No. 13-1235

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner hereby incorporates by reference the disclosure statement filed with the petition for a writ of certiorari on April 10, 2014.

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INTRODUCTION

The Environmental Protection Agency's (EPA or Agency) opposition to the Utility Air Regulatory Group's (UARG) petition for a writ of certiorari proceeds from the false premise that the "arbitrary and capricious" review standard exists disembodied from the statutory standards governing national ambient air quality standards (NAAQS) decisionmaking and can be applied "de novo" without reference to past NAAQS decisions. EPA uses "arbitrary and capricious" and "de novo" as shibboleths to elude even acknowledging the fundamental problem with the decision below. That problem is that the D.C. Circuit substituted a decisional standard grounded in nothing more than EPA's "contemporary policy judgment" for the statutory decisional standard requiring EPA to draw a line separating acceptable and unacceptable public health risks. That statutory health risk standard, announced by this Court in *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), was binding on the D.C. Circuit and was ignored.

In 1999, the D.C. Circuit in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam) ("*ATA I*"), rejected EPA's decision to revise the ozone NAAQS to 0.08 parts per million (ppm) based on the Agency's re-weighing of scientific uncertainties, on the grounds that EPA's interpretation of the Clean Air Act (CAA) created a "non-delegation" problem. According to the D.C. Circuit in *ATA I*, EPA's "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 reversed *ATA I* on the grounds that EPA's failure to identify a principle for saying "how much uncertainty is too much" did not violate the non-delegation doctrine. *Whitman*, 531 U.S. at 475-76. The question presented by the "non-delegation" doctrine, the Court explained, is whether the *statute* provides an intelligible principle for agency decision-making. Declining to read the statute (i.e., 42 U.S.C. § 7409(b)(1)) as calling only for "rational" policy judgment in the face of scientific uncertainty, the Court instead found that section 7409(b)(1) provides "substantial guidance" for revising NAAQS: EPA must explain why the standard level is just right, i.e., neither "lower [n]or higher than is necessary … to protect the public health." *Id.*

Since *Whitman* was decided, EPA and the D.C. Circuit have drifted back to an uncertainty-centric approach to revising NAAQS. As the court below reasoned, a standard under which EPA must draw a line between too much and too little regulation, as required in *Whitman*, is problematic because it "presupposes scientific certainty in an area actually governed by policy-driven approaches to uncertain science." Pet. App. 14a. As a result, the lower court continued, the reviewing court's obligation is not to see whether EPA's NAAQS decision is "'just right'" under *Whitman*, *id.* at 26a, but rather to review whether EPA has reasonably explained its re-

weighing of scientific uncertainty in light of "contemporary policy judgments." *Id.* at 14a-15a.

In its opposition, EPA supports this departure from *Whitman,* arguing that "increased certainty" regarding public health risk alone "justified greater protection of public health." EPA Opp. 12-13. Once a change in the degree of uncertainty is identified, EPA argues, the Agency's prior determination regarding the line between too much and too little regulation is irrelevant because the CAA "require[s] de novo review" of NAAQS. *Id.* at 15-16.

Given the extraordinary burdens that NAAQS impose on society and the exclusive role of the D.C. Circuit in reviewing NAAQS decisions, certiorari is needed to address the confusion that has emerged over the past decade regarding the meaning and application of this Court's *Whitman* decision, culminating in the return in this case to the pre-*Whitman,* uncertainty-centric approach to NAAQS revision.

ARGUMENT

Estimates of public health risk are, by their very nature, uncertain. As a result, proceedings to establish and then to revise NAAQS call for public health policy judgments in the context of uncertain effects. This essential characteristic of NAAQS decisions led this Court in *Whitman* to address the nature of the CAA's guidance for making these NAAQS policy judgments. The Court found that the CAA provides "substantial guidance" as to how uncertain risks are to be managed under the NAAQS program. That

guidance requires EPA to explain why the level at which it sets a NAAQS is neither lower nor higher than necessary to protect public health. *Whitman*, 531 U.S. at 475-76.

According to the lower court, rather than identifying a congressional standard for managing uncertain risks, the *Whitman* standard "presupposes scientific certainty." Pet. App. 14a. Calling the *Whitman* standard a "Goldilocks" standard that does not work where science is uncertain (and ignoring that uncertain science characterizes every risk management program, including NAAQS), the lower court held that EPA cannot be required to "get things 'just right.'" *Id.* at 26a. Rather, "our paramount objective" is merely to see whether EPA "reasonably explains" its re-weighing of inevitable uncertainties in light of "contemporary policy judgment." *Id.* at 14a, 15a, 41a (internal quotation marks omitted).

Never acknowledging the lower court's characterization of *Whitman,* EPA argues that this case involves only "arbitrary and capricious" review of the evidentiary basis for EPA's decision to revise the ozone NAAQS from 0.08 ppm to 0.075 ppm. But that is decidedly *not* what this case is about. This case is about the D.C. Circuit reverting to the pre-*Whitman* uncertainty-based policymaking in statutorily-required NAAQS revisions and refusing to apply the "substantial guidance" for such decisionmaking provided by Congress and this Court in *Whitman*.

I. Certiorari Is Needed To Address the Lower Court's Return to an Uncertainty-Centric Standard for NAAQS Revision.

In its opposition, EPA argues that Petitioner "conflates the standard the CAA requires the EPA to apply … with the [arbitrary and capricious] standard of review." EPA Opp. 13. According to EPA, the lower court's decision involved no more than a "case-specific application" of "the familiar 'arbitrary and capricious' standard" for judicial review. *Id.* at 10, 11. Applying this arbitrary and capricious standard, EPA asserts, shows that the Agency "reasonably explained that the increased certainty of adverse health effects associated with ozone justified greater protection of public health." *Id.* at 12-13.

In judicial review of EPA action under the CAA, the court's first obligation is to determine whether EPA's action is "'*in accordance with law*.'" *Massachusetts* v. *EPA*, 549 U.S. 497, 528 (2007) (quoting 42 U.S.C. § 7607(d)(9)) (emphasis added). In the context of NAAQS revision, that requires the D.C. Circuit to determine whether EPA applied the statutory decisional standard in determining whether such a revision was "appropriate." 42 U.S.C. § 7409(d)(1). Failure to apply that standard renders any EPA decision both contrary to law *and* arbitrary and capricious.

In response to Petitioners' arguments below that EPA's de novo re-weighing of scientific uncertainties was inconsistent with *Whitman*, see Brief of Peti-

tioner State of Mississippi and Industry Petitioners at 27, *Mississippi* v. *EPA*, 744 F.3d 1334 (D.C. Cir. 2013) (per curiam) (No. 08-1200) ("Miss. Br."), the lower court took pains to explain a legal standard for NAAQS revision that is not the *Whitman* standard. According to the court, "as the contours and texture of scientific knowledge change, the epistemological posture of EPA's NAAQS review necessarily changes as well." Pet. App. 16a. In light of the changing nature of scientific certainty, "[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. By contrast, the court stated, application of the *Whitman* standard would "eliminate any adumbration of the inevitable scientific uncertainties," *id.* at 16a-17a, because it "presupposes scientific certainty in an area actually governed by policy-driven approaches to uncertain science," *id.* at 14a. As a result, according to the lower court, EPA is under no obligation to ensure that it "get things 'just right'" by establishing a standard that is neither "lower [n]or higher than is necessary … to protect the public health." *Id.* at 26a; *Whitman*, 531 U.S. at 476. Rather, the court says that all that is needed is "EPA's invocation of scientific uncertainty and … general public health policy considerations [to] satisf[y] its obligations under the statute." Pet. App. 48a.

In short, the court below quite openly rejected the *Whitman* standard in favor of a standard based on

"invocation of scientific uncertainty and more general public health policy." Unlike the *Whitman* standard, the standard applied below is an open-ended invitation to adopt whatever outcome a new EPA Administrator believes is consistent with her "contemporary policy judgment." This is illustrated starkly by EPA's attempt to posture this case as involving only "arbitrary and capricious" review, divorced from applying any congressionally mandated decisional standard.

EPA argues that "new evidence" led it to re-weigh scientific "uncertainties" and to make new "policy judgments," and that a reviewing court must defer to that judgment. See EPA Opp. 4-6, 12-13. But neither EPA nor the lower court ever engage the so-called "new evidence" in the context of the congressionally-mandated decisional standard. Rather, according to the lower court, "arguments that the 2008 science added nothing new to the 1997 NAAQS conversation" concerning the line between public health risk that is neither lower nor higher than necessary are irrelevant, because they "are largely dependent on the conceptual error that EPA is somehow bound by the 1997 NAAQS." Pet. App. 17a. The court's obligation, it said, is *not* to ensure that EPA "get things 'just right'" under *Whitman*, but merely to see whether EPA "reasonably explains its actions." *Id.* at 15a, 26a. But whether an agency has engaged in reasoned decisionmaking must be evaluated in light of the statutory standard governing decisionmaking, and not as an abstract inquiry.

Underscoring its departure from *Whitman,* the lower court found that the fact that new studies merely "confirm[ed] or quantif[ied] a previous finding," or were merely "incremental (and arguably duplicative)" of the studies that led the Agency in 1997 to draw the line between over- and under-regulation does not prevent EPA from re-weighing uncertainties and drawing a different line in 2008. *Id*. at 18a. Nowhere does the court explain, however, how "incremental" or "duplicative" studies that simply "confirm or quantify a previous finding" regarding the level of public health protection that is "requisite" can support a determination that the requisite line has shifted. The court had no obligation to do so under its uncertainty-centric standard, it says, because "EPA's invocation of scientific uncertainty and more general public health policy considerations satisfie[d] its obligation under the statute." *Id*. at 48a.

Certiorari is needed to address the D.C. Circuit's refusal to apply the *Whitman* standard and its decision to revert to the uncertainty-focused review rejected in *Whitman*. Certiorari is especially important now that the D.C. Circuit has confirmed and applied its new legal standard in another NAAQS revision proceeding. See *Nat'l Ass'n of Mfrs.* v. *EPA*, 750 F.3d 921, 925 (D.C. Cir. 2014) ("[W]hen EPA revises the level of the NAAQS, this Court does 'not ask why the prior NAAQS once was "requisite" but is no longer up to the task.' *Mississippi* v. *EPA*, 744 F.3d 1334, 1343 (D.C. Cir. 2013).").

II. Certiorari Is Needed To Address Whether NAAQS Revisions Are "De Novo" Proceedings in Which Any Prior "Requisite" Determination Is Irrelevant.

EPA's uncertainty-centric standard is compounded by its argument, accepted by the lower court, that EPA's prior factual findings regarding the "requisite" level of public health protection are irrelevant to a decision to revise a NAAQS. According to EPA, whether NAAQS revision is appropriate "require[s] de novo review," oblivious to the past. EPA Opp. 16. As a result, EPA claims its "prior determinations are not entitled to any presumption of ongoing validity." *Id.* at 15-16. The lower court agreed, see, *e.g.*, Pet. App. 18a, holding that 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. Whether EPA is doubling the stringency of a NAAQS or relaxing it by half, no explanation is required.

In support of the lower court's decision, EPA now argues the CAA itself makes prior factual findings irrelevant. According to EPA, section 7409(d)(1) requires application of "the same standard for evidence" that applied when the NAAQS were originally promulgated. EPA Opp. 15-16. For this reason, EPA argues that this Court's decision in *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009), which requires agencies to explain revised factual findings used to justify revised regulations, does not apply to

NAAQS revisions. EPA Opp. 14-16. This argument is not only a *non sequitur*, it is contradicted by the language of the statute.

The CAA calls on EPA's Administrator periodically to "complete a thorough review of the … [NAAQS] promulgated under this section [i.e., the existing NAAQS]." 42 U.S.C. § 7409(d)(1). The Administrator then must "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with … subsection (b) of this section [i.e., 42 U.S.C. § 7409(b)]." *Id.* This Court found in *Whitman* that section 7409(b) requires EPA to set NAAQS at a level that is "just right," i.e., neither "lower [n]or higher than is necessary." *Whitman*, 531 U.S. at 475-76. In short, the statute requires application of *the same legal standard* for NAAQS promulgation *and* NAAQS revision.

That the CAA obligates EPA to apply the *Whitman* "just right" legal standard to revise NAAQS does not relieve EPA of the requirement to explain the reasons for any change of position. To the contrary, it heightens it. A decisional standard, like the *Whitman* standard, that calls for precise line drawing demands an agency explanation whenever an agency abandons one line in favor of a different one. Only with such an explanation can the Agency show that the 1997 NAAQS is now neither "lower [n]or higher than is necessary," *Whitman*, 531 U.S. at 475-76, and that revision is "appropriate" under that standard, 42 U.S.C. § 7409(d)(1).

This principle's importance is illustrated by EPA's brief in opposition here. While EPA argues the new "requisite" risk line it established in 2008 was supported by "[t]wo new clinical studies [that] provided 'important' but 'limited' evidence of adverse health effects on healthy adults at 0.06 ppm," EPA Opp. 5, EPA says *nothing* about why the line drawn in 1997 based on an extensive and similar body of clinical evidence has shifted. EPA never acknowledges, for example, analyses showing that the "'limited' evidence" from the two new studies in 2008 demonstrated *lower* risk associated with ozone exposures below 0.08 ppm than EPA assumed in drawing the "requisite" risk line at 0.08 ppm in 1997. William C. Adams, *Comparison of Chamber 6.6-h Exposures to 0.04-0.08 PPM Ozone via Square-wave and Triangular Profiles on Pulmonary Responses*, 18 INHALATION TOXICOLOGY 127, 130 (2006) (noting "[p]ostexposure percent change in [forced expiratory volume (FEV)] for the [filtered air] protocol … was not significantly different from those for the two 0.06-ppm exposures"); William C. Adams, *Comparison of Chamber and Face-Mask 6.6-Hour Exposures to Ozone on Pulmonary Function and Symptoms Responses*, 14 INHALATION TOXICOLOGY 745, 747 (2002) ("no statistically significant differences in pulmonary function or symptoms responses from those observed for the [filtered air] exposure were observed" at 0.06 ppm); William C. Adams, Comment on EPA Memorandum: The Effects of Ozone on Lung Function at 0.06 PPM in Healthy Adults, at 4 (Oct. 9, 2007), Doc.

ID No. EPA-HQ-OAR-2005-0172-4783 (studies "do[] not demonstrate a significant mean effect by ordinarily acceptable statistical analysis" from exposure to ozone levels below 0.08 ppm). And while EPA observes that its "2008 review projected, *inter alia*, that respiratory illness cases per 100,000 relevant population gradually decreased from 6.4 cases at 0.084 ppm to 4.6 cases at 0.064 ppm under certain circumstances," EPA Opp. 6, EPA never acknowledges those projected health risks were of the same magnitude as those that led it to draw the "requisite" risk line at 0.08 ppm in 1997. See Miss. Br. 38-44. Such an examination would have required EPA to compare its 2008 findings to the findings on which the 1997 "requisite" line was based. Instead, EPA found it had no obligation to explain its change in position on the acceptable risk level based on its "de novo" review standard under which such comparisons are irrelevant. EPA Opp. 15-16.

Justice Kennedy previously observed that "[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past." *Fox*, 556 U.S. at 537 (Kennedy, J., concurring). At the least, when confronted with previous "inconvenient" findings, the agency must provide a "more detailed justification" for its change in policy, *id.* at 515 (Scalia, J.), or must "focus upon those earlier views of fact … and explain why they are no longer controlling." *Id.* at 551 (Breyer, J., dissenting). Declaring them irrelevant is not an option.

Under the lower court's decision, EPA is free to re-weigh existing uncertainties "against contemporary policy judgments and the existing corpus of scientific knowledge," Pet. App. 14a-15a, and without reference to the line the Agency has previously drawn between over- and under-regulation. EPA Opp. 15-16. But because there will always be discrepancies between past and present policy judgments, allowing EPA to adopt whatever policy it wants as a *de novo* matter, based on "contemporary … judgments" and without further justification, is an invitation for agency action driven by "nothing more than political considerations or even personal whim." *Fox*, 556 U.S. at 552 (Breyer, J., dissenting). It is a decisional standard to be exercised without any accountability.

In *Whitman*, this Court rejected an interpretation of section 7409(b)(1) as calling merely for rational policy judgment in the face of scientific uncertainty. Instead, the Court found that "substantial guidance" governs decisions to revise NAAQS. *Whitman*, 531 U.S. at 475-76. Certiorari should be granted to address the D.C. Circuit's decision to ignore that guidance in favor of a standard that can be applied without any explanation for why new findings differ from previous findings defining the line drawn between over- and under-regulation.

CONCLUSION

For these reasons and those set forth in UARG's opening brief, the petition should be granted.

Respectfully submitted,

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