No. 19-835

In The
Supreme Court of the United States

VALERO ENERGY CORP., ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF PETITIONERS

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Amicus curiae National Association of Home Builders of the United States (NAHB) respectfully moves for leave of the Court to file the accompanying brief under Supreme Court Rules 21, 33.1, 37.2. Counsel for all parties received timely notice of *amicus curiae's* intent to file the brief, and all but one party has consented. The Renewable Fuels Association takes no position.

NAHB writes in support of the Petitioners because the issues presented, including setting appropriate bounds to the deference courts grant agencies in statutory interpretation, carry wide-ranging effects that impact the many regulations that govern residential construction.

NAHB frequently participates as a party litigant and *amicus curiae* in matters that involve federal agency adherence to Congressional directives and to the Administrative Procedure Act (APA). NAHB members are regulated by multiple federal agencies, in additional to state and local regulators, and are adversely impacted when agencies stray outside Congressional mandates or fail to comply with the APA's rulemaking requirements.

In the accompanying brief, NAHB cites several examples where its members have experienced agency action that ignores or subverts statutory directives, as well as situations where agencies have refused to consider relevant public comment provided through the rulemaking process.

Courts play a critical role in ensuring agency compliance with statute and procedure. Both

Petitioners and NAHB have experienced the consequences when agencies fail to adhere to Congressional mandate and refuse to consider public input. Therefore, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders of the United States ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Regulated communities – industries, municipalities, and individuals – rely on federal agencies' adherence to statute and compliance with the Administrative Procedure Act (APA) to produce effective regulation that accounts for these communities' real-world experience. Congress sets the stage for permissible agency action, and the cornerstone of the APA process is the opportunity for the public to comment on an agency's proposed activity.

In this case, the U.S. Environmental Protection Agency (EPA) has ignored both Congressional directive and relevant public comments, causing significant hardship and uncertainty for the affected regulated industries. But the Petitioners are not alone in this experience – *amicus curiae* NAHB has also experienced situations, described in more detail below, where agencies have failed to adhere to statutory requirements or refused to consider meaningful public input.

This Petition presents the Court with an opportunity to ensure that agencies adhere to clear Congressional mandates and accept relevant public comment. Additionally, consideration of the U.S. Court of Appeals for the District of Columbia's use of "extreme deference" is appropriate given the particularly egregious application in this case.

ARGUMENT

I. REGULATED COMMUNITIES SUFFER WHEN AGENCIES CANNOT BE HELD ACCOUNTABLE BY CONGRESS AND THE PUBLIC.

The Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. was enacted in 1946 to ensure that regulated communities could maintain access to an increasingly bureaucratic government as it developed the laws and rules that govern our activities. *See* U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act*, 1947 (describing the basic purposes of the APA)[2]. While the administrative process can be lengthy and burdensome, it is critical to ensuring that those regulated retain a voice in how they are regulated.

Two primary avenues by which regulated communities exercise this voice – through their elected representatives in Congress and through the APA notice and comment process – are threatened by EPA's actions and the D.C. Circuit's decisions in Petitioners' case.

A. When Agencies Fail to Follow the Commands of Congress, Regulated Communities Experience Uncertainty

NAHB wholeheartedly agrees with Petitioners that "agencies must obey clear congressional commands,"

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[2] *Available at* https://fall.fsulawrc.com/admin/1947coverhtml (*last visited* Jan. 30, 2020).

and that courts play a critical role in enforcing "the line separating lawful exercise of delegated power from unaccountable agency action." Petition For A Writ of Certiorari at 5, *Valero Energy Corp. & Am. Fuel & Petrochemical Mfr*s., 2019 WL 7423389 (No. 19-835), ("Petitioners Brief"). Like Petitioners, NAHB members have experienced regulatory uncertainty and arbitrary outcomes caused when agencies stray from statutory text.

For example, NAHB was a petitioner before this Court in *Utility Air Regulatory Group et al. v. EPA*, 573 U.S. 302 (2014). It came as a surprise to many that NAHB needed to litigate a Clean Air Act (CAA) "prevention of significant deterioration" (PSD) rule since home building has never been considered a major stationary source or subject to CAA permitting requirements. However, when EPA interpreted the CAA to require PSD permits for sources emitting more than 250 tons per year of carbon dioxide, millions of putative new sources became eligible for PSD regulation, including apartment buildings and even some single family homes. *Id* at 328. NAHB members were suddenly thrown into a regulatory program that threatened multi-year construction delays, devastating to an industry dependent on financing mechanisms with short timeframes. EPA's proffered solution – to raise the statutory limit through regulation – was in reality of little assistance because of its legal vulnerability.

Thus, EPA's refusal to adhere to the clear direction of Congress launched NAHB headlong into expensive, protracted litigation. In the end, this

Court held that "EPA's rewriting of the statutory thresholds was impermissible" and "reaffirm[ed] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Id.* at 325, 328. Because of this Court's holding NAHB's members were spared the need to navigate CAA permitting that would have brought important housing projects to a halt. But it never should have made it that far.

The Occupational Safety & Health Administration's (OSHA) Final Rule to Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29,624 (May 12, 2016) ("Electronic Recordkeeping Rule")[3], provides another example of an agency that has attempted to rewrite its statutory authority. OSHA originally sought the electronic submission of detailed employee injury information on workplace incidents, but subsequently revamped the rule it published in 2016 to require only a more general report that does not divulge sensitive employee health information. 84 Fed. Reg. 380 (Jan. 25, 2019). However, OSHA decided to retain certain "anti-retaliatory provisions" included in the original rule designed in OSHA's view to prevent employers from

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[3] After OSHA finalized the Electronic Recordkeeping rule, NAHB and several other organizations challenged the legality of the final rule, alleging, among other things, that the Electronic Recordkeeping Rule exceeded OSHA's statutory authority, was arbitrary and capricious, and violated the APA. *See* Complaint, *National Association of Home Builders of the United States, et al. v. Perez, et al.,* 2017 WL 75736 (No. 5:17-cv-00009) (W.D. Okla. Jan. 4, 2017).

underreporting employee injuries. 29 CFR § 1904.35(b)(1) and § 1904.36.

Moreover, OSHA asserted it had the authority to issue citations to employers that engage in alleged retaliatory activity, despite clear statutory language. Section 11(c) of the Occupational Safety and Health Act (OSH Act) specifies that the federal district courts, not OSHA, have jurisdiction to hear and decide such claims. 29 U.S.C. § 660(c)(2) ("In any such action the United States district courts shall have jurisdiction.").

Once again, NAHB and its members face regulatory uncertainty because an agency has deviated from the language of the statute. Litigation in this matter is currently at the district court level. It could conceivably take years for NAHB to receive clarity, especially if the lower courts fail to rein in the agency's unlawful action.

In Petitioners' case, EPA has rewritten its statutory obligations by ignoring altogether the requirement to annually consider the make-up of obligated parties. Instead, the agency made a one-time determination that it has repeatedly refused to reconsider, despite the statute's clear directive. Because NAHB has been – and continues to be – injured by similar conduct from federal agencies, NAHB urges this Court to hear Petitioners' case.

B. When Agencies Shut Out Relevant Information, Regulated Communities Cannot Be Heard by Their Government

As Petitioners relay, EPA has repeatedly refused to consider their comments concerning obligated parties, despite the relevance of Petitioners' comments to EPA's request for input on why the Renewable Fuels Program (RFS) is going terribly awry. *See* Petitioners Brief at 8 (describing EPA's assessments that statutory volume targets were "impossible to achieve.") (internal citations omitted).

As with agencies' failures to adhere to Congressional directives, NAHB has also experienced agency refusals to consider relevant, critical information offered during public comment periods. Returning to the Electronic Recordkeeping Rule, OSHA explicitly refused to consider public comments concerning the anti-retaliatory regulatory provisions the agency first adopted in 2016. In its proposal to amend the 2016 rule to remove the electronic recordkeeping requirements involving the posting of individual injury information, OSHA repeatedly stated that it "is only seeking comment on the proposed changes to § 1904.41, and not on any other aspects of part 1904." 83 Fed. Reg. 36,494, 36,497, 36,500. However, OSHA's assertion it has authority to hear and decide anti-retaliation claims is unchanged and remains a concern in the Final Rule. Thus the agency deemed these comments concerning § 1904.36 off-limits. NAHB is therefore in the unenviable position – again – of having to litigate OSHA's refusal, at significant expense and while OSHA continues its unlawful practice of

issuing citations in contravention of OSH Act Section 11(c).

NAHB faced a more subtle twist on this issue when EPA sought to bake a voluntary program into a final rule with no notice to the public. In 2015, EPA adopted the Clean Power Plan, a regulation ostensibly governing greenhouse gas emissions from power plants. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,662 (Oct. 23, 2015). Once again, NAHB's members found themselves drawn into the fray of a regulation that by all appearances should not apply to home building. EPA's final rule left the door open to the use of end-use energy efficiency for compliance with the rule's obligations. This is a key concern of NAHB's due to the expense of overly restrictive energy efficiency building codes. Additionally, EPA's actions threatened successful voluntary state and local end-use energy efficiency programs. These programs are used by NAHB's members to cost-effectively deliver energy efficiency and utility cost savings to home owners.

Moreover, the final rule contained a brand-new program not previously proposed: the "Clean Energy Incentive Program" (CEIP). 80 Fed. Reg. at 64,664. (describing the CEIP in broad strokes and noting that EPA will "address design and implementation details . . . in a subsequent action." *Id.* at 64,676). EPA provided a little more information in its proposed "Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January

8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule," 80 Fed. Reg. 64,966 (Oct. 23, 2015) ("Proposed Federal Plan"). In this proposal, EPA described the CEIP as being "outlined and initiated in the final [emission guidelines]." *Id.* at 64,969. Additionally, a more detailed request for information was very quietly made through a posting on EPA's website that was circulated to a small number of organizations. *See* EPA-HQ-OAR-2013-0602, National Association of Home Builders' Petition for Reconsideration of the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Generating Units, Dec. 22, 2015 (describing the now-defunct webpage and NAHB's lack of notice).

However, as EPA had already finalized the CEIP in the final Clean Power Plan rule, NAHB was unable in either post hoc proceeding to comment on whether the CEIP should exist in the first place; whether it tracked with EPA's statutory authority; whether it related to the regulatory purposes of the Clean Power Plan; and the extent to which such a program impacted NAHB's interests. Instead, the CEIP was a fait accompli, and NAHB was limited to providing input on the specifics and logistics in a disjointed and disorganized series of proceedings.

When the public is unable to comment fully and provide federal agencies with pertinent information, the final product will suffer. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 561-2 (2009)(Breyer, J., dissenting) (describing the FCC's failure to consider certain comments and citing to *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987)

"Notice and comment rulemaking procedures obligate the FCC to respond to *all* significant comments, for the opportunity to comment is meaningless unless the agency responds to significant points raised by the public") (emphasis added)(internal citations omitted). The regulation will not encompass the full needs of the communities it governs and will ultimately be less successful.

Agencies are also obligated to consider relevant information received from the public through notice and comment rulemaking. *See Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal citations omitted). To be sure, there are public comments that go beyond the scope of a proposed regulatory action. But the Petitioners' and NAHB's comments are clearly relevant and deserve consideration. In the Petitioners' case, its comments directly addressed EPA's request for comment on how to fix the RFS program. And in NAHB's case, its comments strike directly at the action OSHA seeks to take. In the example of the CEIP, NAHB sought to submit comments on the origin of a brand new program inserted for the first time into a final rule.

NAHB urges this Court to grant the petition to ensure that agencies consider all relevant comments brought before them.

II. PETITIONERS' CASE EXEMPLIFIES WHY THIS COURT SHOULD REJECT THE NOTION OF "EXTREME DEFERENCE" IN THE RULEMAKING CONTEXT.

A. "Extreme Deference" Has No Place in APA Judicial Review

So-called "extreme deference" to administrative agencies has its roots in *Baltimore Gas & Electric Co., et al. v. Natural Resources Defense Council*, 462 U.S. 87 (1983). In that case, decided the year before *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court held that because the Nuclear Regulatory Commission had made "predictions, within its area of special expertise, at the frontiers of science . . . a reviewing court must generally be at its most deferential." 462 U.S. at 103. To date, this Court has not relied heavily on "extreme deference" – instead, this Court's two-part test in *Chevron* governs most litigation concerning agency deference to statutory interpretations. *See* 467 U.S. at 842-3 (describing the two questions confronting agencies when interpreting statutes: first, whether Congress has directly spoken, and second, if not, whether the "agency's answer is based on a permissible construction of the statute."). In *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), the Court returned briefly to *Baltimore Gas & Electric*, recognizing the dispute before it as "a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Id.* at 376. While this Court cited *Baltimore Gas & Electric*, the conclusion ultimately drawn is simply that "we cannot accept respondents'

supposition that . . . the Corps' decision 'deserves no deference.' Accordingly, as long as the Corps' decision . . . was not 'arbitrary or capricious,' it should not be set aside." *Id.* at 377. Thus, *Chevron* analysis applied, and extreme deference did not play a role in the outcome of the litigation.

Other federal Courts of Appeal have followed suit. For example, the Sixth Circuit in *TNS, Inc. v. N.L.R.B.*, 296 F.3d 384 (6th Cir. 2002) cited *Baltimore Gas & Electric* and reiterated the proposition that "in general . . . scientific regulatory agencies such as the NRC should be given extreme deference within their area of expertise." *Id.* at 398. However, the court then declined to apply extreme deference in that case. *Id.* at 399 (holding the Board was not beholden to another agency's conclusion).

Another example from the Seventh Circuit, *Bloomington Nat'l Bank v. Telfer*, 916 F.2d 1305 (7th Cir. 1990) described this Court's holdings in *Baltimore Gas & Electric* and *Chevron*, and ultimately applied the *Chevron* test. *Id.* at 1309 (rejecting petitioner's extreme deference argument by finding the statute to be unambiguous under *Chevron).*

Thus, while courts may occasionally cite to *Baltimore Gas & Electric* or the need to be highly deferential when a dispute turns on scientific fact within the special expertise of the agency, most courts nonetheless apply the level of deference stipulated by *Chevron*'s step two. *See, e.g., Southwestern Electric Power Co. v. U.S. EPA,* 920 F.3d 999, 1028-9 (5th Cir. 2019) (applying *Chevron*

step two to a question of whether EPA's "decision to set surface impoundments as BAT for leachate is" permissible under the statute); *Secretary of Labor v. Cranesville Aggregate Companies, Inc.,* 878 F.3d 25, 33 (2d Cir. 2017) (applying *Chevron* step two to determine whether the OSH Act or Mine Act should govern). These courts are correct in their application.

The D.C. Circuit is the exception in its treatment of *Baltimore Gas & Electric*, however. In a number of cases, including the Petitioners' case, it has espoused the notion that "we give an 'extreme degree of deference' to the EPA's evaluation of 'scientific data within its technical expertise.'" *American Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 574 (D.C. Cir. 2019)(internal citations omitted); *Mississippi Comm'n on Envtl. Quality v. EPA,* 790 F.3d 138, 150 (D.C. Cir. 2015); *Catawba County, N.C. v. EPA*, 571 F.3d 20, 41 (D.C. Cir. 2009). The D.C. Circuit has also added an additional wrinkle to extreme deference by deeming it particularly important when reviewing "EPA's administration of the complicated provisions of the Clean Air Act." *Id.*

As this Court has held numerous times, agency deference is appropriate where a statute is ambiguous and the agency's interpretation is "reasonable." *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016). In determining the reasonableness of an agency's action, a number of factors come into play. For example, the interpretation must be "reasonable in light of the statute's text and the overall statutory scheme," *National Ass'n of Home Builders v.*

Defenders of Wildlife, 551 U.S. 644, 666 (2007); it must "rest[] on a consideration of the relevant factors," *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43); and an agency's interpretation must not "bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization." *Utility Air,* 573 U.S. at 324. Courts have long rationalized this deference as resulting from the agency's "specialized knowledge" *See, e.g., Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (describing the deference due to agencies where the regulation involves a "highly technical regulatory program" and the evaluation of criteria requires "significant expertise"(internal citations omitted)).

Most recently, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court recognized in a different context that "agencies (unlike courts) have 'unique expertise,' often of a scientific or technical nature." *Id.* at 2413. However, these factors all support the rationale for *Chevron* deference, not "extreme" deference. Regardless of the subject matter, courts still have an obligation to ensure that an agency's interpretation is reasonable – that it comports with the statute and regulatory framework and considers relevant factors.

The D.C. Circuit's stated reliance on "extreme deference" impermissibly adds an additional barrier for parties to overcome when they challenge agency action. It fosters the "reflexive" deference that this Court has sought to discourage. *Kisor*, 139 S. Ct. at 2415. Even worse, it is particularly misplaced here,

where the D.C. Circuit deferred to an agency interpretation based on knowledge far outside its area of specialized expertise.

B. Even if "Extreme Deference" Exists, it is Inapplicable Here

Even if the D.C. Circuit is correct that "extreme deference" is warranted for "EPA's evaluation of 'scientific data within its technical expertise,'" *American Fuel & Petrochem.,* 937 F.3d at 574, a proposition NAHB disputes, the facts of this case make clear that the issues here fall well outside EPA's technical expertise.

As Petitioners explain in their brief, the RFS program was established by statute with the goal of increasing the production and use of renewable fuels. Petitioners Brief at 5. The provision at issue involves the point of obligation – which of the entities listed in the statute (refineries, blenders, distributors, and importers) should be designated "obligated parties" and be required to acquire and retire Renewable Identification Numbers (RINs). Petitioners Brief at 6.

EPA's area of specialized knowledge is dictated by the statutes Congress has "entrusted to" its administration. *Chevron*, 467 U.S. at 844; *see also Hydro Resources, Inc. v. EPA*, 608 F.3d 1131, 1146 (10th Cir. 2010)("Courts do not, however, afford the same deference to an agency's interpretation of a statute lying outside the compass of its particular expertise and special charge to administer."). The specialized expertise EPA is expected to maintain

involves matters of environmental science – air and water pollutants, waste treatment, toxic substance characteristics, for example. *See, e.g., Hydro Resources,* 608 F.3d at 1146 (holding that EPA should not receive deference where a statutory provision did not "specially involv[e] environmental regulation.").

Thus, there is no science within the agency's expertise underpinning the decisions concerning obligated parties. Even if one were to include "the groping endeavors of . . . economics" as science, *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 581 (1972)(Douglas, J., dissenting)(internal citations omitted), economics is not within EPA's technical expertise. Extreme deference to EPA on an economical quandary concerning the functioning of fuel markets is therefore highly inappropriate.

CONCLUSION

This case presents an excellent opportunity for this Court to consider agency adherence to statute, responsiveness to public comment, and appropriate bounds of "extreme deference." NAHB respectfully asks this Court to grant the petition.

Dated: February 3, 2020

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