NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 22-5305

S. STANLEY YOUNG, DR.; LOUIS ANTHONY COX, JR., DR.,

Plaintiffs-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the EPA; SCIENCE ADVISORY BOARD; ALISON C. CULLEN, in her official capacity as Chair of the Science Advisory Board; CLEAN AIR SCIENTIFIC ADVISORY COMMITTEE; ELIZABETH A. SHEPPARD, in her official capacity as Chair of the Clean Air Scientific Advisory Committee,

Defendants-Appellees,

ATLANTIC LEGAL FOUNDATION,

Amicus Curiae for Appellants.

On Appeal from the United States District Court for the District of Columbia in No. 1:21-cv-02623-TJK, Timothy J. Kelly, U.S. District Judge

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), *amicus curiae* Atlantic Legal Foundation states as follows:

A. Parties and Amici

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants: *amicus curiae* Atlantic Legal Foundation, which is filing this brief in support of Plaintiffs-Appellants and reversal.

B. Rulings Under Review

References to the rulings at issue in this appeal appear in the Brief for Plaintiffs-Appellants.

C. Related Cases

The case on review was not previously before this Court or any other court. Undersigned counsel for *amicus curiae* Atlantic Legal Foundation is not aware of any pending related case.

/s/ Lawrence S. Ebner
Lawrence S. Ebner
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March 1, 2023

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Atlantic Legal Foundation is a nonprofit, public interest law firm. It has no corporate parent, and since it issues no stock, no publicly held corporation owns 10% or more of its stock.

CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE

1. In accordance with Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Atlantic Legal Foundation hereby represents that all parties have consented to the timely filing of this brief.

2. As suggested in this Court's *Handbook of Practice and Internal Procedures*, on December 22, 2022 undersigned counsel filed on behalf of the Atlantic Legal Foundation a Notice of Intention To Participate As *Amicus Curiae* In Support of Appellants and Reversal.

3. In accordance with D.C. Circuit Rule 29(d), undersigned counsel states that this separate amicus brief on behalf of the Atlantic Legal Foundation is necessary because to the best of his knowledge, no other *amicus curiae* will be addressing the important relationship between sound science and the Federal Advisory Committee Act's requirement that the membership of an advisory committee "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2 § 5(b)(2). The Atlantic Legal Foundation long has been one of the nation's foremost advocates for sound science in judicial and regulatory proceedings. This brief discusses

why the Federal Advisory Committee Act's "fairly balanced" membership requirement promotes environmental protection-related regulatory recommendations that are based on sound science, and why excluding well-qualified, industry-affiliated scientists such as Plaintiffs-Appellants from scientific advisory committees such as EPA's Clean Air Scientific Advisory Committee undermines sound science and the credibility of science-based regulatory recommendations.

/s/ Lawrence S. Ebner
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Dated: March 1, 2023

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GLOSSARY OF ABBREVIATIONS

CASAC or Committee	Clean Air Scientific Advisory Committee
EPA	United States Environmental Protection Agency
FACA	Federal Advisory Committee Act
GSA	General Services Administration

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The principal issue in this appeal—whether the Biden administration's deliberate exclusion of industry-affiliated scientists

[1] No counsel for a party authored this brief in whole or part, and no party or party's counsel, or other person—other than *amicus curiae*, its supporters, and its counsel—contributed money that was intended to fund preparing or submitting the brief.

from the U.S. Environmental Protection Agency's (EPA's) Clean Air Scientific Advisory Committee (the "Committee") violates the Federal Advisory Committee Act (FACA)—directly implicates the Atlantic Legal Foundation's mission of advocating for sound science in judicial and regulatory proceedings. The scientific credibility of environmental regulatory recommendations affecting myriad industries throughout the United States—such as the Committee's recommendations to adopt stricter national ambient air quality standards for emission of particulate matter—is significantly undermined where, as here, the points of view of well-qualified scientists with industrial-sector experience are deliberately excluded. The Atlantic Legal Foundation is filing this brief to discuss the relationship between sound science and FACA's requirement that the membership of scientific (as well as all other) advisory committees be fairly balanced, and why the exclusion of industry-affiliated scientists conflicts with the Committee's purpose and undermines its functions.

INTRODUCTION AND SUMMARY OF ARGUMENT

EPA currently operates 21 federal advisory committees, including the Clean Air Scientific Advisory Committee. *See* EPA, Federal Advisory

Committees at EPA.[2] "The general purpose of such advisory committees is to provide 'expert advice, ideas, and *diverse opinions*' to the agency." *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 13-14 (1st Cir. 2020) (quoting 5 U.S.C. app. 2 § 2(a)) (emphasis added).

The Clean Air Act assigns to the Committee the responsibility to

> (i) advise the [EPA] Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public health, welfare, social, *economic*, or energy effects which may result from *various strategies for attainment and maintenance* of such national ambient air quality standards.

42 U.S.C. § 7409(d)(2)(C) (emphasis added). Similarly, according to the Committee's website,

> CASAC[3] provides independent advice to the EPA Administrator on the technical bases for EPA's National Ambient Air Quality Standards. CASAC *also addresses* research related to air quality,

[2] https://www.epa.gov/faca (last visited Feb. 22, 2023).

[3] EPA refers to the Clean Air Scientific Advisory Committee as "CASAC."

> sources of air pollution, and the *strategies to attain and maintain* air quality standards. To fulfill that mandate, the CASAC has reviewed criteria documents, science assessments, risk and exposure assessments, and *policy-related assessments* developed by EPA.

EPA, About the Clean Air Scientific Advisory Committee (emphasis added).[4] Thus, contrary to the district court's narrow view, scientific advisory committees like the Clean Air Scientific Advisory Committee are not limited to "technocratic tasks, such as scientific peer review." Mem. Op. at 10 (JA313). Instead, the Committee's mandate is broader, and necessarily and directly implicates the technological, logistical, economic, and other interests of regulated industries.

In carrying out its important functions, the Committee is subject to FACA's requirement that its "membership . . . be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2 § 5(b)(2). This provision was "designed to counter 'the belief that . . . [advisory] committees do not adequately and fairly represent the public interest [or] that they may be *biased toward one point of view* or interest.'" *Pub. Citizen v. Nat'l*

[4] https://tinyurl.com/47aryf54 (last visited Feb. 22, 2023).

Advisory Comm. on Microbiological Criteria for Foods, 886 F.2d 419, 423 (D.C. Cir. 1989) (Friedman, J., concurring in the judgment) (quoting S. Rep. No. 92-1098, at 4-5 (1972)) (emphasis added).

> Although the statute does not define the term "fairly balanced" . . . the Senate report on the Act states that "legislation [establishing an advisory committee] shall . . . require that membership of the advisory committee *shall be representative of those who have a direct interest in the purpose of such committee.*" S. REP. NO. 1098, 92d Cong., 2d Sess. 9 (1972). Referring to this statement, [the D.C. Circuit] has noted that the Act's "legislative history makes clear, [that] the 'fairly balanced' requirement was designed to ensure that persons or groups *directly affected by the work of a particular advisory committee would have some representation* on the committee." *National Anti-Hunger Coalition* [*v. Exec. Comm. of President's Priv. Sector Surv. on Cost Control*, 711 F.2d 1071, 1074 n. 2. (D.C. Cir. 1983)].

Id. (emphasis added).

"[A]n interpretation of FACA that permitted a given advisory committee to exclude a disfavored member would fly in the face of the principle established by [this] requirement[]." *Cummock v. Gore*, 180 F.3d 282, 291 (D.C. Cir. 1999); *see also NAACP Legal Def. & Educ. Fund, Inc. v. Barr*, 496 F. Supp. 3d 116, 133-34 (D.D.C. 2020) ("[A]lthough the term 'fairly balanced' may be imprecise . . . [a]t a minimum, 'this

language would provide a standard for a reviewing court to determine whether there had been *a deliberate and explicit effort to avoid* the representation of any *competing viewpoints* on the subject matter of an advisory committee.'") (quoting *Nat. Res. Def. Council v. Dep't of Interior*, 410 F. Supp. 3d 582, 604 (S.D.N.Y. 2019)) (emphasis added).

The "congressional command that [advisory] committees be fairly balanced," *Union of Concerned Scientists*, 954 F.3d at 20-21, implements one of FACA's "principal purpose[s] . . . to enhance the public accountability of advisory committees." *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 459 (1989). The "fairly balanced" membership requirement applies to the Clean Air Scientific Advisory Committee because "FACA requires all Federal advisory committees to be balanced, regardless of whether they are discretionary (agency authority) or non-discretionary (statutory or Presidential) committees." Gen. Servs. Admin., GSA Committee Management Secretariat, Federal Advisory Committee Membership Balance Plan 2 (Jan. 2011);[5] *see Nat'l Anti-Hunger Coal.*, 711 F.2d at 1073 n.1 ("[T]he membership of advisory committees,

[5] Available at https://tinyurl.com/38mejmft.

whether established by legislation or by action of the President or an agency, must be 'fairly balanced.'").

Indeed, "[b]alanced membership" is one of the key "policies to be followed by Federal departments and agencies in establishing and operating advisory committees consistent with the [Federal Advisory Committee] Act." 41 C.F.R. §§ 102-3.30, 102-3.30(c). "[F]actors [that] should be considered in achieving a 'balanced' advisory committee membership should include," *inter alia*, the "*economic or scientific impact* of the advisory committee's recommendations"; the "types of specific perspectives required, for example, such as those of . . . *business*"; and the "need to obtain *divergent points of view* on the issues before the advisory committee." *Id.*, pt. 102-3, subpt. B, app. A, III (Key points and principles) (emphasis added).

The General Services Administration (GSA), which oversees the federal departments' and agencies' implementation of FACA, indicates that "an average of 1,000 advisory committees with more than 60,000 members advise the President and the Executive Branch." Gen. Servs.

Admin., GSA Comm. Mgmt. Secretariat, The Federal Advisory Committee Act (FACA) Brochure 1 (Feb. 26, 2019).[6] GSA explains:

> Federal advisory committee members are *drawn from nearly every occupational and industry group* and geographical section of the United States and its territories. . . . [M]embers of specific committees often have both the expertise and professional skills that parallel the program responsibilities of their sponsoring agencies. *In balancing committee memberships, agencies are expected to consider a cross-section of those directly affected*, *interested, and qualified*, as appropriate to the nature and function of the advisory committee.

Id. at 2 (emphasis added).

Yet, as Appellants Young and Cox demonstrate in considerable detail, the Biden Administration's EPA Administrator flouted FACA's "fairly balanced" membership requirement by packing the 7-member Committee "with academics receiving EPA grants, but not a single industry representative." Am. Compl. at 27 (JA218). More specifically, Drs. Young and Cox allege that "in March 2021, only twenty days after being sworn, new EPA Administrator Michael S. Regan . . . abruptly fired all members" of the Committee (including Dr. Cox, a former Committee chair), and then "rapidly proceeded to pack [the Committee]

[6] Available at https://tinyurl.com/fzfyrde2.

with academics receiving multi-million dollar grants from EPA." *Id.* ¶ 6 (JA195). "Not one" of the Committee's current members "is affiliated with regulated industries." *Id.* (JA196). Drs. Young and Cox contend—and *amicus curiae* Atlantic Legal Foundation agrees—that the Committee's lack of members from regulated industries violates FACA's "fairly balanced" membership requirement.[7]

The district court held, however, that "the Committee's membership—drawn from diverse technical and scientific fields—satisfies all that FACA requires, whatever the wisdom of the Administrator's omission of an industry representative." Mem. Op. at 12 (JA315). To the contrary, there is no way a scientific advisory committee composed of federally funded, ivory-tower academics—an advisory committee whose like-minded membership deliberately excludes all scientists who have been affiliated with regulated industries and may have divergent opinions about the need for stricter environmental regulation—is "fairly balanced in terms of the points of

[7] The Amended Complaint also alleges that the new EPA Administrator excluded all industry-affiliated scientists from EPA's 47-member Science Advisory Board. *See* Am. Compl. at ¶ 6 (JA195-196).

view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2 § 5(b)(2).

As discussed below, developing regulatory recommendations that are based on sound science not only requires a variety of relevant scientific disciplines, but also diverse scientific perspectives, including the expertise, experience, and judgment of highly credentialed scientists who have first-hand knowledge of how proposed regulatory standards would affect individual businesses, entire industries, and the nation's economy and citizens. The district court's erroneous ruling that the Clean Air Scientific Advisory Committee's homogeneous composition satisfies FACA not only undermines implementation of the Committee's statutory mandate, but also sound science.

ARGUMENT

This Case Involves An Egregious Violation of the Federal Advisory Committee Act's "Fairly Balanced" Membership Requirement

A. Exclusion of industry-affiliated scientists from EPA's Clean Air Scientific Advisory Committee conflicts with the committee's purpose and undermines its functions

Appellee EPA Administrator Regan's decision to "initiate the release of the current members" of the Committee (i.e., to fire them *en*

masse), and "to reconstitute, restore, and recreate [a] new committee[] to better address EPA priorities" (i.e., to limit the committee to academics sympathetic to the administration's environmental policies) was blatantly political. EPA, News Releases - Headquarters, *Administrator Regan Directs EPA to Reset Critical Science-Focused Federal Advisory Committees* (Mar. 31, 2021).[8] Critical of "[p]ast administration actions," the Administrator's self-serving decision to "reset" the Committee (and also EPA's Science Advisory Board) supposedly sought to "reverse deficiencies caused by decisions made in recent years." *Id.* According to EPA's News Release, these "deficiencies" included a Trump administration "directive that prevented qualified academics and non-government officials who received EPA research grants from concurrently serving on EPA advisory committees." *Id.* With the advent of the Biden administration, EPA not only reversed that directive and reconstituted the Committee with exactly such grant-recipient academics, but also excluded all industry-affiliated scientists, including Drs. Young and Cox. These highly credentialed and respected scientists

[8] Available at https://www.epa.gov/newsreleases/administrator-regan-directs-epa-reset-critical-science-focused-federal-advisory.

allege that by means of this deliberate omission, "EPA guaranteed that [the Committee] will rubber stamp the new administration's regulations without the inconvenience of an objecting voice from industries targeted by those regulations, knowledgeable about their real-world impacts, and bearing billions of dollars of their costs each year." Am. Compl. ¶ 1 (JA192).

Two scholars recently observed that

> the memberships of federal advisory committees ebb and flow with the political tides. Members—or even entire committees—can be fired at the whim of an agency head [and] new administrations often seize the opportunity to stock these advisory panels with ideologically sympathetic individuals.

Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 Geo. L.J. 1139, 1144 (2020). But as is the case here, carrying such partisan maneuvering to an extreme violates FACA's requirement that the composition of an advisory committee be fairly balanced.

Indeed, where as here, a new administration has intentionally and drastically skewed the membership of an important, statutorily created advisory committee, that is ample reason for a court to closely examine the merits of a "fair balance" challenge to the committee's composition.

More specifically, a court should "consider the functions assigned to each individual [advisory] committee in evaluating whether its balance is fair." *Union of Concerned Scientists*, 954 F.3d at 20.

Here, the district court's cramped view of scientific advisory committees—that "[c]ommittees with technical or scientific mandates can satisfy the fair balance requirement without a representative from a regulated industry or party . . . to conduct 'technocratic' tasks," Mem. Op. at 9-10 (JA312-313)—is oblivious to the breadth of the Committee's statutory mandate. The Committee's functions include, for example, advising EPA on "areas in which *additional knowledge is required* to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, [and on] *any adverse . . . economic, or energy effects* which may result from various *strategies for attainment and maintenance* of such national ambient air quality standards." 42 U.S.C. § 7409(d)(2)(C) (emphasis added); *see also* Clean Air Scientific Advisory Committee Charter, § 4 (Description of Duties).[9]

EPA acknowledged these and the Committee's additional statutorily assigned functions in a pro forma *Federal Register* notice

[9] Available at https://tinyurl.com/mr2da4fx.

seeking nominations for the Committee's "reconstituted" membership. *See* 86 Fed. Reg. 17,146 (Apr. 1, 2021). The selection criteria identified in the notice included scientists with "[b]ackground and experiences that would help members contribute to the *diversity of perspectives* on the committee" since "a *balance of scientific perspectives*, is important." *Id.* at 17,147 (emphasis added).

Nonetheless, as Appellants explain, no scientists who are or have been affiliated with industries affected by EPA's national ambient air quality standards—not even Dr. Cox, the Committee's former chair—were chosen. It defies common sense that an advisory committee whose mission is primarily to advise EPA on national ambient air quality standards directly impacting multifarious industrial operations throughout the United States can be "fairly balanced in terms of the points of view represented," 5 U.S.C. app. 2 § 5(b)(2), if it categorially excludes "expert advice, ideas, and diverse opinions," *id.* § 2(a), from well-qualified scientists who have first-hand experience working for, or consulting with, industries directly affected by the standards. There can be no fair balance, where, like here, an EPA scientific advisory committee is composed of EPA-funded, environmental activist sycophants and

excludes industry-affiliated scientists who can offer real-world expertise, experience, and perspective that can help inform the Committee's function of advising EPA on the "economic . . . effects" of national ambient air quality standards. 42 U.S.C. § 7409(d)(2)(C).

The district court's opinion concedes that Appellants "may be right that the Administrator selected members that all share similar views on the need for more stringent regulation of air quality standards—a highly charged, political issue." Mem. Op. at 11-12 (JA314-315). This indisputable lack of balance squarely violates FACA's "fairly balanced" advisory committee membership requirement. The district court is wrong that "diverse fields of expertise" are enough, and that "[e]ven if it might be wise to have industry represented on the Committee, the law does not require it." *Id.* at 9 (JA312). FACA does not vest EPA with a license to abuse whatever discretion it has in carrying out the statute's mandate to ensure than each advisory committee is "fairly balanced in terms of the points of view represented." 5 U.S.C. app. 2 § 5(b)(2).

The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249,

253-54 (1992). The district court failed to heed this basic principle of statutory construction, and its judgment should be reversed.

B. The "fairly balanced" requirement promotes scientific advisory committee recommendations that are based on sound science

Contrary to the district court's view, a variety of scientific disciplines is not enough to satisfy FACA's "fairly balanced" membership requirement. To be fairly balanced, the Committee must include—and certainly not deliberately exclude—well-qualified scientists who have actual experience working with industries that are required to incur the burdens and costs of complying with EPA's national ambient air quality standards. Industry-affiliated scientists have a real-world perspective that is critical to ensuring that the Committee's recommendations stem from sound science.

"Expertise *does* matter; good policy depends on good inputs, including sound science." Aaron L. Nielsen, *Deconstruction (Not Destruction)*, 150 (3) Daedalus, J. of the Am. Acad. of Arts & Sciences 143, 146 (Summer 2021).[10] "Sound science" means "organized investigations

[10] Available at https://tinyurl.com/atm7zydb.

and observations conducted by qualified personnel using documented methods and leading to verifiable results and conclusions." Tech. Issue Paper, Soc'y of Env't Tox. and Chem., *Sound Science* 1 (1999).[11] To generate reliable results and conclusions, scientific investigators must have "the necessary expertise, either by formal training or *on-the-job experience*, to use descriptive and analytical tools appropriately, to design studies that can *rule out false or alternative hypotheses*, and to communicate the results *accurately*." *Id*. at 2 (emphasis added).

This tenet of sound science is why scientists with industry knowledge and experience need to be among the Committee's members. But as discussed above, the Committee now excludes, indeed shuns, scientists with regulated-industry experience or perspective. This unlawful void in the Committee's composition seriously diminishes the scientific rigor of the Committee's work and EPA's clean-air rulemaking process. These absent private-sector scientists are the individuals who are most informed and best poised to spot critical errors in the scientific processes and analyses that both the Committee and EPA staff need to perform.

[11] Available at https://tinyurl.com/3e5sp8fm.

For example, EPA's recently issued, highly controversial, proposed rule revising national ambient air quality standards for particulate matter to make them more stringent—a proposed rule directly impacted by the Committee's analyses and recommendations—is based on computer modeling. *See* 88 Fed. Reg. 5558 (Jan. 27, 2023). Although modeling is an accepted scientific technique, a computer model's output depends entirely on the choice of numerous inputs and other variables, which require the exercise of sound scientific judgment. Industry-affiliated scientists' real-world knowledge, experience, and judgment are needed to ensure, or at least enhance, the credibility of scientific modeling, including interpretation of the modeling results that EPA uses to inform its clean air and other environmental rulemaking.[12]

The value of such industry expertise and experience is illustrated by the comments that the American Forest & Paper Association submitted in response to EPA's draft Supplement to the 2019 Integrated Science Assessment for Particulate Matter. *See* 86 Fed. Reg. 54,186

[12] The Committee's 2021 Particulate Matter Panel, which drafts preliminary reports and recommendations for the Committee's consideration, also lacks even a single industry representative. *See* https://tinyurl.com/msa9zrrh.

(Sept. 30, 2021). EPA considered, *inter alia*, the EPA Supplement and the Committee's comments on the draft Supplement in developing its proposed, stricter, national ambient air quality standards for particulate matter. *See* 88 Fed. Reg. at 5560. The Association's November 21, 2021 comments on the draft Supplement were submitted by its Chief Scientist, Stuart E. Holm.[13] His comments emphatically highlight the significant methodological deficiencies and other analytical issues reflected in the EPA Supplement, especially concerning the "concentration-response assessment" (i.e., how biological organisms respond when exposed to differing concentrations of airborne toxic substances). These are the type of comments that a scientist whose professional background includes working with regulated industries would have identified and addressed as a member of the Committee, thus helping to enhance the credibility of the scientific bases for EPA's proposed rule on particulate matter.

Although sound scientific analysis rarely can reach absolute conclusions, at some point the margin for error becomes unacceptable. The Association's comments note, for example, that "EPA's evaluation of

[13] The Association's comments, posted on an EPA online docket, are accessible at https://www.regulations.gov/comment/EPA-HQ-ORD-2014-0859-0078.

the concentration-response studies has not been sufficiently scientific and robust." Comments at 1. According to the Association, this fundamental deficiency resulted from EPA relying on the results of studies which only "generally" supported the agency's conclusions. *Id.* at 2.

> The concern with the repeated use of this term, and this generalized approach when evaluating concentration-response curves, is that it disregards the details and seems to waive away differences in studies. This generalized approach in the 2021 Supplement stands in stark contrast to a more rigorous systematic review approach where each study is first evaluated for its quality, relevance and risk of bias and then the studies are integrated in a manner that takes into account the strengths and weaknesses of each study.

Id.

More specifically, the Association criticized EPA's failure to adequately tie into, and discuss, its reasons for deviating from its 2019 Integrated Science Assessment of the same scientific issues:

> We could not find in the 2021 Supplement any systematic evaluation of the new studies that are being considered to update the concentration-response findings of the 2019 [Integrated Science Assessment]. Furthermore we could not find any discussion of how these new studies may be of higher, or lower, quality than those considered in the 2019 [Integrated Science Assessment].

Id. The Association explained that

> the scientific process is one that allows for constant learnings. As studies are released and evaluated, researchers learn from them. New studies are then designed, learning from and building off the results of earlier studies, and the methods and approaches are updated. When the scientific method is working, we would expect that studies produced in 2020 would be more informative, and of higher quality, than studies produced in 2000. Yet, the generalized method used in the 2021 Supplement [and perhaps the 2019 [Integrated Science Assessment]], does not allow for this comparison.

Id.

Because EPA's "generalized approach sweeps away uncertainties and hides inconsistencies which should receive greater consideration," *id.* at 3, the Association

> urge[d] EPA to conduct a more robust and specific evaluation of the concentration-response studies as they are critical inputs to determining the appropriate level for setting the standard. This more specific evaluation should evaluate the quality of the studies as one would in a systematic review (using specific clearly identified a priori criteria), identifying uncertainties in the studies and their potential impacts on the findings, and then weighing and integrating the studies in a manner that takes their quality into account.

Id. at 2.

The foregoing concerns were not unfounded. In the Executive Summary of the preamble to the proposed rule, EPA acknowledges, for example, that "while the available health effects data has expanded, recent studies are subjected to the same types of uncertainties that were judged to be important in previous reviews." 88 Fed. Reg. at 5562.

Sound science is incompatible with EPA's reliance on vague and possibly erroneous characterizations of data, and on studies that only "generally" support findings purporting to justify onerous and costly environmental regulation of industrial operations. To thwart these missteps, the perspectives of industry scientists must be solicited and considered. Their involvement will reduce the likelihood that EPA advances positions founded upon subjective, tenuous, uncertain, and generalized research models.

FACA's "fairly balanced" requirement will be eviscerated if the Clean Air Scientific Advisory Committee continues to be composed of like-minded, EPA-funded, academic scientists who are allowed to simply "preach to the choir" about topics on which they (and the prevailing administration) already agree—but for which there is legitimate disagreement within the larger scientific community. Indeed, by

categorically excluding industry-affiliated scientists from the Committee, EPA is systematically ignoring the knowledge, experience, and perspective of the *largest* component of the nation's scientific community. *See* Jean Opsomer, et al., *U.S. Employment Higher in the Private Sector than in the Education Sector for U.S.-Trained Doctoral Scientists and Engineers: Findings from the 2019 Survey of Doctorate Recipients*, Nat'l Science Found., Nat'l Ctr. for Science and Eng'g Stats., InfoBrief 21-319 (Apr. 2021);[14] *see also* 41 C.F.R. § 102-3.60(b)(3) ("*Fairly balanced membership* . . . [I]n the selection of members for the advisory committee, the agency will consider a cross-section of those *directly affected*, interested, and qualified, as appropriate to the nature and functions of the advisory committee. Advisory committees requiring *technical expertise* should include persons with demonstrated professional or personal qualifications *and experience* relevant to the functions and tasks to be performed.") (emphasis added).

Excluding scientists with disfavored, or merely different, points of view from scientific advisory committees, and from the Clean Air Scientific Advisory Committee in particular, harms the regulatory

[14] Available at https://ncses.nsf.gov/pubs/nsf21319.

process at its core. This is especially true since, as discussed above, the Committee's mandate encompasses more than just what the district court erroneously characterized as "technocratic tasks." Mem. Op. at 10 (JA313).

For EPA to promulgate national ambient air quality standards and other environmental regulations based on sound science, it must look not only to relevant scientific disciplines, but also to wide-ranging viewpoints among scientists within those specific disciplines—including scientists with industry experience. Such scientists are essential to achieve the fair balance that FACA demands.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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March 1, 2023

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding parts of the brief exempted by Fed R. App. P. 32(f), the brief contains 4,299 words.

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared using the Microsoft 365 version of Microsoft Word in a proportionately spaced typeface (Century Schoolbook) and in 14-point font.

/s/Lawrence S. Ebner
Lawrence S. Ebner
Counsel for *Amicus Curiae*
Atlantic Legal Foundation

March 1, 2023

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2023 I filed the foregoing brief using the Court's CM/ECF System, which effected service on all parties.

/s/ Lawrence S. Ebner
Lawrence S. Ebner