

Nos. 26-277, 26-298

**In the
Supreme Court of the United States**

COMMONWEALTH OF KENTUCKY, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.
CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY; LEE ZELDIN,
ADMINISTRATOR, ET AL.,
Respondents.

*On Petitions for Writs of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit*

**BRIEF OF MOUNTAIN STATES LEGAL
FOUNDATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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October 2, 2026

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 *AMICUS CURIAE*¹

Mountain States Legal Foundation's Center for American Prosperity & Energy ("CAPE") works to restore America's economic strength and energy independence by protecting responsible natural-resource development, challenging regulatory overreach, and promoting property rights, innovation, and free enterprise. Its work centers on the Mountain West, where federal environmental rules often decide whether energy, mining, agricultural, manufacturing, transportation, and infrastructure projects can be permitted.

Mountain States Legal Foundation is a nonprofit public-interest law firm that litigates separation of powers, property rights, natural resources, and limits on federal authority. CAPE's interest is both institutional and practical. The statutory process must govern before EPA resets a national air-quality baseline that Western States, landowners, and developers use to plan and invest. CAPE explains how the decision affects Western permitting and resource development, showing why Congress required thorough review before EPA changes that baseline.

SUMMARY OF ARGUMENT

Section 109(d)(1) establishes a durable rule for every administration. Before EPA revises a national ambient air quality standard, it must complete the

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

“thorough review” Congress prescribed. The provision’s second sentence permits EPA to conduct that review “earlier or more frequently” than the ordinary five-year interval. 42 U.S.C. § 7409(d)(1). It changes the timing of the review, not its rigor.

The decision below instead treated Section 109(b)(1)’s statement that a NAAQS “may be revised in the same manner as promulgated” as an independent source of revision authority. It then inferred from the omission of the word “thorough” in Section 109(d)(1)’s second sentence that an off-cycle revision may proceed through an abbreviated review. *Kentucky v. EPA*, 179 F.4th 963 (D.C. Cir. 2026); Ky. Pet. App. 19a–27a. But Section 109(b) defines what a primary NAAQS must accomplish, while the later-enacted and more specific Section 109(d) supplies the substantive safeguard that governs revision. The provisions work together. EPA may revise a NAAQS before the five-year mark, but it must first conduct the thorough review Congress required. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

That safeguard mattered here. EPA lowered the annual PM_{2.5} standard from 12.0 to 9.0 micrograms per cubic meter after “partially reopen[ing]” the air-quality criteria and preparing a supplement focused on selected studies, while reserving other new literature for the next complete review. 89 Fed. Reg. 16,202, 16,213 (Mar. 6, 2024). CAPE takes no position on whether 9.0 is the scientifically correct level. The antecedent question is whether EPA may displace the judgment reached through the completed 2020 review without first completing the process Congress

prescribed.

The Western consequences demonstrate why that process matters. A revised NAAQS immediately governs Prevention of Significant Deterioration permits, including pending applications, and narrows the remaining ambient “headroom” for new or modified sources. 42 U.S.C. § 7475(a)(3); *Murray Energy Corp. v. EPA*, 936 F.3d 597, 624–25 (D.C. Cir. 2019). It also initiates area designations, State Implementation Plans, and, where nonattainment follows, stringent controls on new and existing sources. 42 U.S.C. §§ 7407(d), 7410(a), 7501(3), 7502(c), 7503(a)(2).

Those consequences fall heavily on location-bound Western development. Mineral deposits, timber stands, geothermal resources, agricultural operations, and established transportation and transmission corridors cannot simply be moved to airsheds with more regulatory headroom. Yet a project’s modeled contribution is added to pollution already present, including wildfire smoke, natural dust, and transported emissions that neither the applicant nor the State can readily control. A tighter standard can therefore prevent a well-controlled mine, processing facility, sawmill, biomass plant, generation facility, or supporting project from demonstrating compliance. It can also constrain the wood-processing infrastructure needed to make forest restoration and hazardous-fuels treatment economically and operationally feasible. These consequences do not determine where EPA should set the standard. They show why Congress required a complete review before EPA changes a nationwide rule that immediately governs local

permitting and land use.

The constitutional context confirms that reading. *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), upheld the discretion Congress conferred to set a NAAQS within Section 109(b)'s health-based standard. It did not consider a freestanding authority to reopen a recently completed standard at any time, based on a partial scientific record. Reading “earlier or more frequently” as a timing provision keeps EPA’s authority within the process Congress enacted and avoids the serious separation-of-powers concerns created by the decision below.

The second question independently warrants review. *Whitman* bars cost from determining, influencing, or affecting the level of a NAAQS. But *Michigan v. EPA*, 576 U.S. 743, 752–56 (2015), distinguishes that narrow rule from the ordinary requirement that an agency consider centrally relevant consequences when deciding whether to regulate. If EPA’s decision to initiate an abbreviated off-cycle revision is separate and discretionary, Section 109(b) should not be extended to require EPA to ignore cost, attainability, and disruption at that antecedent stage.

Finally, no other court of appeals can revisit the decision below. Congress placed challenges to nationally applicable Clean Air Act actions exclusively in the D.C. Circuit. 42 U.S.C. § 7607(b)(1). No intercircuit conflict can develop while permitting, designation, and implementation consequences continue to accumulate. The Court should grant both

petitions.

ARGUMENT

I. Section 109(d)(1)’S Thorough-Review Safeguard Governs Every NAAQS Revision.

A. “Earlier or more frequently” changes timing, not rigor.

Statutory interpretation requires courts to determine the law’s best reading by considering text, context, and structure. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400, 412–13 (2024). Here the relevant provisions form one integrated process.

Section 108 directs EPA to publish air-quality criteria that “accurately reflect the latest scientific knowledge” concerning a pollutant’s identifiable effects. 42 U.S.C. § 7408(a)(2). Section 109(a) links those criteria to the initial promulgation of a NAAQS. Section 109(b)(1) supplies the substantive standard: in the Administrator’s judgment, based on the criteria and allowing an adequate margin of safety, the primary NAAQS must be “requisite to protect the public health.” It adds that a standard “may be revised in the same manner as promulgated.” *Id.* § 7409(b)(1).

Section 109(d)(1) then addresses review and revision specifically. Its first sentence requires EPA, at five-year intervals, to “complete a thorough review” of both the Section 108 criteria and the existing standards and to make revisions “as may be appropriate” under Sections 108 and 109(b). Its second sentence provides: “The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.” *Id.* § 7409(d)(1).

The ordinary reading is straightforward. The first sentence establishes the review Congress requires and its default interval. The second permits EPA to perform that work sooner. “Earlier” and “more frequently” are comparative terms. They answer when EPA may conduct the paragraph’s review and revision; they do not create a second, undefined grade of review. Congress did not say that EPA may “dispense with” a thorough review or revise “notwithstanding” the first sentence. It permitted the agency to act earlier than “required under this paragraph”—a cross-reference to the very duty the first sentence describes.

The lower court drew the opposite inference from Congress’s failure to repeat the adjective “thorough.” Ky. Pet. App. 22a–23a. But the second sentence is naturally elliptical. Legislatures routinely avoid repeating a fully described procedure when modifying only its timing. On the court’s reading, moreover, “review” has no statutory content at all. EPA may select whatever subset of information it wishes, subject only to the generic floor of reasoned decisionmaking. *Id.* at 25a–26a. That turns Congress’s chosen adjective into a limitation that applies only when the calendar forces EPA to act, not when an administration elects to unsettle a completed review.

Section 109(b) does not cure the problem. Its “may be revised” clause predated Section 109(d)(1) and says only that revision occurs “in the same manner as promulgated.” The later-enacted, revision-specific provision supplies the detailed process. Where “a general authorization and a more limited, specific authorization” coexist, the specific provision controls the matter it addresses. *RadLAX*, 566 U.S. at 645.

Reading Section 109(d) to govern the review that precedes revision gives effect to both provisions: Section 109(b) authorizes and cabins the substance of a revision. Section 109(d) supplies the review schedule and safeguard. Treating Section 109(b) as a freestanding route around Section 109(d) leaves the detailed safeguard optional.

Nor does Section 108(c)'s direction that EPA review criteria "from time to time" authorize revision of a NAAQS on an abbreviated record. 42 U.S.C. § 7408(c). Criteria and standards are related but distinct. EPA may update scientific criteria when appropriate. But once it uses those criteria to reset the binding national standard, Section 109 governs, and Section 109(d)(1) specifies the review that must accompany revision.

B. The court's reading makes Congress's principal safeguard optional when it matters most.

The court of appeals described the five-year requirement as an "action-forcing device" that keeps standards from lagging behind evolving science. Ky. Pet. App. 20a. That is part of its function, but not all of it. Congress required a review that is "thorough," of both the criteria and the standards, on a regular schedule, with independent scientific advice timed to inform the Administrator's decision. 42 U.S.C. § 7409(d)(1)–(2). That architecture protects against error in either direction. It can justify change, and it can justify stability.

EPA's own description illustrates the difference. The Integrated Science Assessment used in a regular review is a "comprehensive evaluation" and synthesis of policy-relevant science. Chamber Pet. 13; 89 Fed.

Reg. at 16,212. The 2024 process instead “partially reopen[ed]” the criteria and prepared a supplement focused on studies EPA considered most relevant to reconsidering the 2020 decision. 89 Fed. Reg. at 16,213. The supplement did not evaluate studies concerning other PM_{2.5}-related health effects; EPA deferred the balance of the new literature to the next full review. *Id.* at 16,213 & n.47.

That observation is not an attack on the selected studies, the Clean Air Scientific Advisory Committee, or EPA’s public-health objective. The court held that EPA reasonably explained its scientific judgment on the record it chose to assemble. Ky. Pet. App. 34a–38a. But a reasoned explanation sufficient to survive arbitrary-and-capricious review does not establish compliance with Congress’s separate substantive safeguard of a thorough review before revision. A “partial” review may be rational and still fall short of the “thorough review” Congress required.

The sequence matters because a NAAQS is not an ordinary source-specific limit. It resets the baseline for multiple, interlocking regulatory programs across every State. And the decision to reopen a completed standard off-cycle is unusually susceptible to political whipsaw. EPA completed the regular PM review in December 2020 and retained the annual 12.0 standard. 85 Fed. Reg. 82,684, 82,685 (Dec. 18, 2020). Six months later, after a change in administrations, it announced reconsideration. 89 Fed. Reg. at 16,210. A neutral thorough-review rule does not favor either result or administration. It requires the same evidentiary discipline before any administration changes the national baseline.

That rule also respects settled reliance interests. Agencies may change policy, but they ordinarily must acknowledge and assess serious reliance interests created by the prior policy. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30–33 (2020). The decision below held that off-cycle novelty and reliance did not undermine EPA's choice because Congress had authorized revision in the interest of public health. Ky. Pet. App. 34a. That answer assumes the disputed authority. The better reading makes the thorough review Congress prescribed the mechanism by which EPA may justify displacing a recently settled nationwide standard.

C. Separation-of-powers principles confirm the statutory reading.

This case can be resolved by ordinary statutory interpretation. But the constitutional setting confirms why the Court should not lightly infer an unbounded, abbreviated off-cycle authority.

Whitman upheld Section 109(b)(1) against a nondelegation challenge because “requisite” supplied an intelligible principle and because the discretion conferred fell “well within the outer limits” of the Court’s precedents. 531 U.S. at 472, 474–76. That holding concerned the Administrator’s judgment about the level “requisite to protect the public health.” It did not decide whether EPA also possesses a separate power to choose at any time to reopen that judgment, to select less than the complete body of new science, and to revise a standard without considering the disruption caused by departing from Congress’s cycle.

Those additional choices matter for a nonthreshold pollutant. *Whitman* recognized that particulate matter may produce a continuum of adverse effects at concentrations above zero, requiring “judgments of degree.” *Id.* at 475. Under the decision below, the substantive health criterion supplies no temporal limit on when EPA may reopen a standard, while the court’s second holding prohibits consideration of consequences at the trigger stage. Ky. Pet. App. 29a–33a. The combination leaves the decision to begin an off-cycle revision with no identifiable statutory standard beyond EPA’s own desire to revisit the issue.

The major-questions cases reinforce the same caution. Courts do not presume that Congress silently granted an agency a novel power of vast economic and political significance. *West Virginia v. EPA*, 597 U.S. 697, 723–24 (2022); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). EPA’s authority to set NAAQS is longstanding. The novelty lies in a first-of-its-kind shortcut around the review Congress expressly required before EPA resets a standard that governs permitting and implementation nationwide. Nothing in Section 109(b)’s brief “may be revised” clause clearly creates that shortcut.

At minimum, the Court should prefer the reading that preserves the statutory constraint and avoids serious separation-of-powers doubt. *See Bond v. United States*, 572 U.S. 844, 856 (2014). Treating the second sentence as a timing provision keeps EPA within the delegation *Whitman* upheld. The agency may act sooner when science warrants, but it must first complete the thorough review Congress made the price of revision.

II. The Western Consequences Show Why Congress Required a Thorough Review Before Revision.

A. A revised NAAQS immediately narrows the permitting margin for location-bound Western development.

For Western communities, the NAAQS is not an abstract benchmark. It is an operating constraint on whether land can be developed and whether energy, mining, mineral-processing, timber, manufacturing, agricultural, transportation, and infrastructure projects can be built or expanded. Those activities are often the economic base of rural communities and the means by which the West converts location-bound resources into energy, building materials, food, and other goods used nationwide. A standard that eliminates the remaining permitting margin can therefore affect not only a proposed facility, but also the landowners, workers, service businesses, and local governments that depend on the surrounding resource economy.

Western resource development is especially exposed because project location is often constrained by geology, timber supply, hydrology, land ownership, and existing transportation or transmission networks. A mineral deposit, timber stand, geothermal resource, agricultural operation, or established corridor cannot simply be moved to an airshed with more regulatory headroom. Mines, processing facilities, sawmills, biomass plants, generation facilities, and supporting infrastructure often must be permitted near the resource or network they serve. Existing facilities may likewise need new permits to expand, modernize, or

add controls required by other environmental mandates. In many Western communities, each link depends on the others: a timber project needs an economically reachable mill; a mine needs processing and transportation; and generation needs transmission. If the ambient baseline leaves no room for one necessary facility, the practical effects may extend across the entire chain of development.

Yet the permitting analysis considers the airshed, not whether the applicant caused the background concentration. A project's modeled contribution is added to pollution already present. When wildfire smoke, windblown dust, or transported emissions have consumed much of the permissible concentration, even a well-controlled project may have little margin remaining. For a covered major source, insufficient headroom can prevent the demonstration Section 7475(a)(3) requires. The consequence is not that development moves to a more convenient location. The resource may remain undeveloped, the supporting infrastructure may never be built, and the community may lose the productive use and economic opportunity associated with both. Those geographically concentrated consequences underscore why EPA must complete the thorough review Congress required before revising a nationwide standard.

The effect begins before EPA designates a single new nonattainment area. In an area that is in attainment or unclassifiable, the Prevention of Significant Deterioration program bars construction of a covered major source unless the applicant demonstrates that its emissions "will not cause, or contribute to, air pollution in excess of" any NAAQS.

42 U.S.C. § 7475(a)(3). Under D.C. Circuit precedent, the NAAQS in effect when a permit is issued governs the permit, even if the application was already pending when the revised standard took effect. *Murray Energy*, 936 F.3d at 624–25. Lowering the annual PM_{2.5} limit from 12.0 to 9.0 micrograms per cubic meter therefore reduced the allowable concentration by one quarter and immediately narrowed the margin available to new projects.

The statutory chain continues. Within one year of a revised NAAQS, States must submit designation recommendations. EPA ordinarily must complete designations within two years. 42 U.S.C. § 7407(d)(1)(A)–(B). States then must prepare implementation plans providing for implementation, maintenance, and enforcement. *Id.* § 7410(a)(1)–(2). In a nonattainment area, new or modified major sources face the “lowest achievable emission rate,” a standard tied to the most stringent limit in any State’s plan or achieved in practice for the source category. *Id.* §§ 7501(3), 7503(a)(2). Existing sources and States face additional control, inventory, attainment, and planning duties. *Id.* § 7502(c).

This architecture makes the completeness of EPA’s review a national land-use and investment concern. A permit applicant cannot answer a tighter ambient limit merely by installing a device at its own stack. Its modeled impact is added to the ambient concentration already present, including pollution from natural and distant sources. A small numerical change can therefore determine whether a project has room to proceed at all, especially where the ambient baseline is already near the standard.

B. Western ambient concentrations reflect fires, dust, transport, and terrain beyond any permit applicant's control.

EPA's rule itself documents the Western problem. It states that the highest ambient PM_{2.5} concentrations occur in the western United States, particularly California and the Pacific Northwest. 89 Fed. Reg. at 16,266. Trends have been less consistent across much of the West than in the East, with some sites in the Pacific Northwest, northern Rockies and plains, and Southwest showing no significant change since 2000. *Id.* at 16,215.

Fire is a substantial part of that ambient load. According to EPA, wildland fire accounts for 44 percent of primary PM_{2.5} emissions and wildfire alone accounts for 29 percent. *Id.* at 16,214. EPA also recognized that wildfire smoke seasons can last from May through November and that prescribed fire, although itself a source of particulate matter, is an important tool for reducing catastrophic wildfire risk and smoke. *Id.* A regulatory system that treats the ambient concentration as the permitting baseline must account carefully for these cross-cutting realities.

Other background sources compound the problem. EPA defines background particulate matter as particles formed by sources or processes that cannot be influenced by actions within the jurisdiction at issue. *Id.* at 16,218. It estimated annual background PM_{2.5} concentrations at examined sites at 0.5 to 3.0 micrograms per cubic meter, with speciated monitoring estimates of roughly 1.0 to 3.0. *Id.* Sources include wind erosion of natural surfaces, wildland

fires, biological aerosols, biogenic hydrocarbons, volcanic emissions, sea salt, and transboundary transport. *Id.* at n.44.

Geography makes attribution and control still more difficult. EPA's designations guidance recommends that States and Tribes analyze five factors: air-quality data; emissions and emissions-related data; meteorology; geography and topography; and jurisdictional boundaries. U.S. Env't Prot. Agency, *Initial Area Designations for the 2024 Revised Primary Annual Fine Particle National Ambient Air Quality Standard* 5 (Feb. 7, 2024). The guidance recognizes that wind, atmospheric transport, mountains, valleys, and physical airsheds can affect which emissions reach a violating monitor and which nearby areas are included in a nonattainment boundary. *Id.* attach. 3, at 11–12.

These facts do not establish that the 9.0 standard is too strict or that public-health evidence should be discounted. They establish something narrower and directly relevant to the question presented: the decision to revise a national ambient standard has consequences that turn on a complex, interdependent body of science. Congress reasonably demanded a thorough review of the criteria and standards before EPA exercises that power. A process designed around a selected supplement cannot be treated as interchangeable merely because the resulting rule survives deferential review on the record EPA chose.

C. The revised standard can constrain the infrastructure needed for forest restoration and wildfire risk reduction.

Western forest management presents a particularly consequential example. EPA acknowledges that prescribed fire emits particulate matter but also serves as an important tool for reducing catastrophic wildfire risk and smoke. 89 Fed. Reg. at 16,214. Mechanical thinning creates a related disposal problem. The federal Wildland Fire Mitigation and Management Commission reported that treetops, branches, and other material left after vegetation-management projects can increase wildfire intensity, while open pile burning produces smoke. Sawmills, pallet mills, firewood producers, and biomass power facilities can instead use that material, provide market outlets for products that otherwise would be uneconomic to remove, and defray the cost of fuels reduction. Wildland Fire Mitigation & Mgmt. Comm’n, on Fire: *The Report of the Wildland Fire Mitigation and Management Commission* 66 (Sept. 2023) (“Commission Report”).

Processing capacity affects how much work can be accomplished on the ground. Hazardous-fuels treatments are projects designed to reduce or remove vegetation and woody material that can intensify wildfires. A study of 8,451 Forest Service treatment locations in Oregon and Washington found that ranger districts closer to sawmills or biomass facilities treated more total acres and more acres in the wildland-urban interface. Max Nielsen-Pincus et al., *The Influence of Market Proximity on National Forest Hazardous Fuels Treatments*, 59 Forest Sci. 566, 566, 573–75 (2013). Proximity also influenced biomass

utilization and stewardship contracting, with a threshold effect at approximately forty minutes of travel time. The study concluded that a distributed network of wood-processing facilities could offset treatment costs and increase the acreage treated. Nielsen-Pincus et al., *supra*, at 566, 573–75. Mill and biomass capacity therefore supports the practical ability to conduct landscape-scale forest restoration. It is not merely an isolated private economic interest.

The permitting consequences run in the opposite direction. A new or modified processing facility that qualifies as a major source must demonstrate that its emissions will not cause or contribute to a NAAQS violation. 42 U.S.C. § 7475(a)(3). A tighter standard leaves less room to site or expand that capacity near the forests it must serve. If small-diameter timber and woody biomass have no economic outlet, managers may face higher removal costs and greater pressure to leave the material in place or dispose of it through open burning. Commission Report 66. None of this means that EPA should set a health standard by reference to timber markets. It shows that revising the national standard implicates interdependent scientific and operational consequences that Congress required EPA to examine through a thorough review. An abbreviated off-cycle process is especially ill-suited to a decision that may constrain infrastructure on which other federal agencies rely to reduce long-term wildfire smoke.

D. Exceptional-events relief does not replace ex ante review.

Respondents may point to the Clean Air Act's exceptional-events mechanism as an answer to smoke

and dust. It is an important mechanism, but it is not a substitute for the review Congress required before revision.

Under Section 319 and EPA's regulation, a State or Tribe may ask EPA to exclude monitoring data influenced by an exceptional event from a particular regulatory determination. 42 U.S.C. § 7619(b); 40 C.F.R. § 50.14. The air agency must identify the event, provide public notice and documentation, demonstrate a clear causal relationship between the event and the monitored exceedance or violation, and obtain EPA concurrence. *Id.* § 50.14(c). EPA's 2024 rule acknowledges that wildfire events can affect design values and says air agencies "may request" exclusion through that process. 89 Fed. Reg. at 16,214.

That is event-specific, retrospective relief. It depends on a successful demonstration about identified data after an event has occurred. It does not remove ordinary background concentrations; guarantee exclusion of future smoke or dust; expand the margin used to model a proposed source; or eliminate the need to plan around a binding standard while an agency assembles and EPA evaluates a demonstration. The same EPA guidance that addresses exceptional events prescribes deadlines for notifications, documentation, and submissions tied to the designation process. *Initial Area Designations*, *supra*, at 4.

For a project with a multiyear development horizon, that distinction is decisive. Capital must be committed, routes and sites selected, and permits pursued before anyone knows which future events will qualify for exclusion or what ambient concentrations

will remain. Thorough review before revision cannot solve every implementation difficulty. But it ensures that EPA has considered the complete scientific foundation before narrowing a nationwide permitting margin that later, case-specific relief may not restore.

E. Off-cycle revisions destabilize long-lived investments and state planning.

Energy and resource projects are planned over years, often decades. They require coordinated federal, state, Tribal, and local approvals; environmental analyses; engineering; financing; rights-of-way; and construction sequencing. State air agencies likewise build monitoring networks, emissions inventories, designation recommendations, and implementation strategies around the operative NAAQS. EPA's designations memorandum confirms the breadth of the resulting analysis and the statutory deadlines that begin with promulgation. *Id.* at 1–2.

An off-cycle revision can force those public and private actors to pivot before the prior review's implementation work is complete. A pending permit may require new modeling or redesign. A State may have to redirect technical staff and reopen stakeholder processes. A project whose emissions were compatible with the existing ambient margin may no longer be financeable. These are reliance interests in a regulatory baseline. These are not an entitlement to perpetual rules, but a reason Congress required a stable, comprehensive process before the baseline changes.

The burden is asymmetric as well. If EPA later relaxes a primary standard, Section 7502(e) requires areas that had not attained the stricter standard at

the time of relaxation to retain controls no less stringent than those that applied before relaxation. 42 U.S.C. § 7502(e). Thus, a truncated off-cycle revision can create consequences that a later thorough review cannot easily unwind. That feature reinforces the need to enforce Congress's safeguard at the front end.

The States' experience confirms that these burdens are not speculative. They report that preparing their initial designation recommendations consumed millions of dollars and thousands of staff hours; that permitting has already become more difficult; and that nonattainment planning, exceptional-events demonstrations, and related submissions will demand additional public resources. Ky. Pet. App. 14–15. Those concrete costs reinforce the institutional value of enforcing the review safeguard before implementation accelerates.

The decision below permits regulatory whipsaw. One administration may reopen a recently completed NAAQS, rely on a selected portion of the developing scientific record, and revise the nationwide permitting baseline without completing a thorough review. A later administration cannot restore the prior standard by announcement. It must conduct another rulemaking, justify a further change, consider reliance interests created under the intervening standard, and address implementation already underway. *See Regents*, 591 U.S. at 30–33. Section 109(d)(1) supplies a neutral constraint on administrations of either party. No administration may revise a NAAQS without first completing the same thorough review.

III. *Whitman* Does Not Bar Considering Consequences Here.

A. *Whitman* does not bar considering consequences at the antecedent decision-to-revise stage.

The Court should also grant review of the second question. *Whitman* held that Section 109(b)(1) “unambiguously bars cost considerations from the NAAQS-setting process.” 531 U.S. at 471. That holding follows from the text Congress chose for setting the standard’s level: the level must be “requisite to protect the public health,” based on the air-quality criteria, with an adequate margin of safety. 42 U.S.C. § 7409(b)(1).

But *Michigan* called *Whitman*’s rule a “modest principle” applicable where the Act “expressly directs EPA to regulate on the basis of a factor that on its face does not include cost.” 576 U.S. at 755–56. Outside that express direction, cost is ordinarily a “centrally relevant factor” in deciding whether to regulate because reasonable administration attends to both advantages and disadvantages. *Id.* at 752–53.

The distinction maps onto this case. Choosing the health-protective level during a required review is one decision. Choosing whether to launch a concededly discretionary off-cycle revision is another. The second sentence of Section 109(d)(1) uses “may” and, on the court of appeals’ own reading, does not incorporate the first sentence’s substantive or procedural requirements. If that trigger is free of the thorough-review limitation, there is even less basis to import Section 109(b)’s cost prohibition into it.

The court nevertheless held that considering costs or attainability at either stage would have the same impermissible effect. Ky. Pet. App. 31a–32a. That collapses distinct statutory judgments and extends *Whitman* beyond its text. Costs at the trigger stage include the disruption of an unscheduled revision, duplication of state planning, effects on pending permits, and the risk that anti-backsliding rules will lock in controls before the next regular review. Considering those consequences does not set the NAAQS at a cost-optimal level. It informs whether EPA should depart from Congress’s ordinary review cycle at all.

CAPE agrees that the first question offers the cleanest resolution. A holding that every revision requires a thorough review would restore the statutory safeguard without revisiting *Whitman*. But if the Court accepts the D.C. Circuit’s premise that EPA has a separate, abbreviated, discretionary authority, the second question becomes unavoidable. An agency should not be permitted both to escape Congress’s review requirement and to exclude the consequences of choosing that escape route.

B. No circuit split can develop, and delay will entrench the error.

The absence of a split is a reason to grant review, not to wait. Congress placed challenges to nationally applicable Clean Air Act actions exclusively in the D.C. Circuit. 42 U.S.C. § 7607(b)(1). The decision below therefore fixes the governing rule for every future off-cycle NAAQS revision. No other regional circuit can consider the question.

The issues are cleanly presented. The industry and State petitioners raised them; EPA ultimately agreed that it had exceeded its statutory authority and acted unreasonably by ignoring costs; and the D.C. Circuit rejected those arguments in a published opinion. Chamber Pet. 18–20; Ky. Pet. App. 28a–33a. The questions presented are legal and do not require the Court to resolve the parties’ disputes over the scientific record. Under *Loper Bright*, courts must independently determine the statute’s best reading while respecting only the discretion Congress actually conferred. 603 U.S. at 412–13.

Review is also timely. The revised standard has been effective since May 6, 2024. 89 Fed. Reg. at 16,202. Permits issued since then have had to account for it, and the designation and implementation machinery is underway. A district court has ordered EPA to complete designations by February 6, 2027. Chamber Pet. 20. As those measures accumulate, Section 7502(e)’s anti-backsliding command can make correction harder. Waiting for another off-cycle revision would produce the same legal question after another round of nationwide disruption. Chamber Pet. 20–21.

The Court can resolve the case narrowly. It need not decide whether 9.0 micrograms per cubic meter is the right health standard. It need not second-guess EPA’s scientific judgments. And it need not reconsider *Whitman*’s approval of Section 109(b)(1). It need only hold that permission to act “earlier or more frequently” does not authorize EPA to revise a NAAQS through a less-than-thorough review. That rule follows the text, preserves the statutory structure, and secures a stable process for administrations of either

party.

CONCLUSION

The Court should grant the petitions for writs of certiorari.

Respectfully submitted,

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October 2, 2026