

NO. 19-1383

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

UNION OF CONCERNED SCIENTISTS; ELIZABETH ANN SHEPPARD,

Plaintiffs - Appellants,

v.

ANDREW WHEELER, in his official capacity as Administrator of the
Environmental Protection Agency; and UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Defendants - Appellees.

**AMICI CURIAE BRIEF OF THE STATES OF WASHINGTON,
CALIFORNIA, ILLINOIS, MARYLAND, NEW JERSEY, NEW YORK,
OREGON, PENNSYLVANIA, THE COMMONWEALTH OF
MASSACHUSETTS AND THE DISTRICT OF COLUMBIA IN
SUPPORT OF APPELLANTS AND REVERSAL**

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I. INTRODUCTION

The Environmental Protection Agency's advisory committees are critical to upholding its mission to protect human health and the environment. While some committees advise on policy, many of EPA's advisory committees provide robust peer review and specialized scientific expertise on topics ranging from children's health to lab accreditation. Because of the high degree of expertise required, some of the country's best independent scientists from academia—including many from our state university systems—have long staffed EPA's advisory committees.

Current EPA leadership, however, is engaged in an attack against independent science. In October 2017, then-Administrator Scott Pruitt issued the directive at issue in this case that effectively bars EPA grant recipients from serving on EPA advisory committees. Pruitt commanded existing members to either abandon EPA-funded research projects—sometimes years in the making—or relinquish their advisory committee posts. Because EPA is one of the largest sources of funding for independent scientific research, the impact on committee makeup was immediate. From 2017 to 2018, the number of independent academic scientists on EPA's critical Science Advisory Board plummeted by forty percent. Dozens of other independent scientists and

experts were removed from their advisory committee positions. Meanwhile, industry-funded representation *tripled*.¹

As Appellants explain in their brief, “the directive fails the most basic requirement of the Administrative Procedures Act (‘APA’): reasoned decisionmaking.” Br. of Appellants p. 4. By baldly tilting EPA’s advisory committees towards regulated industries, the directive also violates the Federal Advisory Committee Act’s core command that agencies prevent special interest groups from using advisory committees as a vehicle to promote their own vested interests. Appellants’ claims are justiciable, and this Court should reverse the district court’s determination that the directive is shielded from scrutiny. But in addition to being illegal, the directive is also dangerous to human health and the environment. As a result, Amici curiae states write separately to highlight how the directive weakens EPA’s ability to perform rigorous science when making critically important decisions and has

¹ Furthermore, as the Government Accountability Office found in a report issued earlier this month, EPA failed to follow the proper procedures in appointing new members to two of the agency’s most important advisory boards, further undermining the integrity of the process. See U.S. Gov’t Accountability Office, Rep. No. 19-280, *EPA Advisory Committees: Improvements Needed for the Member Appointment Process* (July 2019), <https://www.gao.gov/assets/710/700171.pdf>.

significant, negative impacts on EPA’s ability to carry out its core mission—
all to the detriment of states, regulated entities, and the American people.

II. IDENTITY AND INTEREST OF AMICI

The states of Washington, California, Illinois, Maryland, New Jersey, New York, Oregon, Pennsylvania, the Commonwealth of Massachusetts, and the District of Columbia (Amici States) submit this brief as amici curiae in support of Appellants and urge that this Court reverse the district court’s dismissal of Appellants’ suit alleging that then-Administrator Pruitt acted unlawfully when he issued a directive, “Strengthening and Improving Membership on EPA Advisory Committees” (the Directive), generally banning recipients of EPA grant funds from serving on EPA’s advisory committees or their respective sub-committees.

The Directive will injure Amici States in at least four respects. First, the likely diminished quality of EPA regulatory standards and EPA-funded research will harm the states’ citizens and natural resources and, thus, Amici States’ quasi-sovereign interest “in the health and well-being—both physical and economic—of [their] residents” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607, 102 S. Ct. 3260 (1982).

Second, Amici States have regulatory programs, including authorizations to implement aspects of federal environmental statutes. Excluding many scientists with the best understanding of complex environmental issues weakens the competence of the advisory committees created to help ensure that EPA's policies and regulatory proposals are based on the best available science. This handicaps EPA's ability to perform its core functions and, in turn, harms the Amici States because failure by EPA to adopt standards based on the best available science puts additional burdens on the states to fill those resulting gaps.

Third, EPA's failure to apply quality science to its regulatory agenda subjects Amici States, and regulated entities within Amici States' borders, to ineffective and/or inefficient regulatory standards. As with private parties, states engage in a range of proprietary functions subject to regulation under federal standards. Amici States have an interest in being subjected to regulations that are premised on rigorous science, which the Directive undermines.

And fourth, the Directive directly harms Amici States' respective university systems. Although the Directive exempts employees of state agencies, faculty at state universities are subject to the Directive and have either been removed from service on EPA advisory committees or have been compelled to relinquish their grants. Countless others will be forced to make that arbitrary

choice as well. Flagship state universities are among the Nation's premier research institutions and, as such, are significant recipients of EPA grant funds. For example, Washington State universities have received approximately \$78 million in EPA research funding over the past 10 years alone.² Not only is the research conducted invaluable to society in general—and the United States' standing globally as a leader in environmental and public health science—but EPA grants also support development of our country's scientific talent, helping recipient universities attract and retain world-class faculty and recruit top students to research programs.

By forcing current and potential future advisory committee members to choose between funding for their research and service on advisory committees, the Directive weakens the very bodies necessary to ensure EPA's work is scientifically sound. This weakening directly harms the Amici States, both in terms of their ability to protect human health and the environment within their respective jurisdictions, and in terms of their ability to attract top talent to state universities.

² See EPA Online Grants Database, [https://yosemite.epa.gov/oarm/igms_egf.nsf/AllGrantsNarrow?SearchView&Query=\(FIELD%22Applicant_Type%22=%22State+Institution+of+Higher+Learning%22\)AND\(FIELD%22Applicant_State%22=%22WA%22\)&SearchOrder=1&SearchMax=1000&SearchWV=false&SearchFuzzy=false&Start=1&Count=500](https://yosemite.epa.gov/oarm/igms_egf.nsf/AllGrantsNarrow?SearchView&Query=(FIELD%22Applicant_Type%22=%22State+Institution+of+Higher+Learning%22)AND(FIELD%22Applicant_State%22=%22WA%22)&SearchOrder=1&SearchMax=1000&SearchWV=false&SearchFuzzy=false&Start=1&Count=500) (last accessed on July 30, 2019).

III. ARGUMENT

The advisory committee Directive has already caused the removal of dozens of uniquely qualified scientists from their posts on EPA advisory boards and committees, while increasing persons affiliated with regulated industries. Because the Directive precludes service by many of the nation's preeminent experts, it is broadly detrimental to EPA's work.

A. **The Directive Handicaps Independent Voices Contributing to EPA Science Based on Non-Existent Conflicts of Interest**

EPA's ability to implement the Nation's environmental laws is highly dependent on top-level scientific expertise. As described by former EPA Deputy Director Robert Sussman, "EPA sets allowable ambient levels for our major air pollutants . . . regulates the releases of toxic chemicals from industrial facilities of all types, sets emission standards for cars and trucks, determines permissible levels of contaminants in drinking water, and sets health-based cleanup standards for contaminated sites."³ EPA also "implements a regulatory regime that determines what active ingredients can be used in pesticides . . . reviews all new chemicals before they are introduced into commerce [and] . . . sets safe exposure levels for widely known and distributed environmental toxins like lead,

³ Robert M. Sussman, *Science and EPA Decision-Making*, 12 J.L. & Pol'y 573, 578 (2004).

asbestos, and radon in homes and schools.”⁴ Perhaps more so than any other federal agency, the success of EPA’s mission depends on the rigorous application of science.

EPA’s advisory committees have helped ensure that the scientific underpinnings of EPA’s work are based on the best available research and data. By serving as independent voices informing EPA’s technical determinations, advisory committees curb the influence of financial and political pressures on EPA’s application of relevant scientific evidence and “interject a much needed strain of competence and critical intelligence into a regulatory system that otherwise seems all too vulnerable to the demands of politics.”⁵

In light of these critical functions, EPA’s decision to disqualify scientists who receive EPA funding from serving in these positions is deeply troubling. EPA has long depended upon assistance from academic scientists and medical professionals performing cutting-edge work at universities, hospitals, or non-profits. *See* J.A. A-17–18. Because the vast majority of their work focuses on topics that benefit the public interest, academic and other non-profit researchers rely much more heavily on government funding than funding by industry. *See*

⁴ *Id.*

⁵ Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* 1 (1990).

id. And, because Congress directs EPA to spend a significant portion of its budget on grants, EPA is one of the primary sources of this public funding. As a result, the Directive applies disproportionately to independent, public-interest researchers rather than those who receive industry funding. Many of these independent researchers are leading experts in their respective fields. J.A. A-115 (¶ 19).

The Directive resulted in the removal of scores of highly qualified scientists from advisory committee roles (and will prevent countless others from serving in the future). For just two examples, in March of 2018, the Directive resulted in removal of a prominent scholar from service on the Clean Air Scientific Advisory Committee's subcommittee on national ambient air quality standards for particulate matter pollution. The scholar, Dr. Charles Driscoll, is a Distinguished Professor of Environmental Engineering at Syracuse University who has conducted extensive research on air quality issues. J.A. A-118 (¶¶ 3–4). Due to his receipt of an EPA grant to study particulate matter, ozone, and water quality issues, EPA forced Dr. Driscoll to either relinquish his grant or resign his committee appointment. J.A. A-118 (¶ 8). Dr. Driscoll reluctantly stepped down from the committee. J.A. A-118 (¶¶ 8–9). Similarly, Dr. Joel Kaufman, Interim Dean of the University of Washington's School of Public Health and a board-

certified physician and epidemiologist, was forced to resign from EPA's Particulate Matter Review Panel in 2018.⁶ J.A. A-121 (¶¶ 4–7). EPA's exclusion of these and others of the nation's most capable environmental and public health scientists hobbles the agency's ability to execute its core mission.

Worse still, the Directive sacrifices the critical knowledge and insight of these researchers while delivering *nothing* of value in return. The Directive identifies no instances of actual conflicts arising from academic advisory committee members' receipt of EPA grants, provides no evidence that the receipt of EPA grants would lead to a lack of independence, and fails to explain how existing mechanisms for preventing conflicts are insufficient. J.A. A-43. In fact, committee members already must disclose any potential biases prior to service. J.A. A-20–22. And existing ethics requirements applicable to advisory committee members already prohibit participation on matters that would directly

⁶ In another troubling aspect of EPA's current war on science within the agency, Administrator Wheeler disbanded the Particulate Matter Review Panel altogether, ending their critical look into the adequacy of standards for one of the most hazardous types of air pollution. Sean Reilly, *EPA scraps science panel: 'Your service ... has concluded'*, E&E News (Oct. 12, 2018), <https://www.eenews.net/stories/1060102455>. That task has now fallen to the seven-member Clean Air Scientific Advisory Committee (the CASAC) that was completely re-made in the wake of the Directive. Where the particulate matter review process once included input from at least seven prominent epidemiologists, CASAC is staffed by a statistician funded by industry groups opposed to particulate matter regulation and several state regulators with a history of downplaying the effects of air pollution. Scott Waldman, *Science adviser allowed oil group to edit research*, Climatewire, (Dec. 10, 2018), <https://www.eenews.net/climatewire/stories/1060109129>.

implicate the financial interests of Committee members, including any EPA grants. *See* 5 C.F.R. § 2635.402(a)–(b). By disqualifying individuals from serving on any EPA advisory committee no matter how tenuously related to any EPA grants they may have received, the Directive creates—out of whole cloth—a new conflict-of-interest policy that is inconsistent with decades of executive branch ethics policy and a pre-existing command that agencies receive U.S. Office of Government Ethics approval for supplemental ethics regulations. *See generally*, 5 C.F.R. Part 2635; Executive Order 12,731 (Oct. 17, 1990).

Far from advancing EPA’s alleged goal of reducing conflicts of interest and bolstering committees’ independence, the Directive in fact accomplishes the exact opposite, resulting in real harm to Amici States’ residents. The Directive has *increased* the presence of lobbyists and industry representatives with a vested interest in seeing that EPA policy favors their employers’ and sponsors’ industries.⁷ For example, a recent study conducted by the Appellants in this case found that, after adoption of the Directive, independent academic membership

⁷ Liza Gross, Lindsey Konkel, Elizabeth Grossman, *EPA Swaps Top Science Advisers With Industry Allies*, *Reveal* (Nov. 17, 2017), <http://www.revealnews.org/article/epa-swaps-top-science-advisers-with-industry-allies/>; *see also* Emily Holden, Anthony Adragna, *Major Trump Donor Helped Pruitt Pick EPA Science Advisors*, *Politico* (June 8, 2018), <https://www.politico.com/story/2018/06/08/doug-deason-trump-donor-helped-pruitt-pick-epa-science-advisers-603450>.

on EPA's Science Advisory Board fell by 40 percent while the number of industry representatives tripled.⁸ The study also found troubling decreases in both the number of federal science advisory committee meetings, and the overall number of committee members.⁹ This is made even more alarming by the fact that, as recently detailed in a United States Government Accountability Office report, EPA is currently failing to follow its own procedures in both documenting the rationale for proposed advisory committee members and vetting their potential conflicts of interest. *See* U.S. Gov't Accountability Office, Rep. No. 19-681T, *EPA Advisory Committees: Improvements Needed for the Member Appointment Process* (July 2019), <https://www.gao.gov/assets/710/700299.pdf>.

EPA's shift toward industry-funded scientists has serious implications for its work. Industry research has been repeatedly shown to favor weaker regulations on the sponsoring industry.¹⁰ In one large-scale comparative analysis of industry-funded studies related to chemical safety, researchers concluded that while 60 percent of non-industry-funded studies found harm in a suite of

⁸ *See* Union of Concerned Scientists, *Abandoning Science Advice* 5-6 (2018), <https://www.ucsusa.org/sites/default/files/attach/2018/01/abandoning-science-advice-full-report.pdf>.

⁹ *Id.*

¹⁰ *See* Besley, et al., *Perceived Conflict of Interest In Health Science Partnerships*, *Plos* (April 20, 2017) <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0175643>.

chemicals, only 26 percent of studies funded by the chemical industry found harm in the same chemicals.¹¹ Another review found that industry-funded medical studies were eight times less likely to show results unfavorable to the sponsoring industry.¹²

Certain industries also have a long and well-documented history of purposefully skewing scientific studies to further their agendas. Most famously, the tobacco industry spent decades and billions of dollars funding now-debunked science to counter ever-increasing evidence that smoking is harmful. *See United States v. Phillip Morris USA, Inc.*, 449 F. Supp. 2d 1, 723 (D.D.C. 2006) (“Defendants took steps to undermine independent research, to fund research designed and controlled to generate industry-favorable results, and to suppress adverse research results.”).¹³

More recently, a group of professors at Tennessee Tech denounced an industry-funded study of “glider” truck emissions that “[read] more like an

¹¹ *The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure*, 115 Harv. L. Rev. 1502 (2002) (citing Sheldon Rampton & John Stauber, *Trust Us, We're Experts! How Industry Manipulates Science and Gambles With Your Future* at 219 (2001)).

¹² Joanna K. Sax, J.D., Ph.D., *Protecting Scientific Integrity: The Commercial Speech Doctrine Applied to Industry Publications*, 37 Am. J.L. & Med. 203, 206 (2011).

¹³ See also Elisa Tong, Stanton Glantz, *Tobacco Industry Efforts Undermining Evidence Linking Secondhand Smoke With Cardiovascular Disease*, *Circulation*, Vol. 116, Issue 16, Oct. 16, 2007. <http://circ.ahajournals.org/content/116/16/1845.full.pdf?download=true>.

advertisement” and that contradicted earlier studies showing that such emissions were much more harmful to human health than emissions from trucks with modern emission controls. Adam Tamburin & Jason Gonzales, *Tennessee Tech Professors ‘Begging’ Leaders to Disavow Contested Emissions Research*, *Tennessean* (Feb. 19, 2018).¹⁴ The study, paid for by a glider truck manufacturer, has been disavowed by the institution that issued it and is now the subject of an internal investigation.¹⁵ *Id.* Replacing an entire category of academic scientists with industry scientists means that EPA’s capacity to identify and appropriately counteract environmental harms will be stunted and—in a very real sense for those most vulnerable to environmental harms—more lives may be harmed.

B. The Directive Results in Concrete Harms to EPA’s Mission and the Entities and Individuals Regulated By, or Reliant Upon, EPA’s Work

Throughout its history, EPA’s “greatest successes have occurred when policies, regulations, and decisions are based on the results of sound and relevant scientific research” with “the credibility of [those] decisions depend[ing] on the

¹⁴*See* <https://www.tennessean.com/story/news/politics/2018/02/16/tennessee-tech-professors-begging-leaders-disavow-contested-emissions-research/345773002/>.

¹⁵ Under former Administrator Pruitt, EPA subsequently used the disputed glider truck study to justify its reversal on glider trucks. Administrator Wheeler has since abandoned that reversal.

science underlying them.”¹⁶ As noted, EPA’s use of extensive peer review, provided by independent scientists traditionally chosen solely “for their expertise and their scientific accomplishments,” is one of the primary means by which EPA rigorously applies science.¹⁷ The advisory committee Directive’s shift away from the most qualified and independent participants (and toward industry-funded scientists) to perform this review will have detrimental impacts on EPA’s scientific and technical work and will detrimentally affect its core mission.

First, when EPA is wrong on the science, individuals—including especially vulnerable populations such as children and the elderly—can be exposed to dangerous levels of pollutants, cleanup levels for hazardous waste can be set above what is necessary to prevent long-term harms, critical habitat can be degraded, and water and air quality can be damaged. For regulated parties, EPA mistakes can also result in inefficient expenditures due to complying with regulations that fail to solve the problems they purport to address or preparing to comply with regulations that are later struck down. These harms will follow from

¹⁶EPA Administrator Christine Todd Whitman, Remarks at the EPA Science Forum (May 1, 2002), https://archive.epa.gov/epapages/newsroom_archive/speeches/7f46885c3547108e8525701a0052e439.html

¹⁷ Sussman, 12 J.L. & Pol’y at 580–81.

the pointed shift toward industry-funded scientists as a result of implementation of the Directive. J.A. A-117 (¶¶ 26–27).

Second, the Directive negatively impacts EPA’s institutional legitimacy and capacity for effective and efficient governance. Advisory committee review is a “scientific seal of approval” that helps deflect criticisms from “adversaries within the EPA, from industry and environmental groups, or from the Office of Management and Budget.”¹⁸ This review also helps root out technical missteps before EPA makes final decisions on matters with broad impacts on both regulated industry and the environment, and ensures EPA’s work is defensible once finalized. For example, and as Appellants allege in their complaint, the Science Advisory Board prompted EPA to remove errors in a 2015 report on the impacts to drinking water from hydraulic fracturing. J.A. A-16–17 (¶¶ 26-27).

Indeed, over the years, courts have repeatedly pointed to EPA’s use of advisory committee peer review in upholding EPA actions, preventing the need for EPA to re-do costly regulatory work.¹⁹ *See, e.g., City of Portland v. EPA,*

¹⁸ Lars Noah, *Scientific “Republicanism”: Expert Peer Review and the Quest for Regulatory Deliberation*, 49 Emory L.J. 1033, 1051 (2000).

¹⁹ Conversely, EPA ignores the recommendations of its advisory committees at its peril. For just two examples, the Second Circuit recently overturned EPA’s Vessel General Permit under the Clean Water Act after EPA failed to follow the Science Advisory Board’s report identifying ballast-water treatment systems. *Natural Res. Def. Council v. EPA*, 808 F.3d 556, 573 (2d Cir. 2015). And, in 2009, the D.C. Circuit held that EPA’s decision not to strengthen the particulate matter ambient air quality standards was unlawful and, in doing so,

507 F.3d 706, 716 (D.C. Cir. 2007) (upholding a drinking water standard based on EPA’s use of “the best available, peer-reviewed science” developed by the Science Advisory Board); *Ohio Valley Envtl. Coal. v. Fola Coal Co.*, 120 F. Supp. 3d 509, 523 n.16 (S.D. W.V. 2015) (upholding EPA’s assignment of benchmark discharge levels and noting that “not only are there epidemiologists on the Science Advisory Board, there are some very fine epidemiologists serving in that capacity”); *United States v. Vertac Chem. Corp.*, 33 F. Supp. 2d 769, 778 (E.D. Ark. 1998), *reversed on other grounds by United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001) (upholding EPA’s cleanup level calculations at a Superfund site based in part on review by the Science Advisory Board). Degrading the quality and diversity of advisory committee participants will undoubtedly mean fewer mistakes are caught and corrected before they are litigated.

Third and finally, the move to limit the composition of advisory committees risks significant damage to the credibility and deference that committee work has traditionally received. As described above, industries have a long and well-documented history of pushing questionable science to further

noted EPA’s failure to follow the recommendations of the CASAC. *American Farm Bur. Fed’n v. EPA*, 559 F.3d 512, 521 (D.C. Cir. 2009).

industry objectives. For good reason, that history justifies skepticism of industry research. Thus, when EPA frontloads its science advisory committees with industry-funded scientists, EPA risks losing the credibility that those committees have built up over the decades—both with the courts and the court of public opinion. In short, the Directive will work irreversible damage to EPA’s mission and institutional legitimacy.

IV. CONCLUSION

The Directive challenged by Appellants undermines the quality and independence of EPA’s advisory committees for no discernable benefit and with deeply negative consequences to EPA’s mission. For the reasons set out in Appellants’ opening brief, this Court should reverse the district court’s dismissal.

RESPECTFULLY SUBMITTED this 31st day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I electronically filed a true and correct copy of the foregoing Amici Curiae brief with the Clerk of the United States Court of Appeals for the First Circuit by using the CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated this 31st day of July 2019.

/s/ Renae Smith

Renae Smith

Paralegal

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