[ORAL ARGUMENT NOT YET SCHEDULED]
No. 22-5305

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

S. STANLEY YOUNG, ET AL.,
Plaintiffs-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia (No. 1:21-cv-02623-TJK)

BRIEF FOR APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants S. Stanley Young and Louis Anthony Cox, Jr. certify as follows:

A. Parties and Amici

The appellants in this Court and the plaintiffs in the District Court are S. Stanley Young and Louis Anthony Cox, Jr.

The appellees in this Court and defendants in the district court are the Environmental Protection Agency (EPA); Michael S. Regan, in his official capacity as Administrator of the EPA; the Science Advisory Board; Alison C. Cullen, in her official capacity as Chair of the Science Advisory Board; the Clean Air Scientific Advisory Committee; and Elizabeth A. Sheppard, in her official capacity as Chair of the Clean Air Scientific Advisory Committee.

The Atlantic Legal Foundation has notified the Court that it intends to file an *amicus curiae* brief in support of Appellants and reversal of the district court's judgment.

No intervenors have appeared in this proceeding.

B. Rulings Under Review

The rulings under review are Judge Timothy J. Kelly's (1) order of November 2, 2022, entering partial final judgment for defendants as to Counts V-VIII of the amended complaint (Dkt. No. 42), JA323–25; and (2) order of September 30, 2022 (Dkt. No. 37) and accompanying memorandum opinion (Dkt. No. 38) denying plaintiffs' motion for partial summary judgment and granting defendants' cross-motion for partial summary judgment as to Counts V-VIII of the amended complaint, JA303–22. The orders and opinion are not published, but the opinion is available at 2022 WL 4598693 and will be published in the Federal Supplement 3d.

C. Related Cases

This case has not previously been before this Court or any other court, and there are no related cases pending.

/s/ Brett A. Shumate
Brett A. Shumate

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GLOSSARY

Act	Federal Advisory Committee Act
APA	Administrative Procedure Act
CASAC or Committee	Clean Air Scientific Advisory Committee
EPA or Agency	Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards

INTRODUCTION

On his first day in office, President Biden issued an executive order directing the Environmental Protection Agency (EPA) to reconsider its 2020 rule retaining the air-quality standard for particulate matter (fine particles like dust and soot)—a process that could end up imposing billions of dollars on regulated industries. There was just one problem: The Clean Air Act requires EPA to consider—and explain any disagreement with—the Clean Air Scientific Advisory Committee's policy recommendations in revising this standard. 42 U.S.C. § 7607(d)(3)(C). And during the prior administration, the Committee had concluded that the science did not support strengthening the standard.

The new EPA Administrator decided that he could not risk that happening again. He therefore promptly fired all seven members of the Committee and restocked it with six academics who have received a total of more than $126 million in EPA grants and a statutorily required state official, all of whom agree that the particulate-matter standard should be strengthened. The newly reconstituted Committee then unanimously recommended that EPA make the standard more stringent, and the Agency proposed a rule that would do so.

In reconstituting the Committee in this manner, EPA contravened the law twice over, with each violation requiring vacatur of the Agency's selection of the new members.

First, the Agency defied the fair-balance requirement in the Federal Advisory Committee Act (the Act), which compels agencies to ensure that "the membership" of any advisory committee they create is "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), (c). Here, the Committee is not fairly balanced in terms of viewpoint because it is packed with EPA-funded academics who agree with EPA's policy goals but lacks a single member representing the industry's viewpoint that stronger regulations are unnecessary. Given this lack of viewpoint diversity, those directly affected by air-quality standards have no voice on the Committee.

Second, in its haste to create a Committee that would bless the adoption of a stricter standard, EPA failed basic requirements of reasoned decisionmaking, thus violating the Administrative Procedure Act (APA) as well. In establishing the new Committee, the Agency failed to explain how it was fairly balanced. Instead, EPA relied on improper

considerations—the race and sex of its new appointees—to guide its decisionmaking rather than the Act's requirement of viewpoint diversity.

JURISDICTIONAL STATEMENT

Plaintiffs sued EPA for violations of the Federal Advisory Committee Act and the APA. JA191–245. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1361. JA197.

On November 2, 2022, the district court entered partial final judgment for EPA on plaintiffs' claims related to the Committee, finding that they are separable from the remaining claims and that there was no just reason to delay. JA323–25; *see* Fed. R. Civ. P. 54(b). Plaintiffs filed a timely notice of appeal on November 18, 2022. JA326. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether EPA violated the Federal Advisory Committee Act's mandate that advisory committees be fairly balanced in terms of viewpoint by reconstituting the Clean Air Scientific Advisory Committee—which makes policy recommendations about nationally important particulate-matter standards—to exclude the industry's

viewpoint that current standards are adequate and to consist solely of members who share the same view about the need for stronger standards.

2. Whether EPA violated the APA by failing to explain how the new Committee is fairly balanced and by evaluating nominees on the basis of their race and sex.

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. Enacted in 1972, the Federal Advisory Committee Act "address[es] whether and to what extent committees, boards, and councils should be maintained to advise Executive Branch officers and agencies." *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999). By that time, Congress had become concerned that the government's burgeoning number of advisory committees would be controlled by "special interests seeking to advance their own agendas." *Id.* Specifically, agencies had been constituting committees on the basis of "personal acquaintance or closeness to an agency or its clientele." H.R. Rep. No. 91-1731, at 19 (1970).

Recognizing the "need to expand the base of participation and representation in the advisory system's decisionmaking processes" to avoid "the charge of favoritism," Congress adopted the Act to ensure that agencies would "appoint individuals who can help and be representative of a broader range of interests" and not "receiv[e] their advice from sources which have special and limiting viewpoints," including "individuals associated with the involved program or mission." *Id.* at 19, 23; *see* H.R. Rep. No. 92-1017, at 6 (1972); S. Rep. No. 92-1098 (1972). In short, the Act was meant "to cure … above all the wasteful expenditure of public funds for … biased proposals." *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 453 (1989).

To that end, it mandates that any committee "membership" must be "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. app. 2 § 5(b)(2); *see id.* app. 2 § 5(c). This operates "to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee," *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Priv. Sector Surv. on Cost Control*, 711 F.2d 1071, 1074 n.2 (D.C. Cir. 1983), and that there is be "fair representation of different points of view"

among committee members, *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 437 (D.C. Cir. 1989) (*Microbiological*) (per curiam) (Edwards, J., concurring in part and dissenting in part).

To implement this requirement, the Act directs the General Services Administration to develop government-wide rules for convening advisory committees. 5 U.S.C. app. 2 § 7(c). Those regulations in turn direct agencies to consider several factors to achieve a "balanced" advisory committee, including the "mission" of the committee; the "economic … impact of [its] recommendations"; the "types of specific perspectives required … such as those of consumers, technical experts, the public at-large, academia, business, or other sectors"; and the "need to obtain divergent points of view on the issues before" the committee. 41 C.F.R. pt. 102-3, subpt. B, app. A. Consistent with the Act's purpose, the regulations also require agencies to "consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee." *Id.* § 102-3.60(b)(3); *see* JA10–12.

Echoing these regulations, EPA's handbook on advisory committees reiterates these factors and directs that when "selecting … members," the Agency must consider "[g]roups that have been involved or have a particular interest in the subject matter of the committee" as well as "a cross-section of stakeholders directly affected/interested and qualified JA29, 33–34.

2. The Clean Air Scientific Advisory Committee is one of the many advisory committees subject to the Act's mandates. *See* 42 U.S.C. § 7409(d)(2)(A); JA305. It consists of seven members appointed by the EPA Administrator and must include "one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies." 42 U.S.C. § 7409(d)(2)(A). The Administrator typically appoints Committee members for terms of two to three years and frequently reappoints them. *Union of Concerned Scientists v. Wheeler*, 954 F.3d 11, 14 (1st Cir. 2020).

The Committee plays a "critical role" in major EPA decisions. *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020). Most significantly, it provides "advice and recommendations to EPA" regarding whether it would be "appropriate" for EPA to adopt far-

reaching policies under the Clean Air Act, 42 U.S.C. § 7409(d); JA07—namely, the "national primary and secondary ambient air quality standards" that the Agency must promulgate based on its judgment regarding what is adequate to protect "the public health" (for the primary standards) and "the public welfare" (for the secondary standards), 42 U.S.C. §§ 7408(a), 7409(a)–(b). The Committee also advises EPA on "any adverse public health, welfare, social, economic, or energy effects which may result from" the air-quality standards. *Id.* § 7409(d)(2)(C)(iv); JA07.

The Clean Air Act directs both EPA and the Committee to "review" the standards every five years, 42 U.S.C. § 7409(d)(1), (2)(B), and requires the Committee to "recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards," *id.* § 7409(d)(2). These standards "affect the entire national economy" and can subject regulated industries to billions of dollars of costs. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); *see, e.g.*, JA167–69. Given the national importance of the air-quality standards, both this Court and the Supreme Court regularly review EPA's final rules. *See, e.g.*, *Whitman*, 531 U.S. 457; *Murray Energy Corp. v. EPA*, 936 F.3d 597 (D.C. Cir. 2019); *Mississippi v. EPA*,

744 F.3d 1334 (D.C. Cir. 2013); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009).

Although the Committee is "'advisory' in name," EPA is required to engage with the Committee's recommendations concerning air-quality standards. *Physicians for Soc. Resp.*, 956 F.3d at 639. Whenever EPA proposes rules establishing new air-quality standards or revising previous ones, the Clean Air Act compels the Agency to "set forth or summarize" the findings and recommendations of the Committee and, "if the proposal differs in any important respect from any of these recommendations," to provide "an explanation of the reasons for such differences." 42 U.S.C. § 7607(d)(3). If EPA's explanation for its disagreement is inadequate, the resulting rule may be set aside. *See Murray Energy Corp.*, 936 F.3d at 614; *Am. Farm Bureau Fed'n*, 559 F.3d at 521, 524.

B. EPA's Reconstitution Of The Committee

1. As directed by the Clean Air Act, EPA has established national air-quality standards for six air pollutants, one of which is particulate matter (fine particles such as dust or soot). JA148–49; *see* 42 U.S.C. § 7408(a). There are four air-quality standards for particulate

matter, including one primary annual standard for fine inhalable particles that was last modified in 2012. JA148–49, 160–61. These standards, like the others issued by EPA, can subject regulated industries to costs totaling billions of dollars. *See, e.g.*, JA167–69.

In May 2018, then-Acting Administrator Wheeler announced EPA's intention to review the air-quality standards for particulate matter. JA173–74. As part of the review process, EPA staff released a draft policy assessment in September 2019, which recommended strengthening the annual particulate-matter standard for fine inhalable particles. JA56, 173–74.

In its December 2019 review of the draft policy assessment, the Committee, then chaired by Dr. Tony Cox, concluded that the scientific evidence, when interpreted using rigorous methods from mainstream science, did not justify recommending strengthening the particulate-matter standards. *See* JA56–57, 63–64, 173–74. All but one of the Committee members concluded that the draft policy assessment did not provide valid new scientific evidence and data that reasonably called into question the public-health protection afforded by the current annual primary standard for particulate matter. JA56–57.

Following the Committee's assessment, EPA published a final rule in December 2020 that retained all of the primary and secondary standards without revision. *See Review of the National Ambient Air Quality Standards for Particulate Matter*, 85 Fed. Reg. 82,684 (Dec. 18, 2020). Several parties petitioned this Court for review of the final rule, while regulated industries intervened in support of the rule. Am. Forest & Paper Ass'n Mot. to Intervene, *California v. EPA*, No. 21-1014 (D.C. Cir. Feb. 18, 2021).

2. On his first day in office (and barely a month after EPA issued its final rule), President Biden ordered agencies to "immediately review" a number of rules promulgated under the previous administration that might conflict with his objective to "confront the climate crisis." Exec. Order No. 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7,037, 7,037 (Jan. 20, 2021). One of the regulations specifically identified for review was EPA's 2020 final rule retaining the current air-quality standards for particulate matter. JA180.

In accordance with the President's directive, EPA began clearing the decks to tighten those standards. Of course, that effort would be

difficult if the Committee continued to recommend against changing the standards. So in March 2021, only 20 days after being sworn in, Administrator Regan terminated Dr. Cox and all other Committee members—all but one of whom had opposed revising the annual particulate-matter standard in 2020. JA37–38. EPA's termination of the Committee members was a departure from the Agency's prior practice of allowing members to serve out their entire terms. Dr. Cox's term, for example, was not scheduled to expire until September 30, 2023. *See* JA48.

The following month, EPA solicited nominations for new members of the Committee. *Request for Nominations of Candidates to the EPA's Clean Air Scientific Advisory Committee (CASAC)*, 86 Fed. Reg. 17,146 (Apr. 1, 2021). Dr. Cox and Dr. Stanley Young—each a well-qualified expert with "significant industry experience" related to the Committee's work—were both nominated to be members of the new Committee. JA305. Dr. Cox, who had chaired the Committee from 2017 until his abrupt termination in 2021, has more than 40 years of experience in health, safety, and environmental risk analysis and related methods of statistical forecasting and causal analysis. JA51. Dr. Young, who

previously served on another EPA advisory committee, is an expert with decades of experience in applied statistics and data analysis. JA76, 78.

On June 17, 2021, EPA announced the selection of the new Committee members. JA21–23. Neither Dr. Cox nor Dr. Young was among them. *Id.* In fact, none of the new appointees represent the viewpoint of industries affected by EPA's regulation of air pollution that would challenge the need for tighter regulation. JA81. Instead, the Agency selected a statutorily required state official and six academics who are associated with more than $126 million in grants from EPA and a long record of pro-regulatory statements. *See* JA21–23; Dkt. Nos. 8-16–8-21. All of the new Committee members "share similar views on the need for more stringent regulation of air quality standards." JA315.

EPA offered only a few sentences explaining its June 2021 decision establishing the new Committee. JA21. The Agency began by noting that the new Committee is "the most diverse panel" in the Committee's history, as it is "comprised of five women and two men, including three people of color." *Id.* EPA then added that the new Committee consists of "well-qualified experts with a cross-section of scientific disciplines and experience needed to provide advice on the scientific and technical bases"

for the air-quality standards. *Id.* The Agency provided no explanation for how the new Committee is fairly balanced in terms of viewpoint. *Id.*

Although "two of the new Committee members [Boylan and Frampton] also served on the Committee under the Trump administration," JA315, neither share the industry's viewpoint that current standards are adequate. Boylan and Frampton both supported the new Committee's recommendation to strengthen the annual particulate-matter standard. JA275. Nor could Boylan and Frampton be considered industry representatives by virtue of their backgrounds—Boylan is a state official and Frampton is a professor who is associated with more than $36 million in grants from EPA. JA219. Moreover, Frampton dissented from the previous Committee's 2019 recommendation to retain current standards, and Boylan only consented to that recommendation with the caveat that an "updated risk assessment may lead to different policy recommendations." CASAC Review of the EPA's *Policy Assessment for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (External Review Draft – September 2019)* at B-7, B-31, EPA-CASAC-20-001 (Dec. 16, 2019).

3. In tandem with establishing the new Committee in June 2021, EPA announced its plan to "expeditiously" reconsider the air-quality standards for particulate matter, which it had determined to retain only a few months earlier at the end of 2020. JA188; *see* 85 Fed. Reg. 82,684. EPA tasked the new Committee with advising on this reconsideration by reviewing forthcoming updates to the policy and science assessments concerning the standards. JA187–88.

Agency staff supplied the updated assessments in October 2021. JA170. The policy assessment evaluated the "policy implications of the available scientific evidence" and "'bridge[d] the gap' between the Agency's scientific assessments and quantitative technical analyses, and the judgments required of the Administrator in determining whether it is appropriate to retain or revise the [air quality standards]." JA172. Based on such considerations, the policy assessment recommended that EPA adopt a stricter annual standard for particulate matter. JA175.

Representatives of regulated industries, however, argued against EPA changing the current standards. *See* NAAQS Regulatory Review & Rulemaking Coalition, Comment on the Policy Assessment for the Reconsideration of the National Ambient Air Quality Standards for

Particulate Matter, External Review Draft at 24 (Dec. 14, 2021), https://bit.ly/3xwTLKs; Gradient, Comment on the Policy Assessment for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, External Review Draft at 1 (Dec. 13, 2021), https://bit.ly/3IuwnCr. The U.S. Chamber of Commerce, for example, urged the Committee to "encourage the Administrator to seriously consider the option of retaining the current" air-quality standard for particulate matter based on "the potential direct and indirect economic impacts that can accompany more stringent" air-quality standards. U.S. Chamber of Commerce, Comment on the Policy Assessment for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, External Review Draft at 1, 4 (Dec. 14, 2021), https://bit.ly/3lKXrWc. Drs. Cox and Young likewise agreed that there is no scientific basis to strengthen current standards. JA56–58, 82–83.

The Committee nevertheless completed its review and issued final reports on the issue in March 2022. As expected, based on the single viewpoint of its members, the Committee unanimously recommended that EPA adopt a stricter annual standard for particulate matter on the premise that the current standard "is not sufficiently protective of public

health." JA271, 275, 292; *see also* JA306. A majority of the Committee also recommended a stricter 24-hour particulate-matter standard. JA276.

The Committee's policy recommendation directly conflicted with the previous Committee's viewpoint that sound science did not support tightening current standards. Most significantly, the Committee conveyed an overall policy proposal—that EPA tighten standards regulating particulate matter to achieve what the Committee deemed "sufficient[]" protection for "public health." JA275. This recommendation was based on "public health policy judgments" and the "weight[s]" the Committee had accorded to various factors. JA276–77, 288, 293–96. For instance, the Committee majority endorsed particular standards because it "place[d] more weight" on the hypothesized protection of certain "demographic groups," such as "Black communities," whereas some Committee members did not accord the same weights to such considerations. JA293–94.

Similarly, the Committee also recommended that EPA develop air-quality standards based on how well they reduce "risk disparities across racial and ethnic groups," and particularly between "White and Black

populations." JA275, 288–89. Individual Committee members likewise urged EPA to use air-quality regulation to promote "environmental justice," specifically the reduction of disparate "health burden[s]" experienced by "racial/ethnic minorities[] [and] individuals and communities with lower socio-economic position[s]." JA302. And despite acknowledging that mean concentrations of particulate matter are a "useful metric for determining average health effects of the area population as a whole," the Committee urged EPA to assess air-quality standards using other metrics because mean values do not capture the "[i]mportant[]" consideration that "persons of color and lower-income populations" experience "disproportionately" higher concentrations. JA285–86. The Committee likewise recommended that EPA use morbidity-based risk assessments because other measures do not account for disproportionately-distributed burdens of chronic disease. JA287.

The Committee further counseled that climate change should be accounted for in regulating particulate matter. *Id.* And it urged EPA to perform additional research in areas like "climate change," "microplastic emissions," "visibility," and "health equity." JA297, 299–300.

Once the Committee supplied its predictable recommendation, EPA took action to tighten the annual particulate-matter standard. In January 2023, the Agency published a notice of proposed rulemaking. *See Reconsideration of the National Ambient Air Quality Standards for Particulate Matter*, 88 Fed. Reg. 5,558 (Jan. 27, 2023). Repeatedly touting the new Committee's "unanimous" recommendation, EPA proposed a stricter annual particulate-matter standard. *Id.* at 5,561, 5,623–24.

Industry groups with the viewpoint that had been excluded from this process responded by criticizing EPA's proposal. The Chamber of Commerce called "for the current standards to be maintained," expressing concern "that the proposed regulation would stifle manufacturing and industrial investment and exacerbate permitting challenges that continue to hamper the economy." U.S. Chamber of Com. Glob. Energy Inst., *U.S. Chamber's Global Energy Institute Calls for Current NAAQS Standards to be Maintained* (Jan. 6, 2023), https://bit.ly/3xzcrt0. The Portland Cement Association complained that the new standards will be "technically and economically infeasible for the industry to meet." Parul Dubey, *Portland Cement Association Regards EPA Proposed Action Involving Particulate Matter Air Quality Standards*

as Superfluous, Informed Infrastructure (Jan. 9, 2023), https://bit.ly/3Ix4xGB. The American Petroleum Institute explained that current standards are "effective" and that changing the standards would "place new regulatory and cost burdens on state and local governments, businesses, and the public." Pam McFarland, *EPA Proposes Tougher Air Pollution Standards Under Clean Air Act*, Engineering News-Record (Jan. 6, 2023), https://bit.ly/3EcaCWz.

C. The Present Controversy

1. Drs. Cox and Young filed this lawsuit in October 2021, shortly after EPA had established the new Committee in June 2021. JA305. They raised several claims challenging that decision. Relevant here, they contended that EPA had (i) violated the Act by establishing a new Committee that is not fairly balanced and (ii) contravened the APA by failing to explain how the new Committee is fairly balanced under the Act and by evaluating candidates based on their race and sex. *See* JA236–37, 239–42. To prevent these violations from tainting EPA's imminent rulemaking, they moved for a preliminary injunction or expedited partial summary judgment. *See* JA306.

In February 2022, the district court denied a preliminary injunction. JA269. Rather than address the merits, the court held that Drs. Cox and Young did not face irreparable harm stemming from the reconstituted Committee. JA264–69. In the court's view, any "harm could be remedied" later by, for example, ordering "the EPA Administrator to reconstitute the Committee lawfully" and "the Committee to provide new recommendations." JA266–67.

2. The district court ultimately addressed the merits in September 2022, when it entered summary judgment for EPA on plaintiffs' claims challenging the establishment of the new Committee. JA303, 322. After assuring itself of jurisdiction and that it could review EPA's decision, JA307–11, the court held that EPA had not violated the Act's fair-balance requirement, JA311–15. The court acknowledged EPA had excluded representatives of the industry viewpoint that current standards are adequate and, indeed, had "selected [new] members that all share similar views on the need for more stringent regulation of air quality standards—a highly charged, political issue." JA311–12, 314–15. It nevertheless deemed the new Committee fairly balanced on the premise that it is a "technical and scientific" body whose members have

"varied technical backgrounds across scientific and medical disciplines." JA312–15. The court did not define what qualifies as a "technical and scientific" committee, but believed the Committee is one because it advises on "highly technical" air-quality standards and other issues "rooted in scientific knowledge." JA313. According to the court, such committees "satisfy the fair balance requirement without a representative from a regulated industry … because representatives from affected parties are not needed … to conduct 'technocratic' tasks." JA312–13.

The district court further held that EPA had adequately explained its decision establishing the new Committee. The court determined that EPA's March 2021 announcement terminating the *old* Committee sufficiently articulated "why" the Agency "was seeking to reconstitute the Committee." JA320 (citing JA37–38). In doing so, however, the court did not dispute that EPA had never explained how the *new* Committee is fairly balanced. JA319–21. Nor did it address whether the new Committee's balance is an "important aspect of the problem" that EPA was obligated to address, or whether the Agency had relied on factors that Congress did "not intend[] it to consider," namely the race and sex

of nominees. Dkt. No. 8-1 at 25–26; *see* JA319–20. Instead, the court simply asserted "no authority … requir[es] the EPA to articulate how the reconstituted Committee would comply with" the Federal Advisory Committee Act "specifically." JA319.

Following this decision, Drs. Cox and Young filed an unopposed motion for partial summary judgment under Rule 54(b) on their claims related to the Committee. The district court granted the motion, concluding that entry of partial final judgment "best promotes 'justice to the litigants'" and is "in the interest of sound judicial administration," as the claims pertaining to the Committee are "separable" from the remaining claims pertaining to EPA's separate reconstitution of the Science Advisory Board. JA324–25. Drs. Cox and Young then appealed. JA326.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment below for two reasons.

I. The new Committee is not fairly balanced in terms of viewpoint because EPA excluded the perspective of regulated industries that existing air-quality standards do not need to be strengthened. Because the Agency "selected members that all share similar views on

the need for more stringent regulation of air quality standards," JA314–15, there are no members on the Committee representing industry's different point of view reflected in the Committee's previous recommendation that available evidence did not justify changing existing standards. That lack of viewpoint balance matters because EPA proposed a new particulate-matter standard that will impose billions of dollars in costs on regulated industries (and ultimately consumers) on the basis of a unanimous Committee recommendation that the Agency contrived by excluding the industry's viewpoint. This is precisely the type of manipulation of advisory committees the Act was adopted to prevent.

The district court concluded otherwise only by adopting a cramped reading of the statute and the Committee's mandate. In the court's view, a technical and scientific advisory committee is fairly balanced so long as it has a mix of members from different scientific disciplines. The premise is incorrect, and the conclusion does not follow. The Act requires that *all* advisory committees be fairly balanced in terms of viewpoint, even technocratic ones. And in any event, the Committee's mandate goes well beyond technical and scientific matters because it includes making recommendations to EPA about major policy questions—air-quality

standards that affect the national economy. If this Committee is fairly balanced, it is hard to imagine what it would take to violate the Act.

II. EPA also failed to adequately explain why it believes the new Committee's composition satisfies the Act. The Agency's lack of a contemporaneous explanation is unsurprising, because EPA ignored the Act's fair-balance requirement. Rather than focus on the factors that Congress had directed it to consider, the Agency based its decision on irrelevant and impermissible considerations—the race and sex of the nominees. But the only type of diversity that Congress directed EPA to consider in its decisionmaking is viewpoint diversity.

The district court tried to make up for EPA's missing explanation in three ways, each of which violates fundamental principles of administrative law. *First*, the court excused the Agency from the APA's reasoned-decisionmaking requirement when establishing advisory committees, despite agreeing that EPA's decision to establish the Committee is reviewable. *Second*, it refused to review the operative final agency action—the Agency's June 2021 decision establishing the new Committee—by instead focusing on EPA's irrelevant explanation for terminating the old Committee members in March 2021. And *third*, the

court committed a paradigmatic *Chenery* violation by sustaining EPA's decision to establish the new Committee as fairly balanced for reasons that the Agency never offered in June 2021.

STANDARD OF REVIEW

This Court reviews the District Court's decision *de novo*, while reviewing the underlying agency action under the APA to determine whether it is contrary to law or arbitrary and capricious. *See Physicians for Soc. Resp.*, 956 F.3d at 642; 5 U.S.C. § 706(2). EPA's interpretation of the Act is not entitled to deference because its "broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretative questions *de novo*." *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1252–53 (D.C. Cir. 2003).

ARGUMENT

I. EPA VIOLATED THE FEDERAL ADVISORY COMMITTEE ACT IN ESTABLISHING THE NEW COMMITTEE.

The new Committee is not "fairly balanced in terms of the points of view represented," 5 U.S.C. app. 2 § 5(b)(2), (c), because EPA excluded the industry's viewpoint that strengthening the air-quality standards is unnecessary to protect human health with an adequate margin of safety. That lack of viewpoint balance matters because the Committee

unanimously recommended that EPA strengthen the air-quality standards for particulate-matter only because the Agency had excluded diverse viewpoints, including the viewpoint represented by the previous Committee's recommendation. In nevertheless deeming the Committee to be fairly balanced, the district court erroneously excused the Committee from the viewpoint-balance requirement, discounted the Committee's important role in advising EPA on major policy questions, and misread the relevant caselaw.

A. The New Committee Is Not Fairly Balanced.

1. The viewpoint of industry that current air-quality standards are adequate must be represented on the Committee to ensure it is fairly balanced in terms of viewpoint for three reasons.

First, industry is directly affected by the Committee's recommendations to EPA about the air-quality standards, as these standards subject regulated industries to billions of dollars in costs. *See* JA167–69. Changing the air-quality standards could "adversely affect jobs, business investment, and permitting in a broad range of important economic sectors and activities," U.S. Chamber of Commerce, Comment, *supra*, at 3, because industries will have "to spend additional funds and

resources to comply with any changes to the standards," Am. Forest & Paper Ass'n Mot. to Intervene, *supra*, at 5.

Representation of this industry viewpoint on the Committee therefore is critical because under the Act's implementing regulations, the Committee must contain "a cross-section of those *directly affected*, interested, and qualified." 41 C.F.R. § 102-3.60(b)(3) (emphasis added). Indeed, EPA's own handbook directs the agency to consider "a cross-section of stakeholders *directly affected/interested* and qualified when selecting … members" for its advisory committees. JA29 (emphasis added). This makes sense, because the fair-balance "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." *Nat'l Anti-Hunger Coal.*, 711 F.2d at 1074 n.2 (emphasis added).

Second, the Committee has a broad policy mandate to advise EPA about changing air-quality standards that affect regulated industries. Courts "have paid special attention to the mandate of the advisory committee" when applying the fair-balance requirement. *Microbiological*, 886 F.2d at 435 (Edwards, J., concurring in part and dissenting in part).

The "appropriate inquiry in determining whether the Committee's membership satisfies the 'fairly balanced' standard" is "whether the Committee's members 'represent a fair balance of viewpoints given the functions to be performed.'" *Id.* (quoting *Nat'l Anti-Hunger Coal.*, 711 F.2d at 1074). Where the advisory committee is charged with advising on "complex policy choices" that "directly affect" particular interests, "a fair balance of viewpoints cannot be achieved without representation of" those interests. *Id.* at 436; *accord* 41 C.F.R. pt. 102-3, subpt. B, app. A (requiring agencies to consider the "mission" of the committee to achieve a "balanced" advisory committee).

Here, Congress charged the Committee with advising EPA on major policy questions—air-quality standards—and recommending new rules "as may be appropriate." 42 U.S.C. § 7409(d)(2)(B); *accord* JA07. This important role in EPA's policymaking process includes advising the Agency on "any adverse public health, welfare, social, economic, or energy effects which may result from" the air-quality standards. *Id.* § 7409(d)(2)(C); *accord* JA07, 10. In light of the Committee's role in EPA's policymaking process, the industry's view about the adequacy of current

standards is essential because regulated industries bear the "economic" impact of the Committee's recommendations. *Id.* § 7409(d)(2)(C).

Third, representation of the industry's viewpoint is essential to "obtain divergent points of view on the issues before" the Committee. 41 C.F.R. pt. 102-3, subpt. B, app. A; *see Microbiological*, 886 F.2d at 437 (Edwards, J., concurring in part and dissenting in part) (explaining that there should be "'fair representation of different points of view'" among committee members). There is no such diversity of viewpoint on the Committee because it is undisputed that "the Administrator selected members that all share similar views on the need for more stringent regulation of air quality standards." JA314–15.

Indeed, the Committee lacks any representatives sharing the industry's opposition to stronger regulation who could have advised EPA on the "economic … impact of the advisory committee's recommendations." 41 C.F.R. pt. 102-3, subpt. B, app. A; *see also* U.S. Chamber of Commerce, Comment, *supra*, at 2 (describing economic impact of more stringent air quality standards). This industry viewpoint is directly relevant to the Committee's mandate to consider the "economic[] or energy effects which may result from" the air-quality

standards. 42 U.S.C. § 7409(d)(2)(C)(iv). Hand-selecting scientists who all share the same view on an important policymaking issue is the antithesis of the viewpoint balance necessary under the Act. *See Cargill, Inc. v. United States*, 173 F.3d 323, 338 (5th Cir. 1999) (indicating that a scientific committee lacks viewpoint balance if its membership is "biased toward one particular point of view").

The record shows that scientists with industry experience would have brought different points of view to the Committee about the adequacy of current air-quality standards. *See, e.g.*, NAAQS Regulatory Review & Rulemaking Coalition, Comment, *supra*, at 24; Gradient, Comment, *supra*, at 1; U.S. Chamber of Commerce, Comment, *supra*, at 1, 4. As Dr. Young explained, "scientists with industry experience … have different perspectives and points of view compared to scientists with university experience and perspectives," who currently populate the Committee. JA80; *see also* JA71–72; JA52–56.

For example, one of the central issues in the Agency's current reconsideration of air-quality standards is whether exposure to particulate matter at the levels currently permitted causes adverse health outcomes, including premature death. JA52–56. There is "clear

disagreement" among experts on this issue, JA54, and industry experts have "repeatedly identified critical flaws" in EPA's causal determinations on this topic in past reviews of the air-quality standards. JA55. Both Dr. Cox and Dr. Young share the industry's viewpoint that current standards are adequate and do not need to be strengthened to protect human health with an adequate margin of safety. JA56–58; JA82–83. Without any representation of the industry's viewpoint about current standards, the Agency's only perspective on this important issue came from the EPA-funded faculty lounge (and a statutorily required state official).

2. EPA's decision to establish a new Committee that is not fairly balanced matters for several reasons.

First, the Clean Air Act requires the Agency to consider, and explain any disagreement with, the Committee's policy recommendations, 42 U.S.C. § 7607(d)(3), meaning they serve as the baseline in any rulemaking involving "air standards that affect the entire national economy," *Whitman*, 531 U.S. at 475. This "critical role" in EPA's process of developing major rules distinguishes the Committee from run-of-the-mill advisory committees across the federal government. *Physicians for Soc. Resp.*, 956 F.3d at 647.

Second, the new Committee provided EPA with a "unanimous" recommendation to strengthen the annual particulate-matter standard only because EPA excluded the industry's viewpoint that current standards are adequate. JA272, 275. The Committee's recommendation would not have been unanimous had divergent viewpoints been represented. Indeed, the previous Committee recommended against strengthening the air-quality standards for particulate matter in 2019. *See* Letter from Dr. Louis Anthony Cox, Jr., Chair, CASAC, to Andrew R. Wheeler, Administrator, EPA Regarding CASAC Review of the EPA's *Policy Assessment for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (External Review Draft – September 2019)* at 1, EPA-CASAC-20-001 (Dec. 16, 2019). By excluding such viewpoints from the new Committee, EPA guaranteed that it would receive a unanimous recommendation that did not reflect the industry's dissenting view.

Third, EPA received a "biased" recommendation, *Pub. Citizen*, 491 U.S. at 423, from individuals selected to serve on the Committee despite (or perhaps because of) their "closeness" to the Agency, H.R. Rep. No. 91-1731, at 19. The Committee's manufactured unanimity is not surprising,

because the Agency selected EPA-funded academics, none of whom offer "divergent points of view on the issues before" the Committee. 41 C.F.R. pt. 102-3, subpt. B, app. A. Not only do the Committee members "all share similar views on the need for more stringent regulation of air quality standards," JA314–15, but most of them are associated with grants from EPA totaling more than $126 million. *See* Dkt. Nos. 8-16–8-21. Grant recipients who have been financially beholden to EPA to fund their research have an obvious incentive to adopt viewpoints that align with their benefactor's agenda. *See* JA73–74; JA82.

Finally, EPA relied upon—and repeatedly touted—the Committee's "unanimous" recommendation in its proposed rule strengthening the air-quality standards for particulate-matter. 88 Fed. Reg. at 5,561, 5,623–24. EPA could not have initiated its rulemaking on the basis of a unanimous Committee recommendation without excluding the industry's viewpoint that current standards are adequate, which was reflected in the previous Committee's recommendation under Dr. Cox's leadership. By contriving a unanimous recommendation from the new Committee, EPA was able to present its proposed rule as a *fait accompli*.

B. The District Court Erred In Holding That The New Committee Is Fairly Balanced.

While never disputing that EPA "selected members that all share similar views on the need for more stringent regulation of air quality standards," JA314–15, the district court saw nothing wrong with the new Committee's composition. In its view, the Committee is fairly balanced solely because it contains a mix of technical experts from "diverse technical and scientific fields." JA315. That conclusion misunderstands the fair-balance requirement, the Committee's mandate, and the relevant caselaw.

1. To start, the district court misinterpreted the Act's viewpoint-balance requirement in two ways.

First, the court excused so-called "technical and scientific" committees, JA314, from compliance with the requirement to be "fairly balanced in terms of the points of view represented," 5 U.S.C. app. 2 § 5(b)(2), (c). Nowhere in its opinion did the court even attempt to explain how the Committee could be viewpoint balanced. To the contrary, the court never took issue with the fact that the Committee's members "all share similar views on the need for more stringent regulation of air quality standards." JA314–15. Instead, the court concluded that in light

of its supposed "technical and scientific mandate," the Committee needed only to have members "from diverse technical and scientific fields" to satisfy the Act. *Id.*

Nothing in the Act or its implementing regulations, however, justifies excluding the Committee from the viewpoint-balance requirement. The Act's fair-balance requirement applies equally to the membership of every "advisory committee," 5 U.S.C. app. 2 § 5(b)(2), regardless of its mandate. Neither the Act nor its implementing regulations ever suggest that the fair-balance requirement takes on a different meaning when applied to advisory committees with a technical and scientific mandate. *See id.*; 41 C.F.R. § 102-3.60(b)(3); 41 C.F.R. pt. 102-3, subpt. B, app. A. Nor can they be construed to do so. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."). As Judge Edwards explained, "the need for technical expertise does not negate the requirement of fairly balancing points of view." *Microbiological*, 886 F.2d at 436 (Edwards, J., concurring in part and dissenting in part).

Second, the district court improperly conflated *viewpoint* balance with *functional* balance by concluding that the Committee is fairly balanced simply because it has members from "diverse technical and scientific fields." JA314–15. The Act's fair-balance requirement contains two independent requirements: "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) (emphasis added). Because the fair-balance requirement is written in the conjunctive, an advisory committee that is *functionally* balanced but not *viewpoint* balanced would still be unlawful.

Here, the fact that the Committee's members might have "varied technical backgrounds across scientific and medical disciplines" is at most relevant to *functional* balance alone. JA314. Indeed, "[a]dvisory committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the *functions* and tasks to be performed." 41 C.F.R. § 102-3.60(b)(3) (emphasis added). A cross-section of scientists from different disciplines may qualify the Committee to perform its *function* of advising EPA on the air-quality standards (where a cross-section of novelists and

lawyers would not), but it says nothing about their *points of view* on the important question whether those standards need to be strengthened.

2. Even indulging the district court's misreading of the fair-balance requirement for argument's sake, the court mistakenly classified the Committee as merely a "technical and scientific" advisory committee. In the court's view, the Committee is a "technical and scientific" committee, *see* JA314–15, on the premise that it has a mandate that is "politically neutral and technocratic," *Cargill*, 173 F.3d at 337. This framing misunderstands the Committee's mandate in several respects.

First, the district court did not seem to believe its own characterization of the Committee's mandate as merely "technical and scientific." In the court's own words, the Committee's core function—advising EPA on air-quality standards—concerns a "highly charged, political issue." JA315. Indeed, the air-quality standards were the subject of a day-one executive order; "affect the entire national economy," *Whitman*, 531 U.S. at 475; impose billions of dollars of compliance costs on regulated industries; and implicate the government's response to climate change, "one of the most hotly debated issues of the day," *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 347 (2019) (Alito, J., dissenting from

the denial of certiorari); *see supra* at 8. The new Administrator would not have promptly terminated all of the Committee's former members before their terms had expired if the Committee's tasks were "politically neutral and technocratic." *Cargill*, 173 F.3d at 337.

Second, in characterizing the Committee as merely "technical and scientific," the district court ignored the Committee's policymaking mandate. JA314. The main issue on which the Committee advises EPA—whether the current air-quality standards are "requisite to protect the public health," 42 U.S.C. § 7409(b)(1)—does not involve purely technical and scientific questions. As the Supreme Court has explained, the term "requisite" means "sufficient, but not more than necessary," and thus involves a "degree of policy judgment" in application, as it requires the Agency to determine "how much of the regulated harm is too much." *Whitman*, 531 U.S. at 473–75 (cleaned up). And as the new Committee itself has explained, its views depend on "public health policy judgments" and "weight[s]" accorded to various factors. JA276–77, 288, 293–96. Moreover, the Committee is expressly charged with advising EPA of "adverse public health, welfare, social, economic, or energy effects" that may result from different strategies for attainment of air-quality

standards. 42 U.S.C. § 7409(d)(2)(C)(iv). Thus, the Committee's advice is not simply "technocratic," JA313; it is heavily influenced by the policy views of its members.

Third, the district court overlooked the policy recommendations that the new Committee provided to EPA. The Committee reviewed EPA's evaluation of the "potential policy implications of the available scientific evidence" to help the Administrator determine whether it is appropriate to retain or revise the national air quality standards. JA172; *see* JA171–72 (multiple policy assessment chapters concerning the "policy-relevant aspects" of the scientific evidence). Weighing in on "public health policy judgments," the Committee ultimately recommended that EPA adopt stricter annual and 24-hour particulate-matter standards. JA276–77, 288, 292–95.

The Committee's policy advice did not stop there. It also urged EPA to develop air-quality standards based on how well they reduce "risk disparities across racial and ethnic groups." JA275, 288–89; *see also* JA283. Individual Committee members likewise recommended that EPA promote "environmental justice" for members of certain races and socioeconomic classes. JA302. Despite acknowledging that mean

concentrations of particulate matter are a "useful metric for determining average health effects of the area population as a whole," the Committee recommended using *other* metrics to assess air-quality standards because mean values do not capture that "persons of color and lower-income populations" experience "disproportionately" higher concentrations—a factor the Committee deemed exceedingly "[i]mportant[]." JA285–86.

Other controversial policy recommendations littered the Committee's reports. For instance, the Committee advised that climate change should be accounted for in regulating particulate matter. JA287. It also recommended that EPA expend resources performing additional research in disparate areas like "climate change," "microplastic emissions," "visibility," and "health equity." JA297, 299–300. All this confirms that the Committee's policy role extends far beyond technocratic minutiae.

Finally, the district court failed to appreciate that its ruling would also allow EPA to select "only persons paid by a regulated interested business" opposed to stronger regulation to serve on the Committee. *Union of Concerned Scientists*, 954 F.3d at 19. Such a Committee, filled with industry representatives opposed to stricter air-quality standards,

would plainly not be fairly balanced because the members would all share the same viewpoint. *See, e.g.*, *Nw. Ecosystem All. v. Off. of the U.S. Trade Representative*, No. C99-1165R, 1999 WL 33526001, at *4–7 (W.D. Wash. Nov. 9, 1999) (Rothstein, J.) (committee consisting "exclusively of wood and paper industry representatives" lacked fair balance).

EPA veered to the opposite extreme here, but its error is the same. By excluding representatives of the industry's viewpoint, EPA has ensured that the Committee is no more fairly balanced than one composed entirely of oil companies' in-house scientists.

3. While the district court pointed to three cases to bolster its analysis, JA312–13, none supports its conclusion that the Committee is fairly balanced.

a. The district court principally relied upon the Fifth Circuit's decision in *Cargill*, 173 F.3d 323, to support its conclusion that technical and scientific committees are excused from the viewpoint-balance requirement. JA312–15. But in concluding that the committee at issue was *functionally* balanced because it "include[d] scientists with expertise in many fields related to the subject matter" of the planned study, *Cargill* did not suggest that this variety in technical expertise meant the

committee was fairly balanced in terms of *viewpoint*. 173 F.3d at 337. To the contrary, the Fifth Circuit indicated that such a committee would be *unbalanced* if its members were "biased toward one particular point of view." *Id.* at 338. That is the case here, because the new Committee's members undisputedly "all share similar views on the need for more stringent regulation of air quality standards." JA314–15. This lack of viewpoint balance fails the fair-balance requirement notwithstanding the Committee members' varied technical and scientific backgrounds.

Nor does the district court's characterization of the Committee's mandate find support in *Cargill*. At issue in *Cargill* was an advisory committee charged with peer-reviewing a "protocol to govern a planned study of the health effects of exposure to diesel exhaust" on underground miners. 173 F.3d at 327–28. The Fifth Circuit held that because the "task" of the committee—providing a particular "peer review"—was "politically neutral and technocratic," and because the committee "was not called on to make policy decisions about mine regulation," there was "no need for representatives from the management of the subject mines to serve on the committee." *Id.* at 337. Here, by contrast, the Committee is charged with far more than "evaluating a study protocol." *Id.*

Specifically, it is tasked with making policy recommendations regarding air-quality standards, 42 U.S.C. § 7409(d)—major rules with multi-billion dollar implications for regulated industries. Indeed, the district court itself characterized the Committee's role as involving "a highly charged, political issue." JA311–12; 314–15. This is not a "narrow, technical mandate." *Cargill*, 173 F.3d at 338.

b. The district court also cited this Court's decision in *National Anti-Hunger Coalition*, 711 F.2d 1071, but that case cuts against EPA. There, the Court held that a committee set up to study feeding programs for low-income individuals consisting "almost exclusively of executives of large corporations and containing no representatives of the feeding programs" was fairly balanced due to the committee's "limited function" of applying "private[-]sector expertise" to the "management" of a federal program. *Id.* at 144, 146–47. In doing so, however, this Court indicated a "different result" might be warranted if the committee's mandate expanded to include "*substantive* changes in federal policies and programs." *Id.* at 146 (emphasis added). In fact, after considering new evidence that the committee had made these kinds of "policy recommendations" "of general national import," the district court in the

National Anti-Hunger Coalition litigation concluded on reconsideration that the committee was *not* fairly balanced. 566 F. Supp. 1515, 1516–17 (D.D.C. 1983). "Such recommendations could not have been approved under the Act except by a committee 'fairly balanced' to represent the points of view affected, and this Committee was unbalanced as to these substantive legislative policy issues." *Id*. at 1517.

The same kind of policy mandate is present in this case because the Committee's series of "policy recommendations" to strengthen EPA's current air-quality standards, and thereby impose potentially staggering costs on regulated industries, *id.* at 1516, undeniably bears on "substantive changes in federal policies and programs," 711 F.2d at 1074; *see supra* at 38–42. The Committee's mandate, which bears on matters "of general national import," therefore closely resembles the expanded policy mandate of the advisory committee considered by the district court on reconsideration in *National Anti-Hunger Coalition*, rather than the narrow mandate considered by this Court. 566 F. Supp. at 1517.

c. Finally, in characterizing the Committee as a "technical and scientific" body, the district court invoked Judge Friedman's opinion in the splintered *Microbiological* case, which concerned an advisory

committee established to advise the Department of Agriculture on changes to food-safety regulations, 886 F.2d at 423 (Friedman, J., concurring in the judgment). JA314–15. The district court's reliance on this opinion was misplaced for several reasons.

First, unlike the district court here, Judge Friedman understood that even a "technical and scientific" committee must satisfy the viewpoint-balance requirement. 886 F.2d at 420, 423–24 (Friedman, J., concurring in the judgment).

Second, Judge Friedman concluded that two of the committee members "may be viewed as representing the interests of consumers" with respect to food safety, *id.* at 424, but it is undisputed here that *none* of the seven members of the Committee can be characterized as representing the interests of regulated industries, JA315.

Third, Judge Friedman rejected the argument that the agency had to select "members who are consumer advocates or proponents of consumer interests," 886 F.2d at 423 (Friedman, J., concurring in the judgment), but Drs. Cox and Young do not similarly claim that EPA had to appoint an industry lobbyist. Rather, they maintain only that the Agency must select someone who, by virtue of "his or her background and

employment status," could represent the industry's viewpoint on the air-quality standards, *id.* at 437 (Edwards, J., concurring in part and dissenting in part). Drs. Cox and Young fit the bill because they have "significant industry experience" related to the Committee's work. JA305. Thus, if anything, Judge Friedman's opinion indicates that the Committee is not fairly balanced.

So does Judge Edwards' opinion in *Microbiological*. 886 F.2d at 432–38 (Edwards, J., concurring in part and dissenting in part). Because the food-safety committee's recommendations "involve[d] complex policy choices[] not merely—or even primarily—technical determinations," Judge Edwards rejected characterizing its mandate as "primarily technical and scientific." *Id.* at 436. He concluded that the committee was not fairly balanced in terms of viewpoint because it lacked any representation from those directly affected by the committee's food-safety recommendations—consumers. *Id.* at 436, 438. Like the food-safety committee at issue in *Microbiological*, the Committee here is charged with advising a federal agency on "complex policy choices" while lacking any representation from those directly affected by its recommendations—regulated industries. *Id.*

II. EPA FAILED TO REASONABLY EXPLAIN ITS DECISION ESTABLISHING THE NEW COMMITTEE.

Even if the new Committee could be considered fairly balanced under the Federal Advisory Committee Act, EPA's appointment of the new members would still need to be set aside because the Agency violated the APA by establishing it in an arbitrary and capricious manner. *See* 5 U.S.C. § 706(2)(A); *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). Under bedrock principles of administrative law, an agency acts arbitrarily and capriciously when it (1) fails to "articulate a satisfactory explanation for its action" by ignoring an "important aspect of the problem" or (2) relies on "factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, EPA did both. It neglected to explain a critical aspect of its decisionmaking—whether the new Committee is fairly balanced—and instead relied on factors that Congress never wanted it to address. The district court concluded otherwise only by overlooking fundamental administrative-law principles itself.

A. EPA Both Failed To Explain How The Committee Is Fairly Balanced And Relied On Improper Factors.

1. It is "axiomatic" that an agency must provide a "'reasoned explanation for its action.'" *Physicians for Soc. Resp.*, 956 F.3d at 644, 646. That requirement ensures that "agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019). As both the Supreme Court and this Court have repeatedly admonished, an agency violates this requirement if its explanation does not address an "important aspect of the problem." *State Farm*, 463 U.S. at 43; *see, e.g.*, *Physicians for Soc. Resp.*, 956 F.3d at 644, 647.

This Court has not hesitated to require EPA to explain important aspects of its decisions concerning advisory committees. In *Physicians for Social Responsibility*, this Court considered the Agency's decision to bar recipients of EPA grants from serving on advisory committees. 956 F.3d at 641, 644–48. Scrutinizing EPA's terse explanation, this Court held that the Agency did not adequately address an "'important aspect of the problem'"—namely, how the decision to bar service by grant recipients complied with "statutory mandates" requiring the Agency to rely on "'the best available science.'" *Id.* at 647. Although EPA had previously sought

to satisfy these mandates by allowing grant recipients to serve on advisory committees, the Agency did not "grapple with" the mandates in announcing its new decision. *Id.* Thus, upon finding that EPA ignored this "important" issue, this Court held that the Agency had violated "foundational precept[s] of administrative law." *Id.* at 644, 647.

This case presents the flipside of *Physicians for Social Responsibility*: In its rush to *include* EPA grant recipients in the Committee, the Agency failed to address an "'important aspect of the problem'" here. *Id.* at 647. When establishing the new Committee, EPA was undisputedly subject to a "statutory mandate[]," to ensure that the Committee complied with the Act's fair-balance requirement and its implementing regulations. *Id.*; *see* 5 U.S.C. app. 2 § 5(b)(2); 41 C.F.R. § 102-3.60(b)(3); 41 C.F.R. pt. 102-3, subpt. B, app. A. The new Committee's compliance with the Act was therefore an "'important aspect of the problem'" that the Agency had to address. *Physicians for Soc. Resp.*, 956 F.3d at 647. After all, a "statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency." *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216–17 (D.C. Cir. 2004); *see Union of Concerned Scientists*, 954 F.3d at 20

("[The Act's] standards tell us what Congress intended the EPA to consider, and the APA's reasoned decision-making standards tell us how the EPA is to go about making and explaining that consideration."). Indeed, the government tacitly conceded below that EPA was obligated to explain how the Committee is fairly balanced under the Act by declining to dispute this. *See* Dkt. No. 19 at 37–39.

Yet nothing in EPA's June 2021 decision announcing the new Committee even mentions the Act, its implementing regulations, or the fair-balance requirement—let alone explains how the new Committee is "fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. app. 2 § 5(b)(2); *see* JA21. Nor does the Agency's decision reflect any consideration of the relevant factors set forth in the implementing regulations and EPA's handbook. 41 C.F.R. § 102-3.60(b)(3); 41 C.F.R. pt. 102-3, subpt. B, app. A; JA29, 33–34.

At most, EPA staff baldly asserted during the evaluation process that the new Committee would be "balanced," JA42, but this "conclusory" statement falls well short of the contemporaneous, reasoned explanation required of the Agency, because it does not reflect consideration of either viewpoint or functional balance, *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d

1343, 1350 (D.C. Cir. 2014); *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020); *see Physicians for Soc. Resp.*, 956 F.3d at 648 (refusing to rely on a justification that "appear[ed] nowhere" in the agency's contemporaneous explanation). By failing to "grapple with" how the new Committee is fairly balanced under the Act, EPA ignored an "'important aspect of the problem.'" *Physicians for Soc. Resp.*, 956 F.3d at 647 (quoting *State Farm*, 463 U.S. at 43); *see, e.g.*, *Grace v. Barr*, 965 F.3d 883, 901 (D.C. Cir. 2020) (vacating agency action due to its "silence" concerning a statutory mandate); *Pub. Citizen*, 374 F.3d at 1216–17 (vacating agency action due to the "'absen[c]e of any discussion' of a statutorily mandated factor").

EPA's silence on viewpoint balance is particularly troubling because the Agency received multiple comments regarding this issue. *See* JA13–15, 18–19, 46. For instance, commenters expressly invoked the Act and implored EPA to appoint Committee members who collectively "hold a balanced set of views" and represent "'persons or groups directly affected by the work of [the Committee].'" JA13–14; *see* JA18–19. Yet the Agency ignored these "'arguments raised before it'" in explaining its decision, which further "bespeaks a failure to consider an 'important

aspect of the problem.'" *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1027–28 (D.C. Cir. 2022); *see, e.g.*, *Gresham*, 950 F.3d at 103 (similar).

2. EPA not only ignored a critical issue that Congress required it to address—the Committee's viewpoint balance under the Act—but also relied on factors Congress did "not intend[] it to consider," *State Farm*, 463 U.S. at 43—specifically, the race and sex of nominees. The lead reason EPA gave for its decision to appoint a new Committee was that its membership consisted of "five women and two men, including three people of color, making it the most diverse panel since the committee was established." JA21. And the administrative record confirms that the race and sex of nominees drove the Agency's decisionmaking. For instance, the staff decision memorandum recommended that EPA appoint certain individuals specifically because they "[w]ould bring gender diversity" and "ethnic diversity" to the Committee. JA42–45. Similarly, the staff membership package emphasized that its proposed appointees include "three minorities, four non-minorities, five women and four men." JA49. And the Agency below never denied that the nominees' race and sex drove its decisionmaking here.

This flaw—raised below but never addressed by the district court—is likewise fatal to the Agency's decision to establish new Committee. JA218, 240–41; Dkt. No. 8-1 at 26; Dkt. No. 22 at 14–15. Nothing in the Federal Advisory Committee Act, the Clean Air Act, or any other statute indicates that Congress intended EPA to appoint Committee members based on their race and sex. To the contrary, the Act directs EPA to consider viewpoint diversity, not "gender" or "ethnic diversity." JA42–45. And as the Government Accountability Office has explained, consideration of the "race" or "gender" of appointees "cannot ensure an appropriate balance of viewpoints relative to the matters being considered by the committee." U.S. Gov't Accountability Off., GAO-04-328, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance* 40 (Apr. 2004). By directing EPA to make appointments consistent with certain "dut[ies]" imposed by the Act and the Clean Air Act, Congress made clear that it did "'not intend[] [the Agency] to consider'" other, unmentioned factors like race and sex. *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1518 n.65 (D.C. Cir. 1984).

Indeed, Congress *could not* have directed EPA to make appointments based on race and sex, because such discrimination would violate the Constitution. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214, 223–24, 227 (1995); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–90 (2017); *Lamprecht v. FCC*, 958 F.2d 382, 398 (D.C. Cir. 1992) (Thomas, J.); *see also Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019) ("'race-based decisionmaking is inherently suspect'"). To "avoid the constitutional problems" associated with "race-based" (or sex-based) decisionmaking, this Court should reject the Agency's "interpretation" of any "statute" that would allow EPA to appoint Committee members for these impermissible reasons. *Miller v. Johnson*, 515 U.S. 900, 927 (1995). At a minimum, EPA's substitution of irrelevant (and impermissible) factors confirms that it violated the APA's requirement of reasoned decisionmaking. *See State Farm*, 463 U.S. at 43; *see also Judulang v. Holder*, 565 U.S. 42, 55 (2011) (agency action based on irrelevant considerations must be rejected "in an instant").

B. The District Court Erred In Holding That The Agency Nevertheless Satisfied The APA.

The district court did not dispute that the Agency had failed to explain how the new Committee is fairly balanced under the Act. *See* JA319–20. That alone should have led the court to hold that the decision to appoint the new Committee members was unlawful. In nevertheless upholding it, the court made three fundamental errors.

1. To start, the district court asserted that "no authority … requir[ed] the EPA to articulate how the reconstituted Committee would comply with FACA specifically." JA319. In the court's view, "[a]ll the EPA had to explain was why it was seeking to reconstitute the Committee," which the Agency accomplished by announcing in March 2021—months before it selected the new Committee members—that it had fired the old Committee members to "correct[] [past] … 'decisions,'" "obtain 'the best possible scientific insight,'" and "solicit [new] nominations." JA320; *see* JA37.

The district court plainly erred by excusing EPA from the requirements of reasoned decisionmaking in this way. Even the government did not contend below that EPA was free of any obligation to

explain how the new Committee is fairly balanced under the Act. *See* Dkt. No. 19 at 37–38. And for good reason: As the well-established precedent above "ma[kes] clear," EPA was indeed obligated to explain how the new Committee complies with the Act's "'mandate[].'" *Grace*, 965 F.3d at 901 (quoting *Physicians for Soc. Resp.*, 956 F.3d at 647); *see supra* at 52. Indeed, the district court's refusal to review EPA's June 2021 decision cannot be squared with its conclusion that EPA's decision is reviewable under the APA. JA310–11.

2. The district court further erred by focusing entirely on EPA's March 2021 announcement, which at most explained why the Agency was seeking to replace the old Committee members. *See* JA320; JA37. That announcement obviously did not address the new Committee's balance, as the appointees had yet to be selected. As the court acknowledged, "EPA could not have justified the makeup of the Committee under FACA—which was not finalized until June 2021—when it announced in March 2021 that the Committee would be reconstituted." JA319–20. That is correct, which is why the March 2021 announcement did not provide the necessary explanation.

Nor did the June 2021 decision establishing the new Committee. Although not relied upon by the district court, the June 2021 decision asserted (after emphasizing the race and sex of the new appointees) that the appointees "are well-qualified experts with a cross-section of scientific disciplines and experience needed to provide advice on the scientific and technical bases for the [air-quality standards]." JA21. But this "conclusory statement[] will not do" because it does not provide any "*reasoning*,'" *Amerijet Int'l, Inc.*, 753 F.3d at 1350, as to why the Committee is "fairly balanced in terms of the points of view represented and the functions to be performed," 5 U.S.C. app. 2 § 5(b)(2). The statement does not, for instance, explain how the appointees' "[]qualifi[cations]," "disciplines," and "experience[s]" contribute functional balance to the new Committee. *See* JA21. And the statement does not even attempt to explain how the appointees' viewpoints are balanced. *See id.* The statement therefore does not provide the reasoned explanation required by the APA. *See Amerijet Int'l, Inc.*, 753 F.3d at 1350; *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56, 61 (D.C. Cir. 2020).

Thus, even if the new Committee were *in fact* fairly balanced, EPA would still have violated the APA by neglecting to *explain* the

Committee's balance. *See State Farm*, 463 U.S. at 43; *Physicians for Soc. Resp.*, 956 F.3d at 646–48. EPA was "required" to provide this explanation "'at the time of [its] decision,'" *Physicians for Soc. Resp.*, 956 F.3d at 648, and courts may not "supply the missing reasoning" or "'chisel [it] from what the agency has left vague and indecisive,'" *Farrell v. Blinken*, 4 F.4th 124, 138 (D.C. Cir. 2021) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 197 (1947)). Because EPA did not reasonably explain how the Committee is fairly balanced, its decision cannot stand.

In the absence of any EPA explanation of why the Committee is fairly balanced, the Agency's supposed "discretion" in this area is ultimately beside the point. JA312 (quoting *Microbiological*, 886 F.2d at 424 (Friedman, J., concurring in the judgment)). According to the district court, agencies deserve some degree of "'deferen[ce]'" in selecting advisory committees because "'how' to achieve fair balance … 'lies largely within the[ir] discretion.'" *Id.* (quoting *Microbiological*, 886 F.2d at 424 (Friedman, J., concurring in the judgment), and *id.* at 434 (Edwards, J., concurring in part and dissenting in part)). But even if the Agency had some "discretion" here, it was still required to—but did not—*explain* how it chose to wield that authority. *See Multicultural Media, Telecom &*

Internet Council v. FCC, 873 F.3d 932, 937 (D.C. Cir. 2017) ("[A]n agency's exercise of discretion must be … reasonably explained.").

3. The district court erred in yet another way: It upheld EPA's June 2021 decision to establish the new Committee based on a rationale that the Agency itself did not offer. Under *Chenery*, "a reviewing court … must judge the propriety of [agency] action solely by the grounds invoked by the agency." 332 U.S. at 196. Indeed, a court is "powerless" to affirm the agency action "by substituting what it considers to be a more adequate or proper basis." *Id.* In other words, "'the agency's basis must be expressed by the agency itself and not supplied by the court.'" *Farrell*, 4 F.4th at 138 (alterations omitted).

Ignoring "this 'foundational principle of administrative law,'" *Regents*, 140 S. Ct. at 1909, the district court sustained EPA's decision on the ground that the Committee is merely a "technical and scientific" committee, JA314. According to the court, because the Committee is only a "technical and scientific" committee, its new membership is fairly balanced even without a representative of the industry's viewpoint. JA313–15. But that rationale—which is wrong on its own terms, *see supra* at 35–47—is entirely absent from EPA's decision establishing the

new Committee. EPA's decision simply noted that the new appointees are "diverse" (in terms of race and sex) and are capable of "provid[ing] advice on the scientific and technical bases for the [air quality standards]." JA21. EPA did not, however, claim that the Committee is merely a "technical and scientific" committee, nor that such a committee can achieve fair balance without representation of the industry's dissenting viewpoint. *See id.* The district court thus erred by supplying a "basis" for EPA's decision that "'[t]he [A]gency itself has not given.'" *Farrell*, 4 F.4th at 137.

This Court's decision in *Physicians for Social Responsibility* confirms that the district court went astray. There, EPA sought to defend its choice to bar EPA grant recipients from serving on advisory committees by explaining that the decision "'was issued against a backdrop of well-known public disagreement regarding whether the existing [ethical] regime was adequate.'" 956 F.3d at 648. "Perhaps so," this Court acknowledged, but even that "'well-known'" justification could not sustain EPA's decision because it "appear[ed] nowhere" in the Agency's contemporaneous explanation. *Id.* Likewise here, the *post hoc* rationale invented by the district court cannot justify EPA's decision

establishing the new Committee. "EPA"—not the district court—"must explain the basis for [the] decision." *Id.*

CONCLUSION

This Court should reverse the judgment below and direct the district court to grant the requested relief.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this document contains 11,502 words.

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/s/ Brett A. Shumate

CERTIFICATE OF SERVICE

I hereby certify that, on February 22, 2023, I filed the foregoing brief using this Court's CM/ECF system, which effected service on all parties.

/s/ Brett A. Shumate

ADDENDUM

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5 U.S.C. app. 2 § 5
Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee

determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

42 U.S.C. § 7409
National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air

pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(c) National primary ambient air quality standard for nitrogen dioxide

The Administrator shall, not later than one year after August 7, 1977, promulgate a national primary ambient air quality standard for NO_2 concentrations over a period of not more than 3 hours unless, based on the criteria issued under section 7408(c) of this title, he finds that there is no significant evidence that such a standard for such a period is requisite to protect public health.

(d) Review and revision of criteria and standards; independent scientific review committee; appointment; advisory functions

(1) Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator shall complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and shall make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section. The Administrator may review and revise criteria or promulgate new standards earlier or more frequently than required under this paragraph.

(2)(A) The Administrator shall appoint an independent scientific review committee composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.

(B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.

(C) Such committee shall also (i) advise the 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.

41 C.F.R. § 102-3.60
What procedures are required to establish, renew, or reestablish a discretionary advisory committee?

(a) Consult with the Secretariat. Before establishing, renewing, or reestablishing a discretionary advisory committee and filing the charter as addressed later in § 102–3.70, the agency head must consult with the Secretariat. As part of this consultation, agency heads are encouraged to engage in constructive dialogue with the Secretariat. With a full understanding of the background and purpose behind the proposed advisory committee, the Secretariat may share its knowledge and experience with the agency on how best to make use of the proposed advisory committee, suggest alternate methods of attaining its purpose that the agency may wish to consider, or inform the agency of a pre-existing advisory committee performing similar functions.

(b) Include required information in the consultation. Consultations covering the establishment, renewal, and reestablishment of advisory committees must, as a minimum, contain the following information:

(1) Explanation of need. An explanation stating why the advisory committee is essential to the conduct of agency business and in the public interest;

(2) Lack of duplication of resources. An explanation stating why the advisory committee's functions cannot be performed by the agency, another existing committee, or other means such as a public hearing; and

(3) Fairly balanced membership. A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in 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.

41 C.F.R. pt. 102-3, subpt. B, app. A
Key Points and Principles

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

Key points and principles	Section(s)	Question(s)	Guidance
I. Agency heads must consult with the Secretariat prior to establishing a discretionary advisory committee.	102-3.60, 102-3.115	1. Can an agency head delegate to the Committee Management Officer (CMO) responsibility for consulting with the Secretariat regarding the establishment, renewal, or reestablishment of discretionary advisory committees?	A. Yes. Many administrative functions performed to implement the Act may be delegated. However, those functions related to approving the final establishment, renewal, or reestablishment of discretionary advisory committees are reserved for the agency head. Each agency CMO should assure that their internal processes for managing advisory committees include appropriate certifications by the agency head.

II. Agency heads are responsible for complying with the Act, including determining which discretionary advisory committees should be established and renewed.	102-3.60(a), 102-3.105	1. Who retains final authority for establishing or renewing a discretionary advisory committee?	A. Although agency heads retain final authority for establishing or renewing discretionary advisory committees, these decisions should be consistent with § 102-3.105(e) and reflect consultation with the Secretariat under § 102-3.60(a).

III. An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.	102-3.30(c), 102-3.60(b)(3)	1. What factors should be considered in achieving a "balanced" advisory committee membership?	A. The composition of an advisory committee's membership will depend upon several factors, including: (i) The advisory committee's mission; (ii) The geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations; (iii) The types of specific perspectives required, for example, such as those of consumers, technical experts, the public at-large, academia, business, or other sectors; (iv) The need to obtain divergent points of view on the issues before the advisory committee; and (v) The relevance of State, local, or tribal governments to the development of the advisory committee's recommendations.

IV. Charters for 102-3.70(b) advisory committees required by statute must be filed every two years regardless of the duration provided in the statute.	1. If an advisory committee's duration exceeds two years, must a charter be filed with the Congress and GSA every two years?	A. Yes. Section 14(b)(2) of the Act provides that: Any advisory committee established by an Act of Congress shall file a charter upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.