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

APPENDIX

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)

TABLE OF CONTENTS

Page

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 23-1157

September Term, 2024

EPA-88FR36654

Filed On: September 12, 2024

State of Utah, by and through its Governor, Spencer J. Cox, and its Attorney General, Sean D. Reyes,

Petitioner

v.

Environmental Protection Agency and Michael S. Regan, Administrator, U.S. EPA,

Respondents

City Utilities of Springfield, Missouri, et al.,

Intervenors

Consolidated with 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

Before: Millett, Pillard, and Pan, Circuit Judges.

ORDER

Upon consideration of the motion for partial voluntary remand without vacatur, the opposition thereto, and the reply, it is

ORDERED that the record be remanded to permit the Environmental Protection Agency to further respond to comments in the record related to the severability of the Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards (June 5, 2023). See D.C. Cir. Rule 41(b). Only the record, and not the case, is remanded, and the rule is not vacated. It is

FURTHER ORDERED that these consolidated cases be held in abeyance pending further order of the court. The parties are directed to file motions to govern future proceedings in these cases within 30 days after completion of the proceedings on remand or December 30, 2024, whichever is earlier.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Selena R. Gancasz
Deputy Clerk

APPENDIX B

42 U.S. Code §7607 provides in relevant part:

(d)Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV–A (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV–A (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies,

the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation

of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)

(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)

(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed

in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)

(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) 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.

(7)

(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such

objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

APPENDIX C

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1157, and consolidated cases

STATE OF UTAH, et al.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents

MOTION FOR PARTIAL VOLUNTARY REMAND

Respondents, the United States Environmental Protection Agency and its Administrator, Michael S. Regan (collectively "EPA"), hereby respectfully request that the Court partially remand the "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36654 (June 5, 2023) ("Good Neighbor Plan"), to enable the Agency to take a supplemental final action addressing the record deficiency preliminarily identified by the Supreme Court in *Ohio v. Environmental Protection Agency*, No. 23A349, slip op. (June 27, 2024).

The parties to this case state: State and Local Government Respondent- Intervenors, Public Interest Respondent-Intervenors, and Sierra Club (as Petitioner-Intervenor) consent to the requested

partial voluntary remand. State Petitioners Nevada, Utah, Ohio, Indiana, West Virginia, and Kentucky; Industry Petitioners; the Kentucky Energy and Environment Cabinet; and the State of Wisconsin, solely as Petitioner in 23-1201, oppose the requested partial voluntary remand.

INTRODUCTION AND BACKGROUND

On March 15, 2023, EPA signed a final rule under the Clean Air Act entitled, "Federal 'Good Neighbor Plan' for the 2015 Ozone National Ambient Air Quality Standards," 88 Fed. Reg. 36654 (June 5, 2023). The final rule implements the Clean Air Act's Good Neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), which ensures that sources in upwind States whose pollution is affecting air quality in downwind States do their fair share to reduce that pollution. In accordance with that provision, the Good Neighbor Plan envisions an emissions control program for large industrial polluters in 28 States (though covering only 23 States at the time), based on a methodology that EPA has used for decades and that has been repeatedly upheld by this Court and the Supreme Court. *See EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 524 (2014); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015); *Wisconsin v. EPA*, 938 F.3d 303 (D.C. Cir. 2019); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000).

The Good Neighbor Plan was challenged in this Court in several petitions for review consolidated under Case No. 23-1157. Briefing in those consolidated cases is completed.

After the rule's promulgation, EPA received several administrative petitions to reconsider the

Good Neighbor Plan. Portions of these petitions alleged that the Good Neighbor Plan was not severable as to individual states or groups of states, and so could not reasonably be applied in fewer than 23 States, i.e., the number of states for which its regulatory requirements were originally promulgated. At the time these administrative petitions were filed, the Good Neighbor Plan was active in some, but not all, of the 23 States originally covered by the rule because of judicial orders staying, pending judicial review, a separate EPA action that is a necessary predicate to the Good Neighbor Plan's application in particular States. According to the administrative petitions, this post-decisional change in coverage served to invalidate the Good Neighbor Plan as to all covered States.

EPA partially denied these administrative petitions, rejecting the petitioners' assertions that the Good Neighbor Plan is invalid because it is not severable as to particular States. *See* 89 Fed. Reg. 23526 (April 4, 2024) (announcing denial of reconsideration).[1] EPA's action denying reconsideration was challenged by two petitioners, U.S. Steel and Hybar, LLC, in petitions consolidated under Case No. 24-1172. Additional parties have since moved to join as Respondent-Intervenors, and those motions have been granted. *See* ECF 2062984; 2063062; 2066844. Two petitions challenging EPA's action denying reconsideration were also filed in the Eighth Circuit, by the State of Arkansas and

[1] Denial of reconsideration decision ("Denial") available directly at: https://www.epa.gov/system/files/documents/2024-03/basis-for-partial-denial-of- petitions-for-reconsideration-of-good-neighbo.pdf

Arkansas Department of Energy and Environment, Division of Environmental Quality (Case No. 24-2144) and Hybar, LLC (Case No. 24-2145). Those petitions were consolidated with the petitions in the Eighth Circuit challenging the Good Neighbor Plan, all of which are in abeyance. *See* Case No. 24-2144, ECF 5400548 at 8; Case No. 24-2145, ECF 5400580 at 7.

Although this Court denied motions to stay the Good Neighbor Plan pending judicial review on September 25, 2023, and October 11, 2023, ECF 2018645 & 2021268, the Supreme Court granted several stay applications on June 27, 2024, *see Ohio v. EPA*, No. 23A349, slip op. (June 27, 2024); ECF 2062415. The Court concluded that EPA had likely failed to adequately respond in the Good Neighbor Plan to comments concerning severability. *See* ECF 2062415 at 12-13.

In light of the Supreme Court's decision in *Ohio*, EPA has decided to seek a partial remand of the Good Neighbor Plan to fully consider and respond to the relevant comments. If this Court grants partial voluntary remand, EPA anticipates completing its review by November 30, 2024. EPA would not oppose abeyance of this case while it addresses this narrow issue.[2] In compliance with this Court's July 30, 2024, Order, ECF 2067416, briefing in *U.S. Steel v. EPA*, 24-1172 et al., would continue concurrently with the

---

[2] In light of the narrow scope of remand and EPA's belief that the rule's remaining substantive requirements are sound, as well as the Supreme Court's decision granting stays of the Good Neighbor Plan pending judicial review, vacatur would be inappropriate and is not needed to address any prejudice given the Supreme Court's stay.

partial remand. Once the partial remand is complete, petitioners could opt to challenge that final action. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. EPA*, 803 F.3d 151, 157 (3d Cir. 2015) (voluntary remand granted to allow EPA to more adequately consider and respond to comments already in the record, resulting in new action that petitioners challenged). Those challenges could then be consolidated with the rest of the merits challenges to the Good Neighbor Plan. Consistent with this Court's order of July 30, 2024, oral argument regarding the challenges to the Good Neighbor Plan and EPA's denial of the petitions for reconsideration, as well as any challenges to EPA's action on remand, could occur on the same day before the same panel. *See* Order, ECF 2067416.

ARGUMENT

In its June 27, 2024, opinion granting applications to stay enforcement of the Good Neighbor Plan as to certain petitioners, the Supreme Court concluded that EPA likely did not adequately respond to commenters who pointed out that some States could cease to be covered by the Plan and questioned whether EPA's methodology would reach the same result for a smaller subset of States. *See Ohio*, slip op. at 13. Specifically, the Court stated that EPA likely failed to explain "whether or why the same emissions-control measures it mandated would continue to further the [Good Neighbor Plan's] stated purpose of maximizing cost-effective air-quality improvement if fewer States remained in the plan." *Id.* at 8. The Court further concluded that commenters raised this issue with "reasonable specificity." *Id.* at 15.

In light of the Supreme Court's conclusion that this issue was properly raised in comments but likely not

adequately responded to, EPA seeks a partial voluntary remand in order to appropriately consider, and respond to, those comments. EPA would thus be addressing the likely deficiency the Supreme Court identified.[3] It is well established that agency decisions are judged by the adequacy of their explanations, and permitting an agency to proactively provide further explanation is preferable to reviewing a record with a likely deficiency. *Cf. Ethyl Corp. v. Browner*, 989 F.2d 522, 523-24 (D.C. Cir. 1993) ("We commonly grant such motions [for remand], preferring to allow agencies to cure their own mistakes rather than waste the courts' and parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete."). Therefore, this Court and others routinely grant requests for voluntary remand to allow an agency to address potential deficiencies in an administrative record.[4]

EPA believes the rule was reasonable and lawful as promulgated, for the reasons identified in its brief. But the Supreme Court's stay opinion identified the likelihood upon its preliminary review that EPA's rule might be procedurally defective. Accordingly, EPA

---

[3] EPA's intended action, while addressing overlapping questions, is distinct from the reconsideration denial challenged in U.*S. Steel v. EPA* (24-1172 et al.), because that action addressed post-promulgation events, while the remand will address comments in the original record.

[4] *See, e.g.*, *Sierra Club v. EPA*, No. 20-1121 (D.C. Cir.), remand granted Jan. 11, 2022, ECF 1930070; *Am. Chem. Council v. EPA*, No. 11-1141 (D.C. Cir.), remand granted May 15, 2014, ECF 1493182; *Nebraska v. EPA*, No. 12-3084 (8th Cir.), remand granted March 19, 2015, ECF 4256313; *Ctr. for Biological Diversity v. EPA*, No. 20-9560 (10th Cir.), remand granted January 5, 2021, ECF 010110460392.

believes it would be most efficient to address that possible error now, rather than proceeding through litigation on whether EPA's explanation is "insufficient to permit a court to discern its rationale." *Tourus Records, Inc. v. Drug Enf't Admin.*, 259 F.3d 731, 737 (D.C. Cir. 2001); *see also Lilliputian Sys. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1314 (D.C. Cir. 2014). Remand here would allow EPA to address any possible error.

After EPA completes its action on remand, and should the petitioners challenge that new action, the Court can then consider the Agency's more thorough explanation and reach the ultimate question whether the Good Neighbor Plan is severable, instead of considering whether EPA provided adequate explanation. This process will allow judicial review of EPA's decision to proceed efficiently. EPA does not intend to make any other changes to the Good Neighbor Plan as a result of the partial voluntary remand; nor does it anticipate introducing new facts or data into the record. Rather, it intends to respond to the pertinent comments, which the Supreme Court found were likely raised with reasonable specificity.

EPA anticipates that it can complete this partial remand expeditiously, and thus this request will not prejudice the interests of any party in timely resolution of these petitions for review. For example, because EPA expects to consider and respond to these comments that are already in the record without introducing new facts or data, a wholly new notice-and-comment rulemaking procedure is not required. *See Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006); *cf. West Virginia v. EPA*, 362 F.3d 861, 869 (D.C. Cir. 2004). Nor will the

resources of the parties already invested in briefing the many other issues in this case be lost, since those issues can proceed to be adjudicated, either on a severed basis now or after an abeyance for EPA to complete its action on remand.

Partial remand without vacatur is the most efficient procedural mechanism to allow EPA to address the potential deficiency in its record identified by the Supreme Court and appropriately manage the process of judicial review.

CONCLUSION

For the reasons noted above, the United States respectfully requests that the Court grant EPA's motion for partial voluntary remand.

DATE: August 5, 2024

Respectfully submitted,

TODD KIM
Assistant Attorney General

/s/ Elisabeth H. Carter
CHLOE H. KOLMAN
ELISABETH H. CARTER
ZOE PALENIK
U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 598-3141
elisabeth.carter@usdoj.gov

OF COUNSEL:

DANIEL P. SCHRAMM
KYLE DURCH
ROSEMARY H. KABAN
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Counsel for Respondents

APPENDIX D

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1157, and consolidated cases

STATE OF UTAH, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

JOINT RESPONSE OF PETITIONER STATES INDIANA, KENTUCKY, NEVADA, OHIO, UTAH, AND WEST VIRGINIA, AND INDUSTRY PETITIONERS TO RESPONDENTS' MOTION FOR PARTIAL VOLUNTARY REMAND

Petitioner States Indiana, Kentucky, Nevada, Ohio, Utah, and West Virginia, and Industry Petitioners (collectively, "Opposing Petitioners") jointly file this response in opposition to the motion of Respondents the United States Environmental Protection Agency and Administrator Michael S. Regan (collectively, "EPA") to partially remand the Final Rule in response to the Supreme Court's stay in *Ohio v. EPA*, Nos. 23A349, 23A350, 23A351, 23A384 (U.S. June 27, 2024) ("Supreme Court Stay"). The Supreme Court could not have been clearer: "[T]he Clean Air Act prevents us (and courts that may in the

future assess the [Federal Implementation Plan]'s merits) from consulting explanations and information offered after the rule's promulgation." Supreme Court Stay at 14 n.11 (citing 42 U.S.C. § 7607(d)(6)(C), (d)(7)(A)). Thus, "reversal," *not* remand, is the only appropriate remedy. *Id.* (alterations omitted). Having failed to subvert that command by trying (but failing) to consolidate this case with certain reconsideration actions, EPA tries again here. The Court should deny this motion too.

BACKGROUND

I. In June 2023, EPA issued the final rule at issue here. *See* 88 Fed. Reg. 36,654 (June 5, 2023) ("Rule").[1] The Rule, entitled the "Good Neighbor Plan," is a federal implementation plan (or "FIP") under the Clean Air Act through which EPA intended to regulate air emissions from certain sources in 23 States. But both before and after EPA promulgated its Rule, several federal appellate courts stayed EPA's state plan disapprovals—the necessary legal predicates for EPA to issue a federal plan—in 12 of the 23 States. *See* Supreme Court Stay at 7-8 & n.6; 42 U.S.C. § 7410(c)(1).

Opposing Petitioners timely sought judicial review in this Court challenging the Rule; those petitions for

---

[1] EPA has contended that the Rule was promulgated when signed in March 2023, *see, e.g.*, EPA Mot. at 2; EPA Resp. Br. 30-31, ECF 2060371, while Opposing Petitioners have argued it was promulgated when published in the *Federal Register* in June 2023, *see, e.g.*, Industry Br. 7, ECF 2047829. The Supreme Court agrees with Opposing Petitioners. *See* Supreme Court Stay at 8 (noting certain judicial stays of state plan disapprovals occurred before EPA "proceeded to issue its final [Rule]").

review were consolidated under *Utah v. EPA*, No. 23-1157 (D.C. Cir.). In addition to seeking judicial review of the Rule, two Industry Petitioners also filed administrative petitions requesting that the agency reconsider the Rule, while others asked the agency to administratively stay the Rule pending judicial review. The administrative petitions contended, in part, that the stays of the state plan disapprovals undermined the controls mandated by the Rule and the rationale for requiring them. Opposing Petitioners then moved in this Court for a stay of the Rule. This Court denied those motions and briefing on the merits commenced.

After this Court denied the stay motions, certain State and Industry Petitioners sought a stay of the Rule in the Supreme Court. *Ohio v. EPA*, Nos. 23A349, 23A350, 23A351, 23A384. Those Petitioners argued, among other things, that EPA failed to consider and explain the impact that eliminating one or more states from its uniform 23-State Rule would have on its regulation of sources in other states still subject to the Rule. The Supreme Court set the emergency stay applications for oral argument, and many of the Court's questions focused on the Rule's lack of adequate explanation regarding this critical issue. *E.g.*, Tr. of Oral Arg. 33-34, No. 23A349 (U.S. Feb. 21, 2024).

Given this focus, EPA tried to short-circuit the Supreme Court's review and salvage the Rule by providing further explanation it developed in the course of its March 2024 denial of petitions for

reconsideration of the Rule.[2] EPA then quickly filed a letter with the Supreme Court directing the Court to that additional explanation. *See* Letter from E. Prelogar, Solicitor General, to S. Harris, Clerk of Court 1, No. 23A349 (U.S. Mar. 28, 2024) (referencing denials later published at 89 Fed. Reg. 23,526 (Apr. 4, 2024)).

On June 27, 2024, the Supreme Court stayed the Rule. The Court explained that EPA "failed to supply a satisfactory explanation" for how the Rule would operate once other States were no longer covered by the uniform, 23-State Rule, meaning EPA "ignored an important aspect of the problem before it." Supreme Court Stay at 13 (citations and quotation marks omitted). The Court thus held the FIP was likely "arbitrary or capricious." *Id.* at 19 (citations and quotation marks omitted).

The Supreme Court even acknowledged that, "after [it] heard argument, EPA issued a document in which it sought to provide further explanations for the course it pursued." *Id.* at 14 n.11 (citing 89 Fed. Reg. at 23,526). But, the Supreme Court concluded, "the Clean Air Act prevents us (and courts that may in the future assess the FIP's merits) from consulting explanations and information offered after the rule's promulgation." *Id.* (citing 42 U.S.C. § 7607(d)(6)(C), (d)(7)(A)). Instead, the Supreme Court could "look to only 'the grounds that the agency invoked when it' promulgated the FIP." *Id.* at 14-15 n.11 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). As for the

---

[2] Hybar LLC and U. S. Steel timely petitioned for judicial review of EPA's reconsideration denial, and those challenges have been consolidated under *U.S. Steel v. EPA*, No. 24-1172 (D.C. Cir.).

appropriate remedy, the Supreme Court concluded that "[s]hould the applicants show the FIP was arbitrary and capricious *on the existing record*, as we have concluded is likely, the Clean Air Act entitles [Petitioners] to 'revers[al]' of that rule's mandates on them." *Id.* (second alteration in original) (emphasis added) (quoting 42 U.S.C. § 7607(d)(9)(A)).

II. EPA apparently did not get the message. Back in this Court, EPA immediately sought to subvert the Supreme Court's clear pronouncement that the Rule's legality turns on EPA's explanation and information when it originally promulgated the Rule. EPA first moved to consolidate this case with the reconsideration actions in *U.S. Steel*. *See* EPA Mot. to Consolidate Cases (July 5, 2024) (ECF 2063227).[3] Petitioners explained that EPA's consolidation motion improperly sought to end-run the Supreme Court's holding that courts could not consider in *this* case a newly developed rationale that EPA conjured in its denial of the reconsideration petitions. Joint Resp. 9-10 (July 15, 2024) (ECF 2064792). This Court rightly

[3] Notably, this came after EPA *opposed* consolidation of this case with challenges to the related Interim Final Rules, arguing that consolidation "would unreasonably delay litigation of [*Utah*]." Respondent EPA's Statement at 6, No. 23-1275 (Nov. 13, 2023) (ECF 2026750). EPA also argued that the challenges to the Interim Final Rules could be "mooted," depending on what happened in *Utah*, *id.* at 8, and that consolidation would "thus frustrate rather than serve judicial efficiency," *id.* at 5. This Court did not consolidate the two sets of cases. Order, Nos. 23-1157, *et al.* & 23-1275, *et al.* (Dec. 4, 2023) (ECF 2029865).

rejected EPA's consolidation gambit by denying that motion on July 30, 2024. ECF 2067416.[4]

EPA has now taken it to a new level. Over a month after the Supreme Court stayed the Rule, weeks after moving to consolidate this case with the reconsideration case, and *a week after* Petitioners filed their reply briefs in this case,[5] EPA now asks this Court to partially remand the Rule so it can "take a supplemental final action addressing the record deficiency preliminarily identified by the Supreme Court." EPA Mot. at 1. But the Supreme Court already closed that door: "[T]he Clean Air Act prevents us (and courts that may in the future assess the FIP's merits) from consulting explanations and information offered after the rule's promulgation." Supreme Court Stay at 14 n.11 (citing 42 U.S.C. § 7607(d)(6)(C), (d)(7)(A)). Plus, the remedy for EPA's lack of explanation "on the existing record" is "revers[al]," *id.* at 14-15 n.11 (alteration in original)—meaning remand with vacatur—*not* mere remand (without vacatur). Yet EPA's motion contains nary a mention of this dispositive language from the Supreme Court's opinion.

EPA's motion should be denied. If any affirmative action is warranted at this stage, this Court should remand *and vacate* the Rule and require EPA to start from scratch. That is the remedy that the Clean Air

---

[4] This Court also ordered that oral argument for *U.S. Steel* and this case (23-1157, *et al.*) be set for oral argument on the same day by the same panel. *Id.*

[5] EPA conferred with other parties in *Utah* regarding the motion on July 30, 2024, just *one day* after Petitioners filed their reply briefs.

Act requires for arbitrary and capricious actions, such as EPA's failure to justify its rulemaking—an error that the Supreme Court identified.

ARGUMENT

This Court should deny EPA's motion for partial voluntary remand without vacatur. EPA is engaging in "a sort of administrative law shell game" that this Court should not countenance. *See Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) ("[T]he Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but this ploy may well take the prize."). The Supreme Court squarely held that this Court cannot consider any explanation or information beyond what EPA originally said when it promulgated the Rule. And it held that "reversal" was the appropriate remedy for the Rule's errors. EPA's brazen attempt to circumvent the Supreme Court's mandates should be rejected.

This Court has "broad discretion to grant or deny an agency's motion to remand." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018). "In deciding a motion to remand, [the Court] consider[s] *whether remand would unduly prejudice the non-moving party*. Additionally, if the agency's request appears to be frivolous or made in bad faith, it is appropriate to deny remand." *Id.* (emphasis added) (citations omitted); *see also id.* (denying request to remand aspects of challenge that would "prejudice the vindication of [certain parties'] claim[s]"); *id.* at 438 ("[T]he provisions we now remand stand unchallenged on their merits; accordingly, *no party will suffer prejudice from remand without*

vacatur.") (emphasis added)). Moreover, EPA must identify "substantial and legitimate" concerns in support of remand and show that voluntary remand would "conserve judicial resources." *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). EPA cannot make the required showings.

For starters, the Supreme Court already closed this door for EPA by confirming that reversal is the Act's sole remedy and that this Court cannot consider EPA's *post hoc* explanations. Beyond that, voluntary remand would prejudice the Opposing Petitioners; it would be futile (and thus not substantial and legitimate); and it would be a model of judicial inefficiency. This Court should thus deny EPA's motion.

I. Voluntary Remand Without Vacatur Is Not Permissible Under The Act And Would Otherwise Be Prejudicial, Futile, And A Waste Of The Court's And The Parties' Time And Resources.

A. At the outset, EPA requests relief that is unavailable under the Clean Air Act. The Act prescribes one remedy for EPA's arbitrary and capricious action on the Rule's "existing record": "revers[al]." Supreme Court Stay at 14-15 n.11 (alteration in original) (quoting 42 U.S.C. § 7607(d)(9)(A)). Reversal, at the very least, means remand with vacatur. That is the remedy Opposing Petitioners seek for EPA's errors. State Reply Br. 13-14; Industry Reply Br. 46-47. This is not a simple remand-without-vacatur scenario, where this Court would consider the seriousness of the agency's errors and the disruptiveness of vacatur. *See Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146,

1551 (D.C. Cir. 1993). As the Supreme Court definitively declared, the Act's sole remedial avenue is reversal. That is why the Supreme Court issued a *stay* of the Rule, provisionally providing the petitioners the same remedy they would achieve if ultimately successful on the merits. Any remedy short of that would violate the statutory mandate.

EPA's request for voluntary remand (without vacatur) is tantamount to a request for a judgment from this Court. EPA cannot unilaterally determine that the proper remedy for its defective rulemaking is something different from what the Supreme Court and the statute allow. Accordingly, the Court should deny EPA's request out of hand.

B. EPA otherwise fails to establish the factors necessary for voluntary remand without vacatur.

Start with prejudice. EPA envisions that there is no need for notice or comment because EPA simply intends to take its post-Rule briefing and reasoning on reconsideration, graft it into the Rule and the underlying record after the fact, and then proceed to argue this case as though it was always there. EPA Mot. at 7-8. That approach is futile because it contradicts the Supreme Court's limitation on the permissible record. *See infra* at 11-13.

But even if post-Rule explanations were allowed under the Clean Air Act and the Supreme Court Stay, a new explanation alone would not be enough to fix the problem. The unaddressed comments called on EPA to "'conduct a new assessment and modeling of contribution' to determine what emissions-control measures maximized cost effectiveness in securing downwind ozone air-quality improvements." Supreme Court Stay at 15 (quoting Comments of Air

Stewardship Coalition at 13-14); *see also id.* at 6-7 (detailing many other similar comments). Indeed, the Air Stewardship Coalition comments themselves expressly requested that EPA's updated modeling findings would be "subject . . . to public comment." *Id.* at 7 (quoting Comments of Air Stewardship Coalition at 13-14). These comments reflect that a reduced number of states in the Rule requires consideration of new data and a new analysis, which would require interested parties to be afforded the notice- and-comment process.

EPA's failure is not a mere procedural error to be corrected with explanation. It is substantive, and it goes to the heart of the Rule. EPA failed to do the analysis and explain why the same emissions thresholds would apply "if fewer States remained in the plan." Supreme Court Stay at 8. If EPA is allowed to take back the Rule on this issue, EPA would be setting emissions standards for less than 23 states in a way it did not do before.

Without restarting the process from square one, Opposing Petitioners will not have any opportunity to address EPA's continued misimpression of the Rule's fatal flaws.

C. The remand without vacatur envisioned by EPA would also be legally futile. That is because the Act strictly limits the materials EPA can rely on when promulgating a rule: "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." 42 U.S.C. § 7607(d)(6)(C). And it restricts "[t]he record for judicial review" to only that information or data. *Id.* § 7607(d)(7)(A). Attempting to circumvent the law, EPA says it would

not introduce "new facts or data" to the record. EPA Mot. at 8. This is untrue. EPA admits it will offer information not already on the record before this Court. *Id.* Any later explanations or information cannot be considered when reviewing the legality of the Rule in this case. As the Supreme Court's stay order explains: "[T]he Clean Air Act prevents us (and courts that may in the future assess the FIP's merits)"—*i.e.*, this Court—"from consulting explanations and information offered after the rule's promulgation." Supreme Court Stay at 14 n.11 (citation omitted). In other words, the Rule must stand or fall "on the existing record." *Id.* at 14-15 n.11. Remand for further explanation would thus be pointless because this Court cannot consider anything EPA would say. The agency is attempting to unlawfully backfill a deficient record in response to the Supreme Court's holding.

EPA's request flunks other requirements for voluntary remand. EPA has made clear the result of its remand exercise is pre-ordained. It has no intention to reconsider whether the Plan is properly severable, but instead plans to paper the record with further explanation for its predetermined conclusion of severability. EPA Mot. at 7-8. But "[t]he leading voluntary remand cases confirm that agency reconsideration of the action under review is part and parcel of a voluntary remand." *Limnia, Inc. v. DOE*, 857 F.3d 379, 386-87 (D.C. Cir. 2017) (collecting cases). Though the agency need not always "confess error or impropriety," it "at least need[s] to profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Id.* at 387. Here, EPA's mind is already made up—it merely wishes to launder its new, after-

the-fact explanations into the record for "a second bite at the apple." *Am. Waterways Operators v. Wheeler*, 427 F. Supp. 3d 95, 98 (D.D.C. 2019). If that were reason enough to voluntarily remand, it would seem EPA has found the enduring solution to the age- old *Chenery* problem. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) (agency's decision cannot rest on any *post hoc* justifications offered by counsel).[6] Counsel for agencies would need only publish their court briefs in the *Federal Register* before oral argument or final judgment to cure the administrative record. Such a result would upend the rulemaking process.

But even if that were possible under the APA (doubtful at best), it is patently unavailable under the Act—EPA's decision can be based only on what was "placed in the docket as of the date of such promulgation." 42 U.S.C. § 7607(d)(6)(C). On that "existing record," "revers[al]"—not mere remand—is required. Supreme Court Stay at 14-15 & n.11 (alteration in original).

D. EPA's administrative gamesmanship is also terribly inefficient and borderline frivolous, which alone is enough to deny its motion. *See Util. Solid Waste Activities Grp.*, 901 F.3d at 436.

---

[6] The Supreme Court's holding that post hoc rationalization is impermissible is not a novel concept; rather, it is longstanding precedent under both the Clean Air Act and the Administrative Procedure Act ("APA"). *See Michigan*, 576 U.S. at 758 (noting "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action" (citing *Chenery*, 318 U.S. at 87)); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[T]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action.").

One need only recount the history of this case to see why. Commenters alerted EPA to several significant problems in the Rule, but EPA merely paid lip service to them. Once it became apparent after argument before the Supreme Court that the Rule lacked the hallmarks of reasoned decisionmaking, EPA tried to supplement its explanation via its reconsideration denials. When that effort fell flat in the Supreme Court, EPA tried again in this Court, seeking consolidation to shoehorn those post- Rule rationalizations into this case (after having opposed similar consolidation with the Interim Final Rules, *supra* note 3). And when that did not work, EPA waited until just after merits briefing was completed and asked this Court to remand so it can supply the same tardy explanations through another agency action (apparently prompting another petition for review, which would presumably be accompanied by a full suite of briefing before this Court on an issue and record that is fully briefed). EPA Mot. at 5; *cf. Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 n.4 (D.C. Cir. 2012) (noting that remand to lower court, "'which inevitably would result in a future appeal to this court, would be a waste of judicial resources,' where, as here, the merits of the question are clear" (citation omitted)). EPA predicts that it can thereby fundamentally alter the Rule without notice or comment, complete its reverse-engineering in time for oral argument in this case, then merge that case with this one and call it a day.

This approach to rulemaking is not lawful under the Act. The Rule was final upon promulgation (in 2023), and it must rise or fall based on what EPA said in the Rule. 42 U.S.C. § 7607(d)(6)(C). If it is arbitrary or capricious, it must be "reverse[d]." *Id.* §

7607(d)(9)(A); Supreme Court Stay at 14-15 n.11. The Rule cannot be continuously reconsidered and remanded and reviewed until reasonable. It is important to put this in context. The Supreme Court found substantive error as to one particular issue. But the Court acknowledged that petitioners raised "various other reasons" the Rule is arbitrary and capricious. Supreme Court Stay at 13 n.10. The Supreme Court simply had "no occasion to address those other arguments." *Id.* That being the case, under EPA's approach, EPA could (potentially after oral argument before this Court) move for voluntary remand without vacatur on *other* failure-to-consider issues that Petitioners have raised that were not addressed in the Supreme Court Stay, propose to beef-up the record yet again, and proceed with protracted litigation. EPA's ping-pong approach to rulemaking is inconsistent with well-established law and should be rejected by denying its motion for remand without vacatur.

II. If Remand Is Necessary, Petitioners Do Not Oppose Remand With Vacatur.

If a form of remand is desirable by this Court in light of the Supreme Court's stay opinion, the only appropriate option is remand with vacatur. The case is briefed; the Supreme Court has already said the Rule is likely arbitrary and capricious; and EPA's motion likewise reflects that it cannot prevail "on the existing record" that delimits this case. *Id.* at 14-15 n.11. Thus, if this Court does anything at this stage, it should vacate the Rule and require EPA to start

over.[7] The Supreme Court has identified a fundamental flaw in the Rule, and EPA cannot go back in time to fix it in this posture. The appropriate remedy, therefore, is "revers[al]," 42 U.S.C. § 7607(d)(7)(A), so that EPA can initiate a new rulemaking with a new record.

---

[7] *Farmworker Ass'n of Fla. v. EPA*, No. 21-1079, 2021 U.S. App. LEXIS 16882, at *2 (D.C. Cir. June 7, 2021) (ordering summary vacatur of EPA's action "in light of the seriousness of the admitted error and the error's direct impact on the merits of the EPA's" action); *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (granting environmental petitioners' motion for "summary disposition and vacatur" of an EPA administrative stay because the stay was unauthorized by relevant code and thus unreasonable); *Clean Air Implementation Project v. EPA*, No. 96-1224, 1996 WL 393118, at *1 (D.C. Cir. June 28, 1996) (granting motion for summary vacatur of the "potential to emit" definition in regulations promulgated by EPA under Title V of the 1990 Clean Air Act Amendments).

CONCLUSION

For the foregoing reasons, EPA's Motion should be denied. Alternatively, the Court should remand with vacatur.

Dated: August 15, 2024

Respectfully submitted,

/s/ Ana Maria Gutiérrez
Ana Maria Gutiérrez Michael Dean Miller
Womble Bond Dickinson (US) LLP 1899 Wynkoop Street, Suite 750
Denver, CO 80202
(720) 983-1350
ana.gutierrez@wbd-us.com
michael.miller@wbd-us.com

Counsel for Kinder Morgan, Inc.

Catherine E. Stetson
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
Cate.Stetson@hoganlovells.com

/s/ Eric D. McArthur
Samuel B. Boxerman
Eric D. McArthur
Kathleen Mueller
Jeremy Rozansky
SIDLEY AUSTIN LLP
1501 K Street N.W.
Washington, DC 20005

Counsel for Interstate Natural Gas Association of America and American Petroleum Institute

/s/ Michael B. Schon
Michael B. Schon
Lehotsky Keller Cohn LLP
200 Massachusetts Ave. N.W.
Washington, DC 20001
(512) 693-8350

Mithun Mansinghani
LEHOTSKY KELLER COHN LLP
629 W. Main St. Oklahoma City, OK 73102
(512) 693-8350

Counsel for National Mining Association

THEODORE E. ROKITA
Attorney General of Indiana

/s/ James A. Barta
JAMES A. BARTA
Indiana Solicitor General
Office of the Indiana Attorney General IGC-South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
Phone: 317-232-0709
James.Barta@atg.in.gov

Counsel for State of Indiana

RUSSELL COLEMAN
Attorney General of Kentucky

/s/ Matthew F. Kuhn
MATTHEW F. KUHN
Kentucky Solicitor General
Office of Kentucky Attorney General 700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
Phone: 502-696-5300
Matt.Kuhn@ky.gov

Counsel for the Commonwealth of Kentucky

DAVE YOST
Ohio Attorney General

/s/ Mathura J. Sridharan
T. ELLIOT GAISER
Ohio Solicitor General
MATHURA J. SRIDHARAN*
**Counsel of record*
ZACHERY P. KELLER
Deputy Solicitors General
GREGG BACHMANN
Section Counsel – Environmental
30 East Broad Street, 17th Floor
Phone: 6l4-466-8980
Fax: 614-466-5087
mathura.sridharan@ohioago.gov

Counsel for the State of Ohio

PATRICK MORRISEY
Attorney General of West Virginia

/s/ Michael Williams
MICHAEL WILLIAMS
West Virginia Solicitor General
Office of the West Virginia Attorney General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
Phone: 682-313-4550
Michael.R.Williams@wvago.gov

Counsel for State of West Virginia

AARON D. FORD
Attorney General of Nevada

/s/ Heidi Parry Stern
HEIDI PARRY STERN
Solicitor General
Office of the Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3594
HStern@ag.nv.gov

Counsel for State of Nevada

/s/ David M. Flannery
David M. Flannery
Kathy G. Beckett
Keeleigh S. Huffman
STEPTOE & JOHNSON, PLLC
707 Virginia St. East
Post Office Box 1588
Charleston, WV 25326
(304) 353-8000

Edward L. Kropp
STEPTOE & JOHNSON, PLLC
Post Office Box 36425
Indianapolis, Indiana 46236
(317) 946-9882

Counsel for Petitioners American Forest & Paper Association, American Iron and Steel Institute, and Midwest Ozone Group

/s/ Jarrod L. Bentley
JARROD L. BENTLEY
Kentucky Energy and Environment Cabinet
Office of Legal Services
300 Sower Boulevard, Third Floor
Frankfort, Kentucky 40601
(502) 782-0568
jarrod.bentley@ky.gov

Counsel for Kentucky Energy and Environment Cabinet

/s/ Allison D. Wood
Allison D. Wood
Makram B. Jaber
Aaron M. Flynn
MCGUIRE WOODS LLP
888 16th Street N.W., Suite 500
Black Lives Matter Plaza
Washington, DC 20006

Counsel for Associated Electric Cooperative, Inc., Deseret Generation & Transmission Co-Operative d/b/a Deseret Power Electric Cooperative, Ohio Valley Electric corporation, Wabash Valley Power Association, Inc. d/b/a Wabash Valley Power Alliance, America's Power, National Rural Electric Cooperative Association and Portland Cement Association

/s/ Brittany M. Pemberton
Brittany M. Pemberton
BRACEWELL LLP
2001 M Street N.W., Suite 900
Washington, D.C. 20036
(202) 828-1708

Counsel for TransCanada PipeLine USA Ltd.

/s/ Elliot Zenick
Elliott Zenick
AMERICAN CHEMISTRY COUNCIL
700 2nd St. N.E.
Washington, DC 20002
(202) 249-6744

Counsel for Petitioner American Chemistry Council

/s/ Michael E. Born
Michael E. Born (49961) Cheri A. Budzynski (51761)
SHUMAKER, LOOP & KENDRICK, LLP
Huntington Center
41 South High Street, Suite 2400
Columbus, OH 43215
(614) 463-9441

Counsel for Petitioners Buckeye Power, Inc. and the Ohio Valley Electric Corporation

/s/ Aaron M. Streett
Aaron M. Streett
Matthew L. Kuryla
Beau Carter
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, Texas 77002
(713) 229-1855

Counsel for Energy Transfer LP

/s/ John D. Lazzaretti
John D. Lazzaretti
SQUIRE PATTON BOGGS (US) LLP
1000 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8500

Counsel for Petitioner United States Steel Corporation

/s/ Kelly M. McQueen
Kelly M. McQueen
THE MCQUEEN FIRM, PLLC
12 Woodsong Drive
Roland, AR 72135
(501) 580-3291

Counsel for Petitioner
Arkansas League of Good Neighbors

/s/ Laura K. McAfee
Laura K. McAfee
(D.C. Cir. Bar No. 62386)
BEVERIDGE & DIAMOND, PC
201 North Charles Street, Suite 2200
Baltimore, MD 21201

Counsel for Enbridge (U.S.) Inc.

/s/ Mark W. DeLaquil
Mark W. DeLaquil
BAKER & HOSTETLER LLP
Washington Square, Suite 1100 1050
Connecticut Avenue N.W.
Washington, D.C. 20036
(202) 861-1500

Martin T. Booher
Joshua T. Wilson
BAKER & HOSTETLER LLP
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114

Counsel for Hybar LLC

/s/ Richard S. Moskowitz
Richard S. Moskowitz
Tyler Kubik
American Fuel & Petrochemical Manufacturers
1800 M Street, NW
Suite 900 North
Washington, DC 20036
(202) 844-5474

Counsel for Petitioner American Fuel & Petrochemical Manufacturers

/s/ Elbert Lin
Elbert Lin
Kevin S. Elliker
David N. Goldman
HUNTON ANDREWS KURTH LLP
951 East Byrd Street, East Tower
Richmond, VA 23219
(804) 788-8200

F. William Brownell
E. Carter Chandler Clements
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue N.W.
Washington, DC 20037
(202) 955-1500

Counsel for Petitioners
Union Electric Company, d/b/a Ameren Missouri, and Arkansas League of Good Neighbors

SEAN D. REYES
Attorney General of Utah

/s/ Stanford E. Purser
STANFORD E. PURSER
Utah Solicitor General
Counsel of Record
Office of the Attorney General
Utah State Capitol Complex
350 North State Street Suite 230
Salt Lake City, UT 84114-2320
Phone: 801-538-9600
spurser@agutah.gov

WILLIAM L. WEHRUM
Wehrum Environmental Law LLC
1629 K Street, NW, Suite 300
Washington, D.C. 20006
Ph. 302-300-0388
William_Wehrum@comcast.net

EMILY C. SCHILLING
Holland & Hart LLP
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
Phone: 801-799-5753
Fax: 202-747-6574
ecschilling@hollandhart.com

KRISTINA R. VAN BOCKERN
AARON B. TUCKER
Holland & Hart LLP
555 Seventeenth Street
Suite 3200
Denver, CO 80202

Phone: 303-295-8107
Fax: 720-545-9952
trvanbockern@hollandhart.com
abtucker@hollandhart.com

Counsel for State of Utah

APPENDIX E

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1157, and consolidated cases

STATE OF UTAH, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents

REPLY IN SUPPORT OF MOTION FOR PARTIAL VOLUNTARY REMAND

On August 5th, Respondent EPA moved this Court for partial voluntary remand of the final rule known as the Good Neighbor Plan, 88 Fed. Reg. 36654 (June 5, 2023) ("Rule"). ECF 2068299. EPA explained that while the Agency believes that the Rule was reasonable when promulgated, the Supreme Court subsequently noted a "likely" procedural flaw: that EPA had likely inadequately responded to comments in the record related to the Rule's severability. Partial voluntary remand would allow EPA to address the identified comments. Mot., ECF 2068299.

Petitioners oppose this relief on the grounds that "reversal" is "the only appropriate remedy" for this possible error, Resp., ECF 2070323 at 2, and that EPA's request is "borderline frivolous" and

prejudicial, *id.* at 10-15. But this Court's equitable powers extend to granting requests for voluntary remand, including without vacatur. Neither the Supreme Court's stay decision nor the Clean Air Act's judicial review provisions restrain those powers; nor do Petitioners grapple with the fact that remand would generate a new agency action. As remand would nip in the bud a potential procedural issue in this case, EPA's motion will prevent needless and duplicative judicial process that could only serve to delay reductions in harmful pollution affecting downwind states. And with the Rule's enforcement stayed pending judicial review, Petitioners will not be prejudiced.

A. Granting the motion for partial voluntary remand is within this Court's powers.

This Court has long reserved to itself "broad discretion" to grant agencies' motions for remand, and "generally grant[s]" those motions where agencies intend on remand to "cure their own mistakes." *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018) ("*USWAG*") (citing *Limnia, Inc. v. Department of Energy*, 857 F.3d 379, 381, 386 (D.C. Cir. 2017), and *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)). That authority plainly encompasses EPA's requested partial remand here.

Petitioners charge in response that the Supreme Court "closed th[e] door" on that authority, Resp. 6, relying on a footnote in the Supreme Court stay order stating that the Clean Air Act's judicial review provisions prevent courts "from consulting explanations and information offered after [a] rule's promulgation." Resp. 12. But the Act's review

provisions do not bear on EPA's motion. EPA is not proposing that this Court reach merits determinations based on information beyond the designated administrative record. EPA is requesting a partial remand so that it may address the likely procedural error identified by the Supreme Court and issue a revised rationale concerning the Rule's severability that responds to timely filed comments – resulting in a *new* final agency action on that issue, with a corresponding administrative record, that can be reviewed by this Court consistent with the Clean Air Act. *See* 42 U.S.C. § 7607(d)(6)(C) and (d)(7)(A).

Whether the Court proceeds with the remainder of Petitioners' challenges to the Rule now or holds those challenges in abeyance until the remand is complete, the nature of the Court's review will be the same: the Court will be able to review Petitioners' challenges – save those presented in Section I of both briefs – on the original, complete administrative record applicable to those challenges. And it will be able to review any remaining, substantive concerns with the Rule's severability discussion on the basis of EPA's revised rationale issued on remand. *See* Mot. 7 n.4 (identifying similar challenges where partial voluntary remand was granted). As such, granting EPA's motion would not conflict with the Act's judicial review provisions.

Nor would granting a request for voluntary remand violate the Act's language on remedies. *See* Resp. 9. First, although Petitioners assert that EPA's request for a partial voluntary remand is "tantamount to a request for judgment," Resp. 9, the postures are distinct: agencies may seek voluntary remand without confessing error. *Clean Wisconsin v. EPA*, 964 F.3d

1145, 1175 (D.C. Cir. 2020). Petitioners do not establish in the first instance that the potential scope of remedies after judgment bears on this Court's consideration of voluntary remand before judgment.

In any case, Petitioners are incorrect that "[a]ny remedy short of [vacatur]" would violate the Clean Air Act. Resp. 9. The Act simply does not say that. It states that courts "*may* reverse any [EPA] action found to be" unlawful (the language partially quoted by the Supreme Court). 42 U.S.C. § 7607(d)(9) (emphasis added). The Act also explicitly precludes vacatur for certain types of errors, for example stating that courts "may invalidate [a] rule" on the basis of procedural errors "only if" certain conditions are met. *Id.* § 7607(d)(8); *see also Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 947, 950 (D.C. Cir. 2004); *Sierra Club v. EPA*, 769 F.2d 796, 806 (D.C. Cir. 1985) (explaining that remand so that the agency may "provide us with its rationale" is a "purely procedural victory").

Nor is there any evidence the Supreme Court intended – in a footnote in a stay opinion, no less – to announce significant new constraints on the power of administrative agencies to correct their own mistakes or the power of the judiciary to consider a broader array of remedies for agency errors. Justice Kavanaugh (who joined the stay opinion here) just a week later highlighted courts' practice of remanding without vacatur "when a court rules that an agency must provide additional explanation" for its action. *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 144 S. Ct. 2440, 2466 n.6 (2024) (Kavanaugh, J., concurring). Although noting "some debate" over this widespread practice, *id.*, he did not suggest that the

stay order in this case had declared it unlawful, or even called the practice into doubt.[1] *See also Michigan v. EPA*, 579 U.S. 903 (2016) (denying a petition for certiorari arguing that remand without vacatur was beyond this Court's authority under the Clean Air Act).

As the Supreme Court has explained, "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." *McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013); *see also Ctr. for Biological Diversity v. EPA*, 56 F.4th 55, 71–72 (D.C. Cir. 2022). Clean Air Act text stating that courts "may reverse" unlawful actions clearly does *not* divest courts of their traditional equitable powers, including the power to consider remedies other than vacatur. *Cf. Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). This Court has, of course, long exercised that authority under *Allied- Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993).

Petitioners claim that *Allied-Signal* would not apply to this case, but present no argument except that the Supreme Court's use of the word "reversal" transforms the Act's "may" into a mandate and precludes remand without vacatur. As discussed,

---

[1] Notably, that "debate" concerns the Administrative Procedure Act's use of the phrase "shall … set aside agency action." *See Checkosky v. SEC*, 23 F.3d 452, 491 (1994) (opinion of Randolph, J.). There is no room for debate here, where the Clean Air Act's use of "may" expressly preserves courts' equitable discretion.

Petitioners are wrong that the Act defines vacatur as the "sole remedial avenue"; "*may* reverse" means what it says. And the consequence of Petitioners' argument here – requiring an entirely new notice-and-comment rulemaking for every rulemaking error, including failure to respond to a single comment – would be an extraordinary departure from both this Court's precedents and its foundational equitable powers. There is thus no basis for this Court to deviate here from its longstanding "prefer[ence]" that "agencies … cure their own mistakes" through voluntary remand "rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp.*, 989 F.2d at 524.[2]

B. Granting EPA's request for partial voluntary remand is in the interest of the Court and the parties.

Granting partial voluntary remand in this instance is appropriate. Under this Court's precedents, EPA's stated intention to modify a portion of the existing rationale for the Rule by responding to unaddressed comments is "generally" sufficient to secure partial remand. *See USWAG*, 901 F.3d at 436 (citing *Limnia*). While "intervening events" like "a new legal decision" are not required to seek a voluntary remand, *Clean Wisconsin*, 964 F.3d at 1175,

---

[2] Nor can Petitioners reasonably claim that the grant of a stay is itself a guarantee of subsequent vacatur. *See* Resp. 9. Indeed, both EPA's 1998 NOX SIP Call and 2011 Cross-State Air Pollution Rule were ultimately implemented despite initial stay orders, and notwithstanding that some elements of each rule were remanded without vacatur.

EPA's request comes after an exceedingly rare preliminary order from the Supreme Court specifically identifying a likely procedural flaw in the Rule's rationale – and one that EPA has the ability to quickly cure without disturbing the remainder of this case. These circumstances amplify EPA's basis for seeking voluntary remand. To be sure, the United States believes that the Supreme Court's conclusion (upon limited review) was incorrect for the reasons provided in EPA's brief and in Justice Barrett's dissent. But as this Court might ultimately agree with the Supreme Court's preliminary view, remand to address the potentially overlooked comments now will save the parties and the Court from a far more prolonged process, whereby the same potential flaw must be corrected months or years from now – *after* argument, decision, and perhaps appeal, with all the harms to public health from delay – rather than at this relatively early juncture.

As against its general preference for voluntary remand, the Court weighs three additional factors: prejudice, frivolousness, and bad faith. *USWAG*, 901 F.3d at 436. But Petitioners fail to establish they are present here.

As to prejudice, enforcement of the Rule is presently stayed,[3] so this limited remand will not affect Petitioners' compliance burdens. Indeed, Petitioners' only argument (aside from claiming voluntary remand is unavailable) amounts to a

---

[3] *See* EPA Memorandum, available at: https://www.epa.gov/system/files/documents/2024-08/gnp-stay-policy-memo-08-05-2024-signed.pdf (announcing plan for administrative stay).

projection that EPA's explanation on remand will be substantively flawed. Resp. 10-11. That speculation, and Petitioners' claim that they "will not have any opportunity to address EPA's continued misimpression of the Rule's fatal flaws," *id.*, is unfounded. If Petitioners object to how EPA addresses comments on remand, judicial review is the remedy.

As to frivolousness, Petitioners' argument that EPA's request is "futile" collapses into their distorted view of agencies' authority to correct their own errors. *See* Resp. 11-13. As noted above, Petitioners are simply incorrect that this Court must keep the Rule frozen in amber until the Court can adjudicate the merits and, per Petitioners, order its vacatur.

Petitioners also claim that EPA has no "substantial and legitimate" interest in voluntary remand, Resp. 8-9, and is instead engaged in "gamesmanship." Resp. 14-15. But where the Supreme Court has not only granted emergency applications for stay but also issued an opinion that identifies a specific "likely" procedural flaw in the Rule, EPA's interest – and those of the Rule's supporters – in correcting that flaw is self-evidently legitimate and substantial.[4] The fact that EPA separately addressed reconsideration petitions on overlapping questions (but concerning after- arising judicial stays in other Circuits) and suggested consolidation of what all parties agree are related cases in this Court does not render EPA's interest in voluntary remand illegitimate. To the contrary,

---

[4] An agency's own, reviewable pronouncements are also far afield from *Chenery*'s concern with post hoc justifications of counsel. *See* Resp. 12.

voluntary remand demands substantial Agency resources; it is not undertaken lightly.[5]

Petitioners' reliance on *Limnia*, Resp. 12-13, takes them no further, as that case stands for the proposition that voluntary remands must be for the genuine purpose of addressing some aspect of the original action, not serve as cover for agencies that "d[o] not intend to revisit" the original action such that remand would amount to dismissal. 857 F.3d at 386-88. EPA's express purpose here is to address the identified comments and revise that portion of its rulemaking rationale accordingly.

As such, the requested partial remand is consistent with this Court's preference for administrative, rather than judicial, corrections of possible rulemaking errors.

C. Vacatur is not appropriate here.

Petitioners lastly represent that if this Court grants the request for partial remand, they do not oppose a remand with vacatur. But no party has moved for vacatur here. In any case, vacatur is unwarranted and would be highly prejudicial.

First, EPA's request for partial remand concerns a narrow, potential failure to respond to comments the Supreme Court preliminarily assessed to be fairly raised during rulemaking. There is no serious question that EPA can cure that procedural failure upon remand. Under *Allied-Signal*, the Court weighs

---

[5] The timing of EPA's request also was not frivolous. *See* Resp. 6, 14. The Supreme Court's decision took eight months, and EPA moved for partial remand after a reasonable period reviewing its reasoning.

"the seriousness of the [rule's] deficiencies" and "the disruptive consequences of an interim change that may itself be changed." 988 F.2d at 150-51. "The 'seriousness' of agency error turns in large part on 'how likely it is the agency will be able to justify its decision on remand.'" *Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) (cleaned up). Accordingly, where, as here, "an agency may be able readily to cure a defect in its explanation of a decision," *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009), the first *Allied-Signal* factor favors remand without vacatur.

Second, vacatur is not necessary to avoid prejudice to Petitioners. Enforcement of the Rule is currently stayed, so partially remanding without vacatur would have no effect on the status quo. Remand *with* vacatur, however, would be highly disruptive. *Allied-Signal*, 988 F.2d at 150-51. Vacatur would delay final resolution of Petitioners' Good Neighbor obligations under the 2015 ozone air quality standards well beyond the Act's deadlines for upwind action, *see Wisconsin v. EPA*, 938 F.3d 303, 312-13 (D.C. Cir. 2019), by forcing EPA to restart rulemaking – which began here more than two years ago – on the basis of a "likely" inadequate explanation on a single issue. There is no reason to presume, at this juncture, that the Rule is otherwise unreasonable, let alone so beyond justification that vacatur would be an appropriate remedy. *See Allied-Signal*, 988 F.2d at 150-51 (tying vacatur to "the extent of doubt whether the agency chose correctly" in designing a rule). And there is no reason to start back at the beginning of this litigation where the parties have already briefed a wide variety of disputes that will remain unaffected by the partial remand. That result would be both

inefficient and would deal a significant blow to the people of downwind states, who are awaiting the reductions in Petitioners' pollution promised by the Clean Air Act.

Accordingly, where the Court has found flaws in Good Neighbor rulemakings, it has regularly remanded those rulemakings without vacatur in recognition of the strong equities of downwind states and the unequivocal statutory command that EPA expeditiously eliminate offending pollution where upwind states have not done so. *See Wisconsin*, 938 F.3d at 336; *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 138 (D.C. Cir. 2015); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). Those concerns weigh equally against vacatur here, and indeed more so, as Petitioners have yet to actually prevail on any issue on the merits.

CONCLUSION

For these reasons and those in EPA's motion, the United States respectfully requests that this Court grant EPA's motion for partial voluntary remand without vacatur.

DATE: August 29, 2024

Respectfully submitted,

TODD KIM
Assistant Attorney General

/s/ Chloe H. Kolman
CHLOE H. KOLMAN
ELISABETH H. CARTER
ZOE PALENIK

U.S. Department of Justice
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 598-3141
elisabeth.carter@usdoj.gov

OF COUNSEL:

DANIEL P. SCHRAMM
KYLE DURCH
ROSEMARY H. KABAN
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Counsel for Respondents

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