No. 24-____

In the Supreme Court of the United States

STATE OF OHIO, ET AL.

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVE YOST
Ohio Attorney General

T. ELLIOT GAISER*
Ohio Solicitor General
**Counsel of Record*
MATHURA J. SRIDHARAN
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
thomas.gaiser@ohioago.gov

Counsel for Petitioner
State of Ohio

(additional counsel listed at the end)

QUESTION PRESENTED

It is a "basic" principle of administrative law that "[a]n agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020). This well-established rule, first articulated in *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), prevents courts from considering an agency's belated justifications for its decisions.

The Clean Air Act doubly protects against the risk of post-hoc justifications proscribed under *Chenery* by closing the administrative record to information and explanations added after rule promulgation. It limits the administrative record "exclusively" to specified materials compiled from rule proposal to finalization that support the EPA's bases for its action. 42 U.S.C. §7607(d)(7)(A). And it forbids courts from considering anything that "has not been placed in the docket as of the date of [the rule's] promulgation." 42 U.S.C. §7607(d)(6)(C). The Act thus forces the EPA to defend its actions on the materials included in the administrative record at promulgation.

However, before conducting merits review on the administrative record at promulgation, the D.C. Circuit remanded the record back to the EPA, allowing the Agency to supplement the record with new materials in an effort to cure a rulemaking defect identified by this Court on emergency review. *See Ohio v. EPA*, 144 S. Ct. 2040 (2024).

The Question Presented is: whether the Clean Air Act permits remand to the EPA to supplement the administrative record with new information and justifications after a rule is promulgated.

LIST OF PARTIES

The petitioners are the States of Ohio, Indiana, Kentucky, and West Virginia.

The respondents are the U.S. Environmental Protection Agency and Michael S. Regan, Administrator of the U.S. Environmental Protection Agency.

Intervenors below are City Utilities of Springfield, Missouri; City of New York; Commonwealth of Massachusetts; Commonwealth of Pennsylvania; District of Columbia; Harris County, Texas; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New Jersey; State of New York; State of Wisconsin; Air Alliance Houston; Appalachian Mountain Club; Center for Biological Diversity; Chesapeake Bay Foundation; Citizens for Pennsylvania's Future; Clean Air Council; Clean Wisconsin; Downwinders at Risk; Environmental Defense Fund; Louisiana Environmental Action Network; Sierra Club; Southern Utah Wilderness Alliance; Utah Physicians for a Healthy Environment; and Midwest Ozone Group.

LIST OF DIRECTLY RELATED PROCEEDINGS

This case began as petitions for review in the D.C. Circuit. That case is *Utah, et al. v. EPA*, *et al.*, Nos. 23-1157, 23-1181, 23-1183, 23-1190, 23-1191, 23-1193, 23-1195, 23-1199, 23-1200, 23-1201, 23-1202, 23-1203, 23-1205, 23-1206, 23-1207, 23-1208, 23-1209, 23-1211, 23-1306, 23-1307, 23-1314, 23-1315, 23-1316, 23-1317.

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INTRODUCTION

Some cases return to this Court on unfinished business. *See, e.g.*, *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230 (2019); *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79 (2018); *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015); *Bond v. United States*, 572 U.S. 844 (2014). This case returns on business that should have been finished by now. The facts are no doubt familiar: the EPA promulgated a regulation—a federal-implementation plan—governing twenty-three States' air-quality obligations without considering an important aspect of the problem: "What happens—as in fact did happen—when many of the upwind States fall out" of the federal plan. *Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024). This Court stayed the plan a few months ago pending review on the merits in the D.C. Circuit. *Id.* at 2053–54. Should the States prevail on the merits "on the existing record," this Court held, they would be "entitled" to "revers[al]." *Id.* at 2055 n.11, 2054 (quoting §7607(d)(9)) (alteration in original).

With the federal plan stayed, the only remaining business for the D.C. Circuit was to look at the existing administrative record on the merits and either confirm the Supreme Court's prediction that the States would prevail, reversing the plan, or deny the prediction, sustaining the plan. But the EPA was determined to protect its defective plan from reversal. In the first of two attempts to avoid review of the existing record and reversal, the Agency tried to create a super administrative record—complete with post-hoc justifications for why the twenty-three-state federal plan still worked for the then-remaining eleven States—by consolidating a record created *after* the rule was promulgated with the existing one. But this Court had been presented with that option at the stay-

stage and determined that the option was foreclosed because "the Clean Air Act prevents" courts "from consulting" such "explanations and information offered after the rule's promulgation." *Id.* at 2055 n.11. So constrained, the court below had no option but to reject the EPA's attempt to end-run the statute and this Court's directive.

Undeterred, the EPA tried once more. This time, the Agency asked the D.C. Circuit to remand the case back to the Agency to supplement the administrative record with new justifications for the federal plan. At that point, recall that *no* court had addressed the merits of this case on the record promulgated with the final rule. Nevertheless, the D.C. Circuit acquiesced, permitting the EPA to supplement the administrative record without affording so much as an opportunity for affected parties to comment on the additions to the record.

The EPA's choice to "cut[] corners," with the D.C. Circuit's blessing, is fatal to its case. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 591 U.S. 1, 24 (2020). Indeed, this Court has long held that the People must "'turn square corners when they deal with the Government,'" and the Government must reciprocate in kind by "'turn[ing] square corners in dealing with the people.'" *Id.* (first quoting *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920) (Holmes, J.), then quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)). To that end, it is a "basic" rule of administrative law that "[a]n agency must defend its actions based on the reasons it gave when it acted." *Id.*; *SEC v. Chenery Corp.*, 318 U.S. 80, 84 (1943). Agencies may not offer belated justifications for their decisions. *Chenery*, 318 U.S. at 87–88.

The Clean Air Act doubly protects against the risk of these post-hoc justifications proscribed under *Chenery*. It limits the administrative record for judicial review "exclusively" to the materials supporting the agency's bases for the rule from proposal through promulgation. 42 U.S.C. §7607(d)(7)(A). And it restricts judicial review to the materials placed in the record "as of the date of such promulgation." §7607(d)(6)(C). These statutory guardrails close the administrative record to later-added information and explanations, thus protecting against the risk that the agency will insert belated justifications into the record while judicial review is underway. These textual guardrails answer the Question Presented: the Clean Air Act does not permit remand back to the EPA to supplement the administrative record with remedial justifications for its action.

If there is a silver lining to the D.C. Circuit's remand, it is this: the EPA's maneuver presents the best vehicle to answer this important, but often overlooked, question. The timing of the lower court's remand—before any court has rendered a decision on the merits of the existing record—strips the Question Presented of any of its common camouflage. Usually, courts remand to the EPA to supplement the administrative record after they decide that the EPA acted unlawfully in promulgating a rule under the Act. In other words, such remands function as a remedy. On appeal, questions related to remedy are often overlooked because they are buried under the more-prominent questions about the lawfulness of the agency's decision. So, few petitions shine as clear a spotlight as this case does on the Question Presented. This Court should take this rare opportunity to address this often overlooked but critically important issue.

And the Court's answer will affect more than this sort of pre-merits-review remand. It will also decide whether courts may grant such remands *at all*, as they often do, as a remedy for a rulemaking defect under the Clean Air Act.

There are additional benefits to review now rather than after the D.C. Circuit completes merits review on a supplemented record. If the States are right on this issue and the Court invalidates the remand on appeal from a decision on the mixed record, the parties will have wasted time supplementing and litigating over a record later held partially invalid. The D.C. Circuit would have to redo its analysis over a record available now. Thus, unravelling the error later will waste more time and resources than answering this question now. And a petition after a decision on the merits will also include questions involving the technical and fact-intensive issues plaguing the challenges on the merits. Review now avoids those technical issues and allows the Court to focus on the pure legal question presented in this petition.

Finally, the remand here could be seen by some to defy this Court's clear directive—to consider the merits of the agency's action on the existing record—at the emergency-review stage in this very case. But even if the remand was in keeping with this Court's decision and did not violate the record-building provisions of the Act, such a remand has one additional defect. It erases the stated remedy under the Act (and the one already identified by this Court for this case) for defective rulemaking: reversal of the agency's action. §7607(d)(9); *see Ohio*, 144 S. Ct. at 2054, 2055 n.11. Put it this way: the court gave the EPA a chance to rewrite its D- paper before grading had even begun. The law allows no such second tries.

OPINIONS BELOW

This case originated in the D.C. Circuit. Ohio and five other States, along with several industry groups, petitioned this Court for review of a final rule promulgated by the Environmental Protection Agency entitled Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards. 88 Fed. Red. 36,654 (June 5, 2024). After the D.C. Circuit denied the request of several petitioners to stay the federal plan, several petitioners sought and obtained a stay from this Court. *Ohio v. EPA*, 144 S. Ct. 2040, 2058 (2024).

After this Court issued its stay and merits briefing had been completed in the D.C. Circuit, the EPA sought a partial remand of the case back to the Agency. The D.C. Circuit granted the EPA's request and remanded the administrative record to the Agency for supplementation. The decision of the court of appeals is unpublished, but is available at *Utah v. EPA*, 2024 U.S. App. LEXIS 23314 (D.C. Cir. Sept. 12, 2024); Pet. App. 2a.

JURISDICTIONAL STATEMENT

The D.C. Circuit granted the EPA's request to remand the record back to the Agency. Pet. App. 2a. This Petition timely invokes this Court's jurisdiction under 28 U.S.C. §1254 and 28 U.S.C. §2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are relevant to this case and included in the appendix filed with this petition:

42 U.S.C. §7607(d).

STATEMENT

1. The Clean Air Act tasks the States and the federal Environmental Protection Agency with working together to achieve the nation's air-quality goals. Among the various programs established by the Act, the national ambient air quality standards program tasks the EPA with identifying harmful pollutants and establishing national air-quality standards. §§7409(a)(1), (b)(1). The baton then passes to the States, which have three years to design state-implementation plans to provide for the "implementation, maintenance, and enforcement" of that standard in their jurisdictions. §7410(a)(1). Among other legal requirements imposed by the Act, in their state-implementation plans, States must account for pollution that travels beyond their borders into downwind States. §7410(a)(2)(D)(i). Their plans must be designed to reduce in-state emissions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other State" of the relevant air-quality standard. §7410(a)(2)(D)(i)(I).

After the States submit their plans, the baton returns to the EPA. The EPA has "'no authority to question the wisdom of a State's choices of emission limitations.'" *Ohio,* 144 S. Ct. at 2048 (quoting *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975)). As long as a state plan meets the applicable requirements of the Act, the EPA must approve it within 18 months of the State's submissions. §7410(k)(3); *see* §§7410(k)(1)(B), (k)(2). And only when a state plan "falls short" can the EPA impose a federal-implementation plan of its devise. §7410(c)(1).

2. The Clean Air Act also dictates the process by which challenges to the EPA's rulemaking must

proceed. 42 U.S.C. §7607. These judicial-review provisions allow litigants to bring challenges arising from the just-discussed process of setting and implementing air-quality standards in federal courts of appeals, often in the D.C. Circuit. §7607(b). For example, a petition for review challenging the standards set under the three major Clean Air Act programs—the National Ambient Air-Quality Standard program, Hazardous Air Pollutants program, and New Source Emissions Standards program—must be filed in the D.C. Circuit Court of Appeals. §7607(b). "[N]ationally applicable regulations" and actions "based on" the Administrator's "determination of nationwide scope or effect" must also be filed in the D.C. Circuit Court of Appeals. *Id.*

The Act also provides explicit procedures for judicial review. Some background into this Court's seminal decision in *SEC v. Chenery Corp.*, 318 U.S. 80, 84 (1943) (*Chenery I*) is helpful to understand these procedures as they stand today. The dispute giving rise to *Chenery I* is a familiar one. Briefly, the Securities and Exchange Commission urged this Court to uphold its final order on belated justifications on which it had not based its original decision. This Court would not sustain the order on the Commission's post-hoc justifications, explaining that the Commission's action "must be measured by what the Commission did, not by what it might have done." *Id.* at 93–94. Put another way, the lawfulness of an agency's actions must be assessed "in light of the explanations [they] offered" for their actions "rather than any *ex post* rationales a court can devise." *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021). The holding in *Chenery I*—that "[a]n agency must defend its actions based on the reasons it gave when it acted"—has since become a "basic"

principle of administrative law. *Regents*, 591 U.S. at 24; *see, e.g., Ming Dai*, 593 U.S. at 369; *Michigan v. EPA*, 576 U.S. 743, 758 (2015); *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 301 (2015); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981); *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2479 (2024) (Jackson, J., dissenting) (explaining that the Court's administrative-law jurisprudence disallows courts from considering what happened after rulemaking completed).

The first iteration of the Act's judicial-review procedures largely ignored the problems warned of in *Chenery I*. Clean Air Amendment of 1970, Pub. L. 91–604, §12(a), 84 Stat. 1676, 1707–08 (1970) (§307). As enacted in 1970, the judicial-review provision allowed "any party," including the EPA, to seek leave to amend the administrative record with new evidence while judicial review is underway. *Id.* at §307(c). That provision also allowed the Administrator of the EPA to then "modify" his findings, "make new findings" and to "file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination" based on the new evidence added to the record. *Id.* In other words, the first iteration of the judicial-review provisions did not require that judicial review be conducted over a closed administrative record. The record could be supplemented at any time during the judicial-review process.

Operating in this manner proved unworkable. Five years after the provision was enacted, a veteran attorney for the EPA criticized the "chaos" that the provision's open approach to record-building created. He, in turn, proposed a process for building

administrative records that would be closed by the time the records are certified to reviewing courts. William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38, 70 (1975). Among his criticisms for the state of affairs at that time, Pedersen explained that "the open ended and disorganized way in which rulemaking records [were] compiled," *id.* at 71, encouraged courts to violate the principle established in *Chenery I*—that is, that an agency may not defend its decisions in court on post-hoc justifications either of its own or of its counsel during litigation. *See Chenery I*, 318 U.S. at 94; *Regents*, 591 U.S. at 23.

Pedersen observed that the Act's open approach of iterative record building while judicial review was underway encouraged everyone to circumvent *Chenery*. The EPA could supplement administrative records after rulemaking had closed, doing violence to the "historical" principle that courts review records explaining "what the agency *actually* weighed and evaluated in some manner at the time of the rulemaking." *Id.* at 65. Agency counsel too could inject their litigation rationales into the ever-changing administrative record even if their litigation rationales had not formed the basis for the Agency's actions. *Id.* at 65 n.105. The *Chenery* problems did not end with the Agency. The original Act encouraged courts to search for their own bases to uphold favored rulemaking, even if the Agency had not relied on them. *Id.* at 70–73. And *both* parties—litigants and the agency alike—encouraged the court's "tendency" to circumvent *Chenery* by finding ways to cite and discuss records found nowhere in the record at the time the rule was promulgated. *Id.* at 72. To resolve this problem, Pedersen proposed a closed record-building process beginning with materials supporting the Agency's basis for

proposing a rule, adding the comments, critiques, and data offered by affected parties in the comment period, and ending with materials supporting the final rule at promulgation. *Id.* at 87. Under his proposed process, "when judicial review began, the record would be closed." *Id.*

Pedersen's views proved highly influential. In 1977, Congress amended the Act's judicial-review statute. Clean Air Act Amendments of 1977, Pub. L 95–95, 91 Stat 685, 772–77 (1977) (§305). The House Report on the 1977 Amendments to the Clean Air Act acknowledged that these amendments were "[b]y and large," "a legislative adoption of the suggestions for a rulemaking record set forth" by Pedersen. H.R. Rep. No. 95-294, at 319 (1977) (citing Pedersen, *Formal Records and Informal Rulemaking,* 85 Yale L.J. 38).

The amendments to the judicial-review provisions added the double protections present in the Act today against the *Chenery* concerns raised by Pedersen. One provision prevents the "promulgated rule" from being based (in part or in whole) on any information or data which has not been placed in the docket "as of the date of such promulgation." §7607(d)(6)(C); *see* 91 Stat 775. This forecloses courts from reviewing anything added to the record after rule promulgation. Another provision states that "[t]he record for judicial review shall consist exclusively of" several different components relevant to the proposal, comment period, and finalization stages of rulemaking. §7607(d)(7)(A); *see* 91 Stat 775. The record must include materials associated with the *proposed* rule, including the proposed rule's statement of basis and purpose summarizing the data, methods, and the major legal interpretations and policy considerations. §7607(d)(3)(A)–(C). Those materials must include all supporting data,

information, and documents "included in the docket on the date of publication of the proposed rule." §7607(d)(3). The record also must include evidence collected during the comment period, including the comments received and transcripts of any public hearings held on the proposed rule. §7607(d)(4)(B)(i). Last, the record must include everything associated with the *final* rule, such as the statement of basis and purpose for the final rule, an explanation of the reasons for any major changes from the proposed rule, and responses to major comments, criticisms, and new data submitted during the comment period. §7607(d)(6)(A)–(B). After promulgation, the record-building period closes. By the time judicial review is underway, the administrative record on review is thus doubly closed to new information or explanations collected or created after promulgation.

On review of the record at promulgation, courts may "reverse" actions that they find are "arbitrary, capricious, an abuse of discretion," unconstitutional, in "excess" of the EPA's statutory authority, or otherwise unlawful. §7607(d)(9).

3. This case arises from the EPA's most recent effort to tackle interstate air pollution. In October 2015, the EPA reduced the national ambient air-quality standard for ozone from 75 to 70 parts per billion. 80 Fed. Reg. 65,292, 65,301 (Oct. 26, 2015). That change triggered the States' obligation to update their state-implementation plans. §7410(a)(1). The EPA told the States that they would have "flexibility" in addressing their good-neighbor obligations. *Ohio,* 144 S. Ct. at 2049 (citations omitted). Armed with that assurance, many States submitted state-implementations plans with only modest updates, concluding they would not need to adopt additional emissions-control measures

to satisfy their good-neighbor obligations. The States offered many reasons for their conclusions, including that they were not contributing to downwind air-quality problems and that they could not identify additional cost-effective methods of controlling the emissions beyond those they were currently employing. *Id.* Other States did not submit state-implementation plans.

After sitting on the States' submissions well past its statutory obligation to act on them, the EPA suddenly announced, on a single day, its intent to disapprove *nineteen* States' plans, including those of Ohio, Indiana, West Virginia, and Kentucky. *Id.* (citations omitted). Several months later it proposed to disapprove four more States' plans. Less than two months later, and while public comment on the proposed state-plan disapprovals was still open, the EPA proposed a single federal-implementation plan that would impose substitute obligations on States without valid state-implementation plans—including Ohio, Indiana, West Virginia, and Kentucky—either because the EPA had rejected it or the State had failed to submit one. 87 Fed. Reg. 20,036, 20,038 (Apr. 6, 2022). This federal plan took a coordinated approach to apportioning the responsibility of reducing emissions "collectively" among "contributing upwind states" in an "efficient and equitable" manner. *Id.* at 20,076 (quotation omitted); *see Ohio*, 144 S. Ct. at 2049–51.

To do so, the EPA selected "measures" for each emissions-source category that "would maximize cost-effectiveness in achieving downwind ozone air quality improvements," by "focus[ing]" on the "knee in the curve, or the point at which more expenditures in the upwind States were likely to produce very little in the

way of additional emissions reductions and air quality improvement downwind." *Ohio*, 144 S. Ct. at 2050 (quotations and internal quotation marks omitted and alterations accepted).

Commenters warned the EPA against taking this coordinated approach. Many commenters believed and noted that the EPA's disapprovals of the state plans were legally flawed. *Id.* (collecting comments). And, because an operative state-plan disapproval is the legal predicate for the EPA's authority to impose a federal-implementation plan in a particular State, *see* §7410(c)(1), that meant the EPA would lack authority to impose its federal plan on States where litigation had paused the EPA's state-plan disapproval in that State. So, "if the [federal plan] did not wind up applying to all 23 States as EPA envisioned, commenters argued, the agency would need 'to conduct a new assessment and modeling of contribution and subject those findings to public comment.'" *Ohio*, 144 S. Ct. at 2050 (citing as examples Comments of Air Stewardship Coalition 13–14 (June 21, 2022) and Comments of Portland Cement Association 7 (June 21, 2022)).

Nevertheless, the EPA pressed on. It first disapproved, *en masse*, twenty-one States' plans (two, in part) in February of 2023. 88 Fed. Reg. 9,336 (Feb. 13, 2023). Many States took to the courts over that action. Quickly, the commenters' warnings were "vindicate[d]." *Ohio*, 144 S. Ct. at 2051. Within months, in May, two circuits stayed the state-plan disapprovals of four of the States covered by the proposed federal plan, precluding the EPA from enforcing the federal plan on them. *Id.* (citations omitted). But the EPA continued, finalizing the federal plan for all twenty-three States despite *knowing* that the plan would not cover all of them as originally contemplated. 88 Fed.

Reg. 36,654 (June 5, 2023). After that, the EPA continued to receive bad news. Courts around the country continued to stay the EPA's state-plan disapprovals. Because each new stay precluded the EPA from enforcing the federal-implementation plan on that State, the twenty-three state group over which the federal plan was supposed to apply dwindled down to eleven. *See Ohio*, 144 S. Ct. at 2051–52.

Several States and industry groups challenged the federal plan in the D.C. Circuit arguing, among many things, that the Rule should be reversed as arbitrary and capricious for failing to consider whether and how the coordinated, twenty-three state plan will apply to any different mix of States. As part of the challenge, they sought a stay of the federal plan. The D.C. Circuit denied the stay.

4. If this all sounds familiar to this Court, it should. After the lower court denied a stay, several state and industry petitioners sought a stay before this Court. In a decision the Court acknowledged hinged "ultimately" on the fact that the applicants are "likely to prevail at the end of this litigation," the Court stayed the federal-implementation plan. *Ohio*, 144 S. Ct. at 2053.

The problem? The EPA adopted a plan premised on full participation of all twenty-three upwind States without considering the question, "[w]hat happens—as in fact did happen—when many of the upwind States fall out of the planned [federal plan] and it may now cover only a fraction of the States and emissions EPA anticipated?" *Ohio*, 144 S. Ct. at 2053–54. More specifically, the EPA failed to consider whether "the point at which emissions-control measures maximize cost-effective downwind air-quality improvements"—

that is, the knee in the curve—"shift[s]" when "the mix of states changes, … and their particular technologies and industries drop out with them." *Ohio*, 144 S. Ct. at 2054 (quotation omitted). Based on the EPA's failure to consider "an important aspect of the problem" and to supply "a satisfactory explanation for its action," the Court concluded that the applicants are "likely to be entitled to" reversal. *Ohio*, 144 S. Ct. at 2054 (internal quotation marks omitted).

While proceedings on the stay applications before this Court were ongoing, the EPA issued a document in response to several petitions for reconsideration in which it purported to provide further explanations justifying the application of the twenty-three state plan to the eleven then-remaining States. *Ohio*, 144 S. Ct. at 2055 n.11 (citing 89 Fed. Reg. 23,526 (2024)). It notified this Court of that document. But the Court explained that the Clean Air Act, specifically §7607(d)(6)(C) and §7607(d)(7)(A), "prevents [the Supreme Court] (and courts that may in the future assess the [federal plan]'s merits) from consulting explanations and information offered after the rule's promulgation." *Id.* Rather, courts can only look to "the grounds that the agency invoked when it promulgated the" federal-implementation plan. *Id.* (internal quotation marks omitted). The Court reiterated that the applicants are "entitle[d]" to "revers[al]" should they show the Rule is arbitrary and capricious *on the existing record*. *Id.* (quoting §7607(d)(9)(A)).

5. Since then, the EPA has maneuvered to expand the existing record. First, while merits briefing was underway in the D.C. Circuit, the EPA tried to add to the existing record a document it created after the federal plan was promulgated by consolidating several appeals (and their respective administrative records)

from denials of petitions for reconsideration with this challenge. Mot. in *Utah v. EPA*, No. 23-1157, etc. (D.C. Cir. July 5, 2024) (ECF 2063227). The new document was the same one that the EPA offered to this Court at the stay-stage, which purported to explain that the twenty-three state plan works for the remaining eleven States and which this Court held was foreclosed from judicial review. *See Ohio*, 144 S. Ct. at 2055 n.11. The petitioners vigorously opposed the EPA's consolidation maneuver, arguing that it was an improper end run around this Court's directive that the Act prevents courts from considering such explanations proffered after rule promulgation. Foreclosed by that direct holding, the D.C. Circuit denied the EPA's request. Or. in *Utah v. EPA*, No. 23-1157, etc. (D.C. Cir. July 30, 2024) (ECF 2067416).

Undeterred, the EPA tried again to get a second bite at the apple. This time it was successful. Just one day after merits briefing had completed in the D.C. Circuit, the EPA notified petitioners that it would be asking the court to partially remand the Rule so it could "take a supplemental final action addressing the record deficiency preliminarily identified by the Supreme Court." Resp. in *Utah v. EPA*, No. 23-1157, etc., at 6 & n.5 (D.C. Cir. August 15, 2024) (ECF 2070323) (quoting Mot. in *Utah v. EPA,* No. 23-1157, etc., at 1 (D.C. Cir. Aug. 5, 2024) (ECF 2068299)); Pet. App. 26a (quoting Pet. App. 12a). Again, the petitioners opposed, arguing that the EPA must make its case on the existing record and without supplemental explanations produced during litigation. Moreover, the petitioners explained, should the court remand the case back to the Agency, it must also vacate the Rule because the remedy to which the States are "entitled" under the Act is "reversal." *Ohio*, 144 S. Ct. at 2054,

2055 n.11 (alteration accepted and quotation marks omitted).

The D.C. Circuit disagreed with the petitioners. Pet. App. 2a. In an unreasoned decision, the court remanded the record back to the Agency for curative supplementation. Pet. App. 2a. The Court denied the petitioners' request to vacate the Rule should it be remanded back to the Agency. Pet. App. 2a. Now, the consolidated cases are being held in abeyance indefinitely until the EPA finishes adding new information and justifications to the record. *Id.*

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit violated both Congress's and this Court's directives by allowing the EPA to add new information and justifications to the record after rule promulgation.

Whether courts may grant remands back to the Agency to fix a defective rule while leaving it in place is a hot topic. It has drawn the attention of academics and jurists alike. *See, e.g.*, John Harrison, *Remand Without Vacatur and the Ab Initio Invalidity of Unlawful Regulations in Administrative Law*, 48 B.Y.U. L. Rev. 2077 (2023); Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291 (2003); *Administrative Law–Environmental Law-Remedies–D.C. Circuit Upholds Vacatur and Remand of Dakota Access Pipeline Easement, Reverses District Court Order to Cease Pipeline Operations.*—Standing Rock Sioux Tribe v. U.S. Army, 135 Harv. L. Rev. 1688, 1688 (2022); Christopher J. Walker, *Against Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. Online 106 (2017). Justice Scalia once even declared

in private correspondence that it would "buy[] grief to suggest that a court may exercise its equitable discretion" to "leav[e] a regulation 'not in accordance with law' in effect." Levin, *"Vacation,"* at 352 (quoting letter from Justice Antonin Scalia to Justice Anthony Kennedy regarding draft opinion in *Bowen v. Georgetown Univ. Hospital* (Nov. 28, 1988)).

In the context of the Clean Air Act, however, that debate has been settled. Such curative remands without vacatur are altogether unavailable to the EPA under the Clean Air Act, which disallows record supplementation after rule promulgation. Congress strictly foreclosed the EPA from curing its rulemaking defects by supplementing the administrative record with new information or explanations after promulgation. The Act mandates that the record on judicial review consist exclusively of materials collected and developed through rule promulgation, and the Act restricts judicial review to that record alone. *See* 42 U.S.C. §§7607(d)(6)(C), 7607(d)(7)(A). This closed-record process unique to the Act is *more* protective than *Chenery*: it protects litigants from the risk that the agency will insert belated justifications into the record by way of record supplementation. *See Chenery I*, 318 U.S. at 87–88. This Court has already said as much, albeit at a different stage of this case: that belated record supplementations may not be considered as part of the administrative record under the Act. *Ohio*, 144 S. Ct. at 2055 n.11.

Remanding for record supplementation before any court has rendered a decision on the merits, as the D.C. Circuit did here, violates the Clean Air Act in one other way. It erases the remedy available under the Act—reversal—by avoiding that outcome through iterative record building. §7607(d)(9). Again, this

Court spoke to that already at a prior stage of this case. *Ohio*, 144 S. Ct. at 2054 & 2055 n.11. The remand at issue here thus violates both Congress's statutory order and directly conflicts with this Court's order in this very case.

A. Congress in the Clean Air Act doubly protected against potential *Chenery* violations by directing courts to review agency action on a closed administrative record that may not be changed after rule promulgation.

Under the Clean Air Act, courts must review agency action on the administrative record fixed at the time the rule was promulgated. §7607(d)(6)(C); §7607(d)(7)(A). The reason why "start[s]" and ends "with the text of the statute." *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) (internal quotation marks omitted).

Two provisions, §7607(d)(6)(C) and §7607(d)(7)(A), define the record-building process for judicial review under the Act. One specifies that the materials compiled during the rulemaking process through promulgation—that is, data, methods, legal and policy justifications, comments, and the Agency's responses to significant comments and criticisms—"*exclusively*" make up the record for judicial review of any rulemaking under the Act. §7607(d)(7)(A) (emphasis added). "Exclusively" carries the same ordinary meaning now as it did when these provisions were enacted: "excluding or tending to exclude all others" and "being the only one of its kind." "Exclusive," *Webster's New World Dictionary* 489 (2d College Ed. 1976). Simply put, nothing collected or created after promulgation counts. The other provision reinforces this conclusion by confirming that the "promulgated rule *may not be*

based (in part or whole) on any information or data which has not been placed in the docket *as of the date of such promulgation*." §7607(d)(6)(C) (emphases added). Any regulation promulgated under the Act, including the federal plan at issue here, must therefore stand or fall on the record at the time it was promulgated; data, analysis, explanations, and justifications considered or created after the rule is promulgated cannot be used to justify prior decisionmaking.

By limiting judicial review to a closed record fixed at the time the Rule was promulgated, the Act twice inoculates against the *risk* of a *Chenery* violation. Because the record on review consists exclusively of the materials in the record at promulgation, courts may not consider new explanations, justifications, or other information belatedly supporting the agency's action. §§7607(d)(6)(C), 7607(d)(7)(A). After all, such iterative record building presents an opportunity for an agency to "cut[] corners" by inserting belated justifications into the record. *Regents*, 591 U.S. at 24. That means when the Agency commits a critical error during the rulemaking process under the Act, it must "'deal with the problem afresh' by taking *new* agency action." *Regents*, 591 U.S. at 21 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (*Chenery II*)). Only then can the agency develop *new* reasons and explanations, in compliance with the Act's procedural requirements. The legislative history of these provisions confirms that Congress intended to protect litigants from potential *Chenery* violations by forcing courts to conduct review over fixed administrative records that are closed at the time of promulgation. *Above* 8–11.

In this way, the Act is more protective than *Chenery* and thus unique among statutes governing

judicial review of agency actions. Under the Administrative Procedure Act, for example, agencies may elaborate on their reasons for acting but they may not offer new reasons. *Regents*, 591 U.S. at 21. The Clean Air Act forecloses the agency from offering either by closing the record to all new additions. The Clean Air Act is thus unique among administrative-review statutes.

B. Mid-litigation remand to supplement the record erases reversal as a remedy available under the statute.

The lower court's mid-litigation remand for record supplementation—that is, before a court even reviews the agency's decision on the existing record—reveals yet another problem. Such remands facilitate iterative record building by allowing the EPA to continue tinkering with its justifications for a rule until the courts are satisfied. That practice, however, writes out the remedy available under the Act—reversal. §7607(d)(9). Indeed, if courts could continue to remand after every identified flaw so that the agency can take corrective action, rulemaking would be iteratively improved until it passes muster in courts. Reversal would never be available.

What is more, permitting the EPA to engage in iterative record building, as the court below did, violates this Court's directive. Recall that this Court held the States are "entitle[d]" to "revers[al]" should they ultimately prevail on the existing record. *Ohio*, 144 S. Ct. at 2055 n.11 (quoting §7607(d)(9)). This directive is not only precedent, but it also binds the court below via "vertical *stare decisis*" and as the law of this case. *Andrus v. Texas*, 142 S. Ct. 1866, 1867 (2022) (Sotomayor, J., dissenting from denial of certiorari); *see Sibbald v. United States*, 37 U.S. 488, 492 (1838). A

grant of certiorari in this case would allow this Court to protect its prior mandate and to give meaning to reversal as a remedy under the statute.

II. This case presents the best opportunity to answer the important but often overlooked Question Presented.

This case asks whether the Clean Air Act allows a remand to the EPA to supplement the administrative record with materials created after rule promulgation. The answer to this question affects every challenge arising under the Act, including many currently pending before the Court. Although the issue is an important aspect of every Clean Air Act challenge, it is the focus of few appeals to this Court. That is because such remands are usually granted as a remedy at the end of a case, allowing the Agency to remediate defects in rulemaking identified by a court after full merits review. On appeal to this Court, questions about this remedy are usually buried beneath more-prominent merits questions.

Here, however, the timing of the lower court's remand for record supplementation is unique. It was granted before the court (or any court) had conducted review on the merits of the federal plan on the existing administrative record. Thus, this petition spotlights this very important question and presents a rare opportunity for this Court to address it squarely. Answering it now, when it is cleanly presented, will give clear guidance in this and other Clean Air Act challenges about the Act's judicial-review processes.

A. This case raises an issue of great importance.

The correct interpretation of the Clean Air Act's judicial-review provisions is one of immense importance.

For one thing, challenges under the Clean Air Act are in and of themselves of national importance. The Act "is a comprehensive regulatory scheme" for regulating national air pollution. *Sierra Club v. Johnson*, 541 F.3d 1257, 1260 (11th Cir. 2008) (citing 42 U.S.C. §7401). Regulations under this Act not only set nationwide standards for air quality, but they also affect the nation's energy, manufacturing, transportation, and other critical markets. Given the national impact that regulations under the Act can have, disputes over them are often vented before this Court. *See, e.g.*, *Ohio v. EPA*, 144 S. Ct. 2040 (2024); *West Virginia v. EPA*, 597 U.S. 697 (2022); *Michigan*, 576 U.S. 743; *Util. Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). Reinforcing the practical and jurisprudential importance of questions arising under the Act, several petitions for certiorari and applications for a stay on challenges under Act that are, or were recently, pending before this Court raise questions under the Act. *See, e.g.*, *Oklahoma v. EPA,* No. 23-1067 (challenge arising from the Act's venue requirements); *EPA v. Calumet Shreveport Refining, LLC*, No. 23-1229 (same); *Oklahoma, et al., v. EPA,* No. 24A213 (challenging EPA's methane-emissions Rule); *National Rural Electric Cooperative Association v. EPA*, 24A203 (challenging EPA's mercury-and-air-toxics Rule); *West Virginia, et al., v. EPA,* No. 24A95 (challenging EPA's greenhouse-gas-emissions Rule).

The Question Presented is of heightened importance because the correct interpretation of the Act's judicial-review provisions has a direct effect on every Clean Air Act challenge. Indeed, remands for record supplementation of the sort in dispute here are commonly granted as a remedy to rulemaking violations under the Act. *See, e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008); *EME Homer City Generation, LP v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015) (Kavanaugh, J.). Whether such remands should be available under the Act thus affects most disputes under the Act, including those that recently have been, or will be, addressed by this Court and those pending in the D.C. Circuit. *See, e.g.*, *West Virginia, et al. v. EPA*, No. 24-1120 (D.C. Cir.). An answer to the Question Presented now will clarify in every Clean Air Act challenge going forward whether courts may allow curative remands at any stage of litigation and, as often is the case, as a remedy under the Act for defective rulemaking.

B. Because questions about remand under the Act are often overlooked, the posture in which this case arises presents a rare opportunity to address a critically important question.

This case is the best vehicle to address the Question Presented because of the unique posture of this appeal. Because remands for curative supplementation are usually granted as a *remedy* for rulemaking violations after full merits review, the usual appeal to this Court from the typical case focuses on merits questions at the expense of the lurking remedy question on the legality of such remands. This Court is thus presented with few opportunities to address this

overlooked issue in the mill-run Clean Air Act case that comes before this Court.

The unique posture of this appeal provides that rare opportunity. Here, the D.C. Circuit remanded the record for supplementation before any court had rendered a full decision on the merits of the existing record. Thus, this case shines a spotlight on the oft-overlooked question of whether such remands violate the Act sans the complications of the technical merits issues underlying the challenge. This Court should seize this rare opportunity to provide clarity on this generally overlooked, but very important, question.

III. Other reasons counsel this Court to review the Question Presented now.

Several other features of this petition make it an ideal vehicle to resolve the Question Presented.

A. This Court should review this issue now rather wait until the D.C. Circuit renders a decision on the merits.

Other reasons—particularly the timing and manner of the lower court's remand—warrant review now rather than after the D.C. Circuit renders a decision on the merits.

Start with the timing. On the merits, this case is "fact-intensive and highly technical" and requires reviewing courts to engage with a "voluminous, technical" record. *Ohio*, 144 S. Ct. at 2058, 2070 (Barrett, J., dissenting). Should the Court wait to hear this case until after the decision on the merits, the petition will combine the discrete Question Presented here with other "thorny" technical and legal questions underlying the challenges on the merits. *Id.* at 2070. Review now avoids those technical issues and cleanly

presents a narrow, purely legal question presented by the D.C. Circuit's mid-litigation remand order. *See id.*

Answering the Question Presented now also saves significant resources. This mid-litigation remand gives the EPA an opportunity to fix a problem—to re-write its D- paper—that this Court first flagged in an emergency posture before the lower court, or *any* court, has had an opportunity to review the merits on the existing administrative record. If the Court waits to reverse the remand decision until after the lower court issues a merits decision on the mixed record because the new portions of the record are invalid, much time and money would have been wasted by all the parties and the lower court litigating on a supplemented record. If the States prevail now, that waste can be prevented, and the case will proceed to review on the record that already exists. Thus, review now would spare resources spent compiling and litigating a supplemental record that may later be held invalid.

Review now also saves this Court the potentially difficult task of disentangling the later merits decision from the tainted, supplemental record. Because the deficiency identified by this Court was "important" enough to warrant "reversal," any supplemental analysis the EPA provides in a bid to cure this error will touch on every aspect of the Rule. *Ohio*, 144 S. Ct. at 2054 (quotation omitted and alteration accepted). Indeed, as this Court noted, the emissions budgets in the federal plan rest on calculations unique to each particular mix of States. *See Ohio*, 144 S. Ct. at 2054, 2056 n.12. If the Court agrees that the remand for supplementation was inappropriate, then reviewing the D.C. Circuit's decision on a later, mixed record will require the Court to engage in the potentially difficult process of splitting the lower court's reasoning on the

permissible, existing record from the impermissible, supplemental record. Review now would avoid this problem.

Turn from the timing of remand to the manner of remand. The court granted a remedy no one—not even the EPA—asked for: remand of the record, but not the case, back to the agency. The EPA also indicated it could finish adding to the record by November 30, 2024. Mot. in *Utah v. EPA,* No. 23-1157, etc., at 4–5 (D.C. Cir. Aug. 5, 2024) (ECF 2068299); Pet. App. 15a. Nevertheless, the court placed no time limit on the remand, merely asking for a status update on December 30, 2024 if the EPA's review has not been completed by then. Pet. App. 2a. This "creates a risk that" the EPA will "drag its feet" in allowing a decision to be reached on the merits. *EME Homer City*, 795 F.3d at 132 (Kavanaugh, J.). And the remand order forecloses public inspection and comment on the supplemental record, *see* Pet. App. 2a, 18a–19a, 29a–30a, increasing the risk that the Agency will commit a *Chenery* violation on remand. *See Regents*, 591 U.S. at 22–23.

Put together, the timing and manner of the lower court's remand warrant review now. The unique posture of this appeal spotlights the important statutory question in a way that mill-run Clean Air Act cases cannot. And review now rather than later over a more complex record mixed with technical questions will save time and money wasted litigating a likely invalid, mixed record.

B. A circuit split on the Question Presented is unlikely to manifest because challenges under the Clean Air Act often go to the D.C. Circuit.

It is of no moment that there is no current circuit split on whether the Act permits courts to remand a defective rule to supplement the record with new information and justifications. Congress has designated the D.C. Circuit as the forum for most (but not all) challenges under the Clean Air Act. *See* §7607(b)(1). This limits the likelihood that other Circuits will have an opportunity to address the Question Presented and that a split will form. Perhaps that is why no other circuit has answered squarely, as far as the States aware, whether such remands are permitted under the Act.

This Court sometimes adopts positions that "[n]o Court of Appeals has ever" embraced. *Alexander v. Sandoval*, 532 U.S. 275, 295 n.1 (2001) (Stevens, J., dissenting); *see also*, *e.g.*, *Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting); *Massachusetts v. EPA*, 549 U.S. 497, 505–06 (2007); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994) & *id.* at 192 (Stevens, J., dissenting). It may have to do so here. And given the D.C. Circuit's dominance in administrative matters generally, that Circuit sets the tone for remedies available in administrative challenges for all circuits, including the practice of remand without vacatur. The Court should grant review in this matter even absent a circuit split.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

T. ELLIOT GAISER*
Ohio Solicitor General
**Counsel of Record*
MATHURA J. SRIDHARAN
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
thomas.gaiser@ohioago.gov

Counsel for Petitioner
State of Ohio

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Additional Counsel

THEODORE E. ROKITA
Attorney General of Indiana

JAMES A. BARTA
Solicitor General
Office of the Indiana Attorney General
IGC-South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
317-232-0607
James.Barta@atg.in.gov

Counsel for State of Indiana

RUSSELL COLEMAN
Attorney General of Kentucky

MATTHEW F. KUHN
Solicitor General
Office of Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
502-696-5400
Matt.Kuhn@ky.gov

Counsel for State of Kentucky

PATRICK MORRISEY
Attorney General of West Virginia

MICHAEL R. WILLIAMS
Solicitor General
Office of the West Virginia Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
304-558-2021
mwilliams@wvago.gov

Counsel for State of West Virginia