No. 24-450

IN THE

# Supreme Court of the United States

State of OHIO, et al.,

*Petitioners*,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

*Respondents*.

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

## BRIEF IN OPPOSITION FOR STATE RESPONDENTS


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## QUESTION PRESENTED

Whether the Clean Air Act permits a court to remand a rulemaking record to EPA to allow the agency to "offer a fuller explanation of the agency's reasoning" at the time the rule was promulgated. *See Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (quotation marks omitted).

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## INTRODUCTION

The U.S. Environmental Protection Agency (EPA) promulgated the rule challenged here to curb interstate ozone pollution. Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36654 (June 5, 2023) ("Rule"). This Court granted emergency applications to stay the Rule's enforcement pending judicial review. *Ohio v. EPA*, 603 U.S. 279 (2024). EPA subsequently sought a partial voluntary remand of the Rule to address only the procedural deficiency preliminarily identified by the Court's decision, i.e., a potentially insufficient agency response to certain comments in the administrative record about the Rule's severability. The D.C. Circuit granted a remand of the record and retained jurisdiction. Certain parties that challenged the Rule below (but not all such parties) filed this petition for certiorari seeking review of the D.C. Circuit's interlocutory order.

The petition for certiorari should be denied for the reasons explained in EPA's response to the petition. State Respondents[1] write separately to underscore that for at least three independent reasons the petition is an exceedingly poor vehicle for reviewing the question presented, and that petitioners are wrong on the merits in any event. First, review in this interlocutory posture is premature because subsequent proceedings in the D.C. Circuit may render the question presented irrelevant and, if not, the question presented will be reviewable after final judgment. Second, there are serious questions whether petitioners are aggrieved by a proce-

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[1] State Respondents are the States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin; the District of Columbia; the City of New York; and Harris County, Texas.

dural order that directs another party to produce additional information, and therefore whether they have appellate standing to seek review. Third, this Court will benefit from allowing the question presented—which was the subject of only abbreviated motion practice, without oral argument—to percolate further in the D.C. Circuit. The D.C. Circuit should receive briefing and oral argument on the question presented, and be given an opportunity to provide its reasoning if it ultimately decides to rely on the EPA's further response to comments in issuing final judgment.

## BACKGROUND

The relevant statutory framework and procedural history of this case can be found in this Court's decision in *Ohio v. EPA*, 603 U.S. 279 (2024). In *Ohio*, this Court stayed enforcement of the Rule pending the D.C. Circuit's disposition of these cases and any petition for writ of certiorari to review that disposition, if such writ is timely sought. The Court reasoned that EPA had likely failed to offer a sufficient explanation of the Rule's severability in response to public comments submitted during the notice-and-comment period. *See id.* at 293-94. These comments suggested that the Rule would be invalid if it ultimately applied to fewer States than at proposal. *See id.*

In response to the *Ohio* decision, EPA asked the D.C. Circuit for a partial voluntary remand of the Rule to allow the agency to address only the "record deficiency preliminarily identified by the Supreme Court in *Ohio*." Pet. App. 12a; *see id.* at 15a. EPA explained that it would be "most efficient to address that possible error now" rather than many months later; that a remand would facilitate judicial review; and that the agency

anticipated completing the remand in a matter of months. Pet. App. 18a; *see id.* at 15a. Petitioners opposed, arguing that the Clean Air Act forecloses all remedies except vacatur. Pet. App. 21a-22a (citing *Ohio*, 603 U.S. at 295 n.11); *id.* at 27a-28a.

In a short per curiam order, the D.C. Circuit ordered "that the record be remanded to permit [EPA] to further respond to comments in the record." Pet. App. 2a. The D.C. Circuit placed the case into abeyance and retained jurisdiction. Pet. App. 2a. Four of the thirty-one parties that challenged the Rule below filed this petition for certiorari seeking review of the interlocutory order.[2]

## REASONS FOR DENYING THE PETITION

The petition for certiorari should be denied for the reasons explained in EPA's opposition to the petition. State Respondents write to underscore that there are at least three independent factors that render this petition an extraordinarily poor vehicle for considering the question presented. Each factor is alone sufficient to warrant denying certiorari. Moreover, petitioners are wrong on the merits in any event.

I. This petition is an exceedingly poor vehicle for considering the question presented, i.e., whether the Clean Air Act permits a court to remand a rulemaking

[2] The four parties that filed this petition for certiorari (hereafter, "petitioners") are the States of Ohio, Indiana, Kentucky, and West Virginia. The remaining twenty-seven parties that challenged the Rule below but did not file a petition for certiorari are the States of Nevada, Utah, and Wisconsin; the Kentucky Energy and Environment Cabinet; and twenty-four industrial entities and trade associations.

record to allow the agency to provide further explanation of its reasoning when the rule was promulgated.

*First*, review of the D.C. Circuit's interlocutory order would be premature because subsequent proceedings may render the question presented irrelevant and, if not, petitioners can ask this Court to review the question presented after a final judgment issues.

The interlocutory posture of a case usually warrants denying certiorari because, among other reasons, the issues presented by an interlocutory order may not ultimately be dispositive and may instead become academic. *See, e.g.*, *Abbott v. Veasey*, 580 U.S. 1104, 1104 (2017) (Roberts, C.J., statement respecting denial of certiorari); *Virginia Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., statement respecting denial of certiorari). It is well settled that this Court does not issue advisory opinions or opine on issues that are academic. *See, e.g.*, *Conway v. California Adult Auth.*, 396 U.S. 107, 110 (1969) (per curiam) (dismissing writ as improvidently granted where decision would amount to advisory opinion).

Here, subsequent proceedings in the D.C. Circuit may render the question presented irrelevant to the litigation's outcome. Although the D.C. Circuit's interlocutory order allows EPA to provide a further explanatory response to the comments that this Court identified in the administrative record, the D.C. Circuit could decide not to rely on that further response when it adjudicates petitioners' challenges to the Rule. Indeed, the case was already fully briefed in the D.C. Circuit before the interlocutory order issued (*see* Pet. 1), and the interlocutory order contemplates that the parties may request supplemental briefing to address the further response to comments that EPA provides. *See* Pet. App. 2a (asking

parties to submit motions to govern). Petitioners, as part of that briefing, could raise to the D.C. Circuit their arguments about whether EPA's further response should be considered by that court at all. And the D.C. Circuit might ultimately issue a final judgment that upholds the Rule without relying on the further response. *See Ohio*, 603 U.S. at 318-20, 322 (Barrett, J., dissenting) (applying harmless-error analysis). Alternatively, the D.C. Circuit might issue a final judgment in petitioners' favor, notwithstanding the further response, as petitioners have raised claims unrelated to the severability issue that could be the basis for a ruling in this case. In either scenario, the question presented by the certiorari petition will become irrelevant. The Court should not intervene in the middle of this litigation to decide a question that may not be outcome-determinative and may instead become purely academic. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

This Court has departed from its usual practice of declining to review interlocutory orders only in very rare circumstances, such as, for example, granting review when an important question would be "effectively unreviewable" after final judgment, *e.g.*, *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citation omitted), or when an immunity from suit, rather than a mere defense to liability, is implicated, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009). No such circumstances exist here. If the D.C. Circuit ultimately enters a final judgment that does rely on EPA's further response to comments, petitioners can seek review of the propriety of the record remand at that point.

*Second*, the fact that petitioners seek review of a procedural order that is interlocutory in nature raises serious doubts about appellate standing. *Cf. National Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57

(2020) (Kavanaugh, J., statement respecting denial of certiorari) (observing that petitioners may lack antitrust standing). It is well settled that "'standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 211 (2020) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)). Appellate standing requires "a concrete injury" that is "traceable to the decision below." *Id.*; *see Whole Woman's Health v. Jackson*, 595 U.S. 30, 38 (2021) (in interlocutory appeal, "review is limited to the particular orders under review" and not any "ultimate merits question"). But here, the interlocutory order does not injure petitioners. The order does not require petitioners to take affirmative steps, *cf. Seila Law*, 591 U.S. at 211 (interlocutory order required production of documents), and does not subject petitioners to any compliance obligations. Indeed, the order has no immediate consequences for petitioners because the Rule is stayed through at least the disposition of proceedings in the D.C. Circuit. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 4-55 (11th ed. 2019).

To the extent petitioners argue that the order infringes their alleged procedural right to judicial review on the pre-*Ohio* record, it is well settled that the deprivation of a procedural right, "without some concrete interest that is affected," does not establish standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). In any event, such a purported procedural injury is merely speculative. As explained above, petitioners may ultimately obtain review based solely on the pre-*Ohio* record because the D.C. Circuit could decline to rely on EPA's further response to comments in issuing its final judgment. Petitioners' speculation about a hypothetical procedural injury is insufficient to establish

appellate standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

*Third*, the petition is a poor vehicle to resolve the question presented because this Court does not have the benefit of a lower court's full consideration of that question. EPA's request for a partial remand of the Rule was the subject of only abbreviated motion practice, without oral argument. And the court (necessarily) issued the interlocutory order granting a partial remand of the record without having evaluated the materials that EPA ultimately produced upon remand. *Cf. Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (mem.) (Barrett, J., concurring in denial of application for injunctive relief) (noting difficulties of evaluating issues "without benefit of full briefing and oral argument"). The issue presented is likely to percolate further in the D.C. Circuit because, as noted, the interlocutory order contemplates the potential for supplemental briefing after EPA issues its further response to comments. *See* Pet. App. 2a. The D.C. Circuit should have the opportunity to consider any supplemental briefs, and the parties' oral arguments, in determining whether to rely on EPA's further response to comments. And if the D.C. Circuit does ultimately rely on EPA's further response, this Court would benefit from having the lower court's reasoning for that decision. *See Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) (explaining that court of appeals, with aid of parties' briefs, would yield insights that this Court "cannot muster guided only by our own lights").

II. The petition does not warrant the Court's review for the additional and independent reason that the D.C. Circuit's interlocutory order is consistent with longstanding administrative review principles and does not violate the Clean Air Act. Petitioners' contrary argu-

ments misconstrue the Act's statutory provisions and history.

Appellate courts may order limited remands while retaining jurisdiction for a variety of reasons, including that an agency's statement of reasons is not comprehensive enough to permit judicial review. 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3937.1 (3d ed. June 2024 update) (Westlaw). As this Court recently explained, if an agency's stated grounds for action are inadequate, a court may remand for the agency to "offer a fuller explanation of the agency's reasoning at the time of the agency action." *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (quotation marks and emphasis omitted). Circuit courts around the country commonly order such explanatory remands. *See, e.g.*, *BNSF Ry. v. Federal R.R. Admin.*, 105 F.4th 691, 696 (5th Cir. 2024). And this Court has ordered or recommended such remands. *See, e.g., Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated in part on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (observing that remand is proper recourse for court faced with inadequate administrative record); *Ford Motor Co. v. NLRB*, 305 U.S. 364, 375 (1939) (commending agency for seeking voluntary remand).

Contrary to petitioners' arguments (Pet. 19-21), nothing in the text or history of the 1977 Clean Air Act amendments suggests that Congress displaced reviewing courts' longstanding equitable authority to order an explanatory remand. *See McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) (courts should "not construe a statute to displace courts' traditional equitable authority absent the clearest command" (quotation marks omitted)). Peti-

tioners point to two provisions of the Act, but neither provision prohibits explanatory remands.

Specifically, petitioners point (Pet. 19-20) to the Act's requirement that a 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). That provision defines the universe of factual material upon which EPA may base the final, binding policy determinations that constitute a final rule and has no application here. Here, EPA made clear that it would not introduce any new facts or data and instead provided an "amplified articulation" of its prior response to comments that this Court concluded are already in the administrative record. *See* EPA, Notice on Remand of the Record of the Good Neighbor Plan to Respond to Certain Comments (Dec. 3, 2024). And, contrary to petitioners' atextual reading, nothing in that provision bars "explanations" or "justifications" (Pet. 20) of an agency's prior reasoning that a court orders during judicial review. *See Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (quotation marks omitted).

Petitioners also err in relying on the Act's requirement that the "record for judicial review shall consist exclusively" of the categories of materials listed in the statute. 42 U.S.C. § 7607(d)(7)(A). That provision generally bars parties or agencies from supplementing the record with materials that do not fall into one of the statutorily listed categories. *Id.* But here, the D.C. Circuit's interlocutory order allows EPA to introduce material that, under this Court's decision in *Ohio*, does fall into one of the statutorily listed categories, namely, "a response to each of the significant comments . . . submitted . . . during the comment period." 42 U.S.C. § 7607(d)(6)(B); *see* Pet. App. 2a. Because this Court

concluded in *Ohio* that EPA had likely misjudged the significance of certain comments that are already part of the administrative record, the D.C. Circuit acted reasonably in allowing EPA to provide the explanatory response that this Court determined was likely "required by the statute and wrongfully omitted by EPA." *American Petroleum Inst. v. Costle*, 609 F.2d 20, 22 (D.C. Cir. 1979) (per curiam); *see Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1183 (D.C. Cir. 1980).

In urging otherwise, petitioners mischaracterize the history of the 1977 amendments that added these two statutory provisions to the Clean Air Act. *See* Pet. 8-11, 20-21. Petitioners incorrectly contend that Congress amended the Act because, prior to 1977, the Act allowed EPA to supplement the record "at any time during the judicial-review process." Pet. 8 (citing section 307(c) as problematic "first iteration" of Act). But the 1977 amendments left intact the allegedly problematic provision that petitioners identify, which remains in the Act today. *See* 42 U.S.C. § 7607(c). *Compare* Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1707-08 (§ 307(c)), *with* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305, 91 Stat. 685, 772-76. As before the 1977 amendments, section 307(c) (§ 7607(c)) continues to apply solely to *formal* rulemakings conducted through a hearing "on the record" using "trial-like procedures"—a process that is irrelevant here. *See* Congressional Rsrch. Serv., *A Brief Overview of Rulemaking and Judicial Review* 3 (rev. Mar. 27, 2017).

There is also no evidence that Congress passed the 1977 amendments for the purpose of "forcing courts" to conduct review without any explanatory remands (*contra* Pet. 20-21). Instead, the amendments addressed an issue unrelated to explanatory remands: at that time,

the Clean Air Act (like most organic statutes) did not address informal notice-and-comment rulemaking and thus did not provide any procedural mechanism to define the "record" in such rulemaking. H.R. Rep. 95-294, at 318-19 (1977); *see* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L. J. 38, 38 (1975). To address that gap, the 1977 amendments added the provisions (discussed above) that list categories of materials that constitute the administrative record in informal rulemakings and state that a rule may not be based on facts or information not placed on the docket at promulgation. *See* H.R. Rep. 95-294, *supra*, at 319-21.

## CONCLUSION

The Court should deny the petition for certiorari.

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