ORAL ARGUMENT NOT SCHEDULED
Nos. 21-1251, 21-1252 & 21-1253

In the United States Court of Appeals for the District of Columbia Circuit

HEATING, AIR-CONDITIONING, & REFRIGERATION DISTRIBUTORS INTERNATIONAL, *et al.*,
Petitioners,

v.

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

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency
86 Fed. Reg. 55,116 (October 5, 2021)

REPLY BRIEF FOR PETITIONERS HEATING, AIR-CONDITIONING, & REFRIGERATION DISTRIBUTORS INTERNATIONAL; AIR CONDITIONING CONTRACTORS OF AMERICA; PLUMBING-HEATING COOLING CONTRACTORS—NATIONAL ASSOCIATION; AND WORTHINGTON INDUSTRIES, INC.

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GLOSSARY

Act	American Innovation and Manufacturing Act
EPA	U.S. Environmental Protection Agency
EU	European Union
HFCs	hydrofluorocarbons
Worthington	Worthington Industries, Inc.

SUMMARY OF ARGUMENT

EPA cannot issue regulations without statutory authority, and its regulations cannot be arbitrary and capricious. The non-refillable cylinder ban and QR-code tracking mandate violate both of these prohibitions.

EPA admits that the Act does not expressly authorize the Agency to devise "complementary measures," like the cylinder ban and tracking mandate, to address concerns about hydrofluorocarbon smuggling. The Act never even mentions cylinders, QR codes, or smuggling. Instead, EPA claims authority implicitly conveyed through the words "shall ensure" in Subsection (e)(2)(B) of the Act. That argument fails from every angle. It is untethered from the Act's text, context, and structure, which all reflect Congress's intent that Subsection (e)(2)(B) constrain, rather than expand, EPA's authority. It is incompatible with the Act's prescriptive regulatory regime, which gave EPA specific tools to address specific problems. And it implausibly presumes that Congress intended to hide sweeping regulatory authority in the unremarkable phrase "shall ensure."

Regardless of whether Congress authorized EPA's ban and mandate through the phrase "shall ensure," they must still be vacated as arbitrary and capricious. EPA has no basis to conclude that banning non-refillable cylinders

will prevent smuggling; the Agency ignored comments proposing viable alternatives; dismissed uncontroverted evidence of the infeasibility of replacing the country's most commonly used and manufactured refrigerant cylinder with a type rarely used; and ascribed the cylinder ban unsubstantiated environmental benefits while disavowing any reliance on those surmised benefits in promulgating the ban.

Petitioners fully support the goal of the American Innovation and Manufacturing Act and the mechanisms Congress provided to accomplish it. But the cylinder ban and QR-code mandate are not among Congress's prescribed methods and do not advance the Act's goal. The ban and mandate should be severed from the Final Rule and vacated.

ARGUMENT

I. EPA Lacks Statutory Authority to Prohibit Non-Refillable Cylinders and to Mandate QR-Code Tracking.

"[T]he question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (emphasis omitted). "Where the statute … confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented'—whether

Congress in fact meant to confer the power the agency has asserted." *West Virginia v. EPA*, 597 U.S. __, slip op. at 17 (June 30, 2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

As Petitioners' opening brief explained, EPA's non-refillable cylinder ban and QR-code tracking mandate represent a sweeping expansion of EPA's regulatory authority that finds no basis in the Act's text or structure. There is no indication that "Congress in fact meant to confer the power the agency has asserted" here. *Id.*

EPA's response (at 59) concedes that the Act does not expressly confer authority to ban non-refillable cylinders or to mandate QR codes. Instead, EPA's sole asserted authority for the cylinder ban and tracking mandate is the phrase "shall ensure" in Subsection (e)(2)(B). Gov't Br. 51. According to EPA, that lonely phrase "contains 'no explicit grant of authority'" (Gov't Br. 59), yet *implicitly* grants the Agency sweeping power to devise any "complementary measures" EPA deems helpful to "enforce the requirement that regulated substances may only be produced or consumed when the necessary allowances are expended." Gov't Br. 51-52. Each of EPA's asserted justifications fails as a matter of plain language, context, structure, and simple logic.

A. Subsection (e)(2)(B) Constrains, Rather than Expands, EPA's Authority.

It is insufficient for EPA to say that "ensure" means "to make sure, [or] certain." Gov't Br. 52 (quoting *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 153 (D.C. Cir. 2010)). The issue is whether Congress authorized EPA to employ the *means*—the cylinder ban and tracking mandate—that EPA has chosen. That Congress used the word "ensure" does not answer that question. "Such a vague statutory grant is not close to the sort of clear authorization required" to justify an unexpected, previously "unheralded power." *West Virginia*, *supra*, slip op. at 20, 28. If that word were enough, then *every* statute that directs an agency to "ensure" one thing or another would authorize agencies' demands for all manner of "whatever-it-takes" extra-statutory "complementary measures" Congress neither envisioned nor intended. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

For example, in the case cited by EPA—*National Petrochemical & Refiners Association*, 630 F.3d 145—the statute at issue directed EPA "to *ensure* that gasoline sold or introduced into commerce in the United States … contains [a specified] volume of renewable fuel." 42 U.S.C. § 7545(*o*)(2)(A)(i) (emphasis added). EPA did not, and could not, construe that usage of "ensure" as empowering EPA to craft any unspecified "complementary measures"

tangential to setting renewable fuel volumes, even if helpful to prevent gasoline smuggling. EPA's regulations simply set forth the required renewable fuel standards and nothing more. *See* 630 F.3d at 151. No other agency or court, to our knowledge, has ever read the word "ensure" as expansively as EPA does here, and EPA certainly identifies none.

EPA also neglects the *context* in which these words appear. The Agency asserts (at 54-56) that its interpretation alone gives Subsection (e)(2)(B) any independent meaning. That is incorrect. Under Petitioners' reading, Subsection (e)(2)(B) sets out the annual *aggregate* production and consumption volume for "all regulated substances" and specifically describes *how* to calculate it. 42 U.S.C. § 7576(e)(2)(B). Nowhere else does the Act describe this aggregate quantity or specify that it is calculated by multiplying the production or consumption baseline by the applicable percentage listed on the table contained in subparagraph (C).

The annual volume calculated under Subsection (e)(2)(B), and EPA's obligation to "ensure" that it is met, then serves to constrain EPA's authority as it carries out other assigned tasks under the statute. Specifically, EPA "shall ensure" that the calculated aggregate quantity is met when: designing the "allowance allocation and trading program," § 7576(e)(3); setting the

quantity of allowances, § 7576(e)(2)(D)(i); adjusting exchange values, § 7576(e)(1)(D)(ii); permitting domestic manufacturing in excess of the number of production allowances held by the manufacturer, § 7576(e)(5); permitting domestic and international transfers, § 7576(g), (j)(2); or regulating the "servicing, repair, disposal, or installation of equipment," § 7576(h). In each case, EPA must "ensure" that the aggregate amount of all regulated substances "does not exceed" the amount calculated using Subsection (e)(2)(B)'s formula. Petitioners' reading thus gives the phrase "shall ensure" an independent meaning and clear function within the overall statutory framework. EPA ignores this statutory context at its peril: "shorn of all context, the word ['ensure'] is an empty vessel." *West Virginia*, *supra*, slip op. at 28.

EPA's interpretation disregards the Act's *structure* by ignoring each cross referenc to Subsection (e)(2)(B), which demonstrate Congress's intent that Subsection (e)(2)(B) *limit* rather than expand EPA authority:

Subsection (e)(2)(D)(i). This provision directs EPA "to use the quantity calculated under subparagraph (B)"—that is, Subsection (e)(2)(B)—"to determine the quantity of allowances for the production and consumption of regulated substances that may be used for the following calendar year." In

other words, when granting allowances—which would increase some parties' production and consumption—EPA must do so in a manner that *ensures* the aggregate production and consumption quantities calculated under Subsection (e)(2)(B).

Subsection (e)(5)(B)(iii). This provision permits EPA to "authorize a person" to produce regulated substances for export "in excess of the number of production allowances held by that person" insofar as it "would not violate paragraph (2)(B)." Again, the statute allows EPA to make these export adjustments so long as EPA *ensures* that the adjustments would not cause Subsection (e)(2)(B)'s aggregate limits on production to be exceeded.

Subsections (j)(3)(A) and (j)(3)(B). These provisions authorize EPA to reduce or increase production limits established under subsection (e)(2)(B) to ensure that internationally transferred production allowances do not result in the issuance of allowances exceeding Subsection (e)(2)(B)'s aggregate limits.

Each of these provisions refers to Subsection (e)(2)(B) as establishing the production and consumption quantities that EPA must ensure are achieved as it makes specified types of adjustments to allowances. No provision of the Act suggests that Subsection (e)(2)(B) authorizes EPA to craft whatever unmentioned "complementary measures" EPA demands to achieve

the Act's goals. Indeed, these other provisions contradict EPA's reading: It would make no sense for Subsection (e)(5)(B)(iii) to refer to "violat[ing] paragraph (2)(B)" if, as EPA insists, Subsection (e)(2)(B) operates as an additional (implicit) grant of rulemaking authority.

Petitioners' reading is further confirmed by two other provisions of the Act that use "ensure" in a similarly limiting way. Subsection (f) allows EPA to issue a "more stringent" phasedown schedule through notice-and-comment rulemaking, 42 U.S.C. § 7576(f)(1), and requires that "[a]ny regulations … shall … *ensure* that there will be sufficient quantities of regulated substances … for" certain essential uses and mandatory allocations. § 7576(f)(2)(A)(ii) (emphasis added). And Subsection (g) directs EPA to issue a regulation that will "*ensure* that the transfers under this subsection will result in greater total reductions in the production of regulated substances in each year than would occur during the year in the absence of the transfers." § 7576(g)(2)(A) (emphasis added).

In these two provisions, as in Subsection (e)(2)(B), the word "ensure" constrains EPA's authority; it does not expand it. Subsection (f) constrains EPA's ability to craft a more stringent phasedown schedule, so that it will not disrupt the supply for certain essential uses and mandatory allocations, and

Subsection (g) *limits* EPA's authority when promulgating regulations authorizing allowance transfers to achieve greater total reductions. No plausible construction of these provisions would read the term "ensure" to grant EPA sweeping general powers to devise "whatever-it-takes" complementary measures—whether to address packaging, smuggling, or other areas beyond any common sense understanding of the Act's scope—that EPA believes would help "ensure" these ends.

B. The Act Sets Out a Comprehensive Regulatory Regime that Forecloses Other Nonstatutory "Complementary Measures."

Petitioners' opening brief explained that the Act's other substantive provisions set out the means by which Congress empowered EPA to achieve Subsection (e)(2)(B)'s production and consumption limits. Those include Subsection (e)(3)'s allowance and trading program, Subsection (d)'s monitoring and reporting requirements, Subsection (k)'s enforcement provision, and Subsection (h)(1)'s authorization for EPA to regulate "any practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment." These provisions demonstrate that Congress enacted a comprehensive regulatory regime and did not implicitly preserve unspecified authority for EPA to regulate beyond the Act's express grants of authority.

With respect to Subsection (d), EPA responds (at 56-57) that this provision's reporting requirements "are not inconsistent with, and do not preclude," the QR-code tracking requirement. That misses the point. The point is not that Subsection (d) is *inconsistent* with QR-code tracking. It is that Congress's expressly specified monitoring and reporting directives demonstrate that Congress did not intend Section (e)(2)(B) to authorize the Agency to create an additional and completely separate monitoring and reporting regime. *See Am. Bar Ass'n v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005).

That same argument applies to Subsection (k). *See* Gov't Br. 59. The point is not that EPA's "complementary measures" for ensuring enforcement are inconsistent with the CAA's enforcement regime; it is that Congress's express conferral of enforcement mechanisms to ensure compliance with Subsection (e)(2)(B) precludes interpreting "shall ensure" to authorize EPA to create entirely different enforcement mechanisms—the cylinder ban and tracking mandate. *See Am. Bar Ass'n*, 430 F.3d at 469.

Remarkably, EPA does not even *acknowledge* Subsection (h), except to disclaim any reliance on it. Gov't Br. 53 n.14. Subsection (h) specifically authorizes EPA to "promulgate regulations to control, where appropriate, any

practice, process, or activity regarding the servicing, repair, disposal, or installation of equipment." § 7576(h)(1). That express direction about how EPA should regulate only the "practice[s], process[es], [and] activit[ies]" related to equipment demonstrates that if Congress intended EPA to regulate the cylinders used to distribute regulated substances, it would expressly say so. Instead, Congress expressly *limited* EPA's authority to the regulation of equipment, and says nothing about cylinders or packaging. *Id.* EPA has no answer to this argument.

C. Congress Did Not Hide Sweeping Regulatory Authority Behind the Phrase "Shall Ensure."

EPA claims (at 59-60) that the cylinder ban is not "an issue of … major economic significance." That is plainly wrong. The Rule bans the non-refillable cylinders used by 99% of the heating, ventilation, air-conditioning, and refrigeration industry, which EPA acknowledges will require the industry to "buil[d] up a fleet of refillable cylinders" that does not now exist, and which will radically alter how regulated substances are stored and transported in the United States. Gov't Br. 61; *see* Pets.' Br. 40. It will fundamentally restructure the manufacturing and supply chain. Pets.' Br. 47-50. And, as Petitioners described in their opening brief, EPA severely undercounted the non-refillable cylinder ban's roughly $2 billion price tag. *Id.* at 13.

The point here is not just that the effects of the ban and mandate are large; it's that these large effects come out of nowhere. No one reading the Act would have guessed EPA would read the words "shall ensure" to authorize EPA to ban non-refillable cylinders (not mentioned in the Act) and mandate QR-code tracking (not mentioned in the Act) in order to combat smuggling (not mentioned in the Act). In other words, there is no indication—not in the Act's text, or its structure, or its legislative history—that "Congress in fact meant to confer the power the agency has asserted." *West Virginia*, *supra*, slip op. at 17. Cliches about elephants in mouseholes don't even begin to capture just how untethered the cylinder ban and the QR-code mandate are from the statutory text. *See Am. Bar Ass'n*, 430 F.3d at 469.

Finally, EPA claims (at 61) that there is no slippery slope here because "EPA's regulatory authority to ensure the achievement of the phasedown is limited to complementary measures that are closely linked to the achievement of the phasedown limits" and within "EPA's realm of expertise." But EPA never identifies the source of that "closely linked" limit on EPA's extra-statutory power (other than, as EPA claims, "the statute … read as a whole"). Gov't Br. 61. If EPA's reading of "ensure" authorizes such complementary

measures, how attenuated from the statute's text or EPA's expertise can those measures be? EPA has no answer.

In any event, Petitioners' hypotheticals are hardly "far-flung" (*id.*). If EPA can ban the cylinders used by 99% of the industry, why can't it also regulate how those cylinders are shipped or stored, or where they come from? *See* Pet. Br. 29-30. EPA dismisses those (at 61) as matters outside its expertise because they affect "transportation" and "international trade." But the same can be said of *smuggling* and *cylinder design*, over which EPA now asserts authority. Just as "[w]e would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration," *West Virginia*, *supra*, slip op. at 26, we would not expect EPA to prescribe cylinder design and use to deter HFC smuggling—at least not without congressional direction far more explicit than "shall ensure."

II. The Non-Refillable Cylinder Ban and QR-Code Tracking Mandate Are Arbitrary and Capricious.

A. The Non-Refillable Cylinder Ban Is Arbitrary and Capricious.

1. *EPA irrationally concluded that banning non-refillable cylinders would effectively combat smuggling.*

Assuming, *arguendo*, that EPA has authority to ban non-refillable cylinders, Petitioners' opening brief explained (at 31) that EPA could not

justify the ban as an anti-smuggling measure because the same administrative records upon which EPA relied demonstrated that a similar ban in the European Union (EU)—the largest market to ban non-refillable cylinders—failed to stem rampant HFC smuggling. EPA's response and Final Rule both sidestep Petitioners' citations to docket records demonstrating the conspicuous *ineffectiveness* of non-refillable cylinder bans. Pets.' Br. 31-33. Instead, EPA selectively cites sources EPA believes "rationally connect[] the use of [non-refillable] cylinders with illicit activity." Gov't Br. 63-65. This response fails. The sources EPA cites do *not* rationally connect non-refillable cylinders with illicit activity, and thus do not support EPA's conclusion that the cylinder ban would mitigate smuggling. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Start with the Final Rule's claim that "[a]t least 500 incidents of illegal HFC imports have been reported [in the EU] from 2018–2020, and close to 90 percent of these instances are noted to involve [non-refillable] cylinders." 86 Fed. Reg. at 55,173; *see* Gov't Br. 65 (making similar claim for *2019*–2020). That a large proportion of EU imports involved non-refillable cylinders does not demonstrate that banning non-refillable cylinders is effective to reduce smuggling. Non-refillable cylinders are *banned* in the EU but predominate

outside of the EU, so of course the EU is stopping a disproportionate amount of banned non-refillable cylinders from entering the European market. But that is a function of the EU ban—not an indicator that non-refillable cylinders are more prevalent in smuggling. Indeed, EPA doesn't say—and maybe doesn't know—how much smuggling occurred in compliant refillable cylinders that was not interdicted.

Moreover, EPA's calculation substantially overstates the numbers. The cited database lists only 464 seizures *total*, and far fewer for the timeframes EPA selectively reported.[1] For all years in the United Nations database, less than 38 percent of seizures involved non-refillable cylinders.[2] Importantly, most of the reports (nearly 70 percent) concern Lithuanian seizures of non-refillable cylinders from Belarus or Russia that do not indicate whether the seizures were based only on the fact that non-refillable cylinders are banned in the EU or whether the substances themselves were prohibited from import.

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[1] Specifically, 336 for 2018–2020, including 161 for 2019–2020. *See* https://ozone.unep.org/countries/additional-reported-information/illegal-trade. Moreover, the percentage of these seizures that reference non-refillable cylinders is not even *close* to 90 percent (49 percent for 2018–2020 and 59 percent for 2019–2020). *Id.*

[2] 176 of 464 entries refer to "non-refillable" or "disposable" cylinders.

EPA also attempts to connect non-refillable "cylinders with illicit activity" by citing a finding that "72% [of industry survey respondents] had seen or been offered refrigerants in illegal disposable cylinders." Gov't Br. 63-64. But the study notably did *not* ask respondents about smuggling in any other types of containers; yet, unsolicited, "many companies also stated their belief that illegal [hydrofluorocarbons] were being placed on the market in refillable containers." JA__[EPA-HQ-OAR-2021-0044-0044-13 at 14].

The final source EPA cites (at 64-65) is a single sentence in a press release from the European Fluorocarbons Technical Committee. But EPA ignores that each member of the committee submitted comments *opposing* EPA's cylinder ban. JA__[EPA-HQ-OAR-2021-0044-0227-03 at 518 (Arkema); 511 (Chemours); 520-521 (Daikin); 474-475 (Honeywell); and 492-493 (Koura)].[3]

[3] Referencing experience with the European non-refillable cylinder ban, Arkema explained that hydrofluorocarbons were frequently smuggled in pre-charged equipment, JA__[EPA-HQ-OAR-2021-0044-0227-03 at 37-38], and that "[l]ow cost cylinders entered the market there that were marketed as refillable but in fact were not." JA__[EPA-HQ-OAR-2021-0044-0227-03 at 518.] Committee members also warned that EPA seriously underestimated increased demand for refillable cylinders, and overlooked inadequate cylinder supply and insufficient manufacturing capacity. JA__[EPA-HQ-OAR-2021-0044-0227-03 at 469, 492, 518, 520-522]. They also argued that EPA failed to examine infrastructure needs, logistical challenges, worker safety, and the

EPA's response also restates the Final Rule's unsupported assumption that banning non-refillable cylinders facilitates enforcement because non-refillable and refillable cylinders look different. Gov't Br. 67 (citing 86 Fed. Reg. at 55,173). But "looking different" does not require cylinders to be refillable, and EPA's record shows that EU smugglers readily embraced refillable cylinders to eliminate any visual distinctions. Pets.' Br. 32. As the following section explains, EPA never considered potentially superior cylinder design distinctions or whether visible distinctions could be accomplished with anything short of a non-refillable cylinder ban.

2. EPA never considered viable alternatives to the cylinder ban.

EPA argues (at 67-68) that it properly considered alternatives to the cylinder ban. But the measures EPA cites are alternatives (*e.g.*, tracking system, labeling requirements, auditing) are not actually "alternatives" to the non-refillable cylinder ban; they are other compliance provisions EPA *did* include in the Final Rule.

Instead, even assuming *arguendo* that EPA has authority to regulate cylinder design, EPA was required to consider and reasonably address

high cost of the ban in relation to its questionable benefits. JA__[EPA-HQ-OAR-2021-0044-0227-03 at 469-471, 474-475, 492-493, 518, 520-521, 524].

alternatives recommended by commenters, including Petitioners. Worthington, the only domestic company that actually makes such cylinders, developed and sent EPA alternative designs, distinct markings, and anti-counterfeiting measures (Pets.' Br. 33) to address EPA's stated need for a "visual tool for Customs officials and other enforcement personnel to easily identify illegal material." 86 Fed. Reg. at 55,175. EPA never even acknowledged receiving these alternative designs. Other commenters proposed measures—such as bounties, penalties, facility certifications, authentication programs, import pre-authorizations, coding, and changes to import documentation (Pets.' Br. 33-34)—that targeted the illegal hydrofluorocarbon trade. But EPA unreasonably rejected all alternatives based on EPA's erroneous (and inexplicable) assertion that those measures were unrelated to "potential illegal [hydrofluorocarbon] activity on the border and within the United States." 86 Fed. Reg. at 55,176.

"That falls well short of what is needed to demonstrate the agency grappled with an important aspect of the problem before it or considered another reasonable path forward." *Spirit Airlines, Inc. v. DOT*, 997 F.3d 1247, 1255 (D.C. Cir. 2021). Yet, notwithstanding EPA's failure to engage with Worthington's alternative designs thus far, should this Court set aside the

cylinder ban, Worthington remains committed to working with the government voluntarily and collaboratively to help facilitate enforcement and deter smuggling.

3. EPA's faulty assumptions about cylinder supply and manufacturing capacity are unsupported.

EPA proclaims (at 71) that its judgments about the sufficiency of refillable cylinder supply and manufacturing capacity are entitled to "significant deference." Not only is EPA's expertise about these topics questionable, *see King v. Burwell*, 576 U.S. 473, 474 (2015), but the record demonstrates that EPA did not seriously consider these capacity issues and dismissed the concerns of the cylinder manufacturers and users out of hand. Worthington and many industry representatives who purchase and fill such cylinders, demonstrated with confidential business data that there is insufficient manufacturing capacity to produce sufficient quantity of refillable cylinders to replace the entire domestic supply prior to the ban's effective date. Pets.' Br. 34-37. JA__[EPA-HQ-OAR-2021-0044-0227-03 at 516 - 523].

EPA did not identify any other manufacturers, assess manufacturing capacity, or even contest the concerns raised. Instead, EPA simply declared "there is significant global capacity for the production of refillable cylinders." JA__[EPA-HQ-OAR-2021-0044-0227-03 at 488]. EPA now touts a "supportive

comment from an entity that would be regulated by the disposable cylinder prohibition." Gov't Br. 71. That one comment (JA__[EPA-HQ-OAR-2021-0044-0154]) provided no response to the concerns raised by Worthington or producers and users of refrigerants. Nothing in the record contradicts Worthington's concerns about manufacturing capacity; EPA simply disregarded those concerns. "[A]n agency cannot rely on some comments while ignoring comments advocating a different position." *National Women's Law Center v. OMB*, 358 F. Supp. 3d 66, 91 (D.D.C. 2019).

EPA also responds that its presumption about cylinder supply/capacity sufficiency "was particularly reasonable given that other countries … had already required the transition to refillable cylinders, which meant that 'there is significant global capacity for the production of refillable cylinders.'" Gov't Br. 71. But this is a *post hoc* litigation position that EPA did not articulate in the record. Instead, EPA's response to comments stated: "The global market for refillable cylinders also provides a check on potential price increases given there is significant global capacity for the production of refillable cylinders." JA__[EPA-HQ-OAR-2021-0044-0227-03 at 488]. So EPA's point was that global refillable cylinder capacity is sufficient as a check on *price increases*. But that says nothing about whether capacity is sufficient to support a ban on

non-refillable cylinders. And EPA's *post hoc* rationalization does not even work. Other countries' decades-old experience reveals nothing about global capacity to supply refillable cylinders in 2025 or beyond. EPA skips any substantive analysis of this crucial concern. *Post hoc* or not, when EPA's explanation for its action "lacks any coherence," this Court owes no deference to the Agency's purported expertise. *Fox v. Clinton*, 684 F. 3d 67, 75 (D.C. Cir. 2012).

Nor are the "personal communications" that EPA relied upon concerning manufacturing capacity "adequately documented." *Contra* Gov't Br. 72 n.17. The only information in the docket is EPA's reference to the company where the individual works and the date (*e.g.*, "Personal communication between EPA and representatives of A-Gas, February 24, 2021.") [RIA 72 n. 60]. EPA doesn't purport to rely on the identity of the individual or the date of the communication. Rather, EPA purports to rely on the *substance* of what it learned, and that substance is not documented in the docket. *See* 42 U.S.C. § 7607(d)(6)(B); *Sierra Club v. Costle*, 657 F.2d 298, 402 n.513 (D.C. Cir. 1981).

4. EPA cannot rely on secondary environmental benefits from the ban, which are in any event unsupported.

EPA's rule acknowledges that illegal venting of "heels"—*i.e.*, the residual gas that sometimes remains in cylinders—was *not* "a part of the fundamental rationale or related to the authority upon which EPA is relying." 86 Fed. Reg. at 55,174. Indeed, Petitioners and others recommended options to address EPA's venting concerns that EPA regarded as "provid[ing] environmental benefit relative to the status quo," but did not consider them further because EPA said the "primary reason" for the cylinder ban was to address hydrofluorocarbon smuggling. 86 Fed. Reg. at 55,176. That should be the end of this Court's consideration of such emissions. EPA nonetheless argues in its response (at 77) that banning non-refillable cylinders will achieve emissions reductions, but EPA cannot rely on a rationale that it explicitly disavowed in the rulemaking. *See PDK Lab'ys Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004).

In any case, any reliance on such emissions benefits would have been misplaced. EPA says the benefits are based on a "reasonable estimate" of the amount of heel remaining in cylinders that the Agency claims is "thoroughly explained" in Appendix H-2 of EPA's Regulatory Impact Analysis (RIA). But it is no wonder EPA did not rely on such benefits to support the rationality of

the ban. Appendix H-2 summarizes a 2010 EPA-commissioned study that is not even in the docket or publicly available. JA__[RIA at 246]. Further, section 3.9 of the RIA claims the estimate was based on "several [unidentified] sources [who] suggested an estimate of approximately 0.96 pounds … would be reasonable," and *not* the 2010 study. JA__[RIA85]. Those so-called sources were two "personal communications" with unnamed individuals, the details of which are not summarized in the docket. JA__[RIA72 & nn.60-61, 81-85 n. 91].[4]

B. The QR-Code Mandate Is Arbitrary and Capricious.

Petitioners' opening brief demonstrated (at 47-50) that the QR-code mandate is arbitrary and capricious because EPA failed to sufficiently respond to the numerous, serious practical problems raised by Petitioners in their comments on the Proposed Rule. These included serious concerns about the mandate's massive burden on the supply chain and on the inventory management systems currently in place.

[4] The Natural Resource Defense Council's *amicus* brief does not add anything new. As Petitioners demonstrated in their opening brief, EPA's heel-venting estimates were significantly overstated. Pets.' Br. 38-39. And EPA has expressly disclaimed any argument the ban is meant to reduce heel venting. To the extent EPA has statutory authority to achieve "environmental benefits" through regulating cylinders, 86 Fed. Reg. at 55,176, it can still pursue reasonable alternatives to the cylinder ban if this Court sets aside the rule.

EPA's only substantive response is that it responded to these problems by delaying the mandate's effective date. That is not sufficient. As explained in Petitioner's opening brief, this is precisely the sort of "high-handed and conclusory" response this Court has found "insufficient." *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265-66 (D.C. Cir. 1994). EPA cannot simply hand wave away petitioners' substantive concerns with vague assurances that it will try to fix the problems in some unspecified way at some unspecified time.

CONCLUSION

Petitioners agree with EPA that the cylinder ban and the QR-code mandate are severable from the Final Rule. Gov't Br. 87. And consistent with the Motion for Expedited Consideration that the Court granted in this matter, Petitioners believe that challenges to the cylinder ban and QR-code mandate are amenable to expedited adjudication. The Court should sever and vacate the cylinder ban and QR-code mandate.

Dated: July 8, 2022

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and this Court's order issued March 15, 2022, that the attached Corrected Brief for Association Petitioners and Worthington Industries, Inc. contains 4,731 words and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Century font.

Dated: July 8, 2022

/s/ Ethan G. Shenkman
Ethan G. Shenkman

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2022, I caused the foregoing document to be electronically filed using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 8, 2022

/s/ Ethan G. Shenkman
Ethan G. Shenkman