ORAL ARGUMENT NOT SCHEDULED

No. 22-5305

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

S. STANLEY YOUNG and LOUIS ANTHONY COX, JR.,

Plaintiffs-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the EPA; SCIENCE ADVISORY BOARD; ALISON C. CULLEN, in her official capacity as Chair of the Science Advisory Board; CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE; and ELIZABETH A. SHEPPARD, in her official capacity as Chair of the Clean Air Scientific Advisory Committee,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Plaintiffs in district court, and appellants here, are Dr. S. Stanley Young and Dr. Louis Anthony Cox, Jr. Defendants in district court, and appellees here, are the Environmental Protection Agency (EPA); Michael S. Regan, in his official capacity as Administrator of the EPA; Science Advisory Board; Alison C. Cullen, in her official capacity as Chair of the Science Advisory Board; Clean Air Scientific Advisory Committee; and Elizabeth A. Sheppard, in her official capacity as Chair of the Clean Air Scientific Advisory Committee. There were no amici or intervenors in district court. There are no intervenors before this Court. The Atlantic Legal Foundation filed as amicus supporting appellants.

B. Rulings Under Review

Appellants seek review of the September 30, 2022, Order and Memorandum Opinion in *Young v. U.S. EPA*, -- F. Supp. 3d --, 2022 WL 4598693 (D.D.C. 2022) (No. 1:21-cv-02623-TJK) (Kelly, J.). The order is reproduced at page 303 of the Joint Appendix (JA), the memorandum

opinion is reproduced at pages 304 to 322 of the JA, and the order entering partial final judgment is reproduced at pages 323 to 325 of the JA.

C. Related Cases

The case on review has not previously been before this Court or any other. There are no related cases involving substantially the same parties and the same or similar issues, as defined in D.C. Circuit Rule 28(a)(1)(C).

/s/ Joseph F. Busa
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GLOSSARY

CASAC	Clean Air Scientific Advisory Committee
EPA	Environmental Protection Agency
FACA	Federal Advisory Committee Act
JA	Joint Appendix

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's federal-question jurisdiction under 28 U.S.C. § 1331. JA197. The district court granted the government partial summary judgment on September 30, 2022, JA303; JA304-22, and entered partial final judgment on November 2, 2022, JA323-25. Plaintiffs filed a timely notice of appeal on November 18, 2022. JA326. The district court issued a final judgment from which there is appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The Clean Air Act provides for an "independent scientific review committee," 42 U.S.C. § 7409(d)(2)(A), to advise the Environmental Protection Agency regarding the effects of air pollution on public health and welfare. That committee is subject to the Federal Advisory Committee Act, which provides that membership of advisory committees must be "fairly balanced." 5 U.S.C. app. 2, § 5(b)(2). Congress, in creating the scientific review committee at issue here, prescribed the committee's composition: the agency shall appoint "seven members including 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). Plaintiffs are disappointed applicants who were not appointed to sit on the committee in the most recent selection process. They argue that the committee, as now composed, is not fairly balanced because it has no "industry representatives." JA192. The questions presented are:

1. Whether plaintiffs lack Article III standing.

2. Whether the fair balance of scientific viewpoints among the members of the committee is judicially reviewable, and, if so, whether the agency abused its discretion or acted arbitrarily or capriciously in appointing scientists to the scientific review committee based on the committee's need for their scientific expertise.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. The Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA) establishes certain "standards and uniform procedures" to "govern the establishment, operation, administration, and duration" of committees that advise the

federal government. 5 U.S.C. app. 2, § 2(b)(4). As relevant here, when Congress enacts legislation establishing or authorizing the establishment of an advisory committee, FACA provides that such legislation "shall" contain a "clearly defined purpose for the advisory committee," *id.* § 5(b)(1), and "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee," *id.* § 5(b)(2). The same "guidelines," to the "extent they are applicable," are also to "be followed by … agency heads" when they "creat[e]" their own advisory committees. *Id.* § 5(c).

The Administrator of the General Services Administration has "prescribe[d] administrative guidelines and management controls applicable to advisory committees." 5 U.S.C. app. 2, § 7(c). These regulations provide that "advisory committee members serve at the pleasure of the appointing or inviting authority" and that "[m]embership terms are at the sole discretion of the appointing or inviting authority." 41 C.F.R. § 102-3.130(a). An appendix to the regulations explains that "FACA does not specify the manner in which

advisory committee members and staff must be appointed." *Id.* pt. 102-3, subpt. C, app. A.

With regard to FACA's "fairly balanced" provision, the regulations specify that an agency will "consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee." 41 C.F.R. § 102-3.60(b)(3). "Advisory committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed." *Id.*

2. The Clean Air Act and the Clean Air Scientific Advisory Committee (CASAC)

a. The Clean Air Act directs the Administrator of the Environmental Protection Agency (EPA) to identify and adopt certain regulations regarding air pollutants. *See generally Murray Energy Corp. v. EPA*, 936 F.3d 597, 604-05 (D.C. Cir. 2019). The Administrator identifies air pollutants that, in his judgment, "may reasonably be anticipated to endanger public health or welfare" and adopts "air quality criteria" for each identified air pollutant. 42 U.S.C. § 7408(a). Those criteria "shall accurately reflect the latest scientific knowledge" regarding "all identifiable effects on public health or welfare which may

be expected from the presence of such pollutant in the ambient air, in varying quantities." *Id.* § 7408(a)(2).

The Administrator prescribes, through notice-and-comment rulemaking, national ambient air quality standards for each criteria air pollutant. 42 U.S.C. §§ 7409(a), 7607(d)(1)(A). Those air-quality standards must be set at the level that is "requisite to protect the public health" or "public welfare," "based on" the criteria that accurately reflect the latest scientific knowledge. *Id.* § 7409(b). "Nowhere are the costs of achieving such a standard made part of that … calculation." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 465 (2001). Instead, the Clean Air Act "assigns initial and primary responsibility" to "the States" for "deciding what emissions reductions will be required from which sources" to attain and maintain air-quality standards. *Id.* at 470.

The Clean Air Act directs the Administrator to periodically review and, as appropriate, revise, previously promulgated air-pollutant criteria and air-quality standards. 42 U.S.C. § 7409(d)(1). Such revisions also go through notice-and-comment rulemaking. *Id.* § 7607(d)(1)(A).

b. To advise the Administrator in carrying out those functions, the Clean Air Act provides for an "independent scientific review committee," 42 U.S.C. § 7409(d)(2)(A), often referred to as the Clean Air Scientific Advisory Committee (CASAC) or the Scientific Review Committee. The Clean Air Act specifies the required composition of the Committee: "seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies." *Id.* The "Administrator shall appoint" the members of the Committee. *Id.*

The Clean Air Act specifies that the Committee shall "review" the air-pollutant criteria and air-quality standards and "recommend to the Administrator any new" standards or "revisions" to existing standards or criteria. 42 U.S.C. § 7409(d)(2)(B). In addition to that core function, the Committee also advises the Administrator on "areas in which additional knowledge is required" to perform its task and the "research efforts necessary"; the "relative contribution to air pollution concentrations of natural as well as anthropogenic activity"; and "any adverse public health, welfare, social, economic, or energy effects which

may result from various strategies for attainment and maintenance of" air-quality standards. *Id.* § 7409(d)(2)(C).

c. A notice of proposed rulemaking regarding an air-quality standard must "set forth … any pertinent findings, recommendations, and comments by the Scientific Review Committee" and, "if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences." 42 U.S.C. § 7607(d)(3). All interested persons may comment on a proposed rule, including the Committee's recommendation and the EPA's agreement or disagreement with it. *Id.* § 7607(d)(4), (5). Any final rule must "respon[d] to each of the significant comments, criticisms, and new data submitted … during the comment period." *Id.* § 7607(d)(6).

B. Factual Background

1. EPA Appointed Members to CASAC Using Unusual Procedures in 2018.

"EPA has long allowed individual recipients of EPA grants to serve on its scientific advisory committees." *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 641 (D.C. Cir. 2020). That policy "ensure[s] that the scientific and technical bases of [EPA's] decisions" are "based upon the best current knowledge from science,

engineering, and other domains of technical expertise." *Id.* at 647 (quotation marks omitted). "That changed in October 2017" when the then-EPA Administrator "issued a directive" providing that "no member of an EPA federal advisory committee [may] be currently in receipt of EPA grants." *Id.* at 641 (quotation marks omitted). The directive was ultimately vacated in 2020 by the U.S. District Court for the Southern District of New York. *Natural Res. Def. Council, Inc. v. U.S. EPA*, No. 19-cv-5174, 2020 WL 2769491, at *1 (S.D.N.Y. Apr. 15, 2020).

In 2018, EPA selected members to serve on the Committee under the restrictions imposed by the 2017 directive. JA248. That process also "did not follow a key step in [EPA's] established process" for selecting advisory committee members. U.S. Gov't Accountability Office, GAO-19-280, *EPA Advisory Committees: Improvements Needed for the Member Appointment Process* 17 (2019), https://perma.cc/TFJ3-NAPF. Prior to the 2018 process, EPA staff had created written membership grids for potential nominees and provided written "rationales for recommending the candidates EPA's staff deem best qualified." *Id.* EPA staff did not do so in the 2018 process. *Id.*

2. EPA Appointed New Members to CASAC Using Established Procedures in 2021.

Recognizing the "deficiencies" and "process irregularities" in the 2018 process, the Administrator in 2021 decided to reconstitute the Committee using EPA's traditional practices and permitting consideration of individuals who received EPA grants. JA38. Accordingly, the Administrator terminated the terms of service of the then-existing Committee members, thanked them for their "dedicated service," initiated the process of appointing new members, and "encourage[d]" the departing members to "reapply for consideration." JA38.

The 2021 process "followed the standard … policies" EPA had used before 2017. JA248. EPA solicited nominations, *see* 86 Fed. Reg. 17,146 (Apr. 1, 2021), and "conduct[ed] extensive outreach to over 100 organizations," including "stakeholder/industry associations," JA248. The agency received 115 nominations, of whom 100 were interested in serving, and the agency solicited public comment on those nominees' scientific qualifications to serve on the Committee. JA249-50; JA103-33. EPA staff then "carefully evaluated the 100 candidates … based on demonstrated competence, knowledge, and expertise in scientific and

technical fields of air pollution" and "prepared a decision memo for the Administrator outlining [the staff's] recommendations." JA249-50; *see* JA41-45.

Agency staff recommended seven nominees: a physician with expertise in respiratory medicine and inhalation toxicology; a member of the National Academy of Medicine with expertise in epidemiology and biostatistics; the manager of the Emissions & Control Strategies Unit in a state environmental protection agency with expertise in air quality modeling and monitoring; a professor with expertise in epidemiology and biostatistics; a professor of atmospheric science with expertise in air quality and monitoring, whose research has been "sponsored by grants and contracts from … industry"; a professor of environmental health with expertise in epidemiology, exposure assessment, health disparities, and health effects of air pollution; and a professor of geography and the environment with expertise in "ecosystem effects of air criteria pollutants." JA42-44, 106, 107.

In light of the Committee's "scientific and technical" focus and the slate of recommended nominees' "demonstrated competence, knowledge and expertise in scientific and technical fields," agency staff concluded

that the "appointment of the [recommended] candidates would result in a highly-qualified, diverse, and balanced CASAC." JA41-42. Further review "confirm[ed]" that a CASAC composed of the recommended nominees would be "balanced with respect to the points of view represented for the functions to be performed by the committee." JA49.

The Administrator selected the recommended nominees. JA22-23. The Administrator explained that the Committee would have members who "are well-qualified experts with a cross-section of scientific disciplines and experience needed to provide advice on the scientific and technical bases for the National Ambient Air Quality Standards." JA21. The new Committee members would "include four prior members of the committee, including two members selected by the previous administration." JA22.

C. Disappointed Applicants Brought Suit Alleging CASAC Is Not Fairly Balanced.

Plaintiff Stanley Young is an applied statistician who previously worked in the pharmaceutical industry and currently works as an adjunct professor and runs a private consulting company. JA198. He previously served on another EPA advisory committee. JA198. Plaintiff Anthony Cox holds a Ph.D. in risk analysis, works as an associate

professor of business analytics, and runs a private consulting company. JA200-01. He previously served on CASAC. JA200. Plaintiffs were removed from those committees when they were reconstituted in 2021. JA198, 200. Plaintiffs were both nominated to serve on CASAC in 2021, evaluated by agency staff on the same basis as all other nominees, and not appointed by the Administrator. JA42-45, 48, 108, 133, 135.

Plaintiffs brought this civil action against (as relevant here) the EPA, the EPA Administrator, CASAC, and CASAC's Chair. JA202-03. Plaintiffs challenge the Administrator's selection of the new CASAC members, contending that CASAC is "not fairly balanced," in violation of FACA, because it "does not include any industry-affiliated members." JA237. They also contend that the EPA acted arbitrarily and capriciously by, allegedly, not "reasonably explain[ing] how the new membership of the Committee … is fairly balanced" and considering factors not relevant to the Committee's balance. JA240-41.

D. The District Court Granted Summary Judgment to the EPA Because CASAC Is Fairly Balanced.

The district court resolved those claims in the government's favor. JA304-22. The court first concluded that plaintiffs have standing because they are "directly affected" by the work of the Committee.

JA305 n.2 (quotation marks omitted). And the court determined that the fair balance of an advisory committee is not committed to agency discretion by law and thus may be adjudicated. JA308-11.

On the merits, the court concluded that the EPA Administrator did not abuse his discretion in concluding that the scientific membership of this scientific advisory committee was fairly balanced. JA311-15. The court explained that the Clean Air Act specifies membership requirements for three of the seven positions on the Committee but "does not require an industry representative"—unlike another provision of the Clean Air Act. JA312 & n.6. The court recognized that the type of fair balance that FACA requires depends on the function a particular advisory committee serves. Here, the court explained, Congress created CASAC to provide the EPA with "*scientific* review." JA313 (quoting 42 U.S.C. § 7409(d)).

The Committee's "primary task is to provide scientific expertise and advice on the EPA's national ambient air quality standards." JA313. "Given the Committee's technical and scientific mandate," the court concluded, the Committee's current membership is fairly balanced. JA314. "The Committee's members have varied technical

backgrounds across scientific and medical disciplines, including inhalation toxicology, air pollution expertise, respiratory medicine, ecology, exposure assessment, and biostatistics." JA314. And "representatives from affected parties are not needed for a committee to conduct 'technocratic' tasks, such as scientific peer review." JA313. Finally, the court rejected plaintiffs' arbitrary-and-capricious claim, concluding that the agency had adequately considered the relevant factors and explained its decisions in appointing new members to the Committee. JA319-21. The district court entered partial final judgment to facilitate appellate review of its disposition of these claims. JA323-25.

SUMMARY OF ARGUMENT

Plaintiffs are disappointed applicants who present no justiciable case or controversy regarding the fair balance of the Clean Air Scientific Advisory Committee. That Committee is appropriately staffed with scientists possessing a wide range of scientific and technical expertise relevant to the Committee's scientific mission. Plaintiffs suffer no Article III injury in not being selected for a committee on which they have no cognizable personal right to sit and whose advice does not directly affect them. And their generalized grievance about the fair

balance of the Committee is not fit for judicial resolution in any event because there are no administrable standards by which the Committee's fair balance could be resolved by this Court. The agency did not abuse its discretion in appointing scientists to the Clean Air Scientific Advisory Committee. And its appointment decisions were reasonably explained. The judgment of the district court should be affirmed.

I. Plaintiffs have no Article III standing. It is undisputed that they have no cognizable personal right to serve on the Committee. They contend that "industry" must be represented on the Committee, but there is far too attenuated a link between the composition of the Committee and any state implementation plan that might injure regulated entities. More importantly, plaintiffs do not contend that they are among the regulated entities whose views, they say, must be represented on the Committee. And plaintiffs can provide the same advice to EPA during notice-and-comment rulemaking as they could as members of the Committee. They are thus not personally injured, and their challenge to the Committee's composition is no more than a generalized grievance.

II. A. Plaintiffs' claims are not subject to judicial review. An agency's selection of its own advisors is committed to agency discretion by law. As the record in this case demonstrates, such appointments involve a complex balancing of priorities and considerations uniquely within the agency's purview regarding the committee's needs, the available pool of advisers, the relevant metrics for rating those candidates, and the appropriate trade-offs involved in selecting a discrete set of advisors from that pool that is best situated to meet the agency's needs. FACA, in leaving individual appointments to agency heads, confirms agencies' traditional discretion in this area.

FACA's "fair balance" requirement does not supply a meaningful standard by which a court could assess the agency's exercise of that discretion. "The relevant points of view on issues to be considered by an advisory committee are virtually infinite," and there is no "principled way" for a court to determine "which among the myriad points of view deserve representation on particular advisory committees" or whether those views are "fairly balanced." *Public Citizen v. National Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 426-28 (D.C. Cir. 1989) (Silberman, J., concurring in the judgment). This case

illustrates the point. There are no objective standards by which the Court could determine whether the scientists on the Clean Air Scientific Advisory Committee represent a fair balance of the scientific viewpoints necessary for the Committee to peer review all existing air-quality standards and any new ones that may be issued.

B. Plaintiffs' claims also fail on the merits. At a minimum, the EPA Administrator did not abuse his discretion in 2021 when he appointed scientists with a wide range of expertise in air pollution and its effects on public health and welfare to the Clean Air Scientific Advisory Committee. That Committee is charged with conducting peer review on EPA's assessment of the effects on public health and welfare of exposure, at various levels and over various durations, to air pollutants. That scientific mission requires seven Committee members with a wide range of scientific and technical skills. But it does not require an "industry representative" because the Committee is not a forum for interest advocacy. By statute, its members provide "independent scientific review." 42 U.S.C. § 7409(d)(2)(A). Congress thus reasonably chose not to reserve any seats on this scientific committee for "industry."

The Committee's current members bring to bear a well-balanced set of scientific and technical viewpoints that enable the Committee to fulfill its scientific mission. Nothing more is required. In particular, the Administrator is not required (and did not try) to make appointments to the Committee based on predications about what position each of the 100 candidates would likely take on the many scientific issues regarding air quality that come before the Committee.

C. Plaintiffs' arbitrary-and-capricious challenge, which largely replicates their fair-balance arguments, fails for largely the same reasons. EPA considered the balance of scientific perspectives the Committee requires. It made reasonable appointments based on the appointees' scientific expertise and the Committee's needs. And it provided all the explanation that could reasonably be required of such a managerial task.

STANDARD OF REVIEW

"This Court's review of the District Court's grant of summary judgment is *de novo*." *Jeffries v. Barr*, 965 F.3d 843, 859 (D.C. Cir. 2020).

ARGUMENT

I. Plaintiffs Lack Article III Standing.

Plaintiffs have no Article III standing to challenge the agency's appointment of science advisers to the Clean Air Scientific Advisory Committee because they are not injured by such appointment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs have no cognizable personal right to serve on the Committee; they are not the regulated entities whose views, they say, must be represented on the Committee; and, in any event, they can provide the same advice during notice-and-comment rulemaking as they would on the Committee.[1]

Service on an advisory committee is not a "cognizable personal right." *National Anti-Hunger Coal. v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983). Service is, instead, "at the pleasure of the appointing" authority for a term whose length is "at the sole discretion" of the appointing authority. 41 C.F.R. § 102-3.130(a). Plaintiffs thus could not maintain that FACA requires their personal service on the

[1] Defendants did not raise standing in district court, JA305 n.2, but may raise it for the first time on appeal. *Democratic Senatorial Campaign Comm. v. Federal Election Comm'n*, 139 F.3d 951, 952 (D.C. Cir. 1998) (per curiam).

Committee or that they are personally injured by not being selected to serve.

Without a cognizable personal right to serve on the Committee, plaintiffs also have no cognizable personal right to any particular process by which the Administrator selects Committee members. "FACA does not specify the manner in which advisory committee members and staff must be appointed." 41 C.F.R. pt. 102-3, subpt. C, app. A. In any event, as the district court correctly noted, "[p]laintiffs present[ed] no evidence" on summary judgment disputing the government's evidence that "the Administrator considered the applications of all" nominees, including plaintiffs, JA321, and they "offer[ed] no specific proof that the EPA refused to adjudicate [their] nomination[s] fairly," JA263. Every nominee was "carefully evaluated … based on demonstrated competence, knowledge, and expertise in scientific and technical fields of air pollution and air quality issues." JA250; *see also* JA42-45; JA48.

The district court concluded that plaintiffs have standing because they are "directly affected by the work" of the Committee. JA305 n.2 (quotation marks omitted). That is incorrect. Plaintiffs are not the

"regulated industries" who, they say, must be "represent[ed]" on the Committee. JA222. They are part-time academics who have private consulting businesses—businesses which are not alleged to be directly affected by state implementation plans to attain compliance with air-quality standards under the Clean Air Act. JA198-202. Plaintiffs are thus no more "directly affected" by the Committee's work than anyone else. They cannot sue to vindicate the asserted interests of others, and they suffer no personal injury because of the absence of "industry representatives." JA192.

Even if they were regulated entities, rather than disappointed applicants, plaintiffs would still lack standing. Regulated entities must overcome the "remote and uncertain" connections between the allegedly biased composition of an advisory committee, the committee's recommendations, the agency's action in setting standards, the states' regulatory choices in implementing those standards, and actual harm to the industry's concrete interests. *See R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 810 F.3d 827, 829-30 (D.C. Cir. 2016) (tobacco company lacked standing to challenge alleged conflicts of interest of FDA committee members); *Metcalf v. National Petroleum Council*, 553

F.2d 176, 186-88 (D.C. Cir. 1977) (consumer lacked standing to challenge fair balance of oil advisory committee on the theory that "biased" advice from oil company representatives would increase prices).

The "speculative chain of possibilities," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013), linking CASAC's composition and any future injury to air polluters is further attenuated, in this case, by the statutory requirement that final rules promulgating or revising air-quality standards must go through notice-and-comment rulemaking. EPA must consider and respond to "significant comments, criticisms, and new data submitted … during the comment period." 42 U.S.C. § 7607(d)(6)(B). Even if a state's implementation choices following EPA's promulgation of a final rule were to result in injury to regulated entities, those entities, in order to challenge the Committee's composition, would have to show that the feature of the state's implementation plan that injured the entities was caused by the EPA's air-quality standards, which was caused by the Committee's advice, which was caused by the alleged membership imbalance—rather than the injury at issue instead resulting from some other cause, such as

someone else's comments during rulemaking, the agency's own analysis and initiative, or the state's own implementation decisions. *See Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1026 n.8 (D.C. Cir. 1998) ("If a [committee] report … cannot be acted on by the agency without first undertaking a rulemaking or adjudication, the plaintiff may have difficulty showing the [alleged] FACA violation is responsible for a concrete injury it has sustained or will sustain based on the administrative decisionmaking process.").

Regulated entities, and any other interested person, will have every opportunity to participate in notice-and-comment rulemaking before EPA revises an air-quality standard. During that process, they may provide all the same comments that an industry representative would have provided if one had been appointed to the Committee, and the agency will have to consider and respond to such comments.

II. EPA Did Not Abuse Its Discretion in Appointing Scientists to the Clean Air Scientific Advisory Committee.

A. Fair Balance Is Committed to Agency Discretion.

Judicial review is unavailable under the Administrative Procedure Act to the "extent that … agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). That provision forecloses review if the challenged agency action is of a kind "traditionally regarded as committed to agency discretion" or the "relevant statute" underlying the plaintiff's challenge "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993) (quoting *Heckler*, 470 U.S. at 830). Under that rubric, EPA's decisions to appoint particular people to an advisory committee are committed to the EPA's discretion by law.

1. Selecting people to advise an agency on matters within its purview is traditionally committed to agency discretion. Making such appointments "does not exercise [the government's] *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Heckler*, 470

U.S. at 832. The selection of advisors instead implicates a "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Id.* at 831. The agency must first determine for itself what actions it might take and what kind of advice it needs. It must then consider what kinds of advisors, with which perspectives, would be best. It must then develop a pool of such candidates and evaluate them on metrics the agency thinks most probative. And it then must select a set of advisors from that pool, making trade-offs among any number of factors in striving to obtain an optimal set of advisors given the relevant constraints. "The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities" in making the best use of an advisory committee. *Id.* at 831-32.

"Congress may limit an agency's exercise of [appointment] power if it wishes," *Heckler*, 470 U.S. at 833, at least to some degree. And Congress did so in the Clean Air Act by providing that three members of the seven-member CASAC must satisfy three specific requirements regarding scientific and technical expertise. The choice of whether to appoint, for example, "one person representing State air pollution

control agencies" to CASAC, 42 U.S.C. § 7409(d)(2)(A), is thus not committed to agency discretion. But Congress notably did not reserve a seat on CASAC for an "industry" representative to weigh in on the scientific questions regarding which air-quality standards are requisite to protect public health and welfare. *Compare id.* (no "industry" seat), *with id.* § 7408(b)(2) (giving "industry" a seat on a Clean Air Act committee advising on compliance measures).

FACA's fair-balance requirement does not furnish any judicially manageable standards. It provides that Congress, "[i]n considering legislation establishing[] or authorizing the establishment of any advisory committee," "shall … require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2, § 5(b)(2). As Judge Silberman observed in his concurrence in the judgment in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989) (*Microbiological*), "[t]he relevant points of view on issues to be considered by an advisory committee are virtually infinite." *Id.* at 426-28. There is no "principled way" to determine "which among the myriad

points of view deserve representation on particular advisory committees" or whether those views are "fairly balanced." *Id.*

That concurrence has been favorably cited by this Court and widely applied by district courts within this Circuit. *See Association of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 903 n.2 (D.C. Cir. 1993) ("FACA's 'balanced viewpoint' requirement may not be justiciable, however, because it does not provide a standard that is susceptible of *judicial* application."); *Claybrook v. Slater*, 111 F.3d 904, 906 n.4 (D.C. Cir. 1997); *Fertilizer Inst. v. U.S. EPA*, 938 F. Supp. 52, 54-55, 54 n.3 (D.D.C. 1996); *Public Citizen v. Department of Health & Human Servs.*, 795 F. Supp. 1212, 1218-22 (D.D.C. 1992). As the Ninth Circuit emphasized in adopting Judge Silberman's view, "FACA does not define what constitutes a 'fairly balanced' committee … or how that balance is to be determined." *Center for Policy Analysis on Trade & Health (CPATH) v. Office of U.S. Trade Representative*, 540 F.3d 940, 943 (9th Cir. 2008). In the absence of any "meaningful standards" that a court

could apply, the determination of a committee's fair balance is "best left to the executive and legislative branches." *Id.* at 945.[2]

This case is illustrative. Plaintiffs ask this Court to decide the fair balance of a seven-person scientific review committee for which Congress has already specified the relevant requirements for three members. Of the remaining seats, plaintiffs would demand at least one. But it is unclear why that seat should be accorded to an "industry" representative rather than to a representative of other groups that have an interest in air-quality standards, such as people with health conditions affected by air pollution or groups concerned with wildlife or ecological preservation. And even the term "industry" is not self-defining. Different segments of different industries have different interests and views on different air-quality standards—including the view that additional regulation is necessary to protect public health and welfare. *Compare, e.g.*, RSR Corp., *Comments on EPA Docket No. EPA-HQ-OAR-2010-0108*, at 1-2 (Apr. 6, 2015), https://perma.cc/74SY-7JL7

[2] The Fifth Circuit took a different view in *Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999). But "the *Cargill* decision offers little explanation *why* [that court thinks] FACA's fairly balanced requirement is justiciable." *CPATH*, 540 F.3d at 946.

(lead smelter recommending more-stringent lead standards to protect public health), *with* JA83 (plaintiff Young asserting that scientific research regarding the negative health effects of air pollution may be a "scam" and stating that he wants to "bring that point of view to the Committee's work").

Plaintiffs identify no basis on which a court could decide that their particular conception of "the industry," and their particular views, should get priority seating over anyone else who is just as "directly affected" by CASAC's work. Nor do plaintiffs offer any administrable basis on which a court could determine whether anyone's asserted preferences are adequately reflected in the Committee's membership. Making those determinations is not a task "properly undertaken" by judges. *Microbiological*, 886 F.2d at 427-28 (Silberman, J., concurring in the judgment). It is a "process best left to the executive and legislative branches of government." *CPATH*, 540 F.3d at 945; *see* 5 U.S.C. app. 2, § 5(a) (charging Congress with "mak[ing] a continuing review of the activities of each advisory committee"); *Metcalf*, 553 F.2d at 188 (finding no "objective standards" the court could use in a standing analysis "to determine when a legislative product is the 'best' that it can be").

2. The district court incorrectly concluded that it was bound by Judge Edwards's partial dissent in *Microbiological*, in which Judge Edwards concluded that FACA's fair-balance requirement is justiciable. JA308-11. The court reasoned that Judge Friedman, concurring in the judgment in *Microbiological*, reached the merits of a fair-balancing claim, and that he therefore must have implicitly joined Judge Edwards's dissent in concluding that the claim was justiciable. JA310. But Judge Friedman did not address justiciability or join Judge Edwards's dissent. "To affirm the district court … as in Judge Friedman's opinion" it was "not analytically essential to reach the justiciability issue." *Microbiological*, 886 F.2d at 428 (Silberman, J., concurring in the judgment); *cf. Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) (holding that when a "potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed").

The district court also concluded that, even if Judge Edwards's partial dissent in *Microbiological* were not binding, the court would still conclude that FACA fair-balance claims are justiciable. JA310 n.5. In reaching that conclusion, the court observed that the statute, by using

"shall," creates a mandatory directive. *Id.* But it is undisputed that FACA advisory committees must be fairly balanced; the question is whether FACA supplies meaningful standards by which a court may review fair balance. It does not. Nor do the FACA regulations, which put appointment decisions in the sole discretion of agency heads. Where the regulations address fair balance, they echo the language of the statute in requiring that membership be "fairly balanced." 41 C.F.R. § 102-3.30(c). The regulations similarly provide that an agency head who is considering establishing a committee must develop a "description of the agency's plan to attain fairly balanced membership." *Id.* § 102-3.60(b)(3). Such a plan ensures that the agency, when selecting members, will "consider a cross-section of those directly affected," but only insofar as doing so is "appropriate to the nature and functions of the advisory committee." *Id.* And "the line between those with 'direct interests' and those with indirect or tangential ones" is not judicially administrable. *Microbiological*, 886 F.2d at 427 (Silberman, J., concurring in the judgment).

Indeed, "given the possible range of points of view on virtually any subject, an effort to reduce points of view to a few categories—as if they

were political parties—is quite artificial and arbitrary." *Microbiological*, 886 F.2d at 427 (Silberman, J., concurring in the judgment). "And once one recognizes that, it follows that judicial review of the application of this phrase is not available." *Id.*

The district court's reliance on *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634 (D.C. Cir. 2020), underscores the error of its justiciability analysis. There, this Court reviewed an agency-wide policy change barring EPA grant recipients from serving on advisory committees. *Id.* at 643. The Court did not question EPA's contentions in that case (as here) that the decision to appoint agency advisors is unreviewable and that the fair-balance requirement does not provide judicially administrable standards. *Id.* The Court instead focused its analysis on a FACA regulation requiring that agencies "must … assure" committee members' "compliance with federal ethics rules" found outside FACA, *id.* (alteration in original)—ethics rules that already addressed when grant recipients could serve on committees, *id.* at 640-41. The Court concluded that the ethics rules provided "meaningful standards" for evaluating the plaintiffs' claims that the agency had failed to explain its deviation from existing rules and failed to submit

its new rules to an approval process required by the ethics rules. *Id.* at 643 (quotation marks omitted).

Here, by contrast, there is no detailed system of fair-balance rules that, like the ethics rules in *Physicians for Social Responsibility*, could facilitate judicial review of plaintiffs' claims. And plaintiffs here don't challenge an "agency-wide policy" but "individual hiring decisions committed to discretion." *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 18 n.5 (1st Cir. 2020).

B. CASAC Is Fairly Balanced.

1. Its Members Have the Wide Range of Scientific Viewpoints Needed to Conduct Scientific Peer Review.

a. FACA requires Congress, when creating or authorizing advisory committees, to ensure in such legislation that "the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee," 5 U.S.C. app. 2, § 5(b)(2), and requires agencies to follow the same guideline when establishing their own committees, *id.* § 5(c). Interpreting that language, this Court has held that the members of a committee must "represent a fair balance of viewpoints *given the*

functions to be performed." *National Anti-Hunger Coal.*, 711 F.2d at 1074 (emphasis added); *Microbiological*, 886 F.2d at 423 (Friedman, J., concurring in the judgment) (quoting *National Anti-Hunger Coal.*, 711 F.2d at 1074).

That holding accords with the FACA regulations, to which this Court "properly resort[s] for guidance" on what FACA requires. *Electronic Privacy Info. Ctr. v. Drone Advisory Comm.*, 995 F.3d 993, 999 (D.C. Cir. 2021) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The FACA regulations provide that the kind of diverse perspectives that are required to fairly balance a committee are the perspectives that will be "appropriate to the nature and functions of the advisory committee." 41 C.F.R. § 102-3.60(b)(3). "Advisory committees requiring technical expertise" should thus "include persons with demonstrated professional or personal qualifications and experience relevant to the [technical] functions and tasks to be performed." *Id.*; *see also id.* pt. 102-3, subpt. B, app. A (explaining that the "composition of an advisory committee's membership will depend," among other things, on the "types of specific perspectives required" to serve the "advisory committee's mission," which may include consideration of the "scientific

impact of the advisory committee's recommendations"). EPA's FACA handbook recognizes the same principle in providing that EPA staff will "[e]stablish[] a balanced representation of points of view based on the function of the committee." JA31.

b. Applying that principle, the courts of appeals that have addressed the merits of fair-balance claims have concluded that committees serving primarily scientific or technical purposes may be composed of members with a balance of requisite scientific or technical skills. They do not need to include members representing the policy preferences of self-interested groups.

In *National Anti-Hunger Coalition*, for example, this Court upheld the fair balance of a committee on which "virtually every member" was "an executive of a major corporation." 711 F.2d at 1074. This Court explained that the committee was tasked with "apply[ing] private sector expertise to attain cost-effective management in the federal government." *Id.* In light of that purpose, the President could "select[] those who have experience in the fiscal management of large private organizations" and entirely exclude "public interest representatives" and "beneficiaries of federal feeding programs." *Id.* (alteration in

original) (quotation marks omitted). The interests of those latter groups on policy questions about the level of federal food support to the needy were "simply irrelevant" to the committee's cost-cutting purpose. *Id.* (quotation marks omitted).

This Court in *Microbiological* similarly upheld against a fair-balance challenge the composition of a committee that was tasked with "[d]eveloping microbiological criteria for foods." 886 F.2d at 420 (Friedman, J., concurring in the judgment). That mandate was "primarily technical and scientific" and "require[d] an understanding of … complex science." *Id.* The committee's members had "extensive background in food microbiology," *id.*, but three-quarters were asserted to be "representatives of the regulated industry," *id.* at 421, and none had "work[ed] for, or [was] associated with, a consumer or public health organization," *id.* at 423. Judge Friedman—the only member of this Court that reached the merits of the fair-balance issue and concurred in the judgment on that basis—concluded: "Since the Committee's function in this case involves highly technical and scientific studies and recommendations, a 'fair balance' of viewpoints can be achieved even

though the Committee does not have any members who are consumer advocates or proponents of consumer interests." *Id.*

In *Cargill, Inc. v. United States*, 173 F.3d 323 (5th Cir. 1999), the Fifth Circuit addressed a fair balance issue in a context closely resembling the present case. The statute in *Cargill* established a committee that "provide[d] peer review" regarding "a study to determine and quantify the correlation, if any, between exposure to diesel exhaust and adverse health effects in underground miners." *Id.* at 328. The committee consisted of "scientists with expertise" in "epidemiology, toxicology, chemistry, industrial hygiene, biomarkers and biostatistics" but included no mining industry representatives. *Id.* at 337. The Fifth Circuit concluded that "an advisory committee with a narrow, technical mandate does not have to include representatives of those who might be affected by the committee's work." *Id.* at 338. "The task of the committee—providing *scientific* peer review—is politically neutral and technocratic, so there is no need for representatives from the management of the subject mines to serve on the committee." *Id.*

c. The same principle governs here. The "determination of how the 'fairly balanced' membership of an advisory committee … is to be

achieved, necessarily lies largely within the discretion of the official who appoints the committee." *Microbiological*, 886 F.2d at 424 (Friedman, J., concurring in the judgment). Here, the EPA Administrator "did not abuse his discretion," *id.*, by appointing experts in the science of air pollution and its effects on public health and welfare to a scientific review committee whose job is to advise the EPA on the state of scientific knowledge regarding the effects of air pollution on public health and welfare.

The purpose of EPA's "scientific advisory committees," as this Court has explained, is to "review scientific research" and advise the agency about it. *Physicians for Soc. Responsibility*, 956 F.3d at 638. CASAC is one such committee with a scientific mandate. The Clean Air Act established CASAC to serve as a "*scientific* review committee." JA313 (quoting 42 U.S.C. § 7409(d)(2)(A)). "Its primary task," as the district court correctly explained, "is to provide scientific expertise and advice on the EPA's national ambient air quality standards." JA313.

Those air-quality standards must, by statute, be set at a level that the Administrator determines to be "requisite to protect the public health" and "public welfare" from the ill effects of exposure to criteria

air pollutants. 42 U.S.C. § 7409(b). Such standards cannot be set "lower or higher than is necessary … to protect the public health" or welfare. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 476 (2001). Nor can they reflect extra-statutory considerations, such as the "costs" or methods of compliance or the policy preferences of any interested party. *Id.* at 465. Air-quality standards instead must be "based on," 42 U.S.C. § 7409(b), criteria that "shall 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).

The Administrator has promulgated air-quality standards for six criteria air pollutants and frequently concludes that multiple standards are necessary to provide requisite protection from a single pollutant. *See* JA147-49. There are thus seventeen primary and secondary standards that are nationally applicable. The current primary standards for carbon monoxide, for example, provide that a concentration of 9 ppm, calculated as an average over a period of 8 hours—or a concentration of 35 ppm averaged over one hour—may not

be exceeded more than once per year. JA147; *see American Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 516 (D.C. Cir. 2009) (describing the technical elements of national ambient air quality standards). Determining that these precise standards are "requisite to protect the public health" and "public welfare" from adverse effects from exposure to any given air pollutant, 42 U.S.C. § 7409(b), is a "highly technical" process, JA313. It requires a detailed review of the relevant scientific literature related to an air pollutant to determine what is currently known about the effects on public health and welfare of exposure to that pollutant at various levels and durations.

CASAC's primary mission is to provide "advice on the scientific and technical foundations" of that determination. JA246. CASAC helps ensure that EPA's decisions "are based on scientific and technical information that is sound and properly interpreted" by "conducting public peer reviews" on EPA proposals. JA246; *see, e.g.*, JA274-300 (peer review of science relevant to recent EPA proposal for revising certain standards for particulate matter). To ensure that CASAC can properly serve its function of providing scientific peer review, its members must have a wide range of relevant scientific and technical expertise.

CASAC's scientific mission is evident from the statute itself. Congress mandated in the Clean Air Act that CASAC must be an "independent scientific review committee" composed of "seven members including 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 could have also required an "industry" representative, as it did in the immediately preceding section of the Act to help provide information about the cost and benefits of particular techniques for controlling air pollution. *Id.* § 7408(b)(2). Yet another Clean Air Act advisory committee is charged with advising EPA on "policy," and "seventeen of the forty members on that committee are affiliated with industry." JA313 n.7 (quotation marks omitted). Indeed, Congress has frequently required "industry" representatives when establishing a large number of advisory bodies in many contexts.[3] But it deliberately did not do so here. JA312. Nor did it require representation of any group defined by its interests.

[3] For a small selection of examples from Title 42 alone, *see* 42 U.S.C. §§ 9007(b)(1), 12407, 15704(a)(5), 15906(d)(2), 16156(b)(1), 19106(b).

Congress instead provided for a breadth of scientifically and technically skilled members who could fulfil the Committee's scientific and technical functions. In doing so, Congress satisfied FACA's requirement that "legislation" establishing advisory committees, or authorizing their establishment, must "require the membership of the advisory committee to be fairly balanced." 5 U.S.C. App. 2, § 5(b)(2). As a result of Congress's determination regarding what qualifications to include in the Clean Air Act and which to leave out, CASAC's members must be "independent experts" that "do not represent the views of any special interest group, organization or entity." JA247. CASAC's charter thus correctly provides that the Committee's members shall be "persons who have demonstrated high levels of competence, knowledge, and expertise in scientific/technical fields relevant to air pollution and air quality issues." JA9.

CASAC's current membership satisfies that requirement. In addition to meeting the membership requirements that Congress set out in the Clean Air Act, CASAC's members also "have varied technical backgrounds across scientific and medical disciplines, including inhalation toxicology, air pollution expertise, respiratory medicine,

ecology, exposure assessment, and biostatistics." JA314. That "cross-section of expertise and professional training," "drawn from diverse technical and scientific fields," JA314-15, ensures that CASAC has the breadth of viewpoints necessary to carry out its scientific mission of providing peer review on the scientific bases for concluding that particular levels and durations of exposure to criteria air pollutants will have particular adverse effects on public health and welfare. And because the Committee's purpose is scientific and technical, there is "no need for representatives from [industry or other special interests] to serve on the committee." *Cargill*, 173 F.3d at 337.

2. Plaintiffs' Arguments to the Contrary Are Unavailing.

a. In district court, plaintiffs "seem[ed] to agree that the Committee's mandate is 'primarily technical and scientific.'" JA314. On appeal, plaintiffs now emphasize compliance costs, *see, e.g.*, Br. 1, 8, 19-20, 24, 27, 38, 44-45, and insist that "industry" is a "stakeholder[]" with pecuniary "interests" that are "directly affected" by CASAC's work. Br. 28-29. Plaintiffs conclude that "industry" therefore deserves a seat at the table to make "substantive legislative policy" recommendations on "complex policy choices." Br. 28-29, 45 (quotation marks omitted).

In rejecting that argument, the district court did not "excuse[]" the Committee from needing a balance of viewpoints, Br. 35, or "improperly conflate[] *viewpoint* balance with *functional* balance," Br. 37. The court gave effect to FACA's requirement that the members of a committee must represent a fair balance of "viewpoints given the functions to be performed," *National Anti-Hunger Coal.*, 711 F.2d at 1074, and correctly recognized that CASAC's function is scientific.

Plaintiffs' argument that CASAC has to have an "industry representative" mistakes scientific peer review for interest advocacy. EPA's air-quality standards, and the states' policy decisions about how to attain and maintain compliance with those standards, may have significant effects on regulated entities. But those effects are irrelevant to the EPA's statutory task of setting air-quality standards under the Clean Air Act. They are similarly irrelevant to the inherently scientific and technical nature of the Committee's work. Advising on how air pollutants may affect public health and welfare, at various concentrations and durations of exposure based on the best available scientific information, may involve judgment calls. But those scientific judgments are about what is known and unknown about the maximum

tolerable concentration of pollutants according to the best available science—not satisfying the interest-based preferences of regulated entities to minimize the cost of compliance. *See Whitman*, 531 U.S. at 465, 474-75. There is thus no need for an "industry representative" on a seven-person Committee that, above all else, needs scientific and technical expertise to accomplish its scientific mission.

Plaintiffs' demand for an "industry representative" does not appear to recognize that Committee members are "independent experts that do not represent the views" of anyone else. JA42, 247. Some advisory committees, such as a committee that advises EPA on "policy" issues related to the Clean Air Act, do have members who "serve as Representative members of non-federal interests." EPA, *Clean Air Act Advisory Committee Charter* 1, 3 (2022), https://perma.cc/8SFN-KD36. But CASAC members do not serve as representatives of anyone; they serve as "Special Government Employees." JA9. Accordingly, they are statutorily prohibited from acting as anyone's agent when rendering advice to the government. 18 U.S.C. § 205(a)(2), (c)(1). And they are subject to ethics rules prohibiting conflicts of interests and avoiding the appearance of a loss of impartiality. JA249, 256; *see generally* 41 C.F.R.

pt. 102-3, subpt. B, app. A (distinguishing between "special Government employee[s]," who are subject to such restrictions when serving on advisory committees, and "representative[s]," who are not).

Plaintiffs incorrectly suggest that the current members of CASAC are tasked with advising EPA on matters outside their expertise: the adverse "economic" or "energy effects which may result from" various strategies for attainment and maintenance of air-quality standards. Br. 29 (quoting 42 U.S.C. § 7409(d)(2)(C)(iv)). Those issues are irrelevant to the process of setting air-quality standards, *Whitman*, 531 U.S. at 470 & n.2, which is the function that the current members of CASAC are tasked with fulfilling. The statute does outline a secondary role for advising, as necessary, on economic or energy effects of pollution control techniques. But the current members of CASAC do not provide that advice. Indeed, as of 2015, CASAC had "never provided advice on adverse social, economic, or energy effects" of pollution control techniques because "to date EPA has not asked [it] to do so." U.S. Gov't Accountability Office, GAO-15-500, *EPA's Science Advisory Board: Improved Procedures Needed to Process Congressional Requests for*

Scientific Advice 13 (2015), https://perma.cc/8CXD-SDZP (*EPA's Science Advisory Board*).

The EPA has explained that, if CASAC were ever asked to provide that kind of economic analysis, outside its primary role of peer reviewing air-quality standards, the agency would have to convene an "ad hoc CASAC panel" to "obtain the full expertise necessary." *EPA's Science Advisory Board* 13. A different provision of the Clean Air Act similarly provides that an ad hoc committee that may be convened to advise on "recommended control techniques," must include "persons who are knowledgeable concerning air quality from the standpoint of … economics." 42 U.S.C. § 7417(a). The need for fair balance on a hypothetical ad hoc panel to be convened in the future, if needed, does not call into question the fair balance of the scientific members who perform CASAC's current scientific function of providing peer review on air-quality standards.

Plaintiffs mischaracterize CASAC's recent report on particulate matter air-quality standards as an exercise in interest-based policymaking, not science. Br. 17-18, 39, 40-41. That peer review document is an excellent illustration of the scientific nature of CASAC's

work, and it rewards close reading. JA274-300. The document contains technical assessments of the current state of scientific knowledge regarding the ways in which small particulate matter affects public health and welfare. A majority of CASAC members ultimately agreed, for example, that an annual air-quality standard of "8-10 $\mu g/m^3$" for small particulate matter was supported by specific "[e]pidemiologic studies" showing the public health effects of exposure to particulate matter at that level in comparison to other levels. JA293. Giving analytical "weight" to certain studies to try to infer a fact about the physical world, as the Committee did in this report, JA293, is the task of scientific peer review, not interest-based policymaking.

Plaintiffs contend that certain "public health policy judgments" are beyond the ken of peer review. Br. 39 (quoting JA288). They cite as one such judgment CASAC's statement that it had "concerns about relying on the findings from controlled human exposure studies in identifying the minimum concentration for which health responses are elicited" because "controlled human exposure studies generally do not include populations with substantially increased risk, such as children, elderly frail adults, or those with severe underlying illness." JA288-89.

Plaintiffs characterize the Committee's identification of these "risk disparities," JA288, as improper "policy advice," Br. 40. But accounting for the fact that "people are not randomly distributed over space," JA276, and that "some populations face higher health burdens" than others, even at the same level of exposure, JA288, is an excellent example of the Committee making sure the EPA has at its disposal "the latest scientific knowledge" regarding "all identifiable effects [of air pollution] on public health or welfare," 42 U.S.C. § 7408(a)(2). The same is true of CASAC's recommendation that future EPA proposals consider whether the increasing incidence of wildfires in a changing climate may increase the level of particulate matter in the atmosphere in ways that may affect air-quality standards. JA287.

b. Even if industry needed to have its interests represented on CASAC, the Committee would still be fairly balanced. Judge Friedman's concurrence in *Microbiological* concluded that an Assistant Commissioner of Agriculture for Florida "fairly may be viewed as representing the interests of consumers in being protected against contaminated and unwholesome food" because of his regulatory experience. 886 F.2d at 424. Committee member Boylan has similar

regulatory experience with industry's interests and state implementation strategies in his work as the Manager of Emissions and Control Strategies in Georgia's Environmental Protection Division. JA106.

And even if Judge Edwards's dissenting view in *Microbiological* were the law, and "a fair balance of viewpoints" could not be "achieved without representation of [industry] interests" by someone with a "background and employment status" in industry, 886 F.2d at 436-37, plaintiffs would still not prevail. Committee member Chow conducts research funded by "industry." JA107. Plaintiffs identify no reasoned basis for concluding that one scientist funded by industry does not bring fair balance to the Committee, while people like plaintiffs would. And any attempt to draw a distinction between conducting industry-funded research and being a paid consultant only underscores the lack of any judicially administrable standards for adjudicating plaintiffs' claims.

c. Plaintiffs suggest that, even if FACA does not require someone to represent industry's *interests* on CASAC, it requires someone (from apparently any background or institutional affiliation) to share "industry's viewpoint," on assertedly scientific grounds, that

"strengthening the air-quality standards is unnecessary to protect human health." Br. 26. But plaintiffs provide no basis for treating "industry" as an undifferentiated monolith with a uniform view that existing air-quality standards are set precisely where they need to be to protect public health and welfare. *See supra*, pp. 28-29 (discussing divergent views within different segments of industry).

Plaintiffs also, again, misunderstand CASAC's responsibilities. The Committee conducts peer review of the scientific basis for revising or retaining, on a recurring review cycle, multiple air-quality standards for six different criteria air pollutants, as well as any new criteria or standards that may arise. 42 U.S.C. § 7409(d)(2); JA146-49. Plaintiffs' brief focuses on the ongoing review of small particulate matter standards. But CASAC's scientific mandate sweeps much farther. Since 2021, CASAC has conducted scientific peer review on not only the particulate matter standards but also ozone and lead standards. CASAC, *Advisory Activities*, https://perma.cc/6ZGD-VGLB. And CASAC will have to periodically review yet more air-quality standards as required by the Clean Air Act. *See, e.g.*, 88 Fed. Reg. 17,572 (Mar. 23, 2023) (announcing upcoming CASAC subcommittee meetings to begin

peer review of secondary standards for nitrogen oxide, sulfur oxide, and particulate matter).

Plaintiffs incorrectly assert that it is "undisputed" that the EPA "[h]and-select[ed] scientists who all share the same view" on EPA's draft proposal to change particulate matter air-quality standards and thereby deliberately "manufactured" a unanimous recommendation in favor of that proposal. Br. 30-31, 33. Nothing in the record indicates that EPA staff asked about or tried to predict the views of any nominee on any air-quality standard or that the agency made any selections on that basis. To the contrary, the selection process was focused on striving to achieve the breadth of expertise necessary for CASAC to perform its scientific function, impartially and objectively, with respect to *all* air-quality standards. JA21-23, 42-44, 48, 249-50.

FACA did not require the Administrator to make a predictive judgment in 2021 about which scientific position each of the 100 nominees to the Committee might ultimately take on all possible future EPA proposals regarding a dozen or more air-quality standards (or any new ones). Nor did it obligate the Administrator, after speculating about such matters, to try to appoint from the pool of candidates seven

members who would, after a scientific peer review years down the road, be likely to disagree with each other on all such potential proposals. "Congress clearly did not intend courts"—or, for that matter, agencies—"to inquire into the specific opinions of every committee member in order to determine if a committee is unbalanced." *Microbiological*, 886 F.2d at 437 (Edwards, J., concurring in part and dissenting in part). Surely plaintiffs do not mean to suggest that a seat on the Committee must be reserved for a person willing to pre-commit, up front and before peer review, to the conclusion that every air-quality standard is already set at the perfect level and no revisions or new standards are required.

Nor could fair balance be assessed after the fact based on which conclusions committee members ultimately reach. A unanimous recommendation on any given air-quality standard indicates only that every member of the Committee ultimately agreed after deliberating and applying their diverse scientific and technical expertise. It does not suggest that the Administrator erred at the outset by failing to accurately divine the members' ultimate positions or otherwise failing to ensure viewpoint balance during the appointment process. No

authority supports the self-refuting proposition that the only lawfully constituted advisory committee is the one that fails to reach consensus.

In any event, plaintiffs are wrong about the asserted lack of diverse views on the Committee regarding what to do with current particulate matter air-quality standards. Current CASAC members disagreed with each other during the recent 2022 review of particulate matter standards. The majority of the Committee concluded that the requisite level for protecting public health from small particulates is "8-10 $\mu g/m^3$" on an annual basis, while "[a] minority of CASAC members" instead concluded that "10-11 $\mu g/m^3$" was the requisite level. JA276. The members further disagreed regarding the separate, 24-hour standard, with a majority recommending revisions and a "minority of CASAC members concur[ring] with the EPA's preliminary conclusion to retain the current 24-hour standard without revision." JA277.

That disagreement should be no surprise. Committee member Boylan was also a member during the prior Administration and participated in the 2019 review of particulate matter standards. In that review, he concluded (along with plaintiff Cox, who chaired CASAC at that time) that "the current annual and 24-hour [small particulate

matter] standards be retained without revision" because the then-available information was "not adequate to justify lowering" the standards. CASAC, *Review of the EPA's Policy Assessment for the Review of the National Ambient Air Quality Standards for Particulate Matter* B-6 (Dec. 16, 2019), https://perma.cc/63NE-3AHQ (*CASAC 2019 Review*). Boylan was again appointed to the reconstituted Committee in 2021 during the current Administration, notwithstanding his prior stated views.

The view that Boylan articulated in 2019 about existing standards should plainly satisfy plaintiffs' demand that the Administrator should have appointed in 2021 a person who, at the time, shared "the industry's viewpoint that strengthening the air-quality standards is unnecessary to protect human health." Br. 26. Plaintiffs state (Br. 14) that Boylan noted in 2019 that his assessment of the adequacy of the particulate matter standards at that time was based on then-available information and could change based on additional information in the future. *CASAC 2019 Review* B-7. Plaintiffs thus appear to contend that FACA obligates the agency to include on a scientific advisory committee not just a member who has previously taken a position contrary to the

agency's anticipated future proposal on a standard but has also voiced maximum skepticism that that position could change in light of new information. Nothing in the statute, case law, or common sense supports that position. *See Metcalf*, 553 F.2d at 188 (noting the virtue of "seek[ing] out, consider[ing,] and balanc[ing] all available information before arriving at final decisions").

C. Appointing Scientists to the Clean Air Scientific Advisory Committee Was Not Arbitrary or Capricious.

Plaintiffs arbitrary-and-capricious challenge largely repeats the errors in their fair-balance claim. The EPA selected scientists to serve on the Clean Air Scientific Advisory Committee. In doing so, EPA adequately explained that a wide variety of experts were needed to enable CASAC to do its job. EPA neither "neglected to explain … whether the new Committee is fairly balanced," nor "relied on factors that Congress never wanted it to address," such as gender and ethnic diversity. Br. 48.

1. "[N]o authority" requires an agency head "to articulate how" individual committee personnel decisions "would comply with FACA," as the district court correctly noted. JA319. Plaintiffs identify nothing

in the statute or regulations that would require an agency to explain its rationale for selecting any particular nominee over any other. To the contrary, as noted above, "advisory committee members serve at the pleasure of the appointing … authority," 41 C.F.R. § 102-3.130(a), and "FACA does not specify the manner in which advisory committee members and staff must be appointed," *id.* pt. 102-3, subpt. C, app. A.

Plaintiffs identify no case in which a court has analyzed an agency head's decision to appoint a particular person for whether that decision adequately explained the agency head's reasoning about why the committee would be fairly balanced upon that person's appointment. And they identify no example of any membership announcement, including the press release announcing plaintiff Cox's own appointment to CASAC in 2018, that goes into anything like the explanation that plaintiffs demand here. *See* EPA, *Acting Administrator Wheeler Announces Science Advisors for Key Clean Air Act Committee* (Oct. 10, 2018), https://perma.cc/8P9N-2R6R.

At a minimum, that lack of historical precedent illustrates the limits of what could reasonably be required when an agency head appoints one of the 60,000 current members of federal advisory

committees. *See* U.S. Gen. Servs. Admin., *The Federal Advisory Committee Act (FACA) Brochure*, https://perma.cc/R7DH-ZW6M. For the same reasons that the composition of an advisory committee is committed to agency discretion by law, *see supra* Part. II.A, the task of assembling a slate of only seven experts to peer review all potential air-quality standards is the kind of activity, like "evaluating scientific data," for which this Court should give EPA "an extreme degree of deference" when evaluating its explanations. *Communities for a Better Env't v. EPA*, 748 F.3d 333, 336 (D.C. Cir. 2014) (quotation marks omitted).

2. The agency considered FACA's fair-balance requirement and explained that it was selecting members based on the breadth of scientific viewpoints they would bring in light of CASAC's scientific function. Nothing more is required.

The EPA expressly identified the "scientific and technical" nature of the Committee, JA41; *contra* Br. 60, and explained that the committee members therefore "do not represent the views of any organization or entity," JA42; *contra* Br. 61. The agency "describ[ed] the scientific disciplines" and "viewpoints needed" on the Committee,

JA248, and solicited nominations of experts in "[a]ir quality, biostatistics, ecology, environmental engineering, epidemiology, exposure assessment, medicine, risk assessment, and toxicology." 86 Fed. Reg. 17,146, 17,146-47 (Apr. 1, 2021). In soliciting nominations, the agency specifically noted the "importan[ce]" of Committee members having a "collective breadth and depth of scientific expertise" reflecting a "balance of scientific perspectives" *Id.* at 17,147. The agency solicited public comment on the nominees' "expertise." JA103. And it "evaluated the 100 candidates on demonstrated competence, knowledge and expertise in scientific and technical fields of air pollution and air quality issues." JA42. On the basis of that evaluation, staff recommended "top candidates" whose appointment would result in a "highly-qualified, diverse, and balanced CASAC." JA42. CASAC would be "balanced with respect to the points of view represented for the functions to be performed by the committee," JA49, because of the balance of "the points of view (i.e., scientific disciplines) represented," JA249.

The Administrator selected the CASAC members based on that assessment. EPA issued a press release explaining that the CASAC appointees "are well-qualified experts with a cross-section of scientific

disciplines and experience needed to provide advice on the scientific and technical bases" for air-quality standards, JA21, and listing the scientific and technical qualifications of each new member to demonstrate the point, JA23. The agency explained that the new members would thus "provide credible, independent expertise to EPA's reviews of air quality standards that is grounded in scientific evidence." JA22 (quotation marks omitted). And the agency emailed plaintiffs, explaining that appointments were "constrained by committee size" and the need to achieve a "balance of disciplinary expertise" within that constraint. JA135.

That is not a "conclusory analysis" devoid of "reasoning." Br. 58. It is all the explanation one could reasonably demand about an agency's decision to appoint particular advisors to a committee. "*State Farm* does not require a word count … ." *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 939 (D.C. Cir. 2017) (quotation marks omitted). And even if the agency's explanation were "less than pellucid," its "path may reasonably be discerned." *United Source One, Inc. v. U.S. Dep't of Agric., Food Safety & Inspection Serv.*, 865 F.3d 710, 717 (D.C.

Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

3. Finally, the agency did not select the current CASAC members because of their "race and sex." Br. 53-55. Again, the agency solicited nominees with specified areas of scientific and technical expertise, solicited comments on the nominees' expertise, and "evaluated" and selected the nominees on the basis of their expertise. JA42.

Plaintiffs incorrectly assert that the agency's press release announcing the selection of new committee members cited gender or racial diversity as "[t]he lead reason" for the agency's decision. Br. 53. The press release simply noted that CASAC would be the "most diverse" it had ever been. JA21. The press release does not say that the appointments were made in order to achieve that result.

Nor did the staff memo "recommend[] that EPA appoint certain individuals specifically because" of their race or gender. Br. 53. Like the press release, the memo notes that certain candidates "[w]ould," if selected, "bring gender diversity" or "ethnic diversity." JA43-44. But it does not "recommend" appointment of those individuals because of their gender or race. The memo instead explains that the staff had

"evaluated" the candidates on their "expertise in scientific and technical fields of air pollution," leading the staff to make "[t]he following … recommendations of top candidates," JA42. The Draft Membership Grid attached to the memo, which provided the staff's full evaluation of each candidate, listed only the candidates' relevant professional experiences and areas of expertise as the "[b]asis for [the staff's] [r]ecommendation" regarding each candidate. JA48. None of the grid entries mentions any candidate's sex or race or recommends taking any action on that basis. The agency did not err in appointing scientists to a scientific advisory committee on the basis of their scientific qualifications.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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MARCH 31, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,354 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

TABLE OF CONTENTS

FEDERAL ADVISORY COMMITTEE ACT, 5 U.S.C. APP. 2

§ 5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

. . .

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

FACA REGULATIONS, 41 C.F.R. PT. 102-3

§ 102-3.30 What policies govern the use of advisory committees?

. . .

(c) Balanced membership. An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.

§ 102-3.60 What procedures are required to establish, renew, or reestablish a discretionary advisory committee?

(a) Consult with the Secretariat. Before establishing, renewing, or reestablishing a discretionary advisory committee and filing the charter as addressed later in § 102-3.70, the agency head must consult with the Secretariat. . . .

(b) Include required information in the consultation. Consultations covering the establishment, renewal, and reestablishment of advisory committees must, as a minimum, contain the following information:

. . .

(3) Fairly balanced membership. A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee. Advisory committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

Appendix A to Subpart B of Part 102-3—Key Points and Principles

. . .

III. An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.

[Question] What factors should be considered in achieving a "balanced" advisory committee membership?

[Guidance] The composition of an advisory committee's membership will depend upon several factors, including: (i) The advisory committee's mission; (ii) The geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations; (iii) The types of specific perspectives required, for example, such as those of consumers, technical experts, the public at-large, academia, business, or other sectors; (iv) The need to obtain divergent points of view on the issues before the advisory committee; and (v) The relevance of State, local, or tribal governments to the development of the advisory committee's recommendations.

§ 102-3.130 What policies apply to the appointment, and compensation or reimbursement of advisory committee members, staff, and experts and consultants?

In developing guidelines to implement the Act and this Federal Advisory Committee Management part at the agency level, agency heads must address the following issues concerning advisory committee member and staff appointments, and considerations with respect to uniform fair rates of compensation for comparable services, or expense reimbursement of members, staff, and experts and consultants:

(a) Appointment and terms of advisory committee members. Unless otherwise provided by statute, Presidential directive, or other establishment authority, advisory committee members serve at the pleasure of the appointing or inviting authority. Membership terms are at the sole discretion of the appointing or inviting authority.

. . .

Appendix A to Subpart C of Part 102-3—Key Points and Principles

I. FACA does not specify the manner in which advisory committee members and staff must be appointed

[Question] Does the appointment of an advisory committee member necessarily result in a lengthy process?

[Guidance] No. Each agency head may specify those policies and procedures, consistent with the Act and this part, or other specific authorizing statute, governing the appointment of advisory committee members and staff.

. . .

CLEAN AIR ACT, 42 U.S.C. CH. 85

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

. . .

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall 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 such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate

advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the cost of installation and operation, energy requirements, emission reduction benefits, and environmental impact of the emission control technology. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

. . .

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality 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. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects

associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) . . .

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)

(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator

on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.

§ 7607. Administrative proceedings and judicial review

. . .

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

. . .

. . .

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and

comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

. . .

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)

(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

. . .

. . .