute, EPA must keep "controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. §7502(e). *See also* *S. Coast Air Quality Mgmt. Dist. v. EPA*, 882 F.3d

1138, 1149 (D.C. Cir. 2018) (EPA “required by statute to keep in place measures intended to constrain ozone levels—even the ones that apply to outdated standards—in order to prevent backsliding”) (cleaned up). If EPA lacks the unbounded off-cycle revision authority it claims, the Court needs to say so now, before these new controls lock in. *See All. of Nurses*, 2026 WL 2078145, at *16.

The D.C. Circuit claimed it was not “undermin[ing]” Congress’s thorough-review requirement because the EPA will still need to conduct a thorough review “every fifth year.” *See Kentucky*, 179 F.4th at 978. But that is cold comfort. The States are already incurring costs to adapt to the revised NAAQS that was based on an unthorough review. And unless this Court intervenes, many areas will remain bound by plans written to EPA’s current revised standard even if a proper, thorough review later determines that standard was unnecessarily stringent. For many areas that *amici* represent, what an unthorough review requires cannot be undone by a thorough review later. Worse still, EPA may replace this standard or any other future standard at any time with a standard based on yet another unthorough review. Congress never granted EPA that power in Section 109(d)(1), and such an interpretation, if allowed to stand, would obviate the safeguards Congress created for the NAAQS program. The Court should restore the careful limit that Congress placed on the Administrator’s authority to revise NAAQS by affirming that the Administrator may do so only after completing a thorough review of the latest scientific knowledge.

CONCLUSION

For these reasons, the Court should grant both petitions and reverse the decision below.

Respectfully submitted,

October 2, 2026

THOMAS R. MCCARTHY
Counsel of Record
JOSHUA DAVID JONES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae