No. 24-450

In the Supreme Court of the United States

OHIO, ET AL.,

Petitioners,

v.

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

BRIEF OF INDUSTRY RESPONDENTS IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

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.

CORPORATE DISCLOSURE STATEMENTS

American Chemistry Council has no parent corporation, and no publicly held company has 10 percent or greater ownership in American Chemistry Council.

American Forest & Paper Association has no parent corporation, and no publicly held company has 10 percent or greater ownership in American Forest & Paper Association.

American Fuel & Petrochemical Manufacturers has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in American Fuel & Petrochemical Manufacturers.

American Iron and Steel Institute has no parent corporation, and no publicly held company has 10 percent or greater ownership in the American Iron and Steel Institute.

American Petroleum Institute has no parent corporation, and no publicly held corporation has a 10 percent or greater ownership in American Petroleum Institute.

America's Power has no parent corporation, and no publicly held company owns a 10 percent or greater interest in America's Power.

Arkansas League of Good Neighbors has no parent corporation, and no publicly held company has

10 percent or greater ownership in Arkansas League of Good Neighbors.

Associated Electric Cooperative has no parent company and no publicly held company has a 10 percent or greater ownership interest in Associated Electric Cooperative.

Buckeye Power, Inc. does not have a parent corporation and no publicly held corporation owns 10 percent or more of its stock or other membership interests.

Deseret Power Electric Cooperative nor its member cooperatives issue stock, and therefore no publicly traded company owns 10 percent or more of their stock.

Enbridge (U.S.) Inc. has no parent companies and no publicly held company owns a 10 percent or greater interest in Enbridge (U.S.) Inc.

Energy Transfer LP does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Hybar LLC is 100 percent owned by Hybar Intermediate Holdings LLC, which is 100 percent owned by Green & Clean Holdings LLC. No publicly held corporation owns 10 percent or more of the stock of Hybar LLC, Hybar Intermediate Holdings LLC, or Green & Clean Holdings LLC.

Interstate Natural Gas Association of America has no parent corporation, and no publicly held corporation has a 10 percent or greater ownership in Interstate Natural Gas Association of America.

Kinder Morgan, Inc. does not have a parent corporation, and no publicly held corporation holds 10 percent or more of Kinder Morgan's stock.

Midwest Ozone Group has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Midwest Ozone Group.

National Mining Association has no parent corporation, and no publicly held company has 10 percent or greater ownership in in National Mining Association.

The **National Rural Electric Cooperative Association** has no parent corporation, and no publicly held company has 10 percent or greater ownership in National Rural Electric Cooperative Association.

Ohio Valley Electric Corporation has no parent company. American Electric Power Company, Inc., and Buckeye Power, Inc., each owns greater than 10 percent of the equity in Ohio Valley Electric Corporation.

The **Portland Cement Association** has no parent corporation, and no publicly held company

owns a 10% or greater interest in the Portland Cement Association.

TransCanada PipeLine USA Ltd. is an indirectly owned subsidiary of TC Energy Corporation. TC Energy Corporation is a federally registered Canadian corporation, with its headquarters in Calgary, Alberta. TC Energy Corporation is a publicly held corporation with no parent corporation. No entity (whether publicly or privately held) has an ownership interest in TC Energy Corporation of 10 percent or more.

United States Steel Corporation has no parent company. The following publicly held company has a 10% or greater ownership interest in it: BlackRock, Inc.

Union Electric Company, d/b/a Ameren Missouri, a Missouri corporation's parent company is Ameren Corporation, and the only subsidiary of Union Electric Company that is not wholly owned by the company is STARS Alliance, LLC, in which the company owns a 25 percent interest. The only publicly held company that has a 10 percent or greater ownership interest in Union Electric Company is Ameren Corporation

Wabash Valley Power Association d/b/a Wabash Valley Power Alliance nor its member cooperatives issue stock, and therefore no publicly traded company owns 10 percent or more of their stock.

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INTRODUCTION

Pursuant to Supreme Court Rule 12.6, Respondents American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Iron and Steel Institute, American Petroleum Institute, America's Power, Arkansas League of Good Neighbors, Associated Electric Cooperative, Buckeye Power, Inc., Deseret Power Electric Cooperative, Enbridge (U.S.) Inc., Energy Transfer LP, Hybar LLC, Interstate Natural Gas Association of America, Kinder Morgan, Inc., Midwest Ozone Group, National Mining Association, National Rural Electric Cooperative Association, Ohio Valley Electric Corporation, Portland Cement Association, TransCanada Pipeline USA Ltd., United States Steel Corporation, Union Electric Company, Wabash Valley Power Association Alliance (collectively, "Industry Respondents") submit this brief in support of the Petition for Writ of Certiorari filed by the States of Ohio, Indiana, Kentucky, and West Virginia ("Petitioners").

Industry Respondents wholeheartedly agree with the Petitioners as to why this Court should grant the Petition. *See* Pet. 17–29. Industry Respondents file this brief to emphasize Petitioners' arguments and to further explain why declining to answer the Question Presented would provide the

United States Environmental Protection Agency ("EPA") with justification for its unlawful practice of seeking a second bite of the apple after courts deem its rules – or its records – lacking.

REASONS FOR GRANTING CERTIORARI

Industry Respondents agree with Petitioners that EPA has intentionally undermined this Court and the Clean Air Act.

In its June 27, 2024 opinion granting the requested emergency stay of the Good Neighbor Plan, this Court noted that after oral argument, EPA issued a document attempting to justify its actions related to the Good Neighbor Plan. *See Ohio v. EPA,* 144 S. Ct. 2040, 2055 (2024) ("Supreme Court Stay"). This Court concluded that "the Clean Air Act prevents us (and courts that may in the future assess the FIP's merits) from consulting explanations and information after the rule's promulgation." Supreme Court Stay at 2055 n.11 (citing 42 U.S.C. § 7607(d)(6)(C), (d)(7)(A)). The plain meaning of this quote is that any consideration of this information or the explanations contained therein would be improper under the Clean Air Act. However, EPA chose to disregard this point entirely and sought remand to supplement the deficiencies in the record of the Good Neighbor Plan in the lower court *after* merits briefing and *before the merits have been reached as to the current record*. By granting remand, the D.C. Circuit gave EPA a license to subvert its responsibilities to promulgate fully justified rules by allowing ongoing revisions to the record as flaws are pointed out mid-litigation.

The remand order was unjustified and failed to meaningfully explain how remand is appropriate in these circumstances. A review of the Clean Air Act and the order of this Court is clear. *See* 42 U.S.C. § 7607(d)(6)(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 the date of such promulgation"); *see also id.* § 7607(d)(7)(A) (limiting judicial review to only this information). The remand order most certainly runs afoul of the Court's explicit language and ignores the appropriate remedy available under the Clean Air Act – reversal. Reversal, rather than remand would have been the appropriate remedy for the badly broken Good Neighbor Plan. There is no amount of record supplement Band-Aids that EPA can use to address all the deficiencies in the Rule, its record, and its intended implementation scheme. The deficiencies are substantive and any changes to the record will fundamentally modify the circumstances such that the Rule would not look remotely like the one promulgated in 2023, which is counter to the Clean Air Act. To allow EPA to construct a new rule and record during the course of litigation of the original rule without the opportunity for stakeholders to comment, only to have the agency claim the two are the same, is absurd and conflicts with basic principles of administrative law.

EPA's second bite of the apple here is an explicit refusal to follow the direction of this Court and the text of the Clean Air Act. Answering the Question Presented will provide much needed clarity about the appropriateness of record curative remands in Clean Air Act challenges.

CONCLUSION

Accordingly, the Court should grant the Petition.

Respectfully submitted,

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