ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 20, 2019

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

No. 19-1019 (and consolidated cases)

STATE OF NEW YORK, *et al.*,
Petitioners,
v.

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

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

FINAL REPLY BRIEF OF CITIZEN PETITIONERS

DATED: July 31, 2019

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

**Authorities upon which we chiefly rely are marked with asterisks.*

STATUTES

LEGISLATIVE HISTORY

FEDERAL REGISTER NOTICES

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to D.C. Circuit Rule 28(a)(3), the following is a glossary of uncommon acronyms and abbreviations used in this brief.

Citizen Br.	Opening Brief of Citizen Petitioners (Apr. 19, 2019)
EDF	Environmental Defense Fund
EPA	Environmental Protection Agency
NRDC	Natural Resources Defense Council
Opp'n	Response Brief of EPA (June 14, 2019)

SUMMARY OF ARGUMENT

EPA's claim that it can allow significant interstate contributions to downwind nonattainment to continue beyond downwind states' attainment deadlines is contrary to the Clean Air Act. Further, EPA's brief confirms that EPA's "statutory interpretation" has no grounding in the statutory text and contravenes binding precedent. EPA does not dispute that people will suffer asthma attacks and die prematurely as a result of its decision, yet gives no lawful reason for failing to consider these and other grave public-health and environmental consequences. And EPA's brief confirms that its claim that no pollution reductions are practicable before 2023 is baseless.

ARGUMENT

I. EPA UNLAWFULLY FAILS TO PROHIBIT SIGNIFICANT CONTRIBUTIONS TO OZONE NONATTAINMENT BY STATUTORY ATTAINMENT DEADLINES.

A. The Act Unambiguously Requires EPA to Prohibit Significant Interstate Pollution Consistent With the Deadlines.

Read in context, as they must be, sections 7410(a)(2)(D) and 7511(a)(1) unambiguously require EPA to implement the Good Neighbor Provision consistent with the attainment deadlines faced by downwind states. 42 U.S.C. §§7410(a)(2)(D), 7511(a)(1). *North Carolina v. EPA*, binding on EPA and this Court, so holds. 531 F.3d 896, 911-12 (D.C. Cir. 2008). EPA's decision contravenes this statutory mandate because it is undisputed that (1) downwind

states are subject to an attainment deadline of July 20, 2018, and will soon be reclassified to face stricter pollution control requirements and a new deadline of July 20, 2021, Citizen Br. 20; and (2) EPA's decision allows significant interstate contributions to downwind attainment and maintenance problems to continue well beyond these deadlines, *id.* 11-13.

EPA does not satisfy this obligation to act "consistent with" the attainment deadlines by merely "consider[ing]" them. Opp'n 21. First, *North Carolina* holds that EPA's obligation goes beyond mere consideration: the statute unambiguously requires EPA also "to formulate a rule that is consistent with them." 531 F.3d at 912. Second, EPA's approach conflicts with the plain meaning of "consistent." EPA claims it is entitled to deference based on cases construing the word "consistent" at *Chevron* step two in other contexts. Opp'n 17-19. But statutory interpretation does not turn on whether the word is "in some abstract sense, ambiguous." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004). Rather, "consistent with" must be examined "in context and using the traditional tools of statutory construction," to determine whether it "encompasses" EPA's approach. *Id.*

Recourse to a dictionary, this Court's cases, and common sense all confirm that acting "consistent" with a deadline requires more than merely considering it. Consistency requires "agreement." Merriam-Webster Dictionary (2014). *Accord*

NRDC v. Daley, 209 F.3d 747 (D.C. Cir. 2000) (to be "consistent with" a fishery plan, agency decision must have at least 50 percent probability of achieving plan's target). Indeed, as EPA's brief recognizes (at 18), even the case on which EPA principally relies holds that the term "consistent" requires "congruity or compatibility." *EDF v. EPA*, 82 F.3d 451, 457 (D.C. Cir. 1996). And congruity or compatibility, like consistency, requires substantive agreement. Mere consideration, by contrast, does not. *United States v. Bruce*, 285 F.3d 69, 73 (D.C. Cir. 2002) ("to 'consider' means to 'reflect on,' 'think about,' 'deliberate,' 'ponder' or 'study'" and not to "'adhere to,' 'be bound by' or 'follow.'") (quoting Webster's Third New International Dictionary, Unabridged (1993)).

Finally, EPA's argument (Opp'n 18) that "consistent with" does not require "strict compliance" is a red herring, because allowing nonattainment to persist until 2023, years beyond the applicable deadlines, is not compliance of any kind.

B. EPA's Contrary Interpretation of the Act is Unreasonable and Arbitrary.

EPA claims that the Act requires EPA to secure emissions reductions as expeditiously as practicable but only to consider downwind attainment deadlines. 83 Fed. Reg. at 65,907/2, JA055; Opp'n 21. This interpretation is not just inconsistent with the statutory text, *see* above, but unreasonable and arbitrary.

1. EPA's Interpretation is an Attempt to Rewrite the Statute.

EPA's brief reveals that the agency's "statutory interpretation" is really an impermissible attempt to rewrite the statute. *Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009) ("neither courts nor federal agencies can rewrite a statute's plain text"). The first part of EPA's interpretation—the requirement to prohibit significant interstate pollution "as expeditiously as practicable"—tracks the language of §7511(a)(1). So far so good. But after embracing the language of §7511(a)(1) that it likes, EPA discards the language that establishes the deadlines as a limit on its authority to act as expeditiously as practicable. *See* 42 U.S.C. §7511(a)(1) ("the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1") (emphasis added). Because EPA provides no textually coherent account of how the statute can be read to grant authority to act as expeditiously as practicable without the limitation of the deadlines, and there is none, this is an unlawful "interpretive gerrymander[]." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015). EPA is not authorized to keep parts of the statute that "it likes while throwing away parts it does not." *Id.*

EPA has abandoned the argument advanced in the final rule, despite the plain language of §7511(a)(1), that Congress's use of the term "will" imparts authority to allow continued pollution beyond the deadlines. *See* 83 Fed. Reg. at

65,889/3, JA037; Citizen Br. 22. EPA's decision to abandon that argument, in combination with EPA's failure to heed the plain language of §7511(a)(1), leaves EPA with no basis to argue that its statutory interpretation is "ground[ed] . . . in the statute." *S. Coast Air Quality Mgmt. Dist. v. EPA*, 882 F.3d 1138, 1152-53 (D.C. Cir. 2018) (quoting *NRDC v. EPA*, 777 F.3d 456, 468 (D.C. Cir. 2014)) (internal quotation marks omitted).

Finally, the Court must reject EPA's lawyers' claim that Congress's instruction to prohibit emissions that "significantly contribute" to downwind nonattainment confers authority to override statutory attainment deadlines on grounds of feasibility or cost. Opp'n 48 (quoting §7410(a)(2)(D)). First, this argument does not furnish a basis to uphold the rule because it was not advanced by the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Before filing its brief in this case, EPA consistently maintained that it reached decision at step one of its four-step approach, claiming (wrongly) that because it predicts no downwind air quality problems in 2023, there was no need to determine whether upwind contributions are "significant." 83 Fed. Reg. at 65,886/3, 65,921/1, JA034, 069; EPA-HQ-OAR-2018-0225-0423 at 108, JA774. Second, this new argument is barred by the Supreme Court's decision in *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014). Not one Justice in that case embraced EPA's claim that "contribute

significantly" imparts authority to consider cost. *Id.* 518-19; *see id.* 525 (Scalia, J., dissenting) (pronouncing that argument "so feeble that [the] majority does not even recite it"). To the contrary, the Court held that the Good Neighbor Provision's focus on "amounts" limits EPA's use of cost. *Id.* 513-14, 522 & n.23 (quoting §7410(a)(2)(D)). While EPA may use cost to "allocate" necessary emission reductions among states and sources, EPA has a statutory obligation to avoid both over-control and under-control. *Id.* 523. This Court also therefore must reject EPA's "feeble" attempt to shoehorn a cost-based exception into the Good Neighbor Provision via the word "significantly."

2. EPA Cannot Override the Deadlines Based on Alleged Infeasibility.

EPA misconstrues or ignores multiple decisions of this Court and the Supreme Court establishing that the requirement of timely attainment cannot be overriden by claims of infeasibility. Opp'n 21-25.

In *Train v. NRDC*, the Supreme Court held the attainment deadlines to be the "heart" of the Act and "require[]" attainment of clean air standards "within a specified period of time." 421 U.S. 60, 64-67 (1975). The Court reaffirmed that conclusion in *Union Electric Company v. EPA*, and further held that the Act's deadlines "leave[] no room for claims of technological or economic infeasibility." 427 U.S. 246, 258 (1976). These decisions recognize that the Act is "expressly designed to force regulated sources to develop pollution control devices that might

at the time appear to be economically or technologically infeasible," *id.* 256-57, and that the Act's attainment deadlines are "intended to foreclose the claims of emission sources that it would be economically or technologically infeasible for them to achieve emission limitations sufficient to protect the public health within the specified time," *id.* 258. Under these longstanding precedents, considerations of feasibility are relevant "only in evaluating those implementation plans that attempt to achieve the primary standard in less than" the time allotted by the deadlines—i.e., in determining whether a shorter timeframe for attainment is practicable. *Id.* 260.

EPA's brief ignores *Train* entirely, and relegates *Union Electric* to a footnote, intimating that Congress abrogated these binding precedents through unspecified amendments to the Clean Air Act. Opp'n 25-26 n.6. That claim is wrong for several reasons.

First, Congress's intent in amending the Act was to strengthen the requirement of timely attainment. Thus the 1977 Amendments "retain[ed] and even strengthen[ed] the technology forcing . . . goals of the 1970 Act." Clean Air Conference Report, 123 Cong. Rec. 27070 (1977). The same is true of the 1990 Amendments establishing the attainment deadlines at issue here. As the Supreme Court explained in *Whitman v. American Trucking Associations*, Congress's intent in enacting the ozone nonattainment subpart was to impose "carefully designed

restrictions on EPA discretion," with the attainment deadlines in Table 1 of §7511(a)(1) as the "backbone." 531 U.S. 457, 482, 484 (2001). Indeed, "[t]he principal distinction" between other provisions governing attainment and section 7511 is that section 7511 "eliminates regulatory discretion that the former allowed." *Id.* 484.

Second, the current Act retains the language that was determinative in *Union Electric* and *Train*. Section 110(a)(2)(A)(i) of the 1970 Act required that plans "implementing a national primary ambient air quality standard . . . provide[] for the attainment of such primary standard as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan." Clean Air Act Amendments of 1970, Sec. 4, §110(a)(2)(A)(i), 84 Stat. 1680 (1970). Current section 7511(a)(1) substitutes the dates in Table 1 for an undifferentiated three-year deadline, but conspicuously retains fixed deadlines as a limit on EPA's discretion to address nonattainment as expeditiously as practicable: "the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1." 42 U.S.C. §7511(a)(1). If Congress had intended to abrogate *Train* and *Union Electric*, it would not have reenacted the limiting language on which those decisions turn. *See Whitman*, 531 U.S. at 468 (Congress "does not alter the fundamental details of a regulatory scheme in vague

terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Third, in both the 1970 and current versions, where Congress intended to authorize extensions of the deadlines, it said so expressly. *See* 1970 Amendments, Sec. 4, §110(e) (authorizing two-year deadline extension upon certain findings); 42 U.S.C. §7511(a)(5) (1990) (authorizing two one–year deadline extensions for ozone nonattainment areas upon specific findings). *Cf.* 42 U.S.C. §7502(a)(2) (1990) (authorizing deadline extensions up to ten years, based on feasibility, for certain areas not covered by ozone-specific provisions of §7511). Congress would not have crafted these "carefully designed restrictions on EPA discretion," *Whitman*, 531 U.S. at 484, if it intended EPA to treat them merely as a factor for "consideration" in addressing nonattainment. *See Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002) ("We cannot but infer from the presence of these specific exemptions that the absence of any other exemption … was deliberate.").[1]

[1] EPA's lawyers are also wrong (Opp'n 22, 28) that cost excuses downwind states from attaining by the deadlines. *Sierra Club* holds that costs may be considered in determining "reasonably available control measures," not that adopting such measures is downwind states' only obligation. 294 F.3d at 162-63. Indeed, the provision at issue states that nonattainment plans shall adopt all reasonably available control measures "and shall provide for attainment of the [standards]." 42 U.S.C. §7502(c)(1). And while the Act grants downwind states and EPA certain strictly delimited authority to consider cost in deciding how to secure attainment of clean air by the deadlines, *e.g.*, 42 U.S.C. §7511a(b)(1), it does not permit cost considerations to defeat the core requirement of attainment. *See* 42 U.S.C.

Fourth, decisions of this Court confirm that amendments have neither abrogated the central requirement of timely attainment, nor inserted an unwritten feasibility exception. *Sierra Club* holds that the deadlines are "central to the regulatory scheme and leave no room for claims of technological or economic infeasibility." 294 F.3d at 161 (2002) (quoting *Union Elec.*, 427 U.S. at 258). That decision did not "merely affirm[] the Act's plain text" (Opp'n 25). It also rejected EPA's argument that an exception to the written deadlines should be implied based on the inability of downwind areas to meet them, and the Court's reason—that the deadlines "leave no room" for claims of infeasibility—both confirms the vitality of *Union Electric* and bars EPA's attempt here to authorize nonattainment beyond the deadlines based on alleged infeasibility. *NRDC*, 777 F.3d at 468 (2014), which applied *Union Electric* in rejecting an EPA interpretation at *Chevron* step two, does the same.

3. EPA Ignores Grave Harm to People and the Environment.

EPA does not dispute that its decision to allow continued interstate pollution exposes millions of people to unhealthy ozone levels; that the consequences of this exposure include additional asthma attacks, hospitalizations, and early deaths; or

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§7502(c)(1), (6); *Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 677 (9th Cir. 2012) (state implementation plans must "demonstrate attainment" of clean air standards).

that these burdens are borne disproportionately by children and communities of color. Citizen Br. 6-8, 25-27. EPA refused to assess how many people will suffer and die between now and 2023 as a consequence of continued significant upwind contributions to downwind ozone nonattainment, but other record information and EPA analysis indicate a staggering human cost.[2] EPA also does not dispute that its failure to address ongoing interstate ozone pollution causes serious harm to ecosystems, including contributing to "dead zones" in the Chesapeake Bay, where no aquatic life can survive. Citizen Br. 6-7, 30.

EPA argues that this claim is barred because commenters did not specifically tie their public-health and environmental objections to the statutory term "consistent with." Opp'n 27. The Act, however, requires only that commenters raise their objections with "reasonable specificity." 42 U.S.C. §7607(d)(7)(B). There is no requirement for commenters to couch objections to the public-health and environmental consequences of EPA's decision in terms of a particular statutory phrase. Whichever provision EPA believes grants it authority to delay clean air protections, EPA must consider the consequences of its decision. Citizen Br. 27-28.

[2] EPA calculated that reducing downwind ozone levels by just 0.29 parts per billion would prevent 67,270 asthma attacks and 31-83 premature deaths per year. Citizen Br. 10, 26. Ozone pollution still exceeds the 2008 ozone standard by more than ten times that amount in many downwind areas covered by this rule, due largely to interstate pollution. Earthjustice Comments 6, 10, JA534, 538.

None of EPA's lawyers' arguments in defense of EPA's failure to consider the grave public-health and environmental consequences of delayed attainment appear in the agency's decision. Thus, they are *post hoc* rationales that this Court "may not accept." *State Farm*, 463 U.S. at 50. Furthermore, EPA has waived any claims it made concerning the children's health and environmental justice executive orders, Opp'n 28 n.7 (declaring those statements "irrelevant").

EPA's brief does not even try to defend the agency's incorrect rationale for refusing to consider public-health and environmental damage, namely, that such concerns are "outside the scope of the EPA's authority under the good neighbor provision." *See* EPA-HQ-OAR-2018-0225-0423 at 75, JA741. Because that claim is wrong, Citizen Br. 29-31, EPA's decision is arbitrary. *State Farm*, 463 U.S. at 48.[3]

[3] EPA's lawyers' *post hoc* arguments also lack merit. They claim that delaying infeasible reductions does not delay feasible reductions, Opp'n 27, 34-35, but this tautology does not change the fact that EPA's approach does delay reductions necessary for protection of public health and the environment. Further, EPA's overbroad approach to infeasibility means virtually any available reduction may be deemed infeasible. They also claim EPA's approach "is in service of reducing" harm to health and the environment "where this allows EPA to consider efficacious emission controls that are unavailable." *Id.* 27, 35. But EPA does not and cannot deny that delaying reductions prolongs and increases harm to people and the environment. Furthermore, nothing prevents EPA from considering and requiring reductions based on currently available controls and considering future approaches involving controls that will become available later. These are not mutually exclusive. EPA's lawyers also claim that "[p]rotecting vulnerable communities and ecosystems" is "inherent to the Act's goal of reaching attainment." *Id.* 27-28. But

II. EPA'S CLAIM THAT NO POLLUTION REDUCTIONS ARE PRACTICABLE BEFORE 2023 IS BASELESS.

A. EPA Arbitrarily Rejects Generation Shifting.

EPA describes shifting generation to cleaner power sources as a "cost-effective, timely, and readily available" measure that can "quickly [and] significantly reduce" emissions. EPA-HQ-OAR-2018-0225-0006 at 11, JA230. Indeed, EPA concedes (at 57-58) that generation shifting is occurring and is expected to continue. This concession, far from supporting a claim that generation shifting is impracticable, confirms that it is practicable and thus required under EPA's own statutory interpretation. *See Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 543 (D.C. Cir. 1999) (rejecting agency orders that "defy good reason").

EPA's lawyers suggest (at 57) that the reductions available from generation shifting are "limited," but the agency claimed only that they "may" be. 83 Fed.

EPA has decided to allow nonattainment to persist. Consideration of "provisions … which seek attainment" cannot substitute for consideration of the effects of a decision that does the opposite. Fourth and finally, EPA's lawyers misread the Chesapeake Bay clean-up plan by suggesting that it relies only on air laws in effect at the time it was established. *Id*. 35. In fact the plan relied on "implementation of [Clean Air Act] regulations through 2020" to "ensure achievement." Chesapeake Bay Total Maximum Daily Load at 6-28, *available at* https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document. And EPA's Bay commitment is reinforced by its role as a signatory to the 2014 Chesapeake Bay Agreement. *See* Earthjustice Comments 14, JA542. In any event, EPA does not deny that it failed even to consider these Bay clean-up commitments.

Reg. at 65,894/3, JA042. Further, the *post hoc* claim that reductions are "limited" says nothing about whether they are "practicable." To claim that EPA can reject pollution reductions merely because they are limited would be incompatible with the nature of interstate ozone pollution, which EPA has consistently recognized is a regional problem driven by the "collective impacts of relatively small contributions." 81 Fed. Reg. at 74,518, JA087. It also would contravene the Good Neighbor Provision, which plainly contemplates regulation of relatively small contributions. 42 U.S.C. §7410(a)(2)(D)(i) (requiring prohibition of significant contribution from "any source").

EPA's lawyers also claim that generation shifting exists on a "cost-continuum" and therefore does not fit with EPA's preferred approach of using "discrete cost thresholds." Opp'n 56. However, EPA previously found that generation shifting is available even though it "occurs on a cost continuum." 81 Fed. Reg. at 74,545/1-2, JA114; EPA-HQ-OAR-2018-0225-0006 at 11, JA230. Moreover, EPA's preference for discrete cost thresholds does not make generation shifting impracticable, and must give way in the face of EPA's own statutory interpretation. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998) (reasoned decisionmaking demands agencies apply "the rule announced").

B. EPA Arbitrarily Rejects Reductions From Non-Power-Plant Sources.

Rather than dispute that it would be arbitrary for EPA to reject cost-effective pollution reductions from non-power plants based on lack of information, EPA's lawyers deny that EPA relied on lack of information and claim the agency reached its conclusion based on affirmative data and studies. Opp'n 54. But the final rule shows this to be untrue. In the decision, EPA claims that it is "reasonable to assume" that an expeditious timeframe "may" be four years or more. 83 Fed. Reg. at 65,903/2, JA051. EPA does so, moreover, "in light of" the agency's claims of "insufficient information" and "significant uncertainty." *Id.* 65,903/1, JA051. To the extent the decision invokes technical considerations, it does so in support of the claim of insufficient information and uncertainty, *id.* 65,902/3-03/1, JA050-51, or simply refers back to the prior technical analysis that produced installation estimates of less than one year, *id.* 65,903/3, JA051 (referencing EPA-HQ-OAR-2018-0225-0023), which EPA now claims (at 52-53) are too uncertain. This reliance on lack of information and uncertainty is arbitrary for the (undisputed) reasons given in Citizen Petitioners' Opening Brief (37-38).

III. The Court Should Order EPA To Issue a Lawful Replacement Rule Within Five Months.

Rather than addressing Citizen Petitioners' requested remedy in their brief, EPA relegates the issue to a footnote and requests supplemental briefing to complete the task. Opp'n 74 n.21. EPA had a full opportunity to make its

arguments in its principal brief and chose not to, and thus the Court should deny supplemental briefing on this issue. *See Payne v. D.C. Gov't*, 722 F.3d 345, 354 (D.C. Cir. 2013) (argument not developed in principal brief is forfeited); *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007) ("single footnote…is not enough to raise an issue"); D.C. Cir. Rule 28(e)(1) (requests for additional words are denied absent "extraordinarily compelling reasons").

Further, because EPA has failed to meet its burden, the Court should order it to promulgate a lawful replacement rule by Petitioners' proposed deadline of five months. In the absence of a lawful rule, EPA will be in violation not only of the Act's attainment deadlines but the deadline for promulgation of federal implementation plans. *See* 42 U.S.C. §7410(c)(1). It is well-established under this Circuit's precedent that when Congress directs an agency to perform a regulatory duty within a given time, such as promulgating federal implementation plans, the agency carries "a heavy burden" to show that a remedial deadline allowing for further delay is the most expeditious possible schedule, and that faster compliance is "impossible." *See Train*, 510 F.2d at 713. Courts have frequently found that EPA has failed to demonstrate impossibility, ordering less time than the agency requested. *See, e.g.*, *California v. EPA*, No. 18-cv-03237-HSG, 2019 WL 1995769, at *8-9 (N.D. Cal. 2019) (EPA requested 12 months, court ordered 6 months for promulgation of a federal plan); *Sierra Club v. Gorsuch*, 551 F. Supp. 785, 787,

789 (N.D. Cal. 1982) (EPA requested deadline of more than 9 years, court ordered 180 days).

Here, EPA has failed to show that a five-month deadline is impossible. "It is EPA's burden to go beyond a description of the process and instead explain why it cannot complete the process within" Petitioners' timeframe. *California*, 2019 WL 1995769, at *9. EPA asserts that air quality modeling may take approximately six months, Opp'n 74 n.21, but fails to explain whether staff can perform multiple framework steps concurrently, whether technical data prepared for the 2016 Transport Rule and Closeout Rule can be used for a future rule, or even whether, in response to this litigation, EPA staff have already commenced the process. EPA likewise fails to establish that it faces constraints that are "beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs." *Cal. Communities Against Toxics v. Pruitt*, 241 F. Supp. 3d 199, 204 (D.D.C. 2017). Delaying expeditious remedial rulemaking "without a more convincing demonstration of evident impossibility, would be to, in effect, repeal the Congressional mandate." *Sierra Club*, 551 F. Supp. at 789.

CONCLUSION

For the foregoing reasons, the Court should vacate the rule. And because EPA has failed to show that it is impossible to promulgate a lawful federal implementation plan within five months, the Court should order it to do so.

DATED: July 31, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Counsel hereby certifies, in accordance with Federal Rules of Appellate Procedure 32(g)(1) and the Court's April 1, 2019 briefing order, that the foregoing **Final Reply Brief Of Citizen Petitioners** contains 3,992 words, as counted by counsel's word processing system. The undersigned is informed that the brief filed by State Petitioners in this matter contains no more than 5,000 words, and thus the total word count of the two briefs complies with the 9,000 word limit.

Further, this document complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6) because this document has been prepared in a proportionally spaced typeface using **Microsoft Word 2016** using **size 14 Times New Roman** font.

DATED: July 31, 2019

/s/ Neil Gormley
Neil Gormley

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2019, I have served the foregoing **Final Reply Brief Of Citizen Petitioners** on all registered counsel through the Court's electronic filing system (ECF).

/s/ Neil Gormley
Neil Gormley