

## ORAL ARGUMENT NOT YET SCHEDULED

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

STATE OF NEW YORK, et al.,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, and MICHAEL S.  
REGAN, in his official capacity as  
Administrator of the United States  
Environmental Protection Agency,*Respondents.*

Case No. 21-1028

Consolidated with  
Case Nos. 21-1060  
and 21-1073

## NON-BINDING STATEMENT OF ISSUES

Pursuant to the Court's Order of October 12, 2023 (Doc No. 2021446), Petitioners the States of New York, California, Connecticut, Illinois, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the District of Columbia, the Commonwealths of Massachusetts and Pennsylvania, and the City of New York (collectively, Government Petitioners) hereby submit their non-binding statement of issues to be raised regarding their petition for

review of the final agency action of respondents Michael S. Regan as Administrator<sup>1</sup> and the United States Environmental Protection Agency (collectively, EPA) entitled “Review of the Ozone National Ambient Air Quality Standards,” 85 Fed. Reg. 87,256 (Dec. 31, 2020) (Rule). Without waiving any rights to submit additional issues, Government Petitioners intend to raise the following issues in support of their challenge to the Rule:

- (1) Whether EPA acted contrary to law and/or arbitrarily and capriciously by employing a flawed and abbreviated process for review of the primary and secondary national ambient air quality standards (NAAQS) for ground-level ozone without consideration of the relevant factors or reasoned explanation, including consolidating the Human Risk and Exposure Assessment with the Policy Assessment, failing to convene the pollutant-specific Ozone Review Panel, holding a concurrent rather than sequential public review process for the draft Policy Assessment and draft Integrated Science Assessment, and adhering to former Administrator Pruitt’s

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<sup>1</sup> The Government Petitioners have substituted the name of the current Administrator for the name of the former Administrator who signed the 2020 agency action being challenged, Andrew Wheeler.

unlawful directive barring certain scientific experts from serving on the Clean Air Scientific Advisory Committee.

- (2) Whether EPA acted contrary to law and/or arbitrarily and capriciously by maintaining the primary NAAQS for ground-level ozone at 0.070 parts per million (ppm) when the statute requires that the primary NAAQS be set at a level that is requisite to protect public health with “an adequate margin of safety”; the evidence in the record justifies a more protective standard; members of EPA’s scientific advisory committee concluded that a standard of 0.070 ppm was inadequate to protect public health with an adequate margin of safety, particularly for sensitive populations such as children with asthma; and the Administrator failed to give proper consideration to the environmental justice implications of maintaining the current standard without revision.
- (3) Whether EPA’s decision to maintain the secondary ozone NAAQS without revision was contrary to law and/or arbitrary and capricious when (i) EPA failed to address the flaws identified by this Court in *Murray Energy v. EPA*, 936 F.3d 597 (D.C. Cir. 2019) concerning the agency’s initial adoption of the same standard; and

(ii) the agency otherwise failed, contrary to the scientific evidence in the record, to promulgate a secondary standard at a level that is requisite to protect public welfare from “*any* known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air,” 42 U.S.C. § 7409(b)(2) (emphasis added).

Dated: October 26, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Non-Binding Statement of Issues was filed on October 26, 2023 using the Court's CM/ECF system, and that, therefore, service was accomplished upon counsel of record by the Court's system.

Dated: October 26, 2023

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