

Nos. 26-277 & 26-298

IN THE
Supreme Court of the United States

KENTUCKY, et al.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY; LEE ZELDIN, ADMINISTRATOR, et al.,
Respondents.

**On Petitions for Writs of Certiorari to the
U.S. Court of Appeals for
the District of Columbia Circuit**

**BRIEF OF THE HONORABLE ANDREW R. WHEELER
AND WASHINGTON LEGAL FOUNDATION AS
AMICI CURIAE SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) may revise a National Ambient Air Quality Standard (NAAQS) without the “thorough review” required by section 109(d)(1) of the Clean Air Act simply because it acts “earlier or more frequently” than mandated.

2. Whether EPA must consider costs and attainability when exercising discretion to review and revise a NAAQS “earlier or more frequently” than mandated.

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INTERESTS OF AMICI CURIAE*

The Honorable Andrew R. Wheeler served as the fifteenth Administrator of the United States Environmental Protection Agency from 2019 to 2021, following service as the agency’s Acting Administrator and Deputy Administrator, and previously spent nearly fifteen years in senior leadership roles for the Senate Committee on Environment and Public Works, including as its Staff Director and Chief Counsel. As Administrator, he completed the most recent on-cycle thorough review of the PM_{2.5} standard—the December 2020 review, informed by a full scientific assessment and independent scientific advice, that retained the standard which the off-cycle revision at issue here set aside. *See* 85 Fed. Reg. 82,684 (Dec. 18, 2020). Having exercised the revision judgment that § 7409(d)(1) commits to the Administrator, he has a unique interest in ensuring that the office’s statutory discretion—and the completed reviews on which it rests—cannot be displaced by a streamlined revision power that will bind every future Administrator of either party.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus in disputes over the structure and limits of the administrative state, to help ensure that agencies exercise only the powers Congress

* No party’s counsel authored any part of this brief. No one, other than WLF and its counsel, helped pay for the brief’s preparation or submission. This brief’s filing more than ten days before the due date constitutes timely notice to all parties of Amici’s intent to file.

actually conferred. *See, e.g., Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *West Virginia v. EPA*, 597 U.S. 697 (2022).

Amici’s broader concern in this case is a practical one. Businesses plan and build against regulatory baselines, and no baseline reaches further than a national ambient air quality standard. Planning depends on stability, and stability depends on process. A standard that can be reset at any time, on a partial record, and, in practice, only in one direction is not a baseline. It is a burden that can only grow.

Amici appear here because the decision below creates a revision power no Congress enacted, beyond the practical reach of any election, any administration, and any court save this one. Those defects come at the expense of the stability on which regulatory risk is priced, capital is committed, and long-term projects are built.

INTRODUCTION & SUMMARY OF ARGUMENT

Under the Clean Air Act, the Environmental Protection Agency (EPA) sets a national limit on fine-particle air pollution. That limit operates as the permitting baseline for virtually every major factory, power plant, and industrial project in America. Unlike any sector-specific rule, a national ambient air quality standard (NAAQS) reaches economic activity of nearly every kind. Congress wrote a two-way statute that allows EPA to tighten or relax that standard, as warranted. The court below effectively turned it into a one-way ratchet.

Under the Act, a NAAQS “may be revised in the same manner as promulgated.” 42 U.S.C. § 7409(b)(1). Revised—not merely tightened. The power to revise runs in both directions, and Congress disciplined it with a single, carefully built procedure: every five years, a “thorough review” of the air quality criteria—the scientific record on which every standard rests—and of the standards themselves, informed by an independent scientific committee whose recommendations arrive roughly a year in advance. §§ 7409(d)(1), (d)(2)(B). For nearly half a century, every change to a NAAQS—and every decision to leave one in place—passed through that gate.

The decision below removes the gate. It holds, first, that EPA may revise a NAAQS off-cycle without any thorough review. Ky. Pet. App. 25a. It holds, second, that the Act prohibits EPA from considering costs or consequences not only when setting a standard but when deciding *whether* and *when* to revise one—at “either stage.” Ky. Pet. App. 32a. On its own, each holding is bad enough. Together they hand EPA a power Congress never enacted: a one-way revision power—perpetually available, procedurally unencumbered, and pointed, in operation, only toward ever-tighter standards. That is not statutory interpretation. It is amendment. And only this Court may undo it.

The direction comes from the only consideration the panel’s reading now leaves in play. This Court has described fine particulate matter as a “nonthreshold” pollutant, one that “inflict[s] a continuum of adverse health effects at any airborne concentration greater than zero.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001). A criterion limited to public health

thus always has more work to do. It supplies no obvious stopping point—and no reason to wait. Every permissible input invites another look downward.

That asymmetry is not hypothetical, and this case proves it. Tightening the standard—lowering the allowable concentration from 12.0 to 9.0 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$)—proceeded on merely a partial “supplement” to the existing science. 89 Fed. Reg. 16,202, 16,213 (Mar. 6, 2024). Undoing that revision—as the agency itself, under new leadership, has urged—requires everything the panel excused: a full rulemaking, run through a criterion that, on the panel’s reading, forbids the agency to weigh a single consequence of its choice.

Whitman held that when EPA sets the level of a standard, § 7409(b)(1)’s express command—“requisite to protect the public health”—displaces cost. But this Court has called that holding a “modest principle,” tied to an express statutory directive, *Michigan v. EPA*, 576 U.S. 743, 755–56 (2015), and the panel stretched it across a question *Whitman* never faced: the antecedent, discretionary decision to reopen a settled standard mid-cycle. At that threshold *Michigan*, not *Whitman*, supplies the rule. The panel applied *Whitman* anyway.

No further percolation is possible. Challenges to NAAQS rules lie exclusively in the D.C. Circuit—the court that decided this case. 42 U.S.C. § 7607(b)(1). No other circuit will ever weigh in; no disagreement will ever ripen; and because the asymmetry is structural, every future case will arrive in precisely this posture—a standard tightened without thorough review, already reshaping conduct by the time any challenge is heard.

The ratchet binds every administration going forward in mirror image: any administration may turn it tighter; none may turn it back on the same terms. The Court should grant the petitions.

ARGUMENT

I. THE DECISION BELOW CREATES A ONE-WAY RATCHET THAT CONGRESS NEVER ENACTED.

The panel announced its two holdings in separate sections of its opinion, addressing each in isolation. Each is reason enough for review. The first strips the structural check on off-cycle revision. The second forbids the only substantive consideration that could ever counsel restraint. Together they are intolerable. What remains is a power found nowhere in the statute—revision on demand, cabined only by a criterion with no obvious stopping point of its own. And as applied, its answer has only one direction: tighter.

A. A public-health-only criterion cannot discipline the decision to revise a non-threshold standard.

Start with *Whitman*’s own premise. *Whitman* treated ozone and particulate matter as “nonthreshold” pollutants that inflict a continuum of adverse health effects at any airborne concentration greater than zero,” thus requiring EPA “to make judgments of degree.” 531 U.S. at 475. But if that is so, then below any current standard there is *always* some incremental health benefit to be claimed.

Scholars across the spectrum have diagnosed the structural consequence. Because many pollutants

“lack ambient concentrations below which there is no risk” of harm, a health-only criterion faces a “stopping-point problem”: “when costs cannot be considered, it is difficult to justify any stopping point other than zero,” for “if the only cognizable goal is to protect public health, how can EPA justify a nonzero concentration?” Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. Rev. 1184, 1186–87 (2014).

Whatever one makes of the scholars’ prescriptions, their diagnosis holds: a criterion with no built-in stopping point can set a level only by an act of judgment—but by itself it can never explain *restraint*. It cannot tell the Administrator that now is not the time, that the science has not moved enough, that a months-old judgment deserves repose.

Whitman glossed “requisite” as “not lower or higher than is necessary,” 531 U.S. at 475–76, and in principle that cuts both ways. But for a pollutant whose air quality criteria, as this Court described them, posit harm at every concentration, only one side of the ledger ever has evidence. Measured solely by public health, every existing standard can always be portrayed as inadequate, and every moment as the right moment to tighten. A criterion that always points the same way is not a constraint on the timing of revision. It is an accelerant.

B. Congress supplied the constraint the criterion could not.

Congress understood the problem, and its solution was structural. From the start, the Act contemplated revision—standards “may be revised in

the same manner as promulgated.” Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1679–80. And in 1977, Congress disciplined the practice by requiring a “thorough review” of the criteria and standards at five-year intervals, Pub. L. No. 95-95, § 106(a), 91 Stat. 685, 691, paced by an independent scientific committee whose own quinquennial review must reach the Administrator roughly a year before his deadline, 42 U.S.C. § 7409(d)(2)(B). The decision below called the thorough-review requirement “an action-forcing device” ensuring that standards “do not fall too far behind the evolving scientific evidence.” Ky. Pet. App. 20a.

But the device forces action in both directions—and that is the point. A comprehensive review of *all* the criteria and *all* the standards, on a fixed clock, with the full scientific record assembled first, is exactly the kind of process that can justify restraint as well as change. It is the only feature of the statute that can. And it is how the statute operated in practice: until 2024, no revision had ever issued without a completed thorough review. *See* Chamber Pet. 16.

The state petitioners pressed that history below. The revision, they charged, was “unprecedented” and made “without regard for the reliance interests of those affected by the revised standard.” Ky. Pet. App. 34a. The panel below did not deny the novelty. Its answer was authority alone. Congress, it held, permits revision outside the five-year cycle “in the interests of public health.” Ky. Pet. App. 34a.

The 2024 Final Rule thus stands as the first of its kind. It “partially reopen[ed]” the criteria and deferred the full assessment of new studies “for the

next PM NAAQS review.” 89 Fed. Reg. at 16,213. When an agency discovers, five decades on, a streamlined path around its own governing procedure, some skepticism is in order. *Cf. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). The long silence is itself evidence that something is awry. Administration after administration, whatever its regulatory ambitions, treated thorough review as the price of revision. The better explanation is not that all of them somehow missed the streamlined path, but that the statute simply does not provide one.

C. The decision below dismantles both checks at once.

The panel’s decision removes the structural check. EPA claimed the off-cycle power under the second sentence of § 7409(d)(1): the Administrator “may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.” *See* Chamber Pet. 16–17. However the panel reached its result, the holding is that the Administrator may revise a NAAQS “more frequently without completing a ‘thorough review,’” Ky. Pet. App. 25a—and it is undisputed that no thorough review preceded this revision, Ky. Pet. App. 19a.

But the sentence Congress wrote still says “review,” and on the panel’s reading nothing in the Act prescribes its depth. The panel called its interpretation “not toothless,” pointing to § 7409(b)’s substantive standard and the general “requirement of reasoned decisionmaking.” Ky. Pet. App. 25a. But the substantive standard is the criterion with no stopping point, and reasoned decisionmaking is administrative

law’s floor, not Congress’s design. This case has already measured that floor: a partial “supplement” sufficed.

The decision forecloses the only substantive check: consideration of cost. The panel held that “[w]hether the Administrator considers costs and attainability when deciding whether to revise a NAAQS or when setting the NAAQS would have the same impermissible effect,” and that nothing would “permit the Administrator to consider costs at either stage.” Ky. Pet. App. 31a–32a. The panel thus held not merely that EPA need not consider costs at the threshold, but that it may not.

That reading extends *Whitman* far beyond its rationale. *Whitman* rested on an express statutory command: § 7409(b)(1) “unambiguously bars cost considerations from the NAAQS-*setting* process.” 531 U.S. at 471 (emphasis added). This Court has since confined *Whitman* to exactly that footing—a “modest principle” applicable “where the Clean Air Act expressly directs EPA to regulate on the basis of a factor that on its face does not include cost.” *Michigan*, 576 U.S. at 755–56.

No comparable command governs the antecedent question confronted here—whether to undertake a discretionary off-cycle revision. That decision arises under the second sentence of § 7409(d)(1), which contains no public-health-only limitation—only a permissive “may.” For that kind of threshold judgment, *Michigan*, not *Whitman*, supplies the frame: absent an express statutory bar, cost is not forbidden to an agency deciding whether to act—it is ordinarily part of the “reasoned decisionmaking” that agencies must engage in. *Id.* at 750. Agencies have long

treated cost as “a centrally relevant factor when deciding *whether* to regulate,” *id.* at 752–53 (emphasis added). *Michigan* therefore refused to read the statutory trigger “as an invitation to ignore cost.” *Id.* at 753.

Yet the appeals court converted that narrow, text-bound preclusion into a roving prohibition, forbidding cost—the one consideration capable of counseling restraint—at every stage of the revision decision. The conversion is the panel’s alone, not *Whitman*’s: *Whitman* found an express bar in § 7409(b)(1) and enforced it there; the second sentence of § 7409(d)(1) contains no counterpart. The panel invented one.

Murray Energy Corp. v. EPA, 936 F.3d 597 (D.C. Cir. 2019), does not bridge the gap. It construed “appropriate” in the *first* sentence of § 7409(d)(1)—the mandatory quinquennial review, where a completed thorough review and the § 7409(b) criterion do the substantive work—and said nothing about the second sentence’s discretionary trigger. *Id.* at 605, 622–23. And the rule of *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980)—that an agency may not take account of factors Congress excluded—presupposes the exclusion, which is the very question here. Neither case decided that when EPA volunteers to reopen a standard early, it must blind itself to every consequence of doing so. And this Court’s own version of the excluded-factors rule—agency action is arbitrary when it rests “on factors which Congress has not intended it to consider,” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)—asks the same question the panel skipped: what did Congress intend?

Strip away the thorough review, forbid the weighing of cost, and the result is a power that may be exercised at any time, on a self-selected partial record, and that—for a non-threshold pollutant—has pointed only down. Either holding, standing alone, would warrant this Court’s attention. In combination they demand it. Whether the Act contains such a power is a question the court below has now answered for the Nation, and only this Court can answer it correctly.

II. THE ASYMMETRY IS PROVEN IN THIS CASE, AND NO ADMINISTRATION CAN READILY UNDO IT.

The Court need not take this asymmetric structure on faith. The ratchet has already turned once, in this very case. In December 2020, at the close of a completed review, the agency retained the 12.0 standard “without revision.” 85 Fed. Reg. 82,684 (Dec. 18, 2020). Only six months later, it announced its reconsideration of that decision. 89 Fed. Reg. at 16,210. It issued a partial “supplement” to the existing 2019 science assessment in May 2022, *id.* at 16,213, then finalized a tightening from 12.0 to 9.0 $\mu\text{g}/\text{m}^3$ by March 2024, *id.* at 16,202, 16,204. The entire revision ran on a partially reopened record, with the balance of the new science deferred to the next full review. *Id.* at 16,213. Under the logic of the decision below, all of that was lawful precisely because no thorough review was required—and none was performed.

Going back up is another matter. After a change in administrations, the agency concluded that the 2024 rule was unlawful and moved to vacate it. The appeals court denied the motion and upheld the rule on the merits. Ky. Pet. App. 8a. That standard now binds. The only remaining path to revisit it is a new rulemaking.

And that rulemaking must answer for the “serious reliance interests” the existing rule has engendered. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020). It must supply the “reasoned explanation” any change of course demands. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

Reliance, in other words, now cuts almost entirely one way: it could not stop the standard’s tightening, Ky. Pet. App. 34a, but it will weigh heavily against any loosening. Reliance, moreover, is not the only one-way force. The Act’s own anti-backsliding provision, § 7502(e), can hinder any future relaxation, and the implementation clock is already running—a district court has ordered EPA to complete final area designations under the new standard by February 2027. See 42 U.S.C. § 7502(e); Chamber Pet. 7.

And under the appeals court’s second holding, that rulemaking must be conducted with the agency’s eyes closed. Consideration of costs, attainability, or disruption is forbidden “at either stage.” Ky. Pet. App. 32a. The sole permissible criterion is one that, for a non-threshold pollutant, registers only reasons to go lower. Tightening demanded nothing beyond that partial supplement. Loosening will require the full rulemaking the agency bypassed—and even then, the only criterion the agency may consult is one that offers no ready reason ever to loosen.

This is not a grievance about any particular administration. The values this Court has enforced in its change-of-position cases—*Fox*, *Encino*, *Regents*—

are symmetry values: the same rules of reasoned transition apply whichever way policy moves.

The decision below writes asymmetry into the statute itself. An administration inclined to tighten may do so at will, on a record of its own choosing, and without weighing a single consequence. An administration inclined to reconsider inherits a full-dress rulemaking governed by a criterion that burdens its project from the start. Whatever one thinks of any given standard, no Congress enacted *that* scheme. The asymmetry is not one the political branches can cure—each administration simply inherits it in turn, as this case has already shown. Restoring the statute Congress wrote is work only this Court can do.

III. WAITING WILL NOT PRODUCE A BETTER CASE—ONLY A MORE ENTRENCHED ERROR.

Ordinarily the Court can let a question mature. Not this one. Congress channeled every challenge to a NAAQS rule into the D.C. Circuit alone. 42 U.S.C. § 7607(b)(1). The decision below is therefore the national rule today, and it will be the national rule in every future case. No other court of appeals can ever disagree with it, much less dislodge it, and under the law of the circuit, the published holding will govern each successive revision until this Court intervenes. Congress kept for itself the power to amend the Act; for now, the panel’s amendment controls instead.

Percolation is not merely unlikely; the ratchet forecloses it. Because the power effectively runs only one way, every future vehicle will look exactly like this one—a standard tightened off-cycle without thorough review, with designations, implementation plans, and

permitting consequences accumulating while any challenge winds through the exclusive forum, with the decision below as the binding precedent. Waiting for a better vehicle means waiting for this same vehicle—only arriving later, with more of those harmful consequences locked in. *See* Chamber Pet. 42–43.

And nothing confines the power to one use: each future administration inclined to tighten can turn the ratchet again (and again) on the same truncated basis, while the attainment and implementation framework—built on the premise of standards stable enough to plan against—absorbs revision after revision. Nor is the delay free—a revised NAAQS begins reordering primary conduct long before judicial review concludes (new projects must model their emissions against it from the standard’s effective date, *see* Chamber Pet. 11), so each round of waiting entrenches the panel’s reading a little further.

The question is as clean here as it will ever be. Both holdings were squarely presented, fully litigated through a change in administrations, and decided in a published opinion construing the statute *de novo* under *Loper Bright*. Ky. Pet. App. 36a (citing 603 U.S. at 412–13). There is no vehicle problem to wait out, no conflicting authority to wait for, and no factual dispute in the way. There is only the choice between answering the question now and answering it after the ratchet has turned yet again. Delay will not improve the question; it will only raise the price of answering it.

* * *

There is one more reason not to wait. *Whitman* upheld § 7409(b)(1) against a nondelegation attack because the discretion it confers is “well within the

outer limits of our nondelegation precedents.” 531 U.S. at 474. But the delegation the Court measured sat inside a statute of mandatory comprehensive review, independent scientific advice on a fixed schedule, and revision “in the same manner as promulgated.” § 7409(b)(1).

The panel’s reading subtracts the structure and keeps only the criterion—a criterion the court of appeals once described as leaving the agency “free to pick any point between zero and a hair below the concentrations yielding London’s Killer Fog.” *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1037 (D.C. Cir. 1999), *aff’d in part, rev’d in part sub nom. Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001). A standardless power to reset the nation’s air-quality baseline at any time, on a partial record, with consequences excluded from consideration by law, presses on the constitutional limits *Whitman* found comfortably satisfied.

The Court need not go near those limits to decide this case, and Amici do not ask it to. Between two readings of a statute—one that raises grave constitutional doubt, one that does not—the choice ordinarily makes itself. The panel chose the first, leaving the criterion alone while erasing both checks. The petitions supply the second: the 1977 thorough-review requirement, enforced as Congress wrote it, and *Whitman* as the modest, standard-setting principle that *Michigan* already confirmed. That choice asks nothing novel of this Court and keeps the statute where *Whitman* left it. It is the appeals court’s interpretation, not the petitioners’, that manufactures constitutional doubt. Granting review—and restoring the statute’s own limits—is the avoidance.

CONCLUSION

The Court should grant both petitions.

Respectfully submitted,

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