No. _____

IN THE

Supreme Court of the United States

UTILITY AIR REGULATORY GROUP,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 10, 2014

QUESTIONS PRESENTED

This Court in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), required the Environmental Protection Agency (EPA) to apply a specific and exacting standard in revising national ambient air quality standards (NAAQS) under the Clean Air Act, 42 U.S.C. § 7409(b)(1). This Court held that EPA must set NAAQS "at the level that is … not lower or higher than is necessary." 531 U.S. at 475-76. In 2008, EPA revised the 1997 ozone NAAQS reviewed in *Whitman*. In upholding that revision, the D.C. Circuit characterized the *Whitman* standard as a "Goldilocks" standard that it refused to apply in reviewing EPA's 2008 action. The D.C. Circuit said that demanding that EPA address its 1997 findings in explaining its 2008 changes was a "funhouse" the court "decline[d] … to enter" because those 1997 findings were, according to the court, irrelevant to its 2008 decision. The questions presented are:

(1) Whether the lower court's refusal to require EPA to justify the revised 2008 NAAQS as being "not lower or higher than is necessary" can stand in light of that decision's conflict with *Whitman*.

(2) Whether the lower court's agreement with EPA that the 1997 findings were irrelevant to the 2008 revision can stand in light of EPA's obligation under this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009), to justify changed findings that underlie changed regulation.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the U.S. Court of Appeals for the District of Columbia Circuit:

The Utility Air Regulatory Group, the petitioner on review, was a petitioner below.

The respondent herein, which was the respondent below, is the United States Environmental Protection Agency.

Additional petitioners below were the State of Mississippi, Ozone NAAQS Litigation Group, National Association of Home Builders, State of New York, State of California, California Air Resources Board, State of Connecticut, State of Delaware, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Mexico, State of Oregon, State of Rhode Island, District of Columbia, City of New York, American Lung Association, Environmental Defense Fund, Natural Resources Defense Council, National Parks Conservation Association, and Appalachian Mountain Club.

Petitioner-intervenor below was County of Nassau.

Respondent-intervenors below were American Lung Association, Appalachian Mountain Club, Environmental Defense Fund, National Association of Home Builders, Natural Resources Defense Council, Ozone NAAQS Litigation Group, and Utility Air Regulatory Group.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Utility Air Regulatory Group (UARG) is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

TABLE OF CONTENTS

APPENDIX MATERIALS:

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Federal Register:

Miscellaneous:

PETITION FOR A WRIT OF CERTIORARI

The Utility Air Regulatory Group respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit denying its petition to review a rule of the United States Environmental Protection Agency (EPA or Agency) that revised the primary national ambient air quality standard (NAAQS) for ozone under the Clean Air Act. 73 Fed. Reg. 16,436 (Mar. 27, 2008), Petition Appendix (Pet. App.) 56a-289a.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at __ F.3d __, 2013 WL 6486930 (D.C. Cir. Dec. 11, 2013) (per curiam), and reproduced at Pet. App. 3a-55a. The D.C. Circuit's order partially granting and partially denying panel rehearing is reproduced at Pet. App. 290a-291a. Relevant excerpts of EPA's final rule are reproduced at Pet. App. 56a-289a.

JURISDICTION

The D.C. Circuit entered judgment remanding the secondary ozone NAAQS to EPA and denying the petitions for review in all other respects on July 23, 2013. Pet. App. 2a. The court partially granted and partially denied a timely petition for panel rehearing on December 11, 2013, *id.* at 291a, and issued an amended opinion on that date, *id.* at 3a-55a. On March 3, 2014, The Chief Justice granted an extension to and including April 10, 2014, of the time for the Utility Air Regulatory Group to file a petition for

a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 109 of the Clean Air Act, 42 U.S.C. § 7409, provides in relevant part:

> (b) Protection of public health and welfare
>
> (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.
>
> ***
>
> (d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions
>
> (1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of

> this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

An additional relevant provision of the Clean Air Act (42 U.S.C. § 7607) is reproduced at Pet. App. 292a.

INTRODUCTION

The establishment and revision of NAAQS are the most consequential regulatory decisions that EPA makes under the Clean Air Act. They define a level of air quality that must be attained throughout the country. Once promulgated, NAAQS trigger a series of mandatory regulatory actions at the federal, state, and local levels. Every source of emissions—cars, trucks, residential homes, shopping centers, factories, power plants, and many others—are potential targets for regulation. Costs incurred to attain NAAQS are, accordingly, enormous. Because the Clean Air Act specifies that NAAQS may be reviewed only by the United States Court of Appeals for the District of Columbia Circuit, 42 U.S.C. § 7607(b)(1), that court has sole jurisdiction to review NAAQS, and, after completion of judicial review of a NAAQS, further judicial recourse is unavailable, see *id.* § 7607(b)(2), (e).

In *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (per curiam) ("*ATA I*"), *modified in part on reh'g*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam) ("*ATA II*"), *aff'd in part, rev'd in part, and remanded sub nom. Whitman* v. *Am. Trucking*

Ass'ns, 531 U.S. 457 (2001) ("*Whitman*"), *on remand*, 283 F.3d 355 (D.C. Cir. 2002) ("*ATA III*"), the D.C. Circuit reviewed a 1997 rule that, in relevant part, revised the NAAQS for ozone to 0.08 parts per million (ppm), making it more stringent. The D.C. Circuit in *ATA I* granted the petitions challenging the rule, holding that EPA had interpreted the Clean Air Act in a way that conferred on the Agency unconstrained discretion in revising the level of NAAQS. Invoking the nondelegation doctrine of the Constitution, the D.C. Circuit remanded the NAAQS to EPA to consider interpreting the Clean Air Act so as to provide an intelligible principle to govern the exercise of its discretion.

Following the D.C. Circuit's decision in *ATA I* (and after that court's modification of certain aspects of its decision in *ATA II*), this Court granted certiorari and concluded that the Clean Air Act's text sufficiently constrains EPA's discretion to avoid nondelegation concerns. *Whitman*, 531 U.S. at 476. According to the Court, the "requisite to protect" language of section 109(b)(1) means that EPA must set primary NAAQS "at the level that is … not lower or higher than is necessary … to protect the public health with an adequate margin of safety." *Id.* at 475-76. On remand, the D.C. Circuit held that, in promulgating the revised 0.08 ppm primary NAAQS for ozone in 1997, EPA had satisfied the "not lower or higher than is necessary" test that this Court established in *Whitman*. *ATA III*, 283 F.3d 355 (D.C. Cir. 2002).

Eleven years after it decided *ATA III*, on review of EPA's 2008 decision to revise the 0.08 ppm 1997

NAAQS for ozone to 0.075 ppm, the D.C. Circuit in the case below took a remarkably different approach. The court characterized the *Whitman* "requisite" standard as putting EPA "in a situation reminiscent of *Goldilocks and the Three Bears*" but then, "unlike Goldilocks," the court refused to demand that EPA "get things 'just right.'" Pet. App. 26a. Instead of applying this Court's *Whitman* standard, the D.C. Circuit fashioned a less rigorous standard under which EPA's policy choice of an acceptable risk level will be upheld if it is, in the D.C. Circuit's view, based on an assertion of reduced scientific uncertainty. See *id.* at 14a.

In applying this new, highly deferential standard, the court held that EPA had no obligation to address, and the court had no jurisdiction to consider, the Agency's 1997 risk findings that formed the basis for its earlier conclusion that the 0.08 ppm NAAQS satisfied the *Whitman* standard. In refusing to be governed by the standard articulated by this Court in *Whitman,* the court below created a conflict with *Whitman,* as well as with *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) ("*Fox*"), and other cases that address an agency's obligation to explain a change in findings that underlie a regulatory change. Given the importance of NAAQS to the Clean Air Act and the Nation's economy, the Court should grant this petition and reverse the decision below.

STATEMENT OF THE CASE

1. Section 109 of the Clean Air Act governs EPA's authority to establish NAAQS. 42 U.S.C. § 7409. Section 109(b)(1) requires that "primary" NAAQS

(which protect public health) be set at the level "which in the judgment of the Administrator … and allowing an adequate margin of safety … [is] requisite to protect the public health." *Id.* § 7409(b)(1). Once a NAAQS is established, section 109(d)(1) requires that "at five-year intervals," the EPA Administrator "complete a thorough review" of the existing NAAQS and the scientific evidence on which it is based (called the "criteria" document), and "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section [108 of the Clean Air Act] and subsection (b) of this section." *Id.* § 7409(d)(1).

In 1999, the D.C. Circuit set aside EPA's 1997 revision of the ozone NAAQS. The court found that "EPA appears to have articulated no 'intelligible principle'" for its decision to revise the NAAQS. *ATA I*, 175 F.3d at 1034. According to the court, "EPA's explanations for its decisions amount to assertions that … a more stringent standard would result in less harm." *Id.* at 1035. But "[s]uch arguments only support the intuitive proposition that more pollution will not benefit public health, [and] not that keeping pollution at or below any particular level is 'requisite' or not." *Id.* Furthermore, the court observed, while EPA defended the "decision not to set a standard at a lower level on the basis that there is greater uncertainty that health effects exist at lower levels … the increasing-uncertainty argument is helpful only if some principle reveals how much uncertainty is too much. None does." *Id.* at 1036.

In *Whitman*, this Court granted certiorari to address whether section 109(b) "provide[s] an 'intelligible principle' to guide the EPA's exercise of authority in setting NAAQS," 531 U.S. at 472, and reversed the D.C. Circuit. Justice Scalia, writing for a unanimous Court, stated that "the text of § 109(b)(1) of the [Clean Air Act] *at a minimum* requires that … EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air." *Id.* at 473 (emphasis added) (quotation omitted). The Court specified that "[r]equisite, in turn, mean[s] sufficient, *but not more than necessary*." *Id.* (emphasis added) (quotation omitted; second alteration in original). In other words, the Court held, EPA must set NAAQS "at *the level* that is … not lower or higher than is necessary … to protect the public health…." *Id.* at 475-76 (emphasis added).

Justice Breyer in a concurring opinion added that the statute "do[es] not describe a world that is free of all risk—an impossible and undesirable objective." *Id.* at 494 (Breyer, J. concurring). "The statute, by its express terms, does not compel the elimination of *all* risk." *Id.* (emphasis in original). "[W]hat counts as 'requisite' to protecting the public health" may require application of broad risk-management principles to place a given risk in context with other risks that the public is willing to "tolera[te] … in the particular context at issue." *Id.*

Risk estimates were the basis for EPA's policy judgment in 1997 that, despite the existence of risk below 0.08 ppm, revision of the existing NAAQS to

0.08 ppm was "requisite" to protect "public health with an adequate margin of safety." 62 Fed. Reg. 38,856, 38,868 (July 18, 1997).[1] On remand from the Supreme Court, the D.C. Circuit upheld EPA's revised ozone NAAQS of 0.08 ppm as meeting the *Whitman* standard. According to that court, "[d]espite some 'inherent uncertainties,'" it was proper for EPA to conclude that its risk assessment and scientific studies, when "taken together[,] … indicat[e] that the 'public health impacts' of ozone at levels lower than the [then-existing] … standard are 'important and sufficiently large as to warrant a standard set at a level of 0.08 ppm.'" *ATA III*, 283 F.3d at 377 (quoting 62 Fed. Reg. at 38,868). The

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[1] An "adverse health effect" requires "proof of demonstrable harm" from pollution. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 15 (D.C. Cir. 1976). By contrast, "risk" of adverse effects—which is relevant to defining a "margin of safety"—is based on a statistical association between exposure and health response. See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 9-10 (1993). Risks, by their very nature, are uncertain. *Id.* To manage risk, an agency must balance the magnitude of a health risk (*e.g.*, a possible cough versus an asthma attack) with "the number of those likely to be affected, the distribution of the adverse effects, and the uncertainties surrounding each estimate." *Whitman*, 531 U.S. at 495 (Breyer, J. concurring). This is risk management judgment, and often will require putting that risk in a broader public health context. *Id.*; see also *Sierra Club* v. *EPA*, 353 F.3d 976, 990 (D.C. Cir. 2004) ("[R]isk-based analysis requires EPA to consider, *inter alia*, public health and adverse environmental effects…."); *Hazardous Waste Treatment Council* v. *EPA*, 886 F.2d 355, 358 (D.C. Cir. 1989) (per curiam) (explaining the difference between "technology-based standards" and risk-based standards that are characterized by "inherent" scientific uncertainty).

court also accepted EPA's justifications for why 0.08 ppm was not "lower than necessary." *Id.* at 369.

2. In 2007, EPA proposed a rulemaking for the purpose of determining whether revision of the 0.08 ppm NAAQS that EPA had previously found to be "sufficient, but not more than necessary" to protect public health, was "appropriate" under section 109(d)(1) of the Clean Air Act.

At the conclusion of that rulemaking in 2008, EPA lowered the ozone NAAQS from 0.08 ppm to 0.075 ppm, citing "new evidence" that, according to EPA, created "more certainty" regarding the judgments it had made in support of the 1997 NAAQS revision. See*, e.g.,* 72 Fed. Reg. 37,818, 37,864 (July 11, 2007); Pet. App. 95a ("The newly available information reinforces the judgments … from the last review about the likelihood of causal relationships" between ozone and health risk.). In revising the 1997 NAAQS, EPA declined to address the reasons for the difference between the line it drew in 1997, based on a finding that 0.08 ppm was "requisite," and the line it drew in 2008. Rather, EPA dismissed any consideration of the 1997 risk findings on the ground that methodological differences with the 2008 assessments made the 1997 assessment "irrelevant." Pet App. 194a-196a.

3. The State of Mississippi and various industry associations, including the Utility Air Regulatory Group, challenged EPA's decision to revise the ozone NAAQS from 0.08 ppm to 0.075 ppm. These petitioners argued that the *new* studies that EPA cited in 2008 projected public health risks at 0.08 ppm

that were no greater (and were in some cases lower) than the public health risks that EPA had found at 0.08 ppm in 1997. Given that these public health risk levels satisfied the *Whitman* standard in 1997, petitioners argued that EPA had an obligation under the statute and under *Whitman* to acknowledge no increase in risk and to explain why a different line was drawn in 2008 than in 1997 for similar, or indeed lower, risks. Joint Reply Br. of Pet'r State of Miss. & Industry Pet'rs 1, *Mississippi* v. *EPA*, No. 08-1200 (D.C. Cir. Aug. 24, 2012) (ECF No. 1391375); Joint Opening Br. of Pet'r State of Miss. & Industry Pet'rs 44-46, *Mississippi* v. *EPA*, No. 08-1200 (D.C. Cir. Aug. 24, 2012) (ECF No. 1391373) ("Miss. Op. Br.").

In response to this challenge, EPA argued that requiring it to address its 1997 risk judgments "would improperly prevent EPA from re-weighing existing uncertainties in light of new evidence." Final Br. for Resp't 61-62, *Mississippi* v. *EPA*, No. 08-1200 (D.C. Cir. Aug. 27, 2012) (ECF No. 1391475) ("EPA Br."). According to EPA, it had no obligation "to [c]onduct a [d]irect [q]uantitative [c]omparison" of the 1997 and 2008 "risk estimates," *id.* at 66, and any such comparison "would not be useful in determining the requisite standard," *id.* at 74. Rather, EPA argued that the 2008 revision was properly based on a "reweighing" of uncertainties, as opposed to the line drawing, *i.e.*, identifying "the level [of risk] that is … not lower or higher than is necessary," that is called for by *Whitman*. *Id.* at 61.

4. The D.C. Circuit rejected petitioners' challenges to the 2008 primary ozone NAAQS and sided with EPA. In reviewing the revised primary NAAQS of 0.075 ppm, the panel described the *Whitman* standard as a "Goldilocks" standard requiring a finding that the revised NAAQS is "'just right.'" Pet. App. 26a (quoting *Goldilocks and the Three Bears*). The panel then applied a different standard to determine the validity of the revised NAAQS, one grounded in re-weighing "uncertainties." According to the court, "[t]he task of determining what standard is 'requisite' … necessarily requires the exercise of policy judgment … informed by [EPA's] view of the limitations of the scientific evidence." *Id.* at 47a. "Striking a balance between 'the increasing uncertainty associated with [its] understanding of the likelihood of such effects at lower [ozone] exposure levels' and 'concern about the potential for health effects and their severity'" made revision of the ozone standard to 0.075 ppm appropriate, in the court's view. *Id.*

The lower court's explanation for its rejection of *Whitman* obscures more than clarifies: "[A]s the contours and texture of scientific knowledge change, the epistemological posture of EPA's NAAQS review necessarily changes as well." *Id.* at 16a. Application of the *Whitman* standard would "eliminate any adumbration of the inevitable scientific uncertainties," *id.* at 16a-17a, because that standard "presupposes scientific certainty in an area actually governed by policy-driven approaches to uncertain science," *id.* at 14a. Given the pervasive scientific uncertainty associated with risk estimates underlying NAAQS revi-

sions, the court concluded, "'our paramount objective' in reviewing" EPA's decisions to revise NAAQS, *id.* at 41a (quoting *Nat'l Lime Ass'n* v. *EPA*, 627 F.2d 416, 431 n.48 (D.C. Cir. 1980)), is *not* to ensure that EPA "get things 'just right,'" *id.* at 26a, as this Court required in *Whitman*, but merely to see whether EPA "reasonably explains its action," *id.* at 15a.

Under this standard, policy judgments can change from EPA Administrator to EPA Administrator with no greater explanation than that the same risks are more (or less) certain than in the past. As the court explained, "EPA's invocation of scientific uncertainty and more general public health policy considerations satisfies its obligations under the statute." *Id.* at 48a.

REASONS FOR GRANTING THE PETITION

Before this Court decided *Whitman* and articulated in that case its bright-line standard governing NAAQS revisions, the D.C. Circuit had described the "test" for NAAQS revision as "whether the [Agency's] decision is reasonable when examined in light of the evidence in the record." *Lead Indus. Ass'n* v. *EPA*, 647 F.2d 1130, 1162 (D.C. Cir. 1980); see also *Am. Petroleum Inst.* v. *Costle,* 665 F.2d 1176, 1184 (D.C. Cir. 1981); *Natural Res. Def. Council* v. *EPA,* 902 F.2d 962, 968-69 (D.C. Cir. 1990) (per curiam), *vacated in part*, 921 F.2d 326 (D.C. Cir. 1991) (per curiam). In the decision below, the D.C. Circuit returned to this amorphous pre-*Whitman* test for review of NAAQS.

According to the lower court, an EPA Administrator's findings applying the *Whitman* standard have no relevance to a later Administrator's decision to revise that NAAQS. Pet. App. 14a-15a. Rather, according to the panel, "[e]very time EPA reviews a NAAQS, it … does so against *contemporary policy judgments* and the existing corpus of scientific knowledge." *Id.* (emphasis added). Under this standard, the current EPA Administrator need only "consider[ ] the entire body of scientific evidence," *id.* at 28a, and find that a change in the "certainty" of risk projections justifies whatever "contemporary policy judgment[]" she deems appropriate, *id.* at 14a-15a.

As a result, according to the lower court, "the evidence in the record may … support other conclusions" regarding the "requisite" level of public health risk—including that the prior level found "requisite" by EPA continues to be "requisite"—but this "'does not prevent us from concluding that [the current Administrator's] decisions were rational.'" *Id.* at 26a (quoting *Lead Indus. Ass'n*, 647 F.2d at 1160); see also *id.* at 14a (An approach that "assumes only one standard at any given time can be 'requisite' … presupposes scientific certainty in an area actually governed by policy-driven approaches to uncertain science."). Rather, the D.C. Circuit said, when it is confronted with scientific uncertainty, "the question for this court is not what EPA has done in the past … but only whether it has provided a rational explanation of how it treated the evidence before it." *Id.* at 32a. Applying this uncertainty-centric test, the low-

er court declared irrelevant arguments that "the 2008 science added nothing new to the 1997 NAAQS conversation" concerning the "requisite" risk level, asserting instead that those arguments "are largely dependent on the conceptual error that EPA is somehow bound by the 1997 NAAQS." *Id.* at 17a.[2]

For the reasons discussed below, the *Whitman* Court's standard—"adumbration" notwithstanding, *id.* at 16a-17a—was binding on the D.C. Circuit. Once EPA finds that a NAAQS satisfies the *Whitman* standard, the determination that revision of that NAAQS may be "appropriate," 42 U.S.C. § 7409(d)(1), is not simply a matter of "contemporary policy judgment[]." Rather, revision of a NAAQS found to meet the *Whitman* standard can be "appropriate" only if EPA includes an explanation for why the line it drew in revising that NAAQS is different from the line it drew when it previously concluded the NAAQS was "requisite."

Given the extraordinary burdens that NAAQS impose on states, cities, businesses, and consumers, EPA must be held to the precise standard articulated by this Court in *Whitman.* Certiorari should be granted because the D.C. Circuit's holding conflicts with this Court's holding in *Whitman* as well as with this Court's jurisprudence on judicial review stand-

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[2] Petitioners below, of course, never argued that EPA was bound by the 1997 NAAQS but only that EPA had an obligation to acknowledge that its prior judgments involved similar risks and to provide a reasoned explanation for its NAAQS revision in the absence of a change in risk. Miss. Op. Br. 44-45.

ards that apply when an agency changes findings underlying a regulatory decision.

I. Certiorari Is Needed To Resolve the Conflict Between the Panel's Decision and This Court's Decision in *Whitman*.

In *Whitman*, this Court noted that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" 531 U.S. at 474-75 (quoting *Mistretta* v. *United States*, 488 U.S. 361, 416 (1989) (Scalia, J. dissenting)). Nevertheless, "the degree of agency discretion that is acceptable [under the nondelegation doctrine] varies according to the scope of the power congressionally conferred." *Id.* at 475. In the case of NAAQS, the Court continued, the statute "must provide *substantial guidance* on setting air standards … [because they] affect the entire national economy." *Id.* (emphasis added). This Court found that "substantial guidance" in the language of section 109(b)(1) of the Clean Air Act.

Although the *Whitman* Court rejected the D.C. Circuit's decision that the Clean Air Act must "provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much,'" *id.* (quoting *ATA I*, 175 F.3d at 1034 (alteration in original)), the Court nonetheless confirmed that EPA's policy discretion in setting a NAAQS must be driven by scientific findings that support drawing a precise line separating over-regulation from under-regulation. According to the Court, Congress provided "substantial guidance" for setting NAAQS by specifying that

NAAQS must be (i) "based on published air quality criteria that reflect the latest scientific knowledge," and then (ii) set "'at a level that is requisite to protect public health from adverse effects of the pollutant in the ambient air,'" with "[r]equisite, in turn, 'mean[ing] sufficient but not more than necessary.'" *Id.* at 473 (quoting Tr. of Oral Arg. in No. 99-1257, p. 5, 7). As the Court emphasized, section 109(b)(1) requires that NAAQS be set "at *the* level that is … *not lower or higher than is necessary* … to protect the public health with an adequate margin of safety." *Id.* at 475-76 (emphasis added). The boundaries of EPA's NAAQS policy choices are defined by the quantitative findings and the precise line drawing that the Court found that the statute demands.

Given the absence of adverse health effects (in contrast to health risks) at the level of any ozone NAAQS, see *supra* note 1, EPA must evaluate data suggesting the existence of ozone health "risks" at levels below the NAAQS to determine whether revisions are "appropriate." See, *e.g.*, 62 Fed. Reg. at 38,863 (The EPA Administrator's Clean Air Act scientific review committee advised that "assessments of risk 'must play a central role'" where there are no "'bright line'" health thresholds.). After reviewing such data, the EPA Administrator in 1997 made a "public health policy judgment," *id.*, and drew the line at 0.08 ppm, *id.* at 38,856. On remand, the D.C. Circuit upheld the 1997 NAAQS, applying the *Whitman* standard. *ATA III,* 283 F.3d at 378.

In revising that 0.08 ppm NAAQS in 2008, a different EPA Administrator concluded that the Agency

was authorized to draw a different line based on a different risk policy judgment, and to do so dismissing the 1997 risk estimates as "irrelevant." Pet. App. 195a. The lower court agreed.

According to the court, because NAAQS decisions are governed by policy-driven approaches to uncertain science, the statute "requires us to ask only whether … [the 2008] NAAQS is 'requisite'; we need not ask why the prior NAAQS once was 'requisite' but is no longer up to the task." *Id.* at 15a. Under its uncertainty-centric standard, the court "will defer [to EPA's current judgment] as long as EPA reasonably explains its actions," *id.*, based on its "contemporary policy judgments," *id.* at 14a-15a.

Of course, as the lower court recognized, estimates of "risks," by their very nature, are "uncertain." *Id.* at 14a (characterizing NAAQS revision as "an area actually governed by policy-driven approaches to uncertain science"); see also *Natural Res. Def. Council* v. *EPA*, 824 F.2d 1146, 1165 (D.C. Cir. 1987) ("by its nature the finding of risk is uncertain"). That is why establishing, and later revising, NAAQS have always required public health policy judgments. See *ATA III*, 283 F.3d at 363-64. But a change in uncertainty alone and in isolation cannot justify revision of a NAAQS without any accountability for previous findings addressing those same risks. Rather, under the "substantial guidance" provided by the *Whitman* standard, once EPA has determined, based on the "latest scientific knowledge," *the* level of risk that is "not lower or higher than is necessary" to protect public health, that is the level that is "just

right" under *Whitman*—unless and until EPA can explain why its policy judgments on which that line is based are no longer correct.

Because the lower court could not reconcile the *Whitman* standard with an approach that ignores past Agency findings regarding acceptable risk, that court refused to "demand that EPA get things 'just right'" under what it called a "Goldilocks" standard. Pet. App. 26a. Rather, the court said, "for EPA's decision to survive these challenges," its "contemporary policy judgments" need only be "rational[]." *Id.* at 14a-15a, 26a. Applying this relaxed test, precision evaporates, replaced by obscure speculation. According to the court, new studies that "confirm or quantify previous findings or otherwise decrease uncertainty" are "valuable." *Id.* at 18a. At the same time, the court said, those studies may be only "incremental (and arguably duplicative)." *Id.* Finally, the court concluded with speculation: "[A]dditional certainty about what was merely a thesis [in 1997] *might* very well *support* a determination that the line marked by the term 'requisite' has shifted." *Id.* at 16a (emphasis added). Left unexplained by the lower court—or by the Agency—is how or why "incremental" or "duplicative" studies that "might … support a determination that the line … has shifted" *actually do support* EPA's shift. *Id.* That silence flows inescapably from EPA and the court's conclusion that, because EPA's prior "line" is irrelevant to its new "line," no explanation is necessary.

This Court in *Whitman* rejected an interpretation of section 109(b)(1) as calling merely for a "rational"

policy judgment in the face of scientific uncertainty. Rather, the Court found that "substantial guidance" governs decisions to revise NAAQS, and that guidance requires that EPA explain why the level chosen is "just right," *i.e.*, neither more nor less stringent than necessary. Compare *id.* at 26a (quoting *Goldilocks and the Three Bears*) with *Whitman*, 531 U.S. at 475-76. Certiorari should be granted to address the D.C. Circuit's refusal to follow *Whitman* in reviewing EPA's revision of the 1997 NAAQS.

II. The D.C. Circuit's Decision Is Inconsistent with This Court's Jurisprudence on Judicial Review of Agency Regulatory Changes.

In 1997, EPA revised the then-existing ozone NAAQS based on new science regarding potential health risks associated with exposures to ozone. See, *e.g.*, 62 Fed. Reg. at 38,859 (noting "the large number of new studies … that had become available since" the prior review); *id.* at 38,864 (discussing "[n]umerous epidemiological studies"). Because the association between physiological effects and exposure was uncertain at ozone levels below the then-existing standard, and because the significance to public health of potential exposure effects would depend on the magnitude and incidence of those effects, risk assessment played a "'central role'" in revising the NAAQS. *Id.* at 38,863 (quoting Wolff 1995b).

EPA's ozone risk assessment in 1997 focused on "transient" and "reversible" changes in lung function in children and projected the number of such changes from ozone exposure at different levels. According

to EPA, "statistically significant reductions in exposure [and therefore in lung-function effects would] … result from alternative … standards as the level changes from 0.09 ppm to 0.08 ppm to 0.07 ppm."[3] *Id.* at 38,864. Ultimately, EPA decided that, despite the existence of projected effects below 0.08 ppm, the then-existing NAAQS should be lowered only to 0.08 ppm. EPA concluded that the 0.08 ppm NAAQS was sufficient to reduce the risk of effects to the level that was "requisite" to protect public health with an "adequate margin of safety." *Id.* at 38,871.

In 2008, seven years after this Court's *Whitman* decision, EPA revised the ozone NAAQS from 0.08 ppm to 0.075 ppm. In justifying the reduction, EPA cited "new evidence," placing principal weight on new clinical studies addressing lung-function effects.[4] According to EPA, this new evidence resulted in more certainty regarding the judgments made in 1997 in support of NAAQS revision. 72 Fed. Reg. at 37,864; Pet. App. 95a. EPA did not, however, explain why a line drawn with less certain risk data in 1997

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[3] EPA's risk assessment also examined even less certain effects such as reductions in hospital admissions and emergency room visits. 61 Fed. Reg. 65,716, 65,728 (Dec. 13, 1996).

[4] Pet. App. 9a ("EPA emphasized new clinical studies" in its 2008 review.); *id.* at 19a (Clinical "studies provide 'the most directly applicable' evidence (and engender 'the highest level of confidence') about the causal relationship between ozone exposure and health effects."); see also EPA Br. 14 (EPA in 2008 placed "most weight" on the effects examined in clinical studies on the grounds that they reflect "the most direct evidence of exposure-response relationships.").

had to be redrawn when the Agency was presented with more certain data in 2008, given that both lines were drawn based on similar (if not lower) levels of risk associated with the same physiological effects. Instead, EPA merely cited changing scientific uncertainties to justify revising the NAAQS without providing any justification for the shift in the line called for by *Whitman*. See, *e.g.*, Pet. App. 196a-197a. No explanation was required, EPA said, because the "1997 risk estimates … are irrelevant." *Id.* at 195a. The court below agreed.

In *Fox*, Justice Scalia (writing for the Court), Justice Kennedy (concurring in part and in the judgment), and Justice Breyer (dissenting, joined by Justices Stevens, Souter, and Ginsburg) addressed the standard of review that applies when an agency changes course. Justice Scalia began by observing that the Court has never held "that *every* agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance." *Fox*, 556 U.S. at 514 (emphasis added). Nevertheless, "[a]n agency may not … depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.* at 515. And when a "new policy rests upon *factual findings* that contradict those which underlay its prior policy," an agency may need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.* (emphasis added).

Justice Breyer expressed concern that an agency's failure to examine closely prior policy decisions could

lead to agency action driven by "nothing more than political considerations or even personal whim." *Id.* at 552 (Breyer, J., dissenting). In particular, he observed that where "the agency rested its previous policy on *particular factual findings* … one would normally expect the agency to focus upon those earlier views of fact … and explain why they are no longer controlling." *Id.* at 550-51 (Breyer, J., dissenting).

Justice Kennedy concurred in reversal of the judgment but "agree[d] with … Justice Breyer that [an] agency must explain why 'it now reject[s] the considerations that led it to adopt the initial policy.'" *Id.* at 535 (Kennedy, J., concurring) (third alteration in original). Justice Kennedy continued that, where "the agency based its prior policy on *factual findings* … an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so." *Id.* at 537 (emphasis added). As Justice Kennedy explained, "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Id.* at 538. Because the prior policy at issue in the *Fox* case was "*not* base[d] … on factual findings," *id.* (emphasis added), Justice Kennedy concurred in the Court's judgment reversing the lower court's decision.

Despite the divergent opinions, all Justices agreed on the importance of an agency providing a detailed justification of a change in a fact-based policy decision. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made

in the past," *id.* at 537 (Kennedy, J., concurring), but rather must "focus upon those earlier views of fact … and explain why they are no longer controlling," *id.* at 551 (Breyer, J., dissenting), or at least provide a "more detailed justification," *id.* at 515 (Scalia, J.).[5]

These principles apply with special force to Clean Air Act NAAQS decisions. Under the Clean Air Act, any decision to revise a NAAQS starts with review of the existing scientific evidence in the air quality criteria. 42 U.S.C. § 7409(d)(1). Based on that review, the Administrator is to "make such revisions in such [existing] … standards and promulgate such new standards as may be appropriate in accordance with … subsection (b) of this section." *Id.* This statutory "appropriateness" finding, therefore, requires EPA to focus simultaneously on the inadequacy of the existing NAAQS and on the necessity for a revised NAAQS. Because any existing NAAQS will inevitably reflect a fact-based EPA policy judgment as to the level of air quality that is "requisite" to protect public health with a margin of safety, whether NAAQS revision is "appropriate" must necessarily be a fact-intensive determination conducted with reference to

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[5] After *Fox*, different appellate courts have placed different emphasis on the various views expressed in the *Fox* opinions. See, *e.g.*, *Humane Soc'y* v. *Locke*, 626 F.3d 1040, 1049, 1050 (9th Cir. 2010) (setting aside agency action where the agency's "findings are in apparent conflict with … earlier findings … yet the agency has not offered a rationale to explain the disparate findings"); *Philip Morris USA, Inc.* v. *Vilsack*, 736 F.3d 284, 290 (4th Cir. 2013) ("We defer to the agency's new position no less than the old….").

the reasons why the Agency previously drew the line that it did between "too much" and "too little" protection.

Stated another way, if the Administrator's authority to regulate under the *Whitman* standard ended at a certain risk level in 1997 (*i.e.*, at the line demarcating the level below which regulation would be "more than necessary"), then that line would remain the level beyond which regulation was more stringent than necessary in 2008—absent some Agency explanation why the reasons for drawing that line no longer apply and support a different result. *Fox*, 556 U.S. at 515-16. Otherwise, the Agency's decision to revise the NAAQS would reflect "nothing more than political considerations or … personal whim," *id.* at 552 (Breyer, J., dissenting), and the statute's "requisite" language would become wholly subjective with no consistent or predictable meaning, see *ATA I*, 175 F.3d at 1037 ("EPA's formulation of its policy judgment leaves it free to pick any point between zero and a hair below the concentrations yielding London's Killer Fog.").

Ignoring this Court's jurisprudence and misreading the Clean Air Act, the lower court found the EPA Administrator's prior 1997 policy judgments regarding the "requisite" risk level for the ozone NAAQS irrelevant. According to the court, the statute does not call upon courts to "ask why the prior NAAQS once was 'requisite' but is no longer up to the task." Pet. App. 15a. Moreover, because "discrepancies between past and current judgments as easily reflect problems in the past as in the present," the court

said, prior EPA policy judgments must be irrelevant in reviewing current EPA policy judgments. *Id.* The court's logic is fundamentally flawed.

There will always be discrepancies between past and present policy judgments. As Justice Breyer stated in his concurring opinion in *Whitman*, "what counts as 'requisite' to protecting public health will … vary with background circumstances." *Whitman*, 531 U.S. at 494 (Breyer, J., concurring). It is the fact that discrepancies may exist and the fact that background circumstances may change that preclude EPA from adopting without justification whatever policy it wants based on "contemporary … judgments." Pet. App. 14a-15a. The inevitability of "discrepancies" in a world of changing circumstances compels EPA to explain how the past relates to the present and why EPA is now taking a different path. See *Fox,* 556 U.S. at 537-38 (Kennedy, J., concurring).

Certiorari should be granted. The lower court's decision is contrary to the Clean Air Act and to the jurisprudence of this Court regarding judicial review of an agency decision under a statute requiring an agency to justify change in regulatory policy based on factual findings.

III. The Petition Raises an Important Question of Federal Law.

As this Court explained in *Whitman*, "[section] 109(b)(1) and the NAAQS for which it provides are the engine that drives nearly all of Title I of the [Clean Air Act]." 531 U.S. at 468; see also *Union*

Elec. Co. v. *EPA*, 427 U.S. 246, 249 (1976) (implementation of NAAQS at the "heart" of the CAA). A decision to revise a NAAQS sets into motion a massive regulatory undertaking that falls primarily on the States. Within one year of NAAQS revision, States must designate areas within their boundaries as either attaining or not attaining the revised NAAQS. See Pet. App. 270a-271a.

Each State must also prepare and submit a new State Implementation Plan (SIP) that, consistent with section 110 of the Clean Air Act, shows how the State will attain the new standard in "nonattainment" areas (those areas that do not meet the standard) and how the state will maintain attainment status in areas that already satisfy the revised NAAQS ("attainment" areas). See 42 U.S.C. §§ 7410(a)(1), 7502; see also Pet. App. 272a. That SIP must contain emission limits and other measures and techniques for both mobile and stationary sources that ensure attainment and maintenance of the NAAQS. Pet. App. 272a-273a; see also *Natural Res. Def. Council* v. *EPA*, 706 F.3d 428, 429-30 (D.C. Cir. 2013). The SIP must also address interstate transport of air pollution. See *EME Homer City Generation, L.P.* v. *EPA*, 696 F.3d 7, 13 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 2857 (2013).

NAAQS revision and the subsequent designation of attainment and nonattainment areas will also determine the applicability of industry obligations under the Clean Air Act's "prevention of significant deterioration" program, 42 U.S.C. §§ 7470-7479, which applies in attainment areas, and the Clean Air Act's

especially stringent nonattainment new source review applicable to emission sources in nonattainment areas, *id*. §§ 7501-7515. NAAQS revision therefore imposes substantial burdens on state regulators and has enormous consequences for the communities and businesses responsible for complying with the standards.

The central role of the NAAQS under the Clean Air Act means that a NAAQS revision "affect[s] the entire national economy." *Whitman*, 531 U.S. at 475. Indeed, the costs associated with NAAQS are staggering. For example, EPA estimated the cost of attaining the 1997 ozone NAAQS to be $9.6 billion *annually*. EPA, Regulatory Impact Analyses for the Particulate Matter and Ozone National Ambient Air Quality Standards and Proposed Regional Haze Rule, Executive Summary at ES-11 (July 17, 1997), *available at* http://www.epa.gov/ttn/oarpg/naaqsfin/ria.html. Likewise, EPA estimated the 2008 ozone NAAQS to cost between $7.6 billion and $8.8 billion *annually*. EPA, Final Ozone NAAQS Regulatory Impact Analysis, Executive Summary at ES-3 (Mar. 2008), *available at* http://www.epa.gov/ttn/ecas/regdata/RIAs/0-ozoneriaexecsum.pdf.

As a former official with the White House Office of Information and Regulatory Affairs noted, "[t]he biggest rules—the biggest decisions—during [his] almost thirty-year tenure involved the National Ambient Air Quality Standards." Arthur Fraas, *Observations on OIRA's Policies and Procedures*, 63 ADMIN. L. REV. 79, 81 (2011). Given the enormous impact a NAAQS has on the Nation, certiorari should

be granted to ensure that the D.C. Circuit follows this Court's *Whitman* standard.

Granting certiorari is especially important because EPA must review NAAQS every five years, 42 U.S.C. § 7409(d)(1), and the Agency is expected to issue final rules on its review of three NAAQS within the next two years, see Anna Marie Wood, Dir., Air Quality Policy Div., EPA, NAAQS Implementation and Permits Update at 4 (Feb. 26, 2013), *available at* http://www.epa.gov/air/caaac/pdfs/naaqs-implementation-permits-update.pdf. As noted above, the D.C. Circuit is the only forum for the judicial review of NAAQS. 42 U.S.C. § 7607(b). Without this Court's intervention in this case, the "substantial guidance" announced by this Court in *Whitman* will be replaced in each of these proceedings by a decisional standard without accountability—the inevitable "scientific uncertainties" associated with all risk estimates will justify any "contemporary policy judgment[]" that EPA chooses to make.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 10, 2014