

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

UNION OF CONCERNED
SCIENTISTS, *et al.*,

Plaintiffs,

v.

ANDREW WHEELER, in his official
capacity as Acting Administrator of the
United States Environmental Protection
Agency, *et al.*,

Defendants.

NO. 1:18-cv-10129 (FDS)

**LEAVE TO FILE GRANTED
ON SEPTEMBER 12, 2018**

**AMICI CURIAE BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA,
ILLINOIS, IOWA, MARYLAND, NEW JERSEY, NEW YORK, AND OREGON,
THE COMMONWEALTH OF MASSACHUSETTS, AND THE PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

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I. INTRODUCTION

The Environmental Protection Agency manages twenty-two federal advisory committees and their respective sub-committees. These advisory committees serve as crucial, independent voices and many provide robust peer review for EPA's policy, enforcement, and regulatory efforts. Most significantly, for over 40 years Congress has mandated that EPA maintain a Science Advisory Board to provide independent advice and peer review of the scientific and technical information underlying EPA's mission of combating pollutants, contamination, and other serious threats to human health and the environment.

Academic researchers from America's private and flagship state universities and other independent researchers and scientists have long played a crucial role in EPA's advisory committees. Committee members often have scientific knowledge that is unique and not easily replaced. Many of these individuals—who have dedicated their careers to researching pressing environmental and health issues affecting Americans—rely on independent research grant funds to support their work. EPA is a significant source of funding for this research; Congress requires EPA to spend a substantial portion of its annual budget to fund research grants in areas relevant to its work. Until recently, EPA has never considered the receipt of an EPA grant as posing a conflict of interest for Committee members, and for good reason. EPA's grant funding is a competitive process that is subject to peer review and awarded solely based on merit. Existing ethics rules already prevent committee members from participating in matters that would directly implicate or impact their financial interests, including decisions on any EPA grants. And, as a result, receipt of grant funding while serving on a committee has also consistently been found to be well within long-standing uniform executive branch ethics requirements.

Despite the lack of any documented ethical problems, in October 2017 former EPA Administrator Scott Pruitt¹ issued a directive upending the membership balance on EPA advisory committees. That directive, “Strengthening and Improving Membership on EPA Advisory Committees” (the Directive), bars all EPA grant recipients (with some limited exceptions) from serving on any EPA advisory committees. As a direct result, in early 2018 EPA told advisory committee members with current EPA grants to relinquish their grants or resign their committee memberships. And although the Administrator claimed that the Directive was aimed at stamping out conflicts of interest, the Directive did not exclude persons with funding from—or even those working directly for—regulated industries whose products, emissions, or services may be harmful to human health and the environment. Industry-funded or even industry-employed members of the Science Advisory Board thus have risen from comprising 40 percent of Board members to now comprising nearly 70 percent.

The Directive is arbitrary, capricious, and contrary to law. It in fact exacerbates the very conflicts of interest it purportedly seeks to address, while weakening EPA’s ability to perform rigorous science when making critically important decisions. Furthermore, and as set out below, the Directive has significant, negative impacts on EPA’s ability to carry out its core mission, to the detriment of states, regulated entities, and the American people. The Directive also weakens the ability of the states’ university systems to receive EPA funding by forcing faculty to choose between receiving EPA grants or serving on critical EPA advisory committees and boards. This Court should deny the Administrator’s motion to dismiss (Dkt. No. 16-17).

¹ On July 6, 2018, Scott Pruitt resigned as EPA Administrator. Andrew Wheeler is now serving as Acting Administrator.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The states of Washington, California, Illinois, Iowa, Maryland, New Jersey, New York, and Oregon, the Commonwealth of Massachusetts, and the Pennsylvania Department of Environmental Protection (*Amici States*) submit this brief as *amici curiae* in opposition to Defendants' motion to dismiss (Dkt Nos. 16–17). Plaintiffs allege that former Administrator Pruitt acted unlawfully when he issued the Directive generally banning any recipients of EPA grant funds from serving on EPA's advisory committees or their respective sub-committees. This action will deprive EPA of objective advice, both when setting individual regulatory standards and establishing long-term research goals. It is therefore a matter of general public interest and of particular interest to the *Amici States*.

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. *Amici States* have a quasi-sovereign interest “in the health and well-being—both physical and economic—of [their] residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982).

Second, the *Amici States* have regulatory programs, including authorizations to implement aspects of federal environmental statutes, such as the Clean Water Act (33 U.S.C. §§ 1251 et seq.) and the Clean Air Act (42 U.S.C. §§ 7401 et seq.). These authorizations complement state environmental laws and provide, in many instances, concurrent enforcement authority to enforce EPA-promulgated federal standards within a state's jurisdiction as it exercises its sovereign role in protecting human health and the environment. Furthermore, as discussed in greater detail in Section III.A below, it is difficult to overstate the sweep of EPA's mandate. From developing water quality and air emission standards, to regulating pesticides, to combating climate change, EPA's work helps drive public health and environmental protections across the United States and

impacts the ways in which the states and their residents conduct business. Given the sheer scope of this work, combined with its often complex underpinnings, EPA's execution of its workload depends on the application of best available science. Excluding many scientists with the best understanding of today's environmental problems 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. Any failure by EPA to adopt standards based on the best available science will put additional burdens on the states to fill those resulting gaps.

Third, as with private parties, states engage in a range of proprietary functions subject to regulation under federal standards—from massive construction projects, to performing cleanups as liable parties under the federal Superfund law, to seeking federal permits for air emissions. In these roles, *Amici* States have an obvious interest in being subjected to regulations that are premised on rigorous science. Not only does the removal of some of the most qualified scientists in the country deprive advisory committees of valuable expertise, but the agency's decision in some instances to remove scientists in the middle of an advisory committee's work on an EPA standard is likely to lead to inefficiency and delay. EPA's failure to apply high quality science to its regulatory agenda subjects *Amici* States, and regulated entities within *Amici* States' borders, to ineffective and/or inefficient regulatory standards.

And, fourth, while the Directive exempts employees of state agencies, faculty at state universities subject to the Directive have either been removed from service on EPA advisory committees or have been compelled to relinquish their grants. Consequently, the Directive also directly harms *Amici* States' respective university systems. 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 alone have received approximately \$78 million in EPA research funding over the past 10 years alone.² Not only is the research conducted is invaluable to society in general—and the United States’ standing globally as a leader in environmental and public health science—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.

Similarly, service on advisory committees by faculty also provides direct benefits to employing researchers at state universities. Across the board, EPA’s advisory committees—whether created by Congress, the President, or the Administrator—require highly qualified subject-matter experts, many of whom conduct cutting-edge research in their respective fields. As a result, service on an EPA advisory committee is a high-visibility opportunity within the scientific community that elevates an academic appointee’s profile and enhances his or her ability to fund and perform research. This, in turn, enhances the ability to attract top students (and other faculty) to the appointee’s university program.

Thus, 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 May 2, 2018).

III. ARGUMENT

As set out below, the Directive sacrifices EPA's ability to benefit from the best scientific expertise for no discernable gain. Indeed, the Directive has already caused dozens of uniquely qualified scientists to be removed from their posts on EPA advisory boards and committees, while leaving in place (and even increasing) persons affiliated with regulated industries. *See* Declaration of Dr. Charles Driscoll; Declaration of Dr. Joel Kaufman; *see also* Compl. ¶¶ 42–47 (Dkt. No. 1). Because the Directive precludes service by many of the nation's preeminent experts in the fields in which EPA operates, it is broadly detrimental to EPA's work.

A. **The Directive handicaps the most independent voices contributing to EPA scientific decision-making under the ruse of rooting out non-existent conflicts of interest**

EPA's regulatory mandate is enormous and 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." Robert M. Sussman, *Science and EPA Decision-Making*, 12 J.L. & Pol'y 573, 578 (2004). 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, asbestos, and radon in homes and schools." *Id.* As a result, and perhaps more so than any other federal agency, the success of EPA's core mission to protect the nation's environment and the health of all American citizens depends on the rigorous application of science.

EPA's advisory committees have helped ensure—across multiple administrations—that the scientific underpinnings of EPA's work are based on the rigorous application of the best

available research and data. By serving as independent voices on EPA’s technical determinations, advisory committees help curb the influence of financial and political pressures on EPA’s analysis and 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.” Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* 1 (1990).

In light of these critical functions, the Administrator’s decision to target and 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 professional performing cutting-edge work at universities, hospitals, or non-profits. *See* Compl. ¶ 22 (Dkt. No. 1). Because the vast majority of their work focuses on topics that benefits the public interest, academic and other non-profit researchers rely much more heavily on government funding rather than funding by industry. And, because of the nature of EPA’s mission and Congress’ directive that EPA 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 almost exclusively applies to independent, public-interest researchers—many of whom work at state universities—rather than researchers receiving industry funding. Almost by definition, these researchers are leading experts in their respective fields. *See* Declaration of Christopher Zarba ¶ 18 (Dkt. No. 32-7).

The Directive has already 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 example, in March of this year, the Directive resulted in removal of a prominent scholar from service on the Clean Air Scientific Advisory Committee’s subcommittee on ambient air quality standards. The scholar, Dr. Charles Driscoll, is a Distinguished Professor of Environmental

Engineering at Syracuse University who has conducted significant research on air quality issues. Declaration of Charles Driscoll at ¶¶ 3–4. Dr. Driscoll has also testified numerous times before Congress on environmental-related matters. *Id.* at ¶ 5. 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. *Id.* at ¶ 8. Because relinquishing the grant would have undermined the research project and rescinded funding dedicated to a graduate student recruited to work on the research project, Dr. Driscoll reluctantly gave up his committee appointment. *Id.* at ¶¶ 8–9. Similarly, Dr. Joel Kaufman, Dean of the University of Washington’s School of Public Health and a board-certified physician and epidemiologist, was forced from EPA’s Particulate Matter Review Panel earlier this year. Declaration of Joel Kaufman at ¶¶ 2, 12–13. Because he received a grant to shore up areas of uncertainty regarding the effects of fine particulate matter on cardiovascular health, Dr. Kaufman was told to relinquish his grant or resign from the Particulate Matter Review Panel. Dr. Kaufman was removed from his appointment in April 2018. *Id.* at ¶ 13.

As noted above, these and other removals, as well as future restrictions on service, cause unacceptable impacts on the *Amici* States’ university systems (both public and private) by forcing faculty scientists into the untenable situation of either receiving the funding necessary to carry out critical research or relinquishing service on critical EPA advisory bodies. And by excluding some of the most capable environmental and public health scientists in the nation, these restrictions on service hobble EPA’s ability to execute its core mission, as further discussed below.

Worse still, the Directive creates these harms and sacrifices the critical knowledge and insight of these researchers while getting *nothing* of value in return. The Directive identifies no actual instances of 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. *See* Compl., Ex. A (Dkt. No. 1-1). In fact, committee members already must disclose any potential biases prior to service under existing laws and regulations. Compl. ¶¶ 63-69 (Dkt. No. 1). And existing ethics requirements applicable to advisory committee members already prohibit participation on matters that would directly implicate or impact 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 extant EPA grants they have received, the Directive creates—out of whole cloth—a new and unsupported conflict-of-interest policy that is inconsistent with decades of executive branch ethics policy. *See, generally*, 5 C.F.R. Part 2635; Executive Order 12,731 (Oct. 17, 1990).

At the same time, and far from advancing the Administrator’s alleged goal of decreasing conflicts of interest and bolstering committees’ independence, the Directive in fact accomplishes the exact opposite. Following its adoption, the Directive has *increased* the presence of lobbyists and industry insiders with a vested interest in ensuring that EPA policy sways to the benefit of their employers’ and sponsors’ industries.³ For example, “[a]mong the dozens of new [advisory committee] members . . . are representatives of Phillips 66 Co., Southern Co. and the North Dakota Petroleum Council.” Timothy Cama, *EPA names industry, state officials to advisory boards*, The Hill (Nov. 3, 2017).⁴ Some of the new advisers have indefensible scientific views at odds with

³ Liza Gross, Lindsey Konkel, Elizabeth Grossman, *EPA Swamps 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>.

⁴ <http://thehill.com/policy/energy-environment/358640-epa-names-industry-state-officials-to-advisory-boards>.

EPA's statutory mission, including an oil and chemical industry consultant who believes that certain contaminants actually yield health benefits—contrary to years of research and scientific consensus showing otherwise. *Id.* For these reasons alone the Directive cannot survive scrutiny under APA standards for arbitrary and capricious agency action.

This shift toward industry-funded scientists also has serious implications for EPA's work. Industry research has been repeatedly shown to favor the sponsoring industry. *See* Besley, et al. *Perceived Conflict of Interest In Health Science Partnerships*.⁵ For example, in one large-scale comparative analysis of industry-funded studies related to chemical safety, researchers discovered that while 60 percent of non-industry studies found harm in a suite of chemicals, only 26 percent of studies funded by the chemical industry found harm in the same chemicals. *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)). Another review found that industry-funded medical studies were eight times less likely to show results unfavorable to the sponsoring industry. 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).

Certain industries also have a long and well-known history of purposefully skewing science to further their agendas. Most famously, the tobacco industry spent decades and billions of dollars funding sketchy science (and hiding good science) to counter ever-increasing evidence that smoking is harmful. In the 1980s, when it could no longer obscure the fact that smokers were being substantially endangered, the industry undertook massive efforts to undermine studies showing the dangers of second-hand smoke on non-smokers. *See U.S. v. Phillip Morris USA, Inc.*, 449 F. Supp.

⁵ <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0175643>.

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.”); *see also* Elisa Tong, Stanton Glantz, *Tobacco Industry Efforts Undermining Evidence Linking Secondhand Smoke With Cardiovascular Disease*, *Circulation*, Volume 116, Issue 16, Oct. 16, 2007.⁶

More recently, a group of professors at Tennessee Tech denounced an industry-funded study of “glider” truck emissions that “[read] more like an 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. *Tennessee Tech Professors ‘Begging’ Leaders to Disavow Contested Emissions Research*, Feb 19, 2018.⁷ 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.⁸ *Id.*

As set out in Plaintiffs’ Complaint, the Directive represents the epitome of arbitrary and capricious agency action that, even if it was partially within EPA’s discretion, is an abuse thereof. Replacing an entire category of highly competent scientists with those funded by industry—without any documented justification to do so—is contrary to law. Unfortunately, it also 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 and lost.

⁶ <http://circ.ahajournals.org/content/116/16/1845.full.pdf?download=true>.

⁷ <https://www.tennessean.com/story/news/politics/2018/02/16/tennessee-tech-professors-begging-leaders-disavow-contested-emissions-research/345773002/>.

⁸ Under former Administrator Pruitt, EPA subsequently used the disputed glider truck study to justify its reversal on glider trucks. Acting Administrator Wheeler has since abandoned that reversal.

B. The Directive results in concrete harms to both EPA’s mission and the entities and individuals regulated by, or reliant upon, EPA’s work

This arbitrary and unnecessary targeting of qualified scientists has potentially devastating implications for 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 science underlying them.” Former EPA Administrator Christine Todd Whitman, Remarks at the EPA Science Forum (May 1, 2002).⁹ 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. Sussman, 12 J.L. & Pol’y at 580–81. 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, in turn, negatively impact its core mission.

First, EPA failures have large consequences. 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, including state and federal government agencies, EPA mistakes can result in inefficient expenditures if complying with regulations fail to solve the problems they purport to address or in preparing to comply with regulations that are later struck down. These harms will be especially hard to avoid given the pointed shift toward industry-funded

⁹https://archive.epa.gov/epapages/newsroom_archive/speeches/7f46885c3547108e8525701a0052e439.html

scientists following implementation of the Directive, as detailed above, and the reduced pool of qualified applicants. *See Zarba Decl.* ¶¶ 25–26 (Dkt. No. 32-7).

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 of “adversaries within the EPA, from industry and environmental groups, or from the Office of Management and Budget.” Lars Noah, *Scientific “Republicanism”: Expert Peer Review and the Quest for Regulatory Deliberation*, 49 *Emory L.J.* 1033, 1051 (2000). This review also helps root out technical missteps before EPA makes final decisions on matters with potentially broad impacts on both regulated industry and the environment, and ensures EPA’s work is defensible once finalized.

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.¹⁰ *See, e.g., City of Portland, Oregon v. E.P.A.*, 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 Environmental Coalition v. Fola Coal Co., LLC*, 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”) (internal

¹⁰ 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 Resources Defense Council v. E.P.A.*, 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, expressly noted EPA’s failure to follow the recommendations of the Clean Air Scientific Advisory Committee. *American Farm Bureau Federation v. E.P.A.*, 559 F.3d 512, 521 (D.C. Cir. 2009).

quotations omitted); *U.S. v. Vertac Chemical Corp.*, 33 F. Supp. 2d 769, 778 (E.D. Ark. 1998), *reversed on other grounds by U.S. 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 also risks significant damage to the credibility and deference that committee work has traditionally received. As described above, numerous industries have a long and well-documented history of pushing questionable science to further industry objectives. For good reason, that history justifies skepticism of industry research. Thus, when EPA excludes independent researchers in favor of industry-funded scientists, EPA risks losing the credibility—both with the courts and the court of public opinion—that EPA's advisory committees have built up over the decades. In short, the Directive undermines the quality and independence of EPA's advisory committees for no discernable benefit and with deeply negative consequences to EPA's mission.

C. The Directive is inconsistent with Congress' vision for members of key EPA Advisory Committees

The arbitrary exclusion of grant recipients from advisory committee service is also inconsistent with congressional intent. Many advisory committees targeted by the Directive were created by statute. Among others, Congress established: (1) the Science Advisory Board in 1977 with a mandate to advise both EPA and Congress on relevant scientific matters; (2) the FIFRA Scientific Advisory Panel to advise EPA on health and environmental impacts of pesticide use; and (3) the Clean Air Scientific Advisory Committee to advise EPA on ambient air quality standards. 42 U.S.C. § 4365; 7 U.S.C. § 136w(d); 42 U.S.C. § 7409(d).

Across the board, expertise in the relevant subject matter area is the paramount factor in establishing committee memberships. Science Advisory Board members' sole requirements are the "education, training, and experience" necessary to evaluate the technical scientific data associated with EPA's work. 42 U.S.C. § 4365(b). The Science Advisory Committee on Chemicals must include individuals with "specific scientific expertise in the relationship of chemical exposures to women, children, and other ... susceptible subpopulations." 15 U.S.C. § 2625(o). The FIFRA Scientific Advisory Panel must include scientists nominated by the National Institutes of Health and the National Science Foundation, with other members qualified based solely on "their professional qualifications[.]" 7 U.S.C. § 136w(d)(1).

By excluding a large swath of some of the most qualified current and potential members of EPA's advisory committees and forcing top-notch researchers to choose between receiving EPA grant funding and serving on EPA advisory committees, the Directive subverts Congress' intent that EPA receive expert technical assistance within the subject areas the Committees were designed to serve. This renders the Directive arbitrary, capricious, and contrary to law, and the Directive should be invalidated pursuant to 5 U.S.C. § 706(2).

IV. CONCLUSION

As set out in Plaintiffs' well-pled Complaint, the advisory committee Directive is arbitrary, capricious, and contrary to law. As set out above, the Directive is also anathema to EPA's mission and the very purposes for which advisory committees were created, to the great detriment of the public in general and *Amici* states in particular. On those bases, and for the reasons set out above, this Court should deny Defendants' Motion to Dismiss.

DATED this 12th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2018, I electronically filed a true and correct copy of the foregoing *Amici Curiae* brief with the Clerk of the Court by using the CM/ECF system, which will send notification of such filing to all registered users of the CM/ECF system.

Dated this 12th day of September, 2018.

/s/ Turner Smith
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