

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 United
States Court of Appeals for the D.C. Circuit**

**BRIEF OF *AMICI CURIAE* AMERICAN FUEL &
PETROCHEMICAL MANUFACTURERS,
ASSOCIATION OF ELECTRIC COMPANIES OF
TEXAS, BUSINESS ASSOCIATION FOR
EFFECTIVE REGULATION, TEXAS
AGGREGATES & CONCRETE ASSOCIATION,
TEXAS ASSOCIATION OF MANUFACTURERS,
TEXAS CHEMISTRY COUNCIL, AND TEXAS OIL
& GAS ASSOCIATION 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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INTEREST OF *AMICI CURIAE*

Amici curiae are the American Fuel & Petrochemical Manufacturers (“AFPM”), the Association of Electric Companies of Texas, Inc. (“AECT”), the Business Association for Effective Regulation (“BAER”), the Texas Aggregates & Concrete Association (“TACA”), the Texas Association of Manufacturers (“TAM”), the Texas Chemistry Council (“TCC”), and the Texas Oil & Gas Association (“TXOGA”).¹

Amici curiae are national and regional industry trade associations whose members build and operate the industrial and energy facilities subject to the Environmental Protection Agency’s revised annual PM_{2.5} National Ambient Air Quality Standard (“NAAQS”). Today’s economy is rapidly changing, as is the demand for significant investment in power and manufacturing infrastructure. The important projects that *amici*’s members have undertaken to meet these evolving demands rely on air-quality authorizations that are much harder to obtain under EPA’s revised PM_{2.5} standard.

The American Fuel & Petrochemical Manufacturers is the leading trade association representing the makers of the fuels that keep Americans moving and the petrochemicals that are essential building blocks of modern life. AFPM’s members provide critical energy and chemical products and support millions of American jobs. AFPM’s members operate refineries and petrochemical plants that

¹Pursuant to this Court’s Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37.2, counsel for *amici* timely notified counsel of record for all parties of *amici*’s intention to file this brief at least 10 days before the due date for filing.

are considered major stationary sources under the Clean Air Act, which means those facilities must contend with the additional requirements imposed by the revised standard.

The Association of Electric Companies of Texas, Inc. is a statewide trade organization whose member companies generate, transmit, and distribute the electricity that serves Texas homes, businesses, and industry. AECT's members must obtain preconstruction air permits for the new and modified generating capacity needed to serve rapidly evolving demand from electrification and manufacturing.

The Business Association for Effective Regulation is an association of businesses whose mission includes advancing the mutual goals of environmental protection and a strong economy. BAER's members own and operate industrial facilities in Texas and elsewhere in the United States, including refineries and petrochemical plants, and the PM_{2.5} revisions directly affect their operations.

The Texas Aggregates & Concrete Association is the principal association for the aggregates, cement, concrete, and associated industries in Texas, whose members supply the materials from which the State's roads, bridges, pipelines, plants, and power facilities are built. TACA's members operate quarries, cement kilns, and concrete plants that supply all business sectors and require air authorizations to open, expand, or relocate as construction demand shifts.

The Texas Association of Manufacturers represents more than 500 large and small companies from every manufacturing sector in Texas, an industry that employs more than 982,000 Texans. Its members' facilities range from steel fabrication to advanced electronics assembly, and they require preconstruction permits for the new and

modified capacity that expanding domestic manufacturing requires.

The Texas Chemistry Council is a statewide trade association of chemical manufacturers whose approximately 70 member companies operate more than 200 manufacturing and research facilities across Texas, including the concentration of chemical production capacity along the Texas Gulf Coast that is among the largest in the world and in core areas affected by the revised standard.

The Texas Oil & Gas Association, founded in 1919, is the oldest and largest oil and natural gas trade association in Texas and the only one representing every segment of the industry. Its members produce approximately 90% of the crude oil and natural gas produced in Texas, the nation's leading producer of both, and they operate the gathering, processing, transportation, and refining infrastructure that moves and converts those products.

Collectively, *amici*'s members span the industrial economy: fuel refining; petrochemical and chemical manufacturing; oil and gas exploration, production, and transportation; electric power generation; aggregates and cement production; and general manufacturing. EPA's 2024 revision of the annual PM_{2.5} NAAQS (the "2024 Rule") set that standard at 9.0 micrograms per cubic meter. Building new infrastructure and implementing planned investments requires air-quality permit authorizations from State and federal agencies, and those authorizations are now measured against the more stringent standard. EPA tightened the standard even as air quality steadily improved: national average PM_{2.5} concentrations fell 43% over the first two decades of this century, from 13.5 to 7.6 micrograms per cubic meter. Ky. Pet. App. 100a; Ky. Pet. 5–6. But in the areas where *amici*'s members operate, ambient concentrations run near 8.0 micrograms per cubic meter. The single microgram that separates that figure from the revised standard is the entire margin within

which members must site, design, and permit new industrial capacity. That margin is far too narrow to accommodate the power and manufacturing investment that today's economy demands.

SUMMARY OF ARGUMENT

EPA's mid-cycle revision of the PM_{2.5} NAAQS sets the new standard close to the level of pollution that already exists in the ambient air as a result of wildfires, road dust, campfires, fireworks, and the like. Those sources are nearly impossible to control. The upshot: sources that are possible to control—sources that create the electricity and fuel that run the national economy—bear the brunt of the rule. The rule's inflexibility makes it nearly impossible to build. The safety valves are practically unavailable. For the reasons given in the petitions, the D.C. Circuit's decision is legally erroneous. If this Court does not step in, *amici*'s members—and the economy more generally—will face significant harm.

ARGUMENT

The 2024 Rule harms *amici*'s members in two stages. First, in areas that currently meet the national air-quality standards, the revision immediately tightens the preconstruction permitting that every new or modified major facility must clear, and it applies not only to future permit applications but to those already pending. Second, once EPA designates areas as nonattainment under the revised standard—which a district court has ordered it to do by February 2027—those areas become subject to a separate and considerably stricter set of requirements, and the States must rewrite their implementation plans. The compounding nature of these harms makes this Court's review all the more urgent.

I. THE REVISED STANDARD HAS ALREADY COLLAPSED THE PRACTICAL ABILITY TO PERMIT NEW AND MODIFIED INDUSTRIAL FACILITIES IN ATTAINMENT AREAS

EPA’s decision to lower the annual standard from 12.0 to 9.0 micrograms per cubic meter drastically reduced the margin between ambient pollutant levels and the governing standard. In much of the country, it eliminated that margin altogether. As a result, an applicant seeking to build a new facility or expand an existing operation faces near-insurmountable hurdles in meeting the new standard. Project development is now virtually impossible for most industrial sectors.

A. In Areas That Meet The Standard, The Margin Available For New Permits Has Effectively Vanished

Under the Clean Air Act, any new or modified “major emitting facility” proposed for construction in an attainment area—that is, an area currently meeting the national air-quality standards—must demonstrate, through technical modeling, that its emissions will not cause or contribute to a violation of any NAAQS. 42 U.S.C. § 7475(a)(3).²

² After the 2024 Rule, nearly a quarter of the country could be designated as “nonattainment” because the existing PM_{2.5} concentrations in those areas exceed the revised standard—a remarkable measure of the 2024 Rule’s overreach. See Earthjustice, *Assessing 2024 PM_{2.5} Standard Implementation So Far: Who’s on Track to Get Clean Air and Who’s Left Behind* 2, 13–14 & figs. 3–4 (Dec. 2025), https://earthjustice.org/wp-content/uploads/2025/12/ej_pm2.5white-paper.pdf; Chad S. Whiteman, Vice President, Env’t & Regul. Affairs, Glob. Energy Inst., U.S. Chamber of Com., *Short-Circuiting Progress: How the Clean Air Act’s NAAQS Program Impedes Economic Growth* 9–10 & fig.3 (June 11, 2025) (written statement before the Subcomm. on Env’t, H. Comm. on Energy & Com.), <https://www.congress.gov/119/meeting/house/118385/witnesses/HHRG-119-IF18-Wstate-WhitemanC-20250611.pdf>. As discussed later, *infra* Part II,

An applicant who makes such a demonstration receives a “Prevention of Significant Deterioration” (or “PSD”) permit.

The PSD modeling requirement is cumulative. That means the modeled impact of the proposed source is added to existing ambient concentrations (*i.e.*, what already exists in the air) and to the contributions of other nearby permitted sources. If that total exceeds the NAAQS at any receptor, the permit cannot be issued. The requirement applies even when the proposed source’s own incremental addition is small in absolute terms.

Lowering the standard from 12.0 to 9.0 micrograms per cubic meter shrank the available margin by three micrograms—25%—regardless of an area’s attainment status or ambient levels of PM_{2.5}. A PSD applicant must fit its own modeled level of PM_{2.5} emissions, plus the impact of other permitted sources, into the difference between the existing ambient concentrations and the standard. After EPA’s mid-cycle revision, however, as many as half of the monitored locations in the United States now have *less than one* microgram available to accommodate new projects. Take, for example, the areas in Texas where many industrial facilities are based: monitored concentrations there run around 8.0 micrograms (or higher). That leaves less than a single microgram remaining for the cumulative demonstrations.

Given the diminished margin available under the new rule, a single compressor station, a modest process heater, or a replacement boiler can fail cumulative modeling once its contribution is added to elevated background concentrations. Projects that would have been permitted without difficulty under the prior 12.0-microgram standard now

there are other, far-more-onerous regulatory requirements that apply in nonattainment areas as a result of the 2024 Rule.

face modeling failures that hinder approval and thwart the construction of needed industrial capacity.³

B. The Safe Harbor That Spares Small Projects From Full Modeling Is Largely Unavailable

The 2024 Rule also drains the usefulness from a pre-existing safe harbor that allows permits for new facilities that will not significantly affect the NAAQS. Under longstanding EPA guidance, if an applicant’s modeled impact falls below a designated Significant Impact Level (“SIL”), the permitting authority may conclude that the source does not cause or contribute to a violation, sparing the applicant from the full cumulative analysis. U.S. Env’t Prot. Agency, Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program 17–18 (Apr. 17, 2018) (“2018 SIL Guidance”). Where almost no margin remains, an applicant must often rely on that safe harbor to obtain a PSD permit at all.

Unfortunately, the SIL metric—which was already stringent—has become only more so under the new rule. EPA set the SIL threshold at 0.3 micrograms per cubic meter in a rulemaking promulgated in 2010. 75 Fed. Reg. 64,864, 64,890 (Oct. 20, 2010); 40 C.F.R. § 51.165(b)(2). Under this rule, if a project applicant can demonstrate that its emissions will not exceed 0.3 micrograms per cubic meter of PM_{2.5}, it can proceed without the full cumulative analysis. In 2018, however, EPA issued guidance reducing

³ EPA guidance requires a PM_{2.5} impact assessment when the pollutant triggering PSD review is a precursor to PM_{2.5}, such as sulfur dioxide (SO₂) or nitrogen oxides (NO_x), even if PM_{2.5} itself does not trigger PSD review. See 40 C.F.R. pt. 51, app. W. That guidance sweeps in refineries, chemical plants, and power facilities whose primary emissions are gaseous precursors other than PM_{2.5}. Because NO_x and SO₂ are ordinary products of combustion, the set of facilities encompassed by the revised standard is far larger than if the standard reached only major stationary sources of PM_{2.5} itself.

the SIL to a recommended 0.2 micrograms per cubic meter. 2018 SIL Guidance 15–16. After EPA revised the PM_{2.5} NAAQS in 2024, it supplemented that guidance and recommended an even lower SIL of *0.13 micrograms per cubic meter*. U.S. Env’t Prot. Agency, Supplement to the Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program 5–6 (Apr. 30, 2024) (“2024 SIL Supplement”).

The now-drastically-reduced SIL renders the safe harbor largely illusory. The vast majority of new sources exceed the minuscule 0.13-microgram safe harbor.

II. THE HARM WILL DEEPEN AS DESIGNATIONS, PLANS, AND NONATTAINMENT CONTROLS TAKE EFFECT, FURTHER DEPRESSING INVESTMENT IN NEEDED INFRASTRUCTURE

The permitting collapse described above is only the leading edge of the 2024 Rule’s harm. Its consequences are already being priced into investment decisions made years before any permit application is filed. And they will deepen as EPA designates nonattainment areas under the new NAAQS, States revise their implementation plans, and the resulting nonattainment control obligations take hold.

Permitting uncertainty affects capital allocation first. Sponsors of long-lead projects, including compressor stations, liquefied natural gas export facilities, and petrochemical plants, must commit engineering, land, and equipment capital years before a permit issues. They now must do so despite the inability to reliably forecast modeling outcomes, redesign risk, and permitting timelines because the governing standard falls within a single microgram of measured ambient concentrations. Where approvability cannot be predicted, the rational response is to defer a project, shrink it, or move it to another location,

including outside the United States. Those decisions precede permit applications, so they leave no trace in EPA’s administrative record. But they are the first and most durable economic cost of the 2024 Rule, falling hardest on the new generation and manufacturing capacity that a growing economy requires.

Those harms will compound once States and EPA begin designating areas as attainment or nonattainment under the new NAAQS. Areas designated nonattainment face: a stricter form of preconstruction review, known as nonattainment new source review, under which a new or modified major source must both install the most stringent controls available and obtain offsetting emission reductions from other sources in the area; transportation conformity requirements, which bar federal approval or funding of highway and transit projects unless projected emissions stay within the ceilings set in the State’s plan; and revisions to the State’s implementation plan, due within eighteen months of designation. 42 U.S.C. §§ 7502(c), 7503(a), 7506(c), 7513a(a)(2); see *Catawba County, N.C. v. EPA*, 571 F.3d 20, 26 (D.C. Cir. 2009). A lower NAAQS makes States’ obligations “more difficult and onerous.” See *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); Ky. Pet. 15. Industry bears the corresponding permitting, offset, and conformity obligations.

In nonattainment areas, new and modified major sources must “comply with the lowest achievable emission rate,” 42 U.S.C. § 7503(a)(2), which means the most stringent limit in any State’s plan or achieved in practice. Existing sources must implement “reasonably available [emission] control measures as expeditiously as practicable.” *Id.* § 7502(c)(1). Those obligations run against a statutory attainment deadline, and together they “often mean” that industry within a nonattainment area “must implement potentially expensive technology or expensive process changes to reduce pollution levels” on a

compressed schedule. *Miss. Comm'n on Env't Quality v. EPA*, 790 F.3d 138, 146 (D.C. Cir. 2015). A lower NAAQS means areas are more likely to be designated nonattainment, imposing those heightened costs on industry and the economy.

Offsets theoretically provide a mechanism for sources in nonattainment areas to comply with governing limits by obtaining emission reductions from other lower-emitting, already-compliant sources in the area. 42 U.S.C. § 7503(a)(1)(A). But the offset mechanism presupposes a market for offsets. Offsets are marketable credits created when an emission source achieves an *extra* emissions reduction *below* that needed to attain the air-quality standard. For PM_{2.5}, there is no meaningful offset market—and offset creation will be even less feasible under the new NAAQS. This is because a large majority of PM_{2.5} emissions originate from fires, dust, and agricultural activity.⁴ As a result, sources that might have had offsets to sell under the higher NAAQS now yield few of the discrete, quantifiable reductions that they could sell as PM_{2.5} offsets. And where available offset credits are scarcer, their price increases. Sources that need to purchase offsets to comply with the lower NAAQS face higher costs that, ultimately, negatively affect employment and the economy. In *amici*'s experience, a tighter offset market imposes costs and delays that fall hardest on smaller projects and communities most in need of industrial and infrastructure investment.

Amici anticipate that these problems will develop quickly under the new NAAQS as many metropolitan areas are designated nonattainment in the next round of designations. These nonattainment designations will include

⁴ See U.S. Env't Prot. Agency, 2020 NEI Supporting Data and Summaries, <https://www.epa.gov/air-emissions-inventories/2020-nei-supporting-data-and-summaries>; Whiteman, *supra*, at 7 fig.2.

areas whose air quality has meaningfully improved but that still cannot meet a standard set so close to concentrations that States have limited ability to control. States must nonetheless plan for attainment of a standard that local emission reductions alone may be unable to achieve.

Once costly obligations have been imposed on nonattainment areas under the new NAAQS, they are exceedingly difficult to unwind. This is due to the Clean Air Act's anti-backsliding provision. Under that provision, even if EPA were to relax the PM_{2.5} NAAQS in the future, the Act requires it to promulgate requirements for every nonattainment area that provide "controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation." 42 U.S.C. § 7502(e). Thus, burdensome control obligations that took effect before a future NAAQS revision persist indefinitely. The anti-backsliding provision "looms ever larger as implementation of the standard continues apace." Chamber Pet. 7.

III. EPA REFUSED TO CONSIDER THESE NEGATIVE CONSEQUENCES

EPA did not adequately confront the predictable and damaging economic outcomes of its action. The agency acknowledged that "[a] number of commenters contend that revising the PM NAAQS will impose harm, including economic impacts, employment impacts, exacerbating poverty, threatening electric grid reliability, national security risk, impacts on clean energy transition, and timing concerns, among others." U.S. Env't Prot. Agency, Response to Comments, EPA-HQ-OAR-2015-0072-6010, Chamber Pet. App. 495a–496a ("Response to Comments"). But it did not engage with the substance. The agency dismissed the supporting analyses and concluded that "such concerns would not be valid considerations for this action" because the Clean Air Act "unambiguously

bars cost considerations from the NAAQS-setting process.” Response to Comments, Chamber Pet. App. 496a (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 471 (2001)). EPA similarly avoided the commenters’ explanation that the new standard would be unattainable in much of the country: “To the extent that the comments related to implementation of the NAAQS implicate consideration of the costs of implementation or consideration of attainability and technological feasibility, those are not relevant considerations in making decisions about whether to revise the NAAQS.” *Id.* at 492a.

This was a *non sequitur*. *Amici* do not contend that the effects on their members and the broader economy override the protection of public health. They contend that EPA was required to weigh those effects before opting to reopen a standard it had examined and retained just three years earlier. Agencies “have long treated cost as a centrally relevant factor when deciding whether to regulate,” because “reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.” *Michigan v. EPA*, 576 U.S. 743, 752–753 (2015). It is unreasonable to read a grant of discretion—if EPA has any discretion to reopen a standard mid-cycle at all—as an invitation to ignore cost. “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.” *Id.* at 752. Under the decision below, EPA was barred from weighing the permitting and operational consequences that commenters described at either stage—when deciding whether to reopen the standard and when selecting its level. Ky. Pet. App. 30a.

IV. ONLY THIS COURT CAN CORRECT THE DECISION BELOW

No other court will revisit the two holdings below. And each step of the rule’s implementation narrows what a later correction could accomplish.

National ambient air quality standards “are the engine that drives nearly all of Title I of the [Clean Air Act]” and “affect the entire national economy.” *Whitman*, 531 U.S. at 468, 475. Implementation of such a standard is the “heart” of the Act. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976). Once a standard issues, the Act “shifts the burden to States to propose plans adequate for compliance.” *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014). But States and regulated parties cannot contest the standard itself at any later implementation stage. 42 U.S.C. § 7607(b)(1), (b)(2); *Union Elec. Co.*, 427 U.S. at 253–254.

The statutory structure therefore places a premium on searching analysis before the standard is changed. Section 109(d)(1) requires EPA to conduct a “thorough review” of the air-quality criteria and NAAQS. 42 U.S.C. § 7409(d)(1). This review is a “condition precedent to standard-setting.” Ky. Pet. 17. The D.C. Circuit—the court that holds exclusive original jurisdiction to review challenges to the NAAQS—held that EPA could revise the standard without a thorough review merely because it acted earlier or more frequently than the statutory interval permits. The court also held that EPA may not consider costs or attainability when deciding whether to undertake that discretionary revision. EPA itself confessed error and moved to vacate, Ky. Pet. 11–12, but the court of appeals upheld the rule on a theory grounded in section 109(b) that EPA never invoked and had expressly disavowed. Chamber Pet. 6–7.

A thorough review here would have counseled restraint before revising the standard. For more than four decades, EPA never revised a NAAQS without such a review, and EPA acknowledged that the 2024 Rule was the first. Chamber Pet. 4, 6, 16. That customary practice gave States, regulated parties, and communities reason to expect a complete scientific review before new implementation burdens were imposed. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (“Longstanding policies” can “engender[] serious reliance interests.”). Unsettling that expectation carries concrete costs: pollution-control investments designed and financed to meet a standard set on the ordinary review cycle can be rendered inadequate within a few years, stranding capital that would otherwise have served a facility for decades.

Despite these settled reliance interests, the D.C. Circuit held that “economic considerations and attainability” are impermissible at any step of “the NAAQS-setting process.” Ky. Pet. App. 30a. The court acknowledged the distinction between “*formulating* the NAAQS” and the “*anterior* decision” whether to review the standard at all, but did “not see” how that distinction “would permit the Administrator to consider costs at either stage.” *Id.* at 32a. No decisionmaker therefore weighs these consequences before the revised standard takes hold.

*

Amici’s members are being asked to serve rising electricity demand and the rapidly evolving needs of manufacturing infrastructure. The nation’s economy similarly relies on domestic fuel production, petrochemical manufacturing, and critical-mineral processing. Meeting that demand requires permits for new generation, transmission, and industrial facilities. The 2024 Rule creates a

permitting bottleneck that will hobble or completely thwart those projects. The D.C. Circuit erred in holding that EPA correctly refused to consider those real-world consequences when it chose to revise the NAAQS ahead of schedule.

This Court's review is necessary to prevent the disruptive consequences of the D.C. Circuit's decision.

CONCLUSION

The Court should grant both petitions.

Respectfully submitted.

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