No. 12-760

IN THE
Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

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

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

REPLY BRIEF FOR PETITIONER

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The Environmental Protection Agency's brief in opposition is most notable for what it does not say. Nowhere does EPA explain how its reliance on fictional air quality scenarios can be squared with the text of the Clean Air Act or the precedent of this Court. Nowhere does EPA defend the D.C. Circuit's limitless interpretation of Section 109's "margin of safety" clause. And nowhere does EPA deny that the question presented is recurring, important, and ripe for review.

Instead of addressing these issues, EPA tries its hardest to avoid them. The "just meets" scenario, EPA assures us, was just one among many factors it considered when promulgating a new national ambient air quality standard for nitrogen dioxide. The agency maintains that it properly took into account *all* relevant evidence—including the purely hypo-

thetical "just meets" projection. And it contends that even if it should not have considered the "just meets" scenario, the error was harmless because it also considered current air quality when assessing the need for a new NAAQS.

None of these explanations holds water. EPA's reliance on the "just meets" scenario was critical to its decision to promulgate a new NAAQS. Neither EPA nor the D.C. Circuit relied on any alternative ground for their decisions. And even if they had, that would not insulate the D.C. Circuit's decision from review. An agency's action must be set aside as arbitrary and capricious if the agency relied on a factor that Congress did not intend for it to consider—which is precisely what happened here.

Having failed in its attempt to set up distracting and irrelevant roadblocks to this Court's review, EPA offers practically no defense of its methodology on the merits. The reason for its hesitancy is plain: the agency's reliance on the "just meets" scenario is legally indefensible. The Clean Air Act requires EPA to make fact-based risk assessments—not wild guesses. EPA's repeated invocation of the fictional "just meets" scenario has gone unchecked for long enough. This Court should grant the petition and reaffirm the statutory limits on EPA's authority to promulgate national air quality standards.

I. THE "JUST MEETS" SCENARIO WAS CRITICAL TO EPA'S DECISION.

EPA opens with a bold gambit: It claims the "just meets" scenario—which figured so prominently in its decision to promulgate a new NAAQS and in the D.C. Circuit's opinion affirming that decision—is actually a red herring. The important question, according to EPA, is not whether the Clean Air Act

authorizes regulation based on fictional air quality scenarios. Whether the Act does or not, EPA now says the new NAAQS is "independently justified" because it will "produce significant health benefits relative to *current* air-quality levels." Opp. 11. Those supposed real-world benefits, EPA now tells us, were the "ultimate" reason it decided to promulgate a new NAAQS. Opp. 13; *see also* Opp. 7. And according to EPA, the D.C. Circuit approved the NAAQS for the same reason. Opp. 9, 11. EPA believes this independent basis for its decision insulates it from "attack"—"[e]ven if the 'just meets' scenario [is] found to be an irrelevant criterion." Opp. 11, 12.

EPA's argument suffers from number of flaws. Of those, the most significant is that the argument has absolutely no basis in the record. EPA leaned heavily on the "just meets" scenario in the rulemaking, expressly *rejecting* the notion that it "should rely only on [current] air quality" in its analysis. Pet. App. 86a. It assured commenters that the "just meets" scenario was "clearly useful to inform a decision on the issue before EPA (*i.e.*, the adequacy of the level of public health protection associated with allowable NO_2 air quality under the standard)." *Id.* Indeed, as this phrasing suggests, EPA viewed the public health impact of *allowable* air quality—not actual or anticipated air quality—as "the" issue before it. *Id.*; *accord* Brief for Respondent at 40, American Petroleum Institute v. EPA, 684 F.3d 1342 (D.C. Cir. 2012) (No. 10-1079) ("The question before EPA was not whether present *air quality* threatens human health; it was, instead, whether the existing *standard* protects public health with an adequate margin of safety."). The agency accordingly deferred

to its staff's conclusion that the risks associated with the "just meets" scenario "can reasonably be concluded to be important from a public health perspective." Pet. App. 92a. And it cited, as a key reason for its action, the many ills that would befall the city of Atlanta *if* air quality deteriorated to the "just meets" level. Pet. App. 92a-93a. In short, EPA's decision to revise the pre-existing standard was expressly "[b]ased on" the "just meets" scenario. Pet. App. 93a.

The rulemaking record also confirms that EPA's decision was not based on any actual public health threats linked to current air quality. EPA never identified such a threat, nor did it say that it was acting to prevent such a threat from materializing. It now points to a single statement in the rulemaking record as evidence that it believed the new standard would "produce significant public health benefits relative to *current* air-quality levels (i.e., the 'as is' scenario)." Opp. 11 (citing Opp. App. 54a).

But that is not what the cited passage says. It says the new NAAQS "will provide a significant increase in public health protection compared to that provided by the current *annual standard* alone." Opp. App. 54a (emphasis added). As the agency had made clear just two paragraphs earlier, it was referring to the "level of risk *permitted* by the current annual standard"—in other words, the hypothetical risks associated with the "just meets" scenario. Opp. App. 53a (emphasis added); *see also* Pet. App. 88a (the "just meets" scenario is "meant to estimate NO_2-related exposures and health risks that would be permitted under the current" standard). There is no reason to think EPA's decision was based on anything other than this imagined risk.

It is true, as the D.C. Circuit noted, that a chart buried within the EPA staff's Risk and Exposure Assessment showed some air quality improvement if the area-wide standard were lowered to 50 ppb. *See* Pet. App. 19a.[1] But the projected improvement was relatively minimal, particularly in comparison to the "just meets" scenario. EPA never relied on the chart when explaining the basis for its final decision. And it certainly never found that such a small improvement in air quality was necessary to avoid a threat to the "public health." 42 U.S.C. § 7409(b)(1).

The D.C. Circuit unearthed the chart only to rebut the petitioners' argument that the new standard provided no benefit at all. Pet. App. 18a. Contrary to EPA's contention, the D.C. Circuit never suggested that the minimal air quality improvement disclosed in the chart "independently justified" EPA's final decision. Opp. 11. That rationale was at most a supplement to the D.C. Circuit's approval of EPA's "just meets" projections. *See* Pet. App. 19a ("we conclude the EPA did not act unreasonably by comparing the benefits of the one-hour standard against not only a scenario based upon existing air quality but also upon an alternate scenario in which areas just meet the annual NAAQS set in 1971").

In any event, the question is not whether EPA's decision to promulgate a new NAAQS *could* have been justified on other grounds, or whether the agency would have arrived at the same conclusion if it had considered only the relevant factors. A court must judge the propriety of agency action "solely by the grounds invoked by the agency"; it may not

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[1] The chart is on page JA00635 of the parties' joint appendix filed with the court of appeals.

hypothesize other grounds on which the agency's decision might have rested. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam). If the agency's justification for its action is inadequate or erroneous, "[t]he reviewing court should not attempt itself to make up for such deficiencies; [it] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Chenery Corp.*, 332 U.S. at 196). The proper course in that situation typically is to remand to the agency. *Orlando Ventura*, 537 U.S. at 16.[2]

Here, it suffices to show that EPA "relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. EPA plainly did just that. Its error renders the final NAAQS arbitrary and capricious and requires reversal of the D.C. Circuit's decision.

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[2] To be sure, an agency's analytical lapse may be deemed "harmless" in certain narrow circumstances. *See National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007). But EPA's reliance on the "just meets" scenario was not merely a "stray statement" that had "no effect" on the agency's decision. *Id.* It was a critical finding intended to "bridge the gap" between the scientific evidence regarding health effects of NO_2 in individuals and the policy conclusion that a new standard was necessary to protect the public health. *Natural Res. Def. Council* v. *EPA*, 902 F.2d 962, 967 (D.C. Cir. 1990), *vacated in part*, 921 F.2d 326 (D.C. Cir. 1991).

II. EPA OFFERS NO MEANINGFUL DEFENSE OF THE "JUST MEETS" SCENARIO.

EPA all but concedes that consideration of the "just meets" scenario is improper, mounting what could be generously described as a half-hearted defense. It makes no attempt to show that the Clean Air Act requires or even permits it to protect the public from fictional risks. Indeed, the agency barely mentions the statute at all. *See* Opp. 10-15. Instead of locating its claimed authority in the statutory text, EPA says it has a duty to review "all relevant evidence" in setting air quality standards. Opp. 13. And it suggests that the "possibility" that air quality will substantially deteriorate is relevant to its inquiry. *Id.* This leads the agency to conclude that it properly considered the "just meets" scenario "as part of a comprehensive analysis that included a range of scenarios and a wealth of scientific evidence." Opp. 12. Everything, in other words, is fair game—including speculation.

But the statute is not so open-ended. As API's petition explains in detail, the Clean Air Act channels EPA's focus toward a single question: Is the attainment of a certain level of air quality necessary in order to protect the public health from a reasonably anticipated threat of harm? *See* Pet. 15-19. EPA is correct that a broad range of real-world information and data may be relevant to that question. Imagined air quality, however, is not within that range.

The statute's "margin of safety" clause does not alter that conclusion. The clause is a risk-management device, not an invitation to take into account completely fanciful air-quality scenarios.

Pet. 19-20. This Court's decision in *Whitman* v. *American Trucking Associations*, 531 U.S. 457 (2001), confirmed as much by holding that the clause allows only for modest adjustments to the NAAQS level. Pet. 20.

The court of appeals, however, reached the opposite conclusion, holding that the "margin of safety" clause allows EPA to take any "possible" contingency into account. Pet. App. 18a. But EPA itself did not advocate that expansive interpretation below—and EPA does not defend it in this Court. EPA's silence is a telling concession.

The D.C. Circuit's erroneous interpretation of the statute has constitutional implications as well. As this Court recognized in *American Trucking*, the Clean Air Act's broad delegation of authority to EPA is valid only to the extent that it provides an "intelligible principle" to guide EPA's discretion. 531 U.S. at 472. The phrase "requisite to protect the public health," as interpreted by this Court, provides such a principle, because it limits EPA to instituting measures that are neither more nor less than what is necessary to protect the public health. Although the D.C. Circuit dutifully recited that holding, *cf.* Opp. 14, it then introduced a loophole that threatens to swallow that intelligible principle whole, *see* Pet. App. 17a-18a.

III. THIS COURT'S REVIEW IS NECESSARY.

EPA concedes that the proper administration of the Clean Air Act is "critical to the national well-being." Opp. 15. The statute, and the NAAQS promulgated under it, are among the most powerful and far-reaching tools in the modern regulatory arsenal. EPA has now taken that expansive power and arrogated yet more, promulgating NAAQS after NAAQS

based on risks that are little more than the product of its own imagination. *See, e.g.*, 76 Fed. Reg. 54294, 54301 (Aug. 11, 2011) (carbon monoxide NAAQS); 75 Fed. Reg. 35520, 35527 (June 22, 2010) (sulfur dioxide NAAQS); 73 Fed. Reg. 66964, 66984 (Nov. 12, 2008) (lead NAAQS); 73 Fed. Reg. 16436, 16441 (Mar. 27, 2008) (ozone NAAQS); 71 Fed. Reg. 61144, 61152 (Oct. 17, 2006) (particulate matter NAAQS). Just two months ago, EPA tightened the particulate matter NAAQS based largely on its view of the possible public health risks under the "just meets" scenario. *See* 78 Fed. Reg. 3086, 3089, 3108 (Jan. 15, 2013). These regulations impose enormous costs on cities, states, businesses, and consumers. *See* Pet. 23-24. This Court's intervention is required to relieve these unjustified burdens and reaffirm the statutory limits on EPA's authority.

CONCLUSION

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

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Respectfully submitted,

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