ORAL ARGUMENT NOT YET SCHEDULED
No. 18-1114 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents

On Petition for Review of Final Administrative Action
by the U.S. Environmental Protection Agency

BRIEF OF AMICUS CURIAE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT IN SUPPORT OF PETITIONERS

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Dated: February 14, 2019

CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for amicus curiae certify as follows:

A. Parties and Amici. All parties, intervenors, and amici in this court are listed in the Brief for State Petitioners (Doc. 1772468).

B. Rulings under Review. Petitioners challenge the agency decision titled, "Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles," published at 83 Fed. Reg. 16,077 (April 13, 2018).

C. Related Cases. This amicus curiae adopts the statement of related cases set forth in the Brief for State Petitioners (Doc. 1772468).

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GLOSSARY

District	South Coast Air Quality Management District
CARB	California Air Resources Board
EPA	U.S. Environmental Protection Agency
GHG	Greenhouse Gas
NAAQS	National Ambient Air Quality Standards
NACAA	National Association of Clean Air Agencies
NOx	Oxides of nitrogen
SIP	State Implementation Plan
VOC	Volatile organic compound
ZEV	Zero Emission Vehicle

AMICUS CURIAE'S STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The South Coast Air Quality Management District (South Coast District or District) is a political subdivision of California responsible for comprehensive air pollution control in the Los Angeles metropolitan area and parts of surrounding counties that make up the South Coast Air Basin. Cal. Health & Safety Code § 40410. Across a jurisdiction of 10,743 square miles, the South Coast District is vested with primary responsibility for the control of air pollution from all sources other than motor vehicles. Cal. Health & Safety Code § 40000. In this role, the District has the mission to protect public health and meet the Clean Air Act's National Ambient Air Quality Standards (NAAQS). The region's air pollution challenges are unmatched in persistence, urgency, and scale: the District must secure ozone reductions for a populace that amounts to four-fifths of the nation's population living in areas designated serious, severe, or extreme nonattainment for the 8-Hour Ozone (2015) NAAQS. *See* EPA GREEN BOOK, 8-Hour Ozone (2015) Nonattainment Areas by State/County/Area, *available at* https://www3.epa.gov/airquality/greenbook/jncty.html (last visited February 13, 2019); EPA GREEN BOOK, 8-Hour Ozone (2015) Nonattainment Areas, *available at* https://www3.epa.gov/airquality/greenbook/jnc.html (last visited February 13, 2019).

The South Coast District addresses ozone pollution by imposing control requirements that, "in general, are more expensive and technologically advanced, and apply to smaller emitters" than controls found in other areas of the country. *See* 62 Fed. Reg. 1150, 1153 (January 8, 1997). But EPA has recognized these controls can only go so far. As EPA has explained, the Clean Air Act sets out the "blueprint" by which nonattainment areas will attain the NAAQS—one that couples locally-directed reductions with "Federal measures, such as reductions from mobile source measures promulgated by EPA under Title II of the Act." *See id*. at 1154. Consistent with this, the District has a keen, longstanding interest in ensuring that EPA fulfills its share of reductions needed for attainment. Most vitally, the EPA cannot neglect its responsibilities to address emissions from mobile sources, since they emit 80% of smog-contributing nitrogen oxides pollution in the region. *See* South Coast District, 2016 Air Quality Management Plan, "Appendix III: Base and Future Year Emission Inventory," at III-2-2, http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2016-air-quality-management-plan/final-2016-aqmp/appendix-iii.pdf?sfvrsn=6. Thus, the District can ill afford any EPA action that is careless in its observance of EPA regulations and aims to roll back standards of control on mobile sources. Amicus South Coast District supports the petitioners' efforts to vindicate the rule of law and have this Court declare the challenged action

unlawful. It submits this brief to call attention to EPA's faulty consideration of "the impact of the standards on the reduction of emissions," a factor that EPA was required to assess "in detail" with multiple, other factors to comply with 40 C.F.R. § 86.1818-12(h) ("Section 12(h)").[1]

The South Coast District's interest in the case is further outlined in its Unopposed Motion for Leave to Participate as Amicus Curiae in Support of Petitioners, which was filed on August 3, 2018 and granted by Court order dated August 9, 2018. Amicus, as a governmental entity, submits a separate brief under the Circuit Rule 29(d) exception to the requirement to otherwise join in a single brief. Amicus alternatively certifies that a separate brief is necessary because no other amici share the District's unique focus on how EPA's assessment of the "reduction of emissions" factor in the mid-term evaluation is an arbitrary and capricious agency action that is not in accordance with EPA's regulation and, by itself, warrants judicial invalidation.

No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or its counsel made a monetary contribution to its preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

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[1] "Reduction of emissions" is described as a factor for ease of reference. Strictly speaking, it is one part of a composite, enumerated factor at 40 C.F.R. § 86.1818-12(h)(1)(iv).

SUMMARY OF ARGUMENT

Amicus South Coast District here brings focus on the agency's slipshod treatment of "the impact of the standards on reduction of emissions"—one of the several mandatory factors for assessment in the Section 12(h) requirements for a mid-term evaluation. The *Accardi* doctrine requires federal agencies to follow their own rules, even gratuitous procedural rules, that limit otherwise discretionary actions. *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (*citing United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). In promulgating Section 12(h), EPA so limited itself. 77 Fed. Reg. 62,624 (October 15, 2012). The rule, made by EPA's authority under Section 301 of the Clean Air Act, fashions requirements with binding effect. 42 U.S.C. § 7601. Consistent with *Accardi*, these requirements provide the basis for judicial review of EPA's action. The EPA Administrator's purported satisfaction of the requirements in publishing the mid-term evaluation in the Federal Register clearly points to a "final action of the Administrator" under the Clean Air Act, and EPA may not evade this "judicial review."[2] *See* 42 U.S.C. § 7607(b)(1).

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[2] Respondents and respondent-intervenors incorrectly imply that EPA's 2012 rulemaking preamble *clearly* asserts that judicial review can *only* be had later. *See* Doc. 173996 at 4; Doc. 1751968 at 6; Doc. 1749947 at 5 (*citing* 77 Fed. Reg. 62,624, 62,784-85 (Oct. 15. 2012)). Tellingly, as was also done in the agency decision challenged here, *see* 83 Fed. Reg. at 16,087, the parties provide no direct quotes, only wishful paraphrasing.

Respondent EPA has notably changed positions in seeking to evade judicial review. Initially, Respondent EPA invoked a presumption of regularity, asserting "there is no reason to conclude, if any….error could be identified…that the error would remain following the conclusion of [future] notice-and-comment rulemaking." Resp't Mot. to Dismiss at 13 (Doc. 1739996). But EPA's since-published proposal contained the irregular claim that the agency's rulemaking was to be "entirely *de novo*," *see* 83 Fed. Reg. 42,986, 42,987 (August 24, 2018). Relying on this *de novo* theory, Respondent EPA now claims that it is "not dependent upon" the mid-term evaluation; rather, it asserts power to roll back the existing greenhouse gas (GHG) standards "regardless" of whether the revised determination "had ever been issued or were to remain in place." Resp't Reply in Supp. of Mot. to Dismiss at 3 (Doc. 1751968). Heedless of the *Accardi* doctrine, it appears EPA aims to defy all review and responsibility for its gravely deficient revised determination. Respondent's appeal to a vaunted "presumption of regularity," Resp't Mot. to Dismiss at 13 (Doc. 1739996), must fail when Respondent cannot admit circumstances when violations of Section 12(h) under this kind of agency disposition should ever be reviewable by any court.[3] Here,

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[3] A "presumption of regularity" also rings hollow when too many irregularities in that ongoing rulemaking are already manifest. To name one example: EPA initially published a comment period deadline that "did not reflect the Clean Air Act requirement" of 42 U.S.C. § 7607(d)(5). 83 Fed. Reg. 48,578 (September 26,

therefore, the Court should grant the petitions for review, as would be consistent with the firmly-established convention that "an appellate court may always remand a case to the agency for further consideration." *See Harrison v. PPG Industries*, 446 U.S. 578, 593-594 (1980).

EPA's action beckons judicial invalidation under the governing standard of 5 U.S.C. § 706. *See Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 496-497 (2004) (explaining how the "familiar default standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)" applies for typical actions under the Clean Air Act). As one defect among many, the evaluation's discussion of the "reduction of emissions" factor does not assess the factor. Rather, it essentially spurns it. Specifically, EPA's stated rationale for not discussing the reduction of pollutants, including ozone-forming pollutants, was that "those issues are already handled through the NAAQS implementation process." 83 Fed. Reg. at 16,085. This statement ignores that the emissions reductions associated with Federal mobile source regulations—including the very standards set for mid-term evaluation under Section 12(h)—are part and parcel of the NAAQS implementation process. Federally-driven reductions of pollutants are, as a matter of course, incorporated into the baseline emission inventories in any required plan

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2018). Stakeholders had quickly noted the unusual, incontestable error, but EPA did nothing to fix or acknowledge it for nearly four weeks. *See id.*

for a nonattainment area to meet the NAAQS. *See* 42 U.S.C. § 7502(c)(3) (requiring "comprehensive, accurate, and current" inventories from all sources of the relevant pollutant for the area). Thus, nonattainment areas rely on ongoing emissions reductions from mobile sources (including, without exception, the standards fixed to Section 12(h)). EPA's invalid and incoherent reasoning on this factor is arbitrary and capricious, and not remotely "the product of agency expertise." *Cf. Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

What EPA failed to give—a valid "in detail" assessment of the factor befitting proper expertise—is also "not in accordance with law." *See* 5 U.S.C. § 706. EPA must necessarily follow Section 12(h) as a duly promulgated legal constraint on the Administrator's freedom of action, and EPA's failure to abide by it must be held unlawful and set aside.

I. EPA Was Arbitrary and Capricious In Treatment of the "Reduction of Emissions" Factor.

As a matter of fundamental administrative law, EPA's action must be invalidated for failing to consider an important aspect of the problem and showing a clear error of judgment. *See State Farm*, 463 U.S. at 43. In this case, the agency decision's discussion of the "reductions of emissions" factor was "illogical on its

own terms," and thus arbitrary and capricious. *See American Federation of Government Employees v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006).

The picture of arbitrariness reveals itself in three sentences, which is the totality of EPA's discussion "[r]egarding emissions." 83 Fed. Reg. at 16,085. EPA first spent two sentences to summarize how commenters had called attention to "the co-benefits of GHG standards as important criteria pollutant control measures" and, as EPA vaguely put it, "other air benefits." *Id*. Of note, criteria pollutants refers only to those pollutants for which EPA has set a NAAQS. S*ee* 42 U.S.C. § 7408 (statutory process for setting NAAQS from which the term "criteria" traces). EPA's assessment of the factor, if it can be called such, was a single, meandering sentence that is here reproduced in full:

> "While EPA agrees that there are co-benefits from these standards, EPA notes that the standards are supposed to be based on GHG emissions and that while co-benefits exist with respect to emissions such as criteria pollutants, using GHG emission standards as criteria pollutant control measures is likely a less efficient mechanism to decrease criteria pollutants and those issues are already handled through the NAAQS implementation processes." *Id*.

As seen, this single sentence does not assess the factor or information that may fall under it. Instead, it aims to explain away the factor's relevance. But this and other

factors listed in Section 12(h) cannot be dismissed as irrelevant. They were designated "relevant" by the terms of the duly promulgated rule itself. 40 C.F.R. § 86.1818-12(h)(1), (h)(1)(vii).

Even assuming the Court could credit EPA's wording as an assessment of the factor (rather than an abject "failure to consider a relevant factor"), the articulated rationale speaks only to criteria pollutants and ignores other pollutants, including toxic air pollutants such as benzene. In fact, the only commenter that EPA cited by name, NACAA (which EPA neglected to spell out as the "National Association of Clean Air Agencies"), had specifically praised the standards for "equally important reductions in toxic air pollution." *See* National Association of Clean Air Agencies, Comments on Reconsideration of the Final Determination of the Mid-Term Evaluation of the Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, Doc. Id. No. EPA-HQ-OAR-2015-0827-8962, 2 (October 4, 2017). An agency's "failure to address comments, or at best its attempt to address them in a conclusory manner, is fatal to its defense." *See Ass'n of Private Sector Colleges v. Duncan*, 681 F.3d 417, 449 (D.C. Cir. 2012).

Last, what little the sentence does provide for a rationale on the point of criteria pollutants is flatly wrong. GHG emissions standards are not necessarily nor even "likely" a less efficient mechanism to decrease criteria pollutants. Zero emission vehicle (ZEV) standards that EPA has previously approved in the

California State Implementation Plan, *see* 81 Fed. Reg. 39424 (June 16, 2016), decrease both criteria pollutants and GHGs with dramatic and maximal efficiency. More striking about the sentence, however, is the essential falsity of the point that criteria pollutant control benefits have no bearing because they "are already handled through the NAAQS implementation process." Contrary to this argument, criteria pollutant reductions associated with federal regulations, including mobile source standards, are embedded and counted in NAAQS planning. The GHG standards fixed to Section 12(h) are no exception. While the Administrator conceded that "co-benefits exist," he ignored that the criteria pollutant reductions associated with the GHG standards have material bearing on attainment planning. Specifically, the Clean Air Act requires states to address nonattainment areas by developing a plan for how a nonattainment area will eventually comply with the NAAQS. 42 U.S.C. §§ 7407(a), 7410. Measures on which compliance plans rely, for example the above-mentioned ZEV standards, must be included. 42 U.S.C. § 7502(c)(1); *see Committee for a Better Arvin v. EPA*, 786 F.3d 1169 (9th Cir. 2015). More generically, all plans to attain the NAAQS must always have a "comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant." *See* 42 U.S.C. § 7502(c)(3).

Planners account for the emissions reductions associated with Federal regulations when they develop their baseline emission inventories. For the mobile

source portion of the required emission inventory, EPA designates and oversees the use of computer models to calculate estimates for mobile source emissions. *See Official Release of the MOVES2014 Motor Vehicle Emissions Model for SIPs and Transportation Conformity*, 79 Fed. Reg. 60,343, 60,344 (October 7, 2014) (explaining the updated model "incorporates the effects" of light-duty vehicle GHG standards "phasing in with the 2017 model year" that "will result in decreased energy consumption rates and decreased refueling emissions"); *see also* 80 Fed. Reg. 77,337, 77,338 (December 14, 2005) (approving updated data for the model specific to California, including "reductions associated with CARB's Advanced Clean Cars regulations"). Reductions associated with Federal mobile source regulations, including GHG standards, are conventional inputs for that model. *Id*. In practical terms, federal regulations designed to reduce some pollutant that is not a criteria pollutant (e.g., GHGs) can still provide reductions of criteria pollutants with material bearing on an inventory. The Administrator's stated rationale thus ignores how planners rely on the existing vehicular GHG standards for NAAQS planning purposes. Planners have in fact done so according to past EPA direction and acknowledgement that the existing GHG standards will achieve associated reductions in criteria pollutants from vehicles and sources related to fuel-based transportation (e.g., refineries and gas dispensing facilities). *Id*.

Therefore, even if the Court could accept the brevity of the EPA's one-sentence assessment, it should not uphold its substance.

Nonattainment planners rely on accurate inventories to help quantify control measures that will not be excessive. EPA's action to roll back federal measures—particularly when EPA appears to be heedless and uncomprehending of the implications for nonattainment areas—undermines planning certainty. In the worst case, a rollback action can force the reworking of an attainment plan to demand compensating reductions elsewhere, even when those reductions may not be as sensible or achievable.

The South Coast District has a NAAQS planning role for multiple criteria pollutants and multiple area designations of nonattainment. In this role, the District represents its locally-affected public and industry with the rights and reliance interests that Section 12(h) was meant to protect. Amicus South Coast District therefore counts alongside petitioners as one entitled to insist upon the observance of Section 12(h) and ask that this Court hold EPA accountable for its error of law in ignoring its own regulations. *See Montilla v. INS*, 926 F.2d 162, 167-169 (2nd Cir. 1991) ("Careless observance by an agency of its own administrative processes…exposes the possibility of favoritism and of inconsistent application of the law"); *Morton v. Ruiz*, 415 U.S. 199, 234 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own

procedures. This is so even where the internal procedures are possibly more rigorous than would otherwise be required.").

II. EPA's Past, Responsible Regard For "Reduction of Emissions" Demonstrates How Its Action Flouts Section 12(h).

EPA's skimpy offering also fails to "set forth in detail the bases for the determination." *See* 40 C.F.R. § 86.1818-12(h)(4). It further contradicts EPA's own aspirations for a "robust and comprehensive" evaluation. 77 Fed. Reg. 62,784. EPA's brush-off treatment markedly departs from the details of EPA's past, conscientious study of collateral changes in air pollutants owing to the GHG standards. For starters, the Joint Technical Support Document that accompanied the 2012 rulemaking had dedicated nine pages to air pollutant emissions other than GHGs. EPA, *Joint Technical Support Document: Final Rulemaking for 2017-2025 Light-duty Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards*, Doc. Id. No. EPA-HQ-OAR-2015-0827-0387, 4-39 to 4-49 (August 2012). Continuing from there, the Draft Technical Assessment Report released in July 2016, and the Technical Support Document for the January 2017 final determination to maintain current GHG emissions standards, had also addressed in detail available information on air quality impacts. *See*, *e.g.*, EPA, *Proposed Determination on the Appropriateness of the Model Year 2022-2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm*

Evaluation: Technical Support Document, EPA-420-R-16-021, Doc. Id. No. EPA-HQ-OAR-2015-OAR-0827-5941, 3-36 to 3-41 (November 2016). EPA had noted, for example, its anticipation "that ozone benefits associated with reducing the emissions of NOx and VOC could be substantial." *Id*. at 3-37. This information was all part of the required record for the January 2017 final determination, and that action had aptly covered this territory in referencing back to the "health benefits" and "enormous benefits" for reductions of emissions earlier detailed in the record. *See* 40 C.F.R. § 86.1818-12(h)(2); EPA, *Final Determination on the Appropriateness of the Model Year 2022-2025 Light Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation*, Doc. Id. No. EPA-HQ-OAR-2015-0827-6270, 24 (January 2017). But the withdrawal action challenged here abruptly departed from this past detailed analysis. This highlights EPA's disregard for this factor. In offering a dismissive and incoherent rationale, EPA violated the demands of Section 12(h).

CONCLUSION

For the reasons set forth above, the petitions for review should be granted.

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CERTIFICATE OF COMPLIANCE
WITH WORD LIMITATION

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), it contains 3,092 words. I have relied on Microsoft Word's calculation feature.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system for service on all registered counsel in these consolidated cases.

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