[ORAL ARGUMENT NOT YET SCHEDULED]
No. 22-5305

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

S. STANLEY YOUNG, ET AL.,
Plaintiffs-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia (No. 1:21-cv-02623-TJK)

REPLY BRIEF FOR APPELLANTS

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GLOSSARY

Act or FACA	Federal Advisory Committee Act
APA	Administrative Procedure Act
CASAC or Committee	Clean Air Scientific Advisory Committee
EPA or Agency	Environmental Protection Agency

INTRODUCTION AND SUMMARY OF ARGUMENT

EPA never meaningfully disputes that it stacked the Clean Air Scientific Advisory Committee with "members that all share similar views on the need for more stringent regulation of air quality standards—a highly charged, political issue"—after firing those who disagreed. JA314-15. Perhaps recognizing that such a committee cannot be considered "fairly balanced" under the Federal Advisory Committee Act, the Agency seeks to avoid review altogether, contending that its decision neither injured Plaintiffs nor is reviewable by courts. But EPA ignores an entire line of cases holding that Plaintiffs were harmed, and thus have standing, because the Agency denied them a fair opportunity to be considered for a spot on the Committee. Moreover, "Congress rarely allows claims about agency action to escape effective judicial review," *Axon Enter., Inc. v. FTC*, No. 21-86, 2023 WL 2938328, at *6 (U.S. Apr. 14, 2023), and as this Court and nearly every other circuit to address the issue have held, fair-balance challenges are no exception.

Turning to the merits, EPA repeatedly mischaracterizes Plaintiffs' argument, wrongly asserting that they are seeking an "industry representative" on the Committee. Br.17. But Plaintiffs merely contend

there must be someone on the Committee able to offer the industry's *viewpoint* that there is no need to strengthen current air-quality standards. And when EPA finally gets around to defending the Committee's current composition, it conflates the Act's requirements that an advisory committee be fairly balanced both in terms of points of view *and* functions to be performed. Whatever relevance the members' varied technical backgrounds have to the Committee's functional balance, they cannot backfill its glaring lack of viewpoint balance.

The Agency also fails to show that it adequately explained its decision under the APA. Although EPA tries to stitch together the required explanation from various statements made before, during, and after it established the new Committee, these efforts only confirm that the Agency never explained how the Committee is fairly balanced. Moreover, EPA does not deny that it considered improper factors—the race and sex of Committee candidates—when establishing the new Committee. While even *considering* such factors is impermissible, the Agency went far beyond that by making appointments *because of* race and sex, as its internal memoranda confirm.

ARGUMENT

I. EPA'S THRESHOLD DEFENSES ARE MERITLESS

A. Plaintiffs Have Standing

Despite never contesting standing below (EPA.Br.19 n.1), EPA now insists that Plaintiffs have not suffered an Article III injury. But there is a good reason why the Agency did not raise this argument before: it conflicts with settled precedent.

1. As the Supreme Court and this Court have confirmed across various contexts, "a plaintiff may claim an injury in fact from the purported denial of the ability to compete on an equal footing against other candidates." *Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir. 2015) (positions in the Foreign Service); *see, e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 665 (1993) (contract awards); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978) (university admissions); *W. Va. Ass'n of Cmty. Health Ctrs., Inc. v. Heckler*, 734 F.2d 1570, 1574-76 (D.C. Cir. 1984) (funding). In such cases, "the injury lies in the denial of an equal *opportunity* to compete, not the denial of the [benefit] itself." *Shea*, 796 F.3d at 50.

Applying these principles, the Tenth Circuit held that a nominee denied membership on an advisory committee has standing to challenge whether the committee complies with the Act's fair-balance requirement. *Colo. Env't Coal. v. Wenker*, 353 F.3d 1221, 1235-36 (10th Cir. 2004). As the Tenth Circuit explained, an agency's denial of a "fair opportunity" to be appointed consistent with the "'fair balance' requirement" inflicts an Article III injury, and that injury is redressable where adhering to FACA would avoid "diminish[ing]" one's "opportunities for appointment." *Id.*

The same is true here. Plaintiffs were among the select group of individuals nominated for a position on the Committee, JA103, 108, 133—a "coveted and highly esteemed" credential, *Cummock v. Gore*, 180 F.3d 282, 291-92 (D.C. Cir. 1999); *see* JA78-79. And under their "view on the merits"—which is assumed correct for purposes of standing, *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008)—Plaintiffs were denied a "fair opportunity" to compete for that valuable benefit consistent with FACA and the APA, *Colo. Env't Coal.*, 353 F.3d at 1235. Their loss of "a fair opportunity to compete" for appointment to the Committee is an actionable injury, regardless of whether they "would have been selected in the absence of" EPA's unlawful conduct. *Id.*

2. Even though Plaintiffs made clear below that their standing rests on "the denial of fair opportunities," JA228-29 ¶¶ 70, 73, EPA ignores this line of cases, rendering its arguments largely beside the point. Plaintiffs neither claim to be "regulated entities" themselves, nor do they invoke a "personal right to serve on the Committee" or to "provide … advice." EPA.Br.19-20, 23.[1] Rather, they merely seek "an equal *opportunity* to compete" for spots on the Committee—a chance EPA has denied. *Shea*, 796 F.3d at 50; *see Colo. Env't Coal.*, 353 F.3d at 1235.

While the Agency suggests Plaintiffs lack standing to challenge the Committee selection "process" because "'FACA does not specify the manner in which advisory committee members and staff must be appointed,'" that is incorrect. Br.20. The Act plainly commands that committee appointments must comply with the fair-balance requirement, as EPA elsewhere admits. Br.31. In any event, the regulation EPA quotes here merely explains that agencies have some flexibility when crafting

[1] Nor can Plaintiffs provide the "same" advice by commenting on proposed rules. EPA.Br.19, 23. Such comments do not carry nearly the same weight as those of someone holding an "esteemed" position on the Committee, *Cummock*, 180 F.3d at 291-92, not least because EPA must justify any disagreement with Committee advice, 42 U.S.C. § 7607(d)(3).

"policies and procedures" governing the mechanics of the "appointment process." 41 C.F.R. pt. 102-3, subpt. C, app. A. Far from relieving agencies of their obligation to adhere to FACA, the regulation reiterates that the appointment process must be "consistent with the Act." *Id.* And in all events, this regulation does not excuse the Agency of its duty under the APA (and the Constitution) to refrain from considering the race and sex of Committee candidates. *See infra* Pt. III.B. A female scientist denied an appointment by an Administrator who wanted only men as advisors could obviously challenge that decision, even if she had no "cognizable personal right to serve on the Committee" herself. EPA.Br.20.

The Agency also suggests the district court found that Plaintiffs "offer[ed] no specific proof that the EPA refused to adjudicate [their] nomination[s] fairly." Br.20 (quoting JA263). But EPA omits half of the quoted sentence, which notes Plaintiffs *did* offer such proof—namely, "the new makeup of the Committee." JA263. More fundamentally, EPA overlooks that this Court must "assume for the purposes of standing that [Plaintiffs'] view on the merits will prevail," *Defs. of Wildlife*, 532 F.3d at 924, which explains why the district court made the quoted observation in assessing "irreparable harm," not standing, JA263.

B. EPA's Creation Of The New Committee Is Reviewable

Falling back from Article III, EPA contends (Br.24) this Court may not review its decision establishing the new Committee on the theory that such choices are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That argument faces steep odds. To "honor" the APA's "presumption of judicial review," the Supreme Court has "read the § 701(a)(2) exception … 'quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019). And those unusual statutes concern "categories of administrative decisions that courts traditionally have regarded as committed to agency discretion, such as a decision not to institute enforcement proceedings, or a decision by an intelligence agency to terminate an employee in the interest of national security." *Id.* (cleaned up). As the district court recognized, FACA is not one of those rare laws. JA308-11.

1. Over 30 years ago, this Court held that advisory committee appointments are reviewable under the Act in *Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods*, 886 F.2d 419

(D.C. Cir. 1989) (*Microbiological*). While EPA relies heavily (Br.26-32) on Judge Silberman's solo opinion in that case, his views "did not carry the day," *NAACP Legal Def. & Educ. Fund, Inc. v. Barr*, 496 F. Supp. 3d 116, 132 (D.D.C. 2020) (Bates, J.). Instead, the *majority* of the panel—Judges Edwards and Friedman—agreed that advisory committee appointments are reviewable, though they ultimately parted ways over whether the challengers there had established a FACA violation.

While the panel was obviously fractured in some respects, "it is clear that two of the three judges"—Judges Edwards and Friedman—concluded that the Act's fair-balance provision provides meaningful (and thus reviewable) standards for purposes of § 701(a)(2). *Id.* at 132, 136; *see* JA310. Judge Edwards was explicit, concluding that this was "not an open issue." *Microbiological*, 886 F.2d at 433 (concurring and dissenting in part); *see id.* at 432-34. And by reviewing the Agriculture Department's committee appointments, Judge Friedman necessarily concluded that such decisions were reviewable. *See id.* at 424 (concurring in judgment). *Microbiological* thus establishes that fair-balance challenges under FACA do not fall within the § 701(a)(2) exception—and that is precisely how several other circuits have understood this decision. JA310; *see*

Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 20 & n.6 (1st Cir. 2020); *Colo. Env't Coal.*, 353 F.3d at 1232; *Cargill, Inc. v. United States*, 173 F.3d 323, 335 n.23 (5th Cir. 1999).

Against all this, EPA cites (Br.30) Judge Silberman's tentative view that "it was, I suppose, not analytically essential [for Judge Friedman] to reach the justiciability issue." 886 F.2d at 428 (concurring in judgment). But as the district court explained, Judge Friedman "*must* have agreed with Judge Edwards that the fair balance provision was justiciable because, in the end, 'he judged it.'" JA310 (quoting *NAACP*, 496 F. Supp. 3d at 132) (emphasis added). That is, because the reviewability analysis before Judge Friedman was intertwined with the merits analysis—with the former hinging on whether the fair-balance provision provides meaningful standards and the latter applying those standards—his decision to address the merits does in fact "'stand for the proposition that no [reviewability] defect existed.'" EPA.Br.30.

EPA also asserts that this Court has "favorably cited" Judge Silberman's opinion. Br.27. But the two footnotes the Agency invokes are pure dicta—and equivocal dicta at that. *See Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 903 n.2 (D.C. Cir. 1993);

Claybrook v. Slater, 111 F.3d 904, 906 n.4 (D.C. Cir. 1997). And EPA's two aging district-court decisions did not even try to grapple with "Judge Friedman's tie-breaking conclusion," *Cargill*, 173 F.3d at 335 n.23.

2. Even if *Microbiological* were not "bind[ing]," JA310, EPA's decision would still be reviewable. The Supreme Court has declined to apply the "narrow[]" § 701(a)(2) exception even when a statute "confers broad authority" on an agency and "leave[s] much to [its] discretion" (such as in the Census Act). *Dep't of Com.*, 139 S. Ct. at 2568. The exception is instead reserved for extreme provisions that "foreclose the application of any meaningful judicial standard of review" whatsoever, such as one allowing the CIA Director to fire an employee "'whenever he shall deem such termination necessary or advisable in the interests of the United States.'" *Webster v. Doe*, 486 U.S. 592, 594, 600 (1988).

Far from furnishing no "judicially manageable standards," EPA.Br.26, the Act's fair-balance provision is specific, clear, and "at least as manageable as the requirements set out in the Census Act," *Concerned Scientists*, 954 F.3d at 19. FACA provides that an agency "shall"—a word that limits discretion from the outset—"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." 5 U.S.C. app. 2 § 5(b)(2), (c); *see NAACP*, 496 F. Supp. 3d at 134. Courts are "well equipped to enforce" this mandatory command—or at least patrol its "outer boundaries." *Concerned Scientists*, 954 F.3d at 18. For example, if an "agency announced that only persons paid by a regulated interested business could serve on a committee," it seems obvious that "FACA's fair balance … standard[] would supply a meaningful tool for reviewing" that decision. *Id.* at 19. And "[i]f a statute provides a meaningful standard for review even in extreme cases, it is justiciable." *NAACP*, 496 F. Supp. 3d at 134; *see, e.g.*, *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). In fact, there is no need to speculate about whether courts *can* apply this provision; they *have*. *See infra* Pt. II; *cf. Dep't of Com.*, 139 S. Ct. at 2568.

Indeed, the Act is a particularly poor candidate for § 701(a)(2) because the point of FACA is to *restrict* the freedom of agencies in making advisory committee appointments. *See Concerned Scientists*, 954 F.3d at 18. It is "'implausible to conclude that Congress simultaneously passed a law designed to constrain executive discretion and ensure Executive Branch accountability, while also wholly precluding judicial review of advisory committee design decisions.'" *NAACP*, 496 F. Supp. 3d at 135.

It is thus unsurprising that in addition to this Court, the majority of circuits to have considered the question—the First, Fifth, and Tenth—have held that the Act's fair-balance provision provides meaningful standards for review. *See Concerned Scientists*, 954 F.3d at 18-20; *Colo. Env't Coal.*, 353 F.3d at 1231-34; *Cargill*, 173 F.3d at 334-41. Only the Ninth Circuit—addressing the question before the Supreme Court's more recent § 701(a)(2) decisions—has held that the provision provides no meaningful standards, and even then only in particular circumstances. *See Ctr. for Pol'y Analysis on Trade & Health v. Off. of U.S. Trade Representative*, 540 F.3d 940, 944-47 (9th Cir. 2008). This Court should not depart from its own precedent to join the lonely side of an acknowledged split. *See* EPA.Br.28 n.2.

EPA nonetheless insists the Act qualifies for § 701(a)(2) because it "'does not define what constitutes a fairly balanced committee … or how that balance is to be determined.'" Br.27. But the "difficulty of defining the boundaries" of a statutory standard does not render an agency decision unreviewable. *Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007). Rather, so long as the statute "provides a meaningful standard for review … in extreme cases"—which the Act undeniably does—"it is justiciable."

NAACP, 496 F. Supp. 3d at 134; *supra* at 11. Indeed, "[t]he concepts of fairness[] [and] balance … are not foreign to courts, [which] are certainly capable of reviewing agency actions with reference to those concepts in at least some factual scenarios." *Concerned Scientists*, 954 F.3d at 19; *see, e.g.*, *Sanjour v. EPA*, 56 F.3d 85, 97 (D.C. Cir. 1995) (en banc) (concluding EPA's regulatory scheme threatened "viewpoint discrimination").

In any event, even if the Act itself triggered § 701(a)(2), "FACA's implementing regulations" and EPA's handbook would "provide further law to apply." *NAACP*, 496 F. Supp. 3d at 134. In fact, this Court has already held that "judicially manageable standards may be found in formal and informal policy statements and regulations" and that the "regulations implementing FACA"—specifically, subpart C—"provide just such standards." *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 643 (D.C. Cir. 2020) (cleaned up). The same is true of subpart B—the neighboring provisions of the exact same "regulations implementing FACA," *id.*—which directs EPA in detail to consider specific factors to achieve a "balanced" committee, such as the "mission" of the committee, the "economic" impact of its recommendations, and the need for the perspectives of "consumers, technical experts, the public at-large,

academia, business, or other sectors." 41 C.F.R. pt. 102-3, subpt. B, app. A; *see* Young.Br.6-7. These provisions "are far more precise than other standards, like 'in the interest of justice,'" that this Court "has deemed reviewable." *NAACP*, 496 F. Supp. 3d at 134.[2]

EPA also fails to show that advisory committee appointments are "traditionally committed to agency discretion," Br.24, as it "point[s] … to nary a case that would suggest as much," *Concerned Scientists*, 954 F.3d at 18. Instead, it merely contends that such appointments "implicate[] a complicated balancing of a number of factors which are peculiarly within the agency's expertise." Br.25 (cleaned up). "But that description applies to most things that the EPA does"—indeed, most things *any* agency does—"including mandated non-discretionary activities." *Concerned Scientists*, 954 F.3d at 18. The Agency's theory would therefore have § 701(a)(2)'s "'quite narrow[]'" exception swallow the APA's "'basic presumption of judicial review.'" *Dep't of Com.*, 139 S. Ct. at 2567-68.

[2] Nor can EPA dismiss these regulations and its own handbook as merely "echo[ing]" the Act—an odd choice for an agency given the antiparroting canon. Br.31; *see Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). Those directives flesh out rather than repeat the statutory standard and thus "provide further law to apply." *NAACP*, 496 F. Supp. 3d at 134.

II. THE COMMITTEE IS NOT FAIRLY BALANCED

Turning to the merits, EPA acknowledges (Br.33) that the Act requires the Committee to be "fairly balanced in terms of the points of view represented." 5 U.S.C. app. 2 § 5(b)(2), (c). And it does not deny that "the Administrator selected members that all share similar views on the need for more stringent regulation of air quality standards—a highly charged, political issue." JA314-15. One would think that would be enough to show a violation of the fair-balance requirement, yet the Agency provides (Br.33-56) three arguments to the contrary. But as a threshold matter, EPA never made any of these points in reconstituting the Committee and thus cannot rely on them now under *Chenery*. *See* Young.Br.60-62. The bedrock rule that "agency action … can be upheld only on the basis of a contemporaneous justification by the agency itself … applies to statutory interpretations" offered after the fact. *N. Air Cargo v. USPS*, 674 F.3d 852, 860 (D.C. Cir. 2012); *see, e.g.*, *Bus. Roundtable v. SEC*, 905 F.2d 406, 417 (D.C. Cir. 1990). In any event, EPA's newly-minted readings of the Act all lack merit.

A. EPA's Mischaracterization Of Plaintiffs' Position Fails

To start, the Agency repeatedly distorts Plaintiffs' argument, accusing them of asking for an "industry representative" or someone to advance industry's "interests" on the Committee. Br.41, 43-45, 49. But Plaintiffs contend only that the Act requires representation of "the industry's *viewpoint* that stronger regulations are unnecessary," making much of EPA's brief beside the point. Young.Br.2 (emphasis added). For example, the fact that Congress directed the Committee to include a few members with certain backgrounds and other committees to include an "'industry' representative," Br.41, in no way suggests that the Agency can create an advisory committee with a single perspective on a critical matter before it. Likewise, it makes no difference whether Drs. Boylan and Chow could be seen as representing "industry's interests," given that they do not share industry's viewpoint. EPA.Br.49-50.[3]

[3] In any event, Dr. Boylan's background as a *regulator* does not mean he adequately represents the interests of the *regulated*. Nor does the fact that industry has been one of Dr. Chow's many funders throughout her lengthy career make her qualified to reflect industry's views. *See* JA107.

B. EPA's Reliance On Functional Balance Fails

The Agency, like the district court before it, also appears to contend that "because the Committee's purpose is scientific and technical," its "cross-section of expertise and professional training drawn from diverse technical and scientific fields ensures that CASAC has the breadth of viewpoints necessary." Br.43 (cleaned up). EPA's premise is incorrect, and its conclusion does not follow.

1. As to the conclusion, the Committee's purported diversity in scientific *backgrounds* in no way gives it the necessary diversity in *viewpoint*. Rather, as EPA admits, the Committee members' "wide range of relevant scientific and technical expertise" goes to the "*function* of providing scientific peer review." Br.40 (emphasis added). But the Act mandates that the Committee be "fairly balanced in terms of the points of view represented *and* the functions to be performed," making mere functional balance insufficient. 5 U.S.C. app. 2 § 5(b)(2), (c) (emphasis added). If the law were otherwise, the next Administrator could staff the Committee with scientists unanimously committed to relaxing current air-quality standards, so long as they "possess[ed] a wide range of scientific and technical expertise." EPA.Br.14; *see* Young.Br.41-42.

While EPA invokes (Br.33-34) this Court's statement that a particular committee's "members represent a fair balance of viewpoints given the functions to be performed," that observation at most suggests that a committee's function can be *relevant* to viewpoint diversity. *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Priv. Sector Survey on Cost Control*, 711 F.2d 1071, 1074 (D.C. Cir. 1983). It does not indicate that courts can *ignore* a lack of viewpoint diversity if functional diversity exists. That would rewrite the Act to mandate only that committees be "fairly balanced in terms of the points of view represented *or* the functions to be performed." Nor does anything else in *National Anti-Hunger Coalition* support EPA's atextual argument. While that decision rejected the claim that a committee was imbalanced because "virtually every member … was an executive of a major corporation," there was no discussion of whether those executives shared the same views on how "'to perform [the committee's] limited function.'" *Id.*

EPA's remaining cases are even further afield. Br.36-37. Judge Friedman's opinion in *Microbiological* did not conclude that a variety of technical backgrounds may substitute for a balance of viewpoints. Young.Br.45-46. Rather, Judge Friedman thought the committee was

fairly balanced because one of its members had been "recommended" by the plaintiffs as someone "who 'would bring a strong consumer and/or public health perspective to bear on the work of the Committee.'" 886 F.2d at 425. As for *Cargill*, the Fifth Circuit concluded that a committee consisting of "scientists with expertise in many fields" satisfied the Act's "*functional* balance" requirement. 173 F.3d at 337 (emphasis added). But it went on to assess whether the committee was also fairly balanced in terms "of *points of view*," and clarified that a scientific committee with members boasting "expertise in many fields" would *not* be fairly balanced if its members were "biased toward one particular point of view." *Id.* at 337-38 (emphasis added).

2. In any event, even indulging EPA's atextual theory that a diversity in professional backgrounds can demonstrate a diversity in viewpoint when a committee's "purpose is scientific and technical," Br.43, that condition does not exist here. Far from having "narrow, technical mandate," *Cargill*, 173 F.3d at 338, the Committee is tasked with advising EPA on its national air-quality standards. That is a "highly charged, political issue," JA315, as these standards "affect the entire national economy" and threaten to impose billions of dollars in costs on

regulated industries, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); *see* Young.Br.38. Rather than dispute any of this, EPA tries to present the Committee as engaged in mere "peer review," but its efforts do not withstand scrutiny. Br.40.[4]

EPA first points to (Br.38-40) some of the statutory criteria for setting air-quality standards, but ignores that this task necessarily involves a "'degree of policy judgment,'" because the Agency (and the Committee) must determine "how much of the regulated harm is too much," *Whitman*, 531 U.S. at 473-75 (cleaned up). Thus, in EPA's words, the Committee must make "judgment calls" on matters freighted with policy implications. Br.44.

The Agency next urges the Court to disregard the Committee's statutory mandate to advise EPA on "any adverse public health, welfare, social, economic, or energy effects which may result from" the air-quality standards, 42 U.S.C. § 7409(d)(2)(C)(iv), insisting these considerations are "irrelevant to the process of setting air-quality standards," Br.46.

[4] EPA also contends that in the district court, Plaintiffs "seemed to agree that the Committee's mandate is primarily technical and scientific." Br.43 (cleaned up). Not so. *See* Dkt. No. 8-1 at 19; Dkt. No. 24 at 13.

That is false. "The Committee's advice concerning certain aspects of adverse public health effects from various attainment strategies is unquestionably pertinent," and therefore must be addressed by EPA under 42 U.S.C. § 7607(d)(3) as part of "the standard-setting process," *Whitman*, 531 U.S. at 470 n.2 (cleaned up).

With the statute against it, the Agency retreats to a 2015 Government Accountability Office report quoting an EPA official's comment that the Agency has never asked the Committee to provide "'advice on adverse social, economic, or energy effects.'" Br.46. But EPA's reliance on a dated statement from an unnamed official cannot overcome either the Committee's statutory mandate or its governing charter, which requires the Committee to "[a]dvise 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." JA07.

Finally, the Agency cites the Committee's recent report as "an excellent illustration of the scientific nature of CASAC's work." Br.47-48. But EPA never disputes that this report made "public health policy judgments" and addressed "policy-relevant aspects" of the evidence, such

as recommending that the Agency assign particular significance to the impact of particulate-matter concentrations on "persons of color" and pursue a strategy "responsive to … climate change." JA171-72, 285-87, 296; *see* Young.Br.40-41. And while the report may have assigned "'weight' to certain studies," EPA.Br.48, it simultaneously "place[d] … weight on" its "predict[ion]" that strengthening the standards would generate "substantial risk reduction for Black residents," JA293. Such "policymaking" judgments go far beyond "peer review." EPA.Br.48.

C. EPA's Account Of Viewpoint Balance Fails

When EPA finally addresses the lack of anyone on the current Committee who shares the "'industry's viewpoint' … that 'strengthening the air-quality standards is unnecessary to protect human health,'" it again comes up short. Br.50-51. For example, the Agency emphasizes (Br.54) that the Committee's members disagreed over *how much* to strengthen the current air-quality standards, but that only underscores the absence of any meaningful diversity of viewpoints here. Nor is it relevant that one Committee member, Dr. Boylan, opposed reducing the annual particulate-matter standard in 2019. EPA.Br.54-55. A single vote overlapping with industry's view does not prove that Dr. Boylan broadly

represents that position, particularly when his tentative opposition was based on perceived shortcomings in the underlying risk assessment rather than any substantive commitments. *Compare* CASAC Review of the EPA's *Policy Assessment for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (External Review Draft - September 2019)* at B-1-B-7, EPA-CASAC-20-001 (Dec. 16, 2019) (Dr. Boylan's analysis), *with id.* at B-8-B-28 (Dr. Cox's analysis).

Ultimately, EPA returns to its theme that ensuring a fair viewpoint balance is beyond the ken of the Judiciary, contending, for example, that there is no "uniform view" among regulated industries on whether to strengthen air-quality standards and that the Agency should not be expected to "divine the members' ultimate positions" on any given issue at the time of appointment. Br.51-53. But this retread of EPA's § 701(a)(2) argument is no more persuasive the second time around. *See supra* Pt I.B. And in any event, there was no need for the Agency to "speculat[e]" as to how its appointees would vote, EPA.Br.52, because the five members of the reconstituted Committee who were "experts in environmental epidemiology"—a category that excludes Dr. Boylan—had already made clear in "their papers and public statements" that they

were "fully convinced that current air quality is bad" and that the standards should therefore be strengthened, JA81. It was likewise clear back in 2021 that the reconstituted Committee "no longer" contains "any members" who "take the position that current air quality standards have not been shown to result in premature fatalities." *Id.* If that is not enough to show a lack of fair balance, such claims may as well be nonreviewable.

III. EPA DID NOT ENGAGE IN REASONED DECISIONMAKING

Even setting aside the Committee's lack of fair balance, the Agency fails to show that it complied with the APA's reasoned-decisionmaking requirement in establishing the new Committee. Young.Br.48-62.

A. EPA Failed To Explain How The Committee Is Fairly Balanced

1. Straining to show that it did not ignore an "important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the Agency asserts that "no authority require[d]" it to "articulate how" the establishment of the new Committee "would comply with FACA." Br.56 (cleaned up). But that extraordinary argument, which would excuse agencies from ever explaining their adherence to the Act, is both forfeited and meritless.

It is forfeited because EPA "failed to raise th[e] argument below." *Chichakli v. Tillerson*, 882 F.3d 229, 234 (D.C. Cir. 2018); *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (courts should "'normally decide only questions presented by the parties'"). Indeed, the Agency does not even respond to Plaintiffs' submission that it "declin[ed] to dispute" in the district court that "EPA was obligated to explain how the Committee is fairly balanced." Young.Br.51.

In any event, EPA's newfound argument is meritless. No less an authority than Congress, via the APA, requires agencies to address "'important aspect[s] of the problem,'" including whether an advisory committee meets FACA's fair-balance "'mandate[].'" Young.Br.48-52, 57. Rather than deny this, EPA asserts that agencies "historical[ly]" have not explained how their committees are fairly balanced. Br.57. But if agencies are habitually violating "foundational precept[s] of administrative law," *Physicians for Soc. Resp.*, 956 F.3d at 644, that is all the more reason to start enforcing them now. After all, neither agencies nor courts may dispense with the requirements of the APA—even if litigants have not previously raised the exact same claims as Plaintiffs. *See Air Line Pilots Ass'n, Int'l v. Chao*, 889 F.3d 785, 792 (D.C. Cir. 2018).

2. EPA next asserts (Br.58-60) that it provided the required explanation via its June 2021 decision establishing the new Committee. But that decision merely listed the appointees' credentials, announced that they "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 air-quality standards, and stated that they will "provide credible, independent expertise to EPA's reviews of air quality standards that is grounded in scientific evidence." JA21-22.

Thus, as EPA does not deny, that decision never articulated how the appointees are fairly balanced under the Act, particularly in terms of their viewpoints. *See* Young.Br.58; EPA.Br.59-60. And *that* is the explanation required by the APA, yet it is entirely absent from the June 2021 decision. As a result, this is not a case where the required explanation "'may reasonably be discerned.'" EPA.Br.60. Rather, because the June 2021 decision "contains no discussion" of the new Committee's balance under the Act, it "'cross[ed] the line from the tolerably terse to the intolerably mute.'" *Physicians for Soc. Resp.*, 956 F.3d at 648.

3. EPA also tries (Br.58-59) to cobble together the required explanation from various statements the Agency and its staff made *before*

the June 2021 decision. But as the district court explained and as the Agency does not dispute, these pre-decisional statements necessarily "could not have justified the makeup of the Committee under FACA" because that selection process "was not finalized until June 2021." Young.Br.57 (quoting JA319-20).

Even setting aside that problem, nothing in the statements comes close to explaining how the new Committee is fairly balanced. Many of them merely indicated that the Committee should have broad scientific expertise: EPA's April 2021 announcement soliciting nominations sought experts in various fields with a "'collective breadth and depth of scientific experience,'" and the staff decision memorandum likewise stated that candidates were evaluated on "'demonstrated competence, knowledge and expertise.'" EPA.Br.59. But these statements focusing on *expertise* do not say anything about *viewpoints*, let alone viewpoint *balance*.

True, several statements at least used the word "balance": the April announcement noted a "'balance of scientific perspectives'" is "'importan[t]'"; the staff decision memorandum claimed its recommended candidates "'would result in a … balanced CASAC'"; and the Federal Advisory Committee Management Division stated that the Committee is

"'balanced with respect to the points of view represented for the functions to be performed.'" *Id.* But because these assertions at most declare that the Committee is "balanced" without any explanation, they are examples *par excellence* of "conclusory statements [that] will not do," *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014).

4. Finally, the government points to statements made *after* the June 2021 decision establishing the new Committee. It is "well-trod ground," however, that such "'post hoc'" rationales cannot "sustain agency action." *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 387, 390 (D.C. Cir. 2020); *see* Young.Br.59.

In any event, none of the post-decisional statements provides the required explanation. Although EPA staff told Dr. Young several days after the June 2021 decision that "appointments were constrained by committee size and balance of disciplinary expertise," JA135; *see* EPA.Br.60, that non-public, conclusory statement at most addressed a balance among pedigrees rather than viewpoints. *See supra* Pt II.B. Equally conclusory was the EPA staff declaration filed in this case months after the June 2021 decision, which asserted that the new Committee is balanced in terms of "'the points of view (*i.e.*, scientific

disciplines) represented.'" EPA.Br.59. Such "take our word for it" assertions do not satisfy the APA. *See supra* at 28. Although no particular "'word count'" applied, EPA still had to reasonably explain how the new Committee is fairly balanced under the Act. EPA.Br.60.

B. EPA Relied On Improper Considerations

EPA not only ignored a key issue Congress required it to address—viewpoint diversity—but relied on factors Congress did "not intend[] it to consider," *State Farm*, 463 U.S. at 43—namely, "gender and ethnic diversity," EPA.Br.56; *see* Young.Br.53-55. The Agency never denies that it is forbidden to "make appointments based on race and sex" or even "'consider' … race and sex" when doing so, Young.Br.54-55. Instead, EPA contends only that it did not actually select its new appointees "because of" their race and sex. Br.61. That argument fails on multiple levels.

1. To start, the Agency misunderstands the governing law. The APA does not merely bar agencies from taking action "because of" improper factors like race and sex, *id*, but from "rel[ying] on" or "consider[ing]" such factors in the first place, *State Farm*, 463 U.S. at 43. EPA ignores this well-established rule and cites no cases supporting its preferred approach. *See* EPA.Br.61-62.

That is fatal to EPA's decision because the Agency at minimum "relied on" or "'consider[ed]'" the race and sex of the candidates here. *See* Young.Br.53. The second sentence of the June 2021 decision expressly discussed the race and sex of its appointees, emphasizing that the new Committee is "comprised of five women and two men, including three people of color, making it the most diverse panel since the committee was established." JA21. And the internal materials underlying that decision likewise devoted significant attention to these factors as well. *See infra* Pt. III.B.2. EPA thus "consider[ed]" race and sex in establishing the new Committee, which alone renders its decision "arbitrary and capricious." *State Farm*, 463 U.S. at 43; *see, e.g.*, *Idaho Conservation League v. Wheeler*, 930 F.3d 494, 506 (D.C. Cir. 2019) (an agency "consider[s]" an issue by "discussing" it).

2. In any event, EPA *did* appoint new Committee members "because of" their race and sex. Indeed, its June 2021 decision trumpeted these characteristics *before* even mentioning the new appointees' scientific qualifications. JA21. In an effort to downplay that fact, the Agency contends the second sentence of the decision "simply noted" the race and sex of the new appointees without "say[ing] that the

appointments were made in order to achieve that result." Br.61. But that characterization cannot be squared with the Agency's arguments regarding the third sentence, which supposedly explained that EPA selected appointees "based on"—*i.e.*, to achieve—the broad "'scientific'" expertise they would bring to the Committee. Br.18, 58-60 (quoting JA21). These back-to-back sentences describing the makeup of the new Committee either explained what makeup EPA aimed "to achieve" or they did not. EPA.Br.61. If the former, then the Agency impermissibly appointed Committee members on the basis of race and sex; if the latter, then references to scientific expertise in the June 2021 decision do not explain the decision at all, let alone explain how the new Committee is fairly balanced. *See supra* Pt III.A. Either way, the Agency violated the APA. *Cf. Johnson*, 969 F.3d at 391 (an agency "cannot maintain" logically inconsistent positions "in the same order").

At any rate, the Agency's internal materials confirm that EPA selected the new appointees on the basis of their race and sex. As courts have held in related contexts, there is "ampl[e] support[]" for the conclusion that an entity took action "because of" a particular characteristic when an internal memorandum "list[s]" the characteristic

while "recommending" the action, *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1186-87 (2d Cir. 1992), or "note[s]" that the action would improve "'minority representation,'" *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 718, 723 (7th Cir. 2005). Here, the cover page to the membership package "proposing" the ultimate appointees did just that, "recommending" that the "membership package be approved" while highlighting that the proposal would result in a Committee with "three minorities" and "five women." JA49.

If that were not enough, the staff decision memorandum went far beyond "listing" the race and sex of the proposed appointees or "not[ing]" the implications for minority representation. The memorandum's "RECOMMENDATION" was that the Administrator appoint the seven chosen candidates on the ground that doing so "would result in a highly-qualified, *diverse*, and balanced CASAC." JA42 (emphasis added). The memorandum then provided several bullet points under each candidate summarizing their scientific qualifications. JA42-44. For five of the seven candidates, the bullet points also emphasized that they "[w]ould bring gender diversity" and/or "ethnic diversity" to the Committee. *Id.* So even if an "attach[ment]" to the memorandum did not "mention[] any

candidate's sex or race," EPA.Br.62, the memorandum itself makes clear that the Committee's new appointees were chosen because their selection "would result in a … diverse" Committee and "[w]ould bring gender diversity" and/or "ethnic diversity" to the Committee, JA41-44—*i.e.*, "because of" their race and sex.

CONCLUSION

This Court should reverse the judgment below and direct the district court to grant the requested relief.

Dated: April 21, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 6,431 words.

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

I hereby certify that, on April 21, 2023, I filed the foregoing brief using this Court's CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate