ORAL ARGUMENT NOT YET SCHEDULED

Case No. 18-1203 (and consolidated cases)

United States Court of Appeals for the District of Columbia Circuit

CLEAN WISCONSIN, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR REVIEW OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FINAL ACTION

PROOF BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for amici curiae States of New York, Connecticut, Delaware, Maine, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, and the District of Columbia, all parties, intervenors and amici appearing in this proceeding are listed in petitioners' opening brief.

B. Ruling under Review

References to the final agency action by the United States Environmental Protection Agency at issue appear in petitioners' opening brief.

C. Related Cases

Four petitions brought in the Fifth Circuit challenging a related rule making Clean Air Act ozone designations for the San Antonio, Texas, 83 Fed. Reg. 35,136 (July 25, 2018), have been consolidated as *Texas, et al. v. Evtl. Prot. Agency* (5th Cir. No. 18-60606).

/s/ Brian Lusignan
BRIAN LUSIGNAN

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GLOSSARY

Amici States	Amici curiae States of New York, Connecticut, Delaware, Maine, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, and the District of Columbia
EPA	U.S. Environmental Protection Agency
Illinois EPA	Illinois Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NYSDEC	New York State Department of Environmental Conservation
Pets' Br.	Petitioners' Joint Opening Brief
TSD	Technical Support Document

STATUTES AND REGULATIONS

Amici States incorporate by reference the pertinent statutes and regulations attached as addenda to petitioners' opening brief.

INTERESTS OF AMICI CURIAE

Amici States of New York, Connecticut, Delaware, Maine, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, the Commonwealth of Massachusetts, and the District of Columbia (amici States) submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Local Rule 29(b) as amici curiae in support of petitions for review filed by the State of Illinois and other parties. The petitions challenge certain EPA designations of attainment areas for the 2015 ozone national ambient air quality standards (NAAQS) under Clean Air Act § 107, 42 U.S.C. § 7407. *See Additional Air Quality Designations for the 2015 Ozone NAAQS*, 83 Fed. Reg. 25,776 (June 4, 2018) (the "final designations").[1] Amici States' ability to secure clean air for our residents depends in part on EPA's timely and accurate designation of areas as in attainment or nonattainment based on its reasoned analysis of the air-quality factors that Congress intended it to consider. These designations are important because sources in areas

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[1] EPA technically designated the relevant areas as "Attainment/Unclassifiable." 83 Fed. Reg. at 25,778. For the sake of simplicity, this brief will use the term "Attainment" to mean "Attainment/Unclassifiable" throughout.

designated as nonattainment are subject to stricter pollution controls than sources in areas designated as attainment.

In this case, petitioners challenge EPA's failure to justify certain area designations on the basis of air-quality criteria in a consistent manner. For many of the challenged designations, EPA failed to adequately explain its departures from nonattainment designations it had announced its intention to make. *See EPA Responses to Certain State Designation Recommendations for the 2015 Ozone NAAQS*, 83 Fed. Reg. 651 (Jan. 5, 2018) (the "intended designations"). Amici States submit this brief to emphasize that unless EPA follows a process that is transparent, science-based, nationally-consistent, and driven by air-quality factors—as intended under the Clean Air Act—amici States will be subject to an increased risk of harm to public health, public welfare and the environment.

Ozone is an air pollutant formed through chemical interactions between solar radiation and precursor pollutants such as volatile organic compounds and nitrogen oxides. *National Ambient Air Quality Standards for Ozone*, 80 Fed. Reg. 65,292, 65,299 (Oct. 26, 2015). Ozone causes a host of short- and long-term health impacts, including lung

inflammation, new or worsening asthma attacks or allergic reactions, reduced respiratory functions, increased hospital admissions and emergency room visits, and even death. *Id.* at 65,302-309; *see also Miss. Comm'n on Envtl. Quality v. Envtl. Prot. Agency*, 790 F.3d 138, 147 (D.C. Cir. 2015) (describing health effects of ozone).

Amici States have a strong interest in ensuring that EPA properly implements the 2015 ozone NAAQS. Amici States include some of the most densely populated parts of the country—areas that are still suffering from unhealthy levels of ozone pollution. *See* 80 Fed. Reg. at 65,300. The 2015 ozone NAAQS reduced the upper limit on the concentration of ozone in the air that EPA considered sufficient to protect public health and welfare with an adequate margin of safety. *Id.* at 65,342-46. By lowering the acceptable level of ozone pollution, the 2015 ozone NAAQS—if implemented properly—are expected annually to prevent hundreds of premature deaths and avoid thousands of lost work days, tens of thousands of lost school days, and billions of dollars in health care expenses. *See* EPA, 2015 Ozone NAAQS Regulatory Impact Analysis, at ES-15 to ES-18 (September 2015) (J.A.__-__).

Consistent regulation of ozone pollution at the federal level is necessary for the states to address that pollution. Ozone and its precursor pollutants can travel long distances from their sources, contributing to air-quality problems in downwind states. *See Envtl. Prot. Agency v. EME Homer City Generation, L.P.*, 572 U.S. 489, 497 (2014). Indeed, several of the designations at issue in this proceeding are upwind of, and thus directly affect, certain amici States. For example, nitrogen oxide pollution from Indiana, Illinois and Michigan contributes to ozone problems in New York, New Jersey, Connecticut and other northeastern states. *See New York State Dep't of Envtl. Conservation (NYSDEC), Section 126(b) Petition on Interstate Pollution Transport*, at 1, 11-16 (March 12, 2018).[2]

Despite the need for federal regulation, EPA has consistently rebuffed attempts by certain amici States to secure meaningful regulation of trans-boundary ozone pollution. Under the 2008 ozone NAAQS, EPA refused to impose the same ozone reduction measures that apply to northeastern states on upwind states such as Indiana, Illinois,

[2] *Available at* https://www.dec.ny.gov/chemical/112997.html.

and Michigan under Clean Air Act § 176a, 42 U.S.C. § 7506a, claiming that the "good neighbor provision" of Clean Air Act § 110, 42 U.S.C § 7410(a)(2)(D)(i)(I), was better suited to address the interstate transport of ozone precursors. *See Response to Dec. 9, 2013, Clean Air Act Section 176A Petition*, 82 Fed. Reg. 51,238, 51,239, 51,242 (Nov. 3, 2017) (under review in *New York v. Envtl. Prot. Agency*, D.C. Cir. No. 17-1273). But, in 2018, EPA decided against requiring any further upwind ozone reductions under Clean Air Act § 110, despite acknowledging that northeastern states would suffer from ozone at levels above the 2008 standards until at least 2023. *See Determination Regarding Good Neighbor Obligations for the 2008 Ozone NAAQS*, 83 Fed. Reg. 65,878, 65,885-86 (December 21, 2018) (under review in *New York v. Envtl. Prot. Agency*, D.C. Cir. No. 19-1019). EPA also denied petitions filed by Delaware and Maryland seeking to employ the good neighbor provision to reduce Midwest power-plant emissions that contribute to nonattainment in the Northeast. *See Response to Clean Air Act Section 126(b) Petitions from Delaware and Maryland*, 83 Fed. Reg. 50,444 (Oct. 5, 2018) (under review in *Maryland v. Envtl. Prot. Agency*, D.C. Cir. No.

18-1285).[3] Now, under the 2015 ozone NAAQS, EPA has again failed to account for air pollution from upwind counties and states that contribute to nonattainment in downwind areas as required by Clean Air Act § 107, 42 U.S.C. § 7407(d)(1)(A)(i).

In light of the long overdue health and air-quality benefits of the 2015 ozone NAAQS and the interest of all states in ensuring the integrity of the designations process, amici States have supported expeditious implementation of the standards. *See, e.g.*, Amicus Brief, *Murray Energy Corp. v. Envtl. Prot. Agency*, Case No. 15-1385 (D.C. Cir., Aug. 12, 2016) (ECF#1630226); Per Curiam Order, *id.*, (Aug. 2, 2017) (ECF#1686901) (granting amici States' intervention). Certain amici States challenged EPA's attempt to illegally delay the 2015 ozone NAAQS designations by a year. *See New York v. Envtl. Prot. Agency*, D.C. Cir. No. 17-1185 (seeking review of 82 Fed. Reg. 29,246 (June 28, 2017)). After EPA purported to withdraw the illegal delay, *see* 82 Fed. Reg. 37,318 (Aug. 10, 2017), but nonetheless ignored the October 1, 2017 deadline to make the

[3] EPA also extended its deadline to act on a good neighbor petition filed by the State of New York by six months, and has now missed even that delayed deadline. *See* 83 Fed. Reg. 21,909 (May 11, 2018).

final designations, certain amici States commenced a citizen suit to compel EPA to make them. *See In re Ozone Designation Litig.*, N.D. Ca. Case No. 17-cv-06900-HSG. A district court agreed that EPA's delays were in violation of the Clean Air Act and ordered EPA to make most of the remaining designations by the end of April 2018. *See In re Ozone Designation Litig.*, 286 F. Supp.3d 1082, 1085, 1091 (N.D. Cal. 2018).

Pursuant to that court order, EPA made final designations on April 30, 2018, and published them in the Federal Register in June. *See Additional Air Quality Designations for the 2015 Ozone NAAQS*, 83 Fed. Reg. 25,776 (June 4, 2018). Among these designations were several areas that EPA had announced (in late 2017) an intention to designate as nonattainment in the intended designations, but in the final designations switched to attainment without an explanation grounded in air-quality factors. As explained below, EPA violated its statutory duties in making these attainment designations.

SUMMARY OF ARGUMENT

EPA violated its duty to engage in reasoned decisionmaking when it issued the final 2015 ozone NAAQS designations challenged in these consolidated cases. EPA is obligated to conduct a designations process

that is transparent, science-based, implemented consistently in all regions of the nation, and directed to the Clean Air Act's goal of improving air quality. EPA did not meet any of those obligations here.

By declining to designate as nonattainment many areas that contribute to NAAQS violations in nearby areas, EPA improperly shifted the regulatory burden to reduce emissions from upwind states, where the emissions occur, onto downwind states. For many of the challenged designations, EPA reversed its carefully reasoned intention to designate areas as nonattainment—which would trigger stricter pollution controls—and instead declared them to be in attainment, without providing any new data or analysis of air quality to explain why it was disregarding its previous conclusions.

In a particularly egregious example of EPA's arbitrary actions, EPA ignored the carefully considered recommendation of the Illinois Environmental Protection (Illinois EPA) and EPA's own analysis in the intended designations to designate two counties in Illinois as nonattainment. Instead, EPA designated the areas as attainment based principally on a one-page letter sent by Illinois EPA four days before the court-ordered designations deadline. Contrary to the requirements of the

Clean Air Act, that letter provided no air-quality justification for the change, instead referencing unspecified and outside-the-record "discussions" between EPA and Illinois EPA.

Moreover, EPA's eleventh hour changes to certain designations undermined its public comment period, denying Amici States and interested members of the public an opportunity to weigh in on the changes.

The challenged designations should be vacated.

ARGUMENT

EPA ACTED ARBITRARILY AND CAPRICIOUSLY IN MAKING THE CHALLENGED DESIGNATIONS WITHOUT A JUSTIFICATION BASED ON AIR-QUALITY CONSIDERATIONS

A. Standard of Review

This Court "review[s] EPA's NAAQS designations under the same standard [it] use[s] in reviewing a challenge brought under the Administrative Procedure Act." *Miss. Comm'n on Envtl. Quality*, 790 F.3d at 150. When making NAAQS designations, EPA must engage in "reasoned decisionmaking" and "consider[] all relevant factors and articulate[] a rational connection between the facts found and the choice

made." *Catawba County, N.C. v. Envtl. Prot. Agency*, 571 F.3d 20, 41 (D.C. Cir. 2009) (internal quotation marks and citation omitted).

B. The Clean Air Act Requires EPA To Make Final Designations Based on Air-Quality Considerations

Amici States agree with petitioners that the Clean Air Act § 107(d)(1)(A)(i), 42 U.S.C. § 7407(d)(1)(A)(i), and EPA's five-factor test govern how EPA should determine whether a nearby area contributes to nonattainment. *See* Petitioners' Joint Proof Opening Brief, at 3-8 (Jan. 25, 2019) (ECF#1770369) (Pets' Br.). Moreover, the structure and purpose of the Clean Air Act reflect a congressional intent that EPA rely on air-quality factors and scientific analysis in making final designations.

The Clean Air Act "reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter." *S. Coast Air Quality Mgmt. Dist. v. Envtl. Prot. Agency*, 472 F.3d 882, 900 (D.C. Cir. 2006), *cert. denied* 552 U.S. 1140 (2008). The NAAQS program, 42 U.S.C. §§ 7407-7410, is "[t]he cornerstone of the Clean Air Act." *See* H.R. Rep. 101-490, at 145, *reproduced in* 2 Legislative History of the Clean Air Act Amendments of 1990 3,021, at 3,169 (Nov. 1993). EPA must establish NAAQS for certain harmful pollutants (including ozone), then work with states to identify "nonattainment" areas where ambient concentrations

of harmful pollutants exceed the NAAQS or "contribute[]" to a violation of the NAAQS in a "nearby area." *See* 42 U.S.C. § 7407(d)(1)(A)(i).

A "nonattainment" designation means the subject state must prepare an implementation plan with enforceable measures designed to reduce emissions so the state may achieve attainment "as expeditiously as practicable." 42 U.S.C. § 7502(a)(2). The pollution control requirements for a state plan applicable to a nonattainment area are generally more stringent than the requirements that would apply to sources in an attainment area. *Compare* Clean Air Act, Subchapter 1, Part D, 42 U.S.C. §§ 7501-7515, *with id.* Part C, 42 U.S.C. §§ 7470-7492.

Because compliance with the pollution control measures triggered by a nonattainment designation can be more expensive for sources, states sometimes seek to avoid nonattainment designations in their borders to better keep and attract industry. *See generally Sw. Pa. Growth Alliance v. Browner*, 144 F.3d 984, 988 (6th Cir. 1998) (describing "economic advantage" of region with attainment designation over region with nonattainment designation). Nonetheless, in enacting the modern NAAQS program, Congress willingly accepted these costs to sources and burdens on states to further the goal of achieving clean air nationwide,

and courts have repeatedly invalidated attempts to interject considerations unrelated to air quality into the NAAQS process. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 465-71 (2001); *Lead Indus. Ass'n v. Envtl. Prot. Agency*, 647 F.2d 1130, 1149 (D.C. Cir. 1980), *cert. denied* 449 U.S. 1042 (1980).

The Clean Air Act also provides a process for states to ask EPA to change final designations "on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator deems appropriate." 42 U.S.C. § 7407(d)(3)(A). Before redesignating a nonattainment area as attainment, the EPA Administrator must make specific, air-quality related findings, including that the area has attained the relevant NAAQS and that the improvement in air quality is "due to permanent and enforceable reductions in emissions." *See id.* § 7407(d)(3)(E).[4] An area redesignated as attainment also must be subject to an EPA-approved "maintenance plan" to ensure that the area remains in attainment. *See id.* § 7407(d)(3)(E)(iv), § 7505a. The redesignation process demonstrates the

[4] The Administrator is not permitted to redesignate a nonattainment area as unclassifiable. 42 U.S.C. § 7407(d)(3)(F).

importance Congress placed on not relaxing the pollution controls required by a nonattainment designation unless the relevant data firmly establish that air quality in the area had been permanently improved.

The legislative history of the NAAQS program bears this out. When Congress strengthened the NAAQS program in 1990, the Senate noted that EPA had to make the designations based "on sound data that is available, preferably air quality monitoring data," or "where appropriate and necessary . . . on modeling or on statistical extrapolation from monitored concentrations of another pollutant." S. Rep. 101-228, *reproduced in* 1990 U.S.C.C.A.N. 3,385, at 3,401. The Senate also noted the importance of erring on the side of over-inclusion for ozone nonattainment areas, since ozone "is not a local phenomenon but is formed and transported over hundreds of miles." *Id.* at 3,399. *See also* H.R. Rep. 101-490, at 217, *reproduced in* 2 Legislative History of the Clean Air Act Amendments of 1990 3,021, at 3,241 (noting that "high pollution levels may be a result of the combined impact of all sources in a broad geographic area" and therefore "[p]ollution levels may not decrease significantly unless control measures are applied to the entire area.").

In other words, EPA's final designations must be made on the basis of reasonable findings related to air quality and grounded in scientific analysis. That did not happen here.

C. EPA Failed To Provide a Reasoned Explanation Based on Air Quality Considerations for the Final Designations

The designations challenged in this proceeding are the latest product of EPA's flawed practice of illegal delay and refusal to address the upwind sources of ozone pollution. *See* pp. 4-7, *supra*. In making the challenged designations, EPA failed to comply with its legal duty to engage in reasoned decisionmaking based on air quality considerations. Instead, as ably set forth by petitioners, EPA engaged in an inconsistent and arbitrary process that failed to designate as nonattainment various areas that "contribute[]" to NAAQS violations in downwind areas. *See* Pets' Br. at 47-124.

As an example of EPA's arbitrary actions, several of the final designations challenged here are reversals from EPA's intended designations. For the nonattainment area encompassing the Chicago metropolitan area, EPA changed from nonattainment (its original proposal, which reflected substantially the same boundaries it had used

in 1997 and 2008) to attainment the entirety of McHenry County, Illinois and Porter County, Indiana, along with parts of Lake County, Indiana, and Kenosha County, Wisconsin. *Compare* Chicago, IL-IN-WI Nonattainment Area Intended Area Designations TSD, at 2, 22-23, 25 (J.A.__) ("Intended Chicago Designations TSD"), *with* Chicago, IL-IN-WI Nonattainment Area Final Area Designations TSD, at 2 (J.A.__) ("Final Chicago Designations TSD").

EPA did not identify any new data or analysis of air-quality factors to justify its Chicago-area reversals. Indeed, EPA's analysis in the Final Chicago Designations TSD for the relevant counties is virtually identical to EPA's analysis in the Intended Chicago Designations TSD, with EPA purporting to apply the same five-factor test to the same data in both documents. *Compare* Final Chicago Designations TSD at 7-25 (J.A.__-__) *with* Intended Chicago Designations TSD at 6-25 (J.A.__-__). EPA did rely on more recent air-quality data for Cook County, Illinois, but that data showed that air quality had gotten worse, not better. *Compare* Final Chicago Designations TSD at 7 (J.A.__) *with* Intended Chicago Designations TSD at 7-8 (J.A.__). Counties surrounding the St. Louis and Milwaukee metropolitan areas were similarly changed from

nonattainment in the intended designations to attainment in the final designations without adequate explanation or new air-quality data to support such a change in position. *See* Pets' Br. at 60-69, 93-108. Reaching a different conclusion based on the same or similar data without reasoned explanation is a hallmark of arbitrary and capricious agency action. *See Catawba County, N.C.*, 571 F.3d at 51-52 (rejecting designation for county where EPA's rationale changed "between the initial designation and the final designation, with no apparent change in data").

As a result of EPA's arbitrary actions, downwind states—including many amici States—must bear a disproportionate regulatory burden in order to move towards attainment. *See EME Homer City Generation, L.P.*, 572 U.S. at 496-97 (as air pollutants cross state borders, "upwind States are relieved of the associated costs" which are instead borne by downwind states). Even as downwind states employ more and more stringent pollution controls, EPA is loosening the regulations that apply to upwind sources that contribute to nonattainment. For example, the New York State Department of Environmental Conservation has identified two upwind sources in Porter County, Indiana (one of the

Chicago-area counties that has now been designated as "attainment") that emit a combined total of more than 10,000 tons of the ozone precursor nitrogen oxides per year, which is more than all the electricity generating sources in New York State combined. *See* NYSDEC, Section 126(b) Petition on Interstate Pollution Transport, App'x B.[5] These sources may no longer be subject to the stricter regulations a nonattainment designation would generally entail, which may mean New York and other northeastern states suffer from worse air quality, regardless of the steps they take to control pollution from sources within their borders.

EPA's reasoning here threatens to commence a race to the bottom in which States and EPA avoid the required scientific analyses of air quality to achieve unjustified attainment designations that they prefer, thus allowing sources to operate without the stricter pollution controls triggered by nonattainment designations. Such a race to the bottom

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[5] The two sources in Porter County, Indiana are the ArcelorMittal Burns Harbor, LLC steel mill (EPA Source ID 7376511) and the Baily electric generating station (EPA Source ID 7376611). Data regarding emission totals are available through *EPA's Air Markets Program Data* at https://ampd.epa.gov/ampd/.

would contravene Congress' goal in the Clean Air Act Amendments of 1970 to avoid "efforts on the part of States to compete with each other in trying to attract new plants and facilities without assuring adequate control of extra-hazardous or large-scale emissions therefrom." H. Rep. No. 91-1146, Reporting on H.R. 17255, p. 893 (Jun. 3, 1970), *reproduced in* 1970 U.S.C.C.A.N 5356, 5358.

D. EPA's Designations of McHenry and Monroe Counties in Illinois Based Principally on a One-Page Letter Sent Four Days Before the Designations Deadline Were Arbitrary and Capricious

For two counties in Illinois—McHenry County in the Chicago area and Monroe County in the St. Louis area—EPA's arbitrary actions are particularly apparent. EPA made attainment designations in the final rule even though the Illinois EPA had recommended nonattainment designations, relying principally on a three-sentence letter from the Director of the Illinois EPA to the then-EPA Administrator, dated four days before the court-ordered designations deadline. *See* Final Chicago TSD, at 2 n.1, 23 (J.A.__,__); Final St. Louis TSD, a 1 n.1, 25 (J.A.__,__). In that letter, the Illinois EPA Director generically asserted that "consideration of a designation of attainment would be appropriate" for McHenry and Monroe Counties in light of an outside-the-record

"discussion of impending air quality designations for ozone" between the Illinois EPA Director and federal EPA officials. Letter from Alec Messina to Scott Pruitt (April 26, 2018) (J.A.__). That letter comes nowhere close to justifying EPA's change of position, especially considering the robust and largely unchanged technical record supporting the intended designations.[6]

Most critically, the sparse letter identifies no air-quality considerations whatsoever to support its vague suggestion that "it would seem appropriate [for EPA] to consider a designation of attainment" for McHenry and Monroe Counties. Messina Letter (J.A.__). The absence of an air-quality rationale and EPA's heavy reliance on the letter, which apparently resulted from outside-the-record phone calls set up by the EPA Administrator with the Illinois EPA Director, raises concern that

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[6] As petitioners correctly argue (Pets' Br. at 50-51), EPA's reversal also violated the statutory requirement that the agency provide a state with at least 120 days notice before making a final designation that departs from a state-recommended designation. *See* 42 U.S.C. § 7407(d)(B)(ii). EPA's last-minute reliance on the Illinois EPA Director's letter—which was sent only four days before the court-ordered deadline for completing final designations—failed to provide the requisite 120-day notice.

the designations were changed on the basis of improper factors. *See* Pets' Br. at 47-51.

Amici States strongly encourage open and transparent consultation between state and EPA officials. As in any cooperative federalism program, communication between state and EPA officials is essential to ensuring that the NAAQS program operates effectively. But those communications must support, not supplant, EPA's reasoned decisionmaking based on appropriate air quality considerations.

E. EPA's Designation Process Failed to Provide Meaningful Opportunity For Public Comment

EPA's process here contradicts its own assertions that public comments play an important role in the designation process. EPA opened a voluntary public comment period on the intended designations, 83 Fed. Reg. at 651, then relied on its voluntary public comment process to defend its delay in issuing the final designations. *See In re Ozone Designation Litig.*, 286 F. Supp.3d at 1087. EPA represented to the district court its "expect[ation] that comments . . . will provide valuable information," with the result of "improving the quality, supportability, and defensibility of the final designations." *In re Ozone Designation Litig.*, Case No. 4:17-cv-6900, ECF 40 at 9-10, ECF 40-1 ¶¶ 27-28 (N.D. Cal. Jan. 19, 2018). Yet

in designating McHenry and Monroe Counties as attainment areas without even a hint in advance that it would do so, EPA eliminated any opportunity for amici States or the public to comment on either the substance of the designations or the defects of the process, its timing, or the improper factors considered. Would-be-commenters had no ability to submit the "valuable information" that EPA told the district court it needed more time to review. This Court has "refused to allow agencies to use the rulemaking process to pull a surprise switcheroo" in cases involving mandatory notice-and-comment procedures, holding that "an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former." *Envtl. Integrity Project v. Envtl. Prot. Agency*, 425 F.3d 992, 996 (D.C. Cir. 2005). EPA similarly should not be permitted "to pull a surprise switcheroo" after having attested to the critical importance of public comments.

CONCLUSION

For the reasons set forth above, this Court should vacate the challenged designations.

Albany, New York
February 1, 2019

Respectfully submitted,

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[7] Pursuant to ECF-3(B) of this Court's Administrative Order Regarding Electronic Case Filing (May 15, 2009), counsel for the State of New York represents that the other parties listed in the signature blocks below consent to the filing of this Amicus Brief.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Brian Lusignan, hereby certifies:

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2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

/s/ Brian Lusignan
BRIAN LUSIGNAN

CERTIFICATE OF SERVICE

I certify that on February 1, 2019, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

/s/ Brian Lusignan
BRIAN LUSIGNAN