No. 12-____

IN THE

Supreme Court of the United States

ASARCO LLC,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act directs the U.S. Environmental Protection Agency to promulgate primary national ambient air quality standards for certain pollutants at the level that is "requisite to protect the public health" while "allowing an adequate margin of safety." 42 U.S.C. § 7409(b)(1). As these standards "affect the entire national economy," this Court held in *Whitman v. American Trucking Associations*, 531 U.S. 457, 475–76 (2001), that the Administrator must set them at the level that is "requisite," i.e., "not lower or higher than is necessary" to protect public health with an adequate margin of safety. The District of Columbia Circuit below affirmed EPA's revised national ambient air quality standard for sulfur dioxide on the grounds that EPA "chose a level below that which produced adverse effects . . . in order to set a standard that allows an adequate margin of safety." Petition Appendix 16a ("Pet. App."). The D.C. Circuit did not, however, consider whether the standard was more stringent than necessary to protect public health, despite acknowledging that the administrative record may not "necessitate" the level of the revised standard. Pet. App. 21a.

The question thus presented is: Whether the court below erred by concluding that EPA's authority to include an adequate margin of safety allowed the court to avoid determining whether the revised sulfur dioxide national ambient air quality standard was more stringent than is necessary to protect public health.

PARTIES TO THE PROCEEDINGS

Petitioner below was ASARCO LLC. ASARCO LLC's suit was consolidated with suits filed by the State of North Dakota, State of Nevada, State of Louisiana, State of South Dakota, State of Texas, Texas Commission on Environmental Quality, State of Louisiana, Louisiana Department of Environmental Quality, Montana Sulphur and Chemical Company, National Environmental Development Association's Clean Air Project, Utility Air Regulatory Group, and SO_2 NAAQS Coalition.

Respondents below were the United States Environmental Protection Agency and Lisa P. Jackson, Administrator, United States Environmental Protection Agency. The American Lung Association and Environmental Defense Fund intervened as respondents.

RULE 29.6 STATEMENT

ASARCO LLC is a wholly owned subsidiary of ASARCO USA Incorporated, which is a wholly owned subsidiary of ASARCO Inc., which is a wholly owned subsidiary of Americas Mining Corporation, which, in turn, is a wholly owned subsidiary of Grupo Mexico.

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PETITION FOR A WRIT OF CERTIORARI

ASARCO LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the District of Columbia Circuit is reported at 686 F.3d 803, and reproduced at Pet. App. 1a-22a. The underlying agency decision, *Primary National Ambient Air Quality Standard for Sulfur Dioxide*, is published at 75 Fed. Reg. 35,520 (June 22, 2010), and reproduced at Pet. App. 23a-427a.

JURISDICTION

The court of appeals entered judgment on July 20, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provision of the Clean Air Act, 42 U.S.C. § 7409, is reproduced at Pet. App. 428a-431a.

INTRODUCTION

Petitioner ASARCO LLC ("Asarco") owns and operates one of the last three primary copper smelters remaining in the United States. This petition raises the important and recurring question whether the reviewing court must ensure that national ambient air quality standards ("NAAQS"),

which "affect the entire national economy," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475–76 (2001) ("*Whitman*"), are set at the "requisite" level.

In *Whitman*, the Court held that Congress' delegation of authority to set NAAQS was authorized only because Congress specified the scope of EPA's authority by requiring that EPA set the standards at the level that is "requisite," that is, "not lower or higher than is necessary [] to protect the public health with an adequate margin of safety." 531 U.S. at 475–76. But in considering the revised NAAQS for sulfur dioxide ("SO_2"), a rule that is projected to cost $1,500,000,000, see Pet. App. 349a, the District of Columbia Circuit, in a decision that will stand as precedent for all future air quality standards, failed to follow the Court's directive to consider whether the revised standard was lower than necessary to protect public health with an "adequate" margin of safety. Instead, the court below acknowledged that evidence in the administrative record may not have "necessitated" EPA's decision, but did not consider whether the standard was too low on the grounds that the Agency had authority to set the standard at "a level below that which produced adverse effects . . . in order to set a standard that allows an adequate margin of safety." Pet. App. 16a. By treating EPA's authority to include an adequate margin of safety as license to avoid determining whether or not the standard was more stringent than necessary to protect the public health, the court below fundamentally abrogated its duty to police the scope of Congress' delegation to set the NAAQS at the level that is "requisite," and in so doing created a conflict with *Whitman*.

The question of whether a reviewing court must ensure that EPA set the NAAQS at the requisite level is one of major national importance that merits this Court's decision to exercise its certiorari jurisdiction. EPA has promulgated to date NAAQS for six separate criteria pollutants that are reviewed, and, in many cases, revised every five years. *See* 42 U.S.C. § 7409. Because EPA must set NAAQS at a level that incorporates a margin of safety, the question of whether a reviewing court may forego considering whether a NAAQS is more than adequate to protect public health by invoking the Agency's authority to use an "adequate margin" will recur in each of these cases.

Furthermore, while EPA may not consider costs in setting NAAQS, *see Whitman*, 531 U.S. at 471, 475, this case is of national importance in part because these standards "affect the entire national economy," *id.* During the last thirty years, emission levels in the United States have declined precipitously and sulfur dioxide levels alone have decreased by over 75%.[1] In light of these dramatic reductions in SO_2 concentrations, the marginal benefit of increasingly stringent regulation has dramatically diminished; the revised sulfur dioxide standard alone will impose at least $1.5 billion dollars in economic costs for $2.2 million dollars in direct public health benefits from SO_2 reductions. Pet. App. 349a.

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[1] *See* EPA Air Quality Trends, http://www.epa.gov/airtrends/aqtrends.html#airquality (last visited Oct. 16, 2012).

For these reasons, there is a compelling need for the Court to exercise its certiorari jurisdiction to reverse the decision below and guide the D.C. Circuit—the only court with original jurisdiction to review challenges to the NAAQS—to ensure that EPA's decision stays within the scope of Congress' delegation that EPA set standards that are necessitated by the evidence that the Agency considers and are "not lower or higher than is necessary" to protect public health with an adequate margin of safety.

STATEMENT OF THE CASE

1. This suit is a petition for review of EPA's rulemaking revising the primary NAAQS for SO_2. The NAAQS are at the heart of the Clean Air Act's pollution-control scheme. Under Clean Air Act § 108, the Administrator is charged with identifying air pollutants that, among other things, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare and issuing air quality criteria that indicate the kind and extent of effects on public health or welfare expected from the presence of such pollutants in the ambient air. 42 U.S.C. §§ 7408(a)(1), (a)(2). Following the issuance of air quality criteria, the Administrator must establish primary NAAQS, "the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). EPA also may establish secondary NAAQS to prevent against adverse effects on the public welfare. 42 U.S.C. § 7409(b)(2).

Finally, the Administrator is required "at five-year intervals" to "complete a thorough review of" its air quality criteria and the NAAQS and to "make such revisions in such criteria and standards and promulgate such new standards as may be appropriate in accordance with section 7408 of this title [prescribing air quality criteria] and subsection (b) of this section [setting new NAAQS]." 42 U.S.C. § 7409(d)(1).

2. EPA first promulgated a primary NAAQS for SO_2 in 1971. At that time, the Administrator determined that a standard of 140 parts per billion ("ppb") of SO_2 measured over 24-hours, or 30 ppb averaged annually, was requisite to protect public health with an adequate margin of safety. *See* 36 Fed. Reg. 8186 (Apr. 30, 1971). The Administrator reviewed the standard on several occasions following the 1971 decision, and determined in 1996 not to revise it. *See* 61 Fed. Reg. 25,566 (May 22, 1996).

The current NAAQS review process began after the D.C. Circuit remanded EPA's 1996 decision for further explanation. *See Am. Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998). EPA reviewed its air quality criteria, *see* 71 Fed. Reg. 28,023 (May 15, 2006), and proposed to revoke the existing 24-hour and annual NAAQS and to replace them with "a new 1-hour SO_2 standard within the range of 50-100 ppb." 74 Fed. Reg. 64,810, 64,810/1 (Dec. 8, 2009). EPA proposed the upper limit of 100 ppb in order to "appreciably limit" exposure to short-term (five-to-ten minute) SO_2 concentrations of 200 ppb or more. 74 Fed. Reg. at 64,842/2. It proposed the

lower limit of 50 ppb because it was "well below" the exposure levels where key epidemiological studies were conducted and would virtually eliminate situations where exercising asthmatic children were exposed to short-term SO_2 concentrations exceeding 200 ppb. 74 Fed. Reg. at 64,844/3.

In response to the proposed rule, numerous commenters explained why a standard of 100 ppb, or potentially even higher, was requisite to protect the public health with an adequate margin of safety. In addition, these commenters demonstrated that a standard set below this level would be more stringent than necessary to protect the public health with an adequate margin of safety. Among other things, the commenters explained that EPA's proposed rule was based on a misapplication of an American Thoracic Society statement on what type of public health effect is properly considered to be adverse, that EPA could not properly set the level of the standard based on the weak and confounded epidemiological evidence, and that the clinical studies before the Agency showed equivocal results that were inconsistent with a standard at the lower end or middle of the range EPA had proposed.

3. In June 2010, EPA published a final rule revising the SO_2 NAAQS. Pet. App. 23a. Based on the Administrator's consideration of certain human clinical studies and epidemiological studies,[2]

[2]Clinical studies, also known as controlled human exposure studies, measure the test subjects' responses, if any, to controlled concentrations of the air pollution agent being studied. *See* Pet. App. 8a. Epidemiological studies assess the association between ambient SO_2 concentrations and various

EPA set the level of the standard at 75 ppb, the mid-point of its proposal. Pet. App. 24a.

In support of her decision, the Administrator determined that a 1-hour standard at a level of 100 ppb "would appropriately limit" the occurrence of short-term SO_2 concentrations between 200 and 400 ppb, which were the levels of concern the Agency derived from the human clinical studies. *See* Pet. App. 155a. Although determining not to rely solely on the epidemiological studies because of concerns about confounding factors, *see* Pet. App. 75a, 81a-82a, 151a-152a, 158a n.19, the Administrator then relied in part on a subset of the epidemiological studies to "support…setting a standard that limits the 99th percentile of the distribution of 1-hour daily maximum SO_2 concentrations to 75 ppb," Pet. App. 160a. Included in the decision was an unspecified margin of safety, which the Administrator determined to be adequate because the standard was set below the lowest ambient SO_2 concentrations considered in the epidemiological studies on which the EPA relied in setting the level of the standard. *See* Pet. App. 160a-161a.

4. Asarco, along with several other regulated entities and states, brought timely petitions for review of the rule revising the SO_2 NAAQS and EPA's decision not to reconsider that rule. Asarco is a vertically integrated primary copper producer that produces annually a significant proportion of the nation's supply of refined copper.

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health-related events, such as emergency room visits. *See* Pet. App. 8a.

Asarco's Hayden Smelter in Arizona is one of the last three primary copper smelters remaining in the United States. The Hayden Smelter emits SO_2, currently is subject to requirements and controls for emissions of SO_2 imposed in part for the attainment and maintenance of the SO_2 NAAQS, and is part of a unit source category that EPA identified as being subject to controls for attainment of the revised NAAQS.

Asarco's suit was consolidated under the lead case *National Environmental Development Association's Clean Air Project v. EPA*, No. 10-1252 (D.C. Cir.). Asarco and numerous other petitioners challenged EPA's decision to set the revised NAAQS at the level of 75 ppb. The court below denied Asarco's petition for review.

In relevant part, the court below divided its decision into three sections.

First, the D.C. Circuit rejected the petitioners' claims that EPA had arbitrarily misapplied the American Thoracic Society's statement on what constitutes an adverse public health effect in setting the standard. The court found that "EPA . . . was not bound to set the SO_2 standard according to the [American Thoracic Society] guidelines," despite the fact that this was EPA's professed basis in setting the standard. Pet. App. 16a. The court instead held that "[i]t could [] not exceed EPA's authority to choose a level below that which produced adverse effects in the clinical studies in order to set a standard that allows an adequate margin of safety." Pet. App. 16a.

Second, the D.C. Circuit construed petitioners' challenge to EPA's use of epidemiological studies as a challenge to EPA's selection of three particular studies that EPA claimed showed statistically significant results in multi-pollutant models. *See* Pet. App. 17a-20a. The Court rejected this challenge because "[b]ased on the record . . . , we cannot conclude that the choice EPA made to give special weight to the three studies . . . was arbitrary or capricious." Pet. App. 20a.

Third, the Court of Appeals rejected the petitioners' claim that EPA's decision to set the revised NAAQS at 75 ppb was arbitrary because EPA disregarded the lack of statistical significance in clinical studies. Pet. App. 20a-21a. The D.C. Circuit invoked its precedent in *American Trucking Associations v. Whitman*, 283 F.3d 355, 371 (D.C. Cir. 2002), which it construed as holding "that EPA has discretion to set a NAAQS at a concentration level below a level that has been demonstrated to have a statistically significant association with negative health effects." Pet. App. 21a.[3]

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[3]All petitioners challenged statements in the preamble to the final rule regarding implementation of the revised standard through computer air quality modeling and EPA's decision not to reconsider these statements. The court dismissed these challenges for lack of jurisdiction. *See* Pet. App. 10a-13a. Numerous petitioners, including Asarco, also argued that EPA failed to consider whether revision of the NAAQS was appropriate in light of the minimal reduction in adverse public health outcomes that the revised standard would generate, and the reductions in future sulfur dioxide concentrations that EPA expected would be generated by other Clean Air Act programs. *See* Pet. App. 21a-22a. The court denied this challenge. *See*

REASONS FOR GRANTING THE PETITION

The question of whether reviewing courts, in considering challenges to NAAQS, may abdicate their duty under *Whitman* to consider whether the standard is more stringent than necessary to protect public health merely because EPA has authority to include *a* margin of safety, is of exceptional importance to the Nation. The Court's guidance on this question will dictate EPA's administration of the central feature of the Clean Air Act. The D.C. Circuit's conflict with *Whitman* is constitutionally significant because, as the Court held in *Whitman*, the requirement that EPA set NAAQS only at the "requisite" level was necessary to ensure that Congress' delegation of authority to EPA provided an "intelligible principle" for the Agency to follow.

Moreover, the question presented in this case is of continuing importance to EPA's administration of the Clean Air Act because EPA perpetually reviews and revises the NAAQS for different pollutants—two other NAAQS are in active litigation, and EPA has proposed revision to at least one more standard.

Finally, the question presented is economically significant to the Nation. The Court has recognized that the NAAQS "affect the entire national economy," *Whitman*, 531 U.S. at 475–76, and an overly-stringent standard not only exceeds

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Pet. App. 22a. Asarco does not seek certiorari on either of these issues.

Congress' delegation, it causes billions of dollars of economic dislocation.

For these reasons, the Court should grant certiorari and should reverse the decision of the District of Columbia Circuit.

I. THE DECISION BELOW CONFLICTS WITH THE COURT'S HOLDING IN *WHITMAN* THAT NAAQS MUST BE SET AT THE REQUISITE LEVEL

In the decision below, the D.C. Circuit found that the administrative record may not have "necessitated" the standard that EPA chose for the NAAQS, but held that the standard was nonetheless "requisite" because EPA is authorized "to set a standard that allows an adequate margin of safety." Pet. App. 16a, 21a. By upholding EPA's decision to set the NAAQS at some level below that which produced adverse health effects without considering whether the level was lower than necessary simply because EPA has included a purportedly-adequate margin of safety, the D.C. Circuit impermissibly broadened EPA's discretion beyond the bounds of the agency's properly delegated authority. It was not sufficient for the D.C. Circuit to find that EPA set the NAAQS at "a level below that which produced adverse effects." Pet. App. 16a. Rather, as this Court's decision in *Whitman* requires, reviewing courts are obligated to determine whether NAAQS are set "at the level that is . . . not lower or higher than is necessary [] to protect the public health with an adequate margin of safety." *Whitman*, 531 U.S. at 475-76. The Court should grant certiorari to

correct the conflict between the D.C. Circuit's new ground rules for reviewing NAAQS and *Whitman*.

1. In Section 109(b)(1) of the Clean Air Act, Congress specified its delegation of authority to the EPA Administrator by requiring that ambient air quality standards must be set at levels "requisite to protect public health," allowing an "adequate" margin of safety. 42. U.S.C. § 7409(b)(1). As the Court recognized, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and that it therefore "must provide substantial guidance on setting air standards that affect the entire national economy." *Whitman*, 531 U.S. at 475. While recognizing that a "'certain degree of discretion, and thus lawmaking, inheres in most executive or judicial action," the Court held that Section 109 is within constitutional bounds because the Act "require[s] the EPA to set air quality standards at the level that is 'requisite'—that is, not higher or lower than is necessary—to protect the public health with an adequate margin of safety." *Whitman*, 531 U.S. at 475-76 (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989)).

2. The District of Columbia Circuit's decision upholding the SO_2 NAAQS breaks fundamentally with the Court's decision in *Whitman*.

In the proceedings below, Asarco explained that EPA arbitrarily failed to consider the role that variability played in the key study results on which EPA based the revised SO_2 NAAQS, where

approximately half the affected study subjects experienced decreased lung function, half experienced increased lung function, and the results were not statistically significant. *See* Pet. App. 88a-89a. This was the equivalent of EPA "look[ing] over the heads of the crowd and pick[ing] out your friends." *See* Antonin Scalia, *A Matter of Interpretation* 36 (1997) (quoting Judge Harold Leventhal's aphorism about legislative history). Moreover, Asarco explained that EPA's professed rationale for finding adverse public health effects from these studies relied on the American Thoracic Society's statement on what constitutes an adverse health effect, but that EPA flatly misapplied that statement in reaching its decision. *See* Pet. App. 84a-86a.

Rather than consider Asarco's claims in light of the Court's directive that a NAAQS is lawful only where it is set at the level that is requisite to protect public health with an adequate margin of safety, the D.C. Circuit asked a different question: whether EPA had authority to set the NAAQS at "a level below that which produced adverse effects in the [key] studies in order set a standard that allows an adequate margin of safety." Pet. App. 16a. *See also* Pet. App. 21a (considering whether EPA "has discretion to set a NAAQS at a concentration level below a level that has been demonstrated to have a statistically significant association with negative health effects").

In so doing, the court below construed EPA's duty to allow an adequate margin of safety as relieving the court of its responsibility to address the

fundamental question posed by *Whitman*: whether the standard was not "requisite" because it was set at a level that was lower than would be adequate to protect public health. The District of Columbia Circuit's decision below even recognized that the standard might be more stringent than necessary, considering it an open possibility "that the studies" on which EPA relied may not have "necessitated a 75 ppb standard." Pet. App. 21. The decision below did not, however, answer the question whether the standard was more stringent than would be adequate to protect public health, even considering EPA's obligation to include an adequate margin of safety. Thus, the decision fundamentally is incompatible with this Court's decision in *Whitman*.

3. The Court's Rules expressly provide that certiorari is appropriate where a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10. The Court should grant certiorari to resolve the conflict between the D.C. Circuit's decision below and this Court's decision in *Whitman*.

II. ENSURING THAT AIR QUALITY STANDARDS ARE NOT MORE STRINGENT THAN IS NECESSARY TO PROTECT PUBLIC HEALTH IS A RECURRING ISSUE OF GREAT NATIONAL IMPORTANCE

The question presented in this case is an issue of national importance both because the D.C. Circuit's decision rewrites the ground rules for all

future air quality standards and because of the significant economic implications of setting an overly stringent NAAQS.

1. It is critical that the Court grant certiorari and reverse the District of Columbia Circuit's decision to ensure that the D.C. Circuit does not repeat the error in the decision below and take EPA's duty to include an adequate margin of safety as license to avoid the essential question of whether the NAAQS are set at the requisite level because this question regularly recurs.

EPA has promulgated NAAQS for six pollutants and is obligated to review, and if appropriate to revise, these standards every five years. *See* 42 U.S.C. § 7409(b)(1). Currently, EPA is litigating the lawfulness of recently-revised standards for carbon monoxide, *see Communities for a Better Env't v. EPA*, No. 11-1423 (D.C. Cir.), and ozone, *see Mississippi v. EPA*, No. 08-1200 (D.C. Cir.). EPA has proposed revisions of its particulate matter NAAQS. *See* 77 Fed. Reg. 38,890 (June 29, 2012). Finally, EPA is in the process of reviewing the lead air quality criteria, *see* 77 Fed. Reg. 5247 (Feb. 2, 2012), and nitrogen dioxide air quality criteria, *see* 77 Fed. Reg. 7149 (Feb. 10, 2002), which are part of the NAAQS review process.

By obliterating the lower bound limit on EPA's authority to set NAAQS at a level that is more stringent than necessary to protect public health with an adequate margin of safety, the ripple-effects of the D.C. Circuit's decision will impact every industry in the country with regulated air emissions.

While the Clean Air Act's grant of exclusive jurisdiction to review the D.C. Circuit's decision makes it unlikely that there would be a conflict among the courts of appeals on this issue, the significance of the question presented, as to EPA's administration of the Clean Air Act, is an important factor in deciding whether to grant certiorari, *see United States v. Ruzicka*, 329 U.S. 287 (1946), as is the question of the proper "construction of a major federal statute," *United States v. Donovan*, 429 U.S. 413, 422 (1977). The Court should, therefore, exercise its discretion to review the D.C. Circuit's decision.

2. The importance of this recurring question is amplified by the direct economic costs and dislocation of the Clean Air Act's ambient air quality standards. By EPA's own estimate, our nation's industries will incur enormous expense—$1.5 billion—to comply with the revised standard for sulfur dioxide. *See* Pet. App. 349a. In contrast, EPA estimates that the rule will have direct monetary benefits of $2.2 million, with indirect monetary benefits exceeding $14 billion. *See* Pet. App. 349a.

The Court has recognized the fact that a matter with a large economic impact that "turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari) (citation omitted); *see also United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983); *Comm'r v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977).

Given that the D.C. Circuit has exclusive jurisdiction to review EPA's national rulemakings under the Clean Air Act and petitions for review must be filed within 60 days of the final rulemaking, there is no further opportunity to challenge this rulemaking. Absent this Court's review, EPA's standard for sulfur dioxide will forever escape the careful hearing it deserves.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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