No. 24-450

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

REPLY

This case asks whether the Clean Air Act allows a federal court to remand a matter to the EPA—*after* a rule's promulgation—to supplement the administrative record. The answer is no. The Clean Air Act prohibits the EPA from supporting a rule with "any information or data" that was not "placed in the docket as of the date of" the rule's "promulgation." 42 U.S.C. §7607(d)(6)(C). Courts should not circumvent this prohibition by sending matters back to the EPA long after promulgation. But whatever the answer, the question presented is undoubtedly significant. The circuits (especially the D.C. Circuit) need to know whether, and to what extent, the Clean Air Act permits remands to the agency for record supplementation in the many Clean-Air-Act cases that they review.

The EPA does not seriously dispute the importance of the question presented. It instead encourages the Court to delay review until a later stage of the case. But the issue's nature renders the case's interlocutory posture a feature, not a bug. Right now, this case asks a discrete, purely legal question about federal courts' remand authority under the Clean Air Act. But if the Court awaits further proceedings, the question presented is likely to be buried in myriad other issues—including highly technical arguments about the rule itself. The current posture keeps the case laser-focused on the rulemaking process.

The EPA also misstates the scope of judicial power in this area by reframing the question presented as one about remand without vacatur. It spends little time on the Clean Air Act's text, instead preferring to reframe the case as one about remand without vacatur in *ordinary* administrative-law cases. Again,

whatever the status of that broader debate, the question presented here offers a more specific answer, grounded in statutory text. Pet.17–18.

I. This case presents a unique chance to answer an important question about the Clean Air Act.

This case asks whether the Clean Air Act allows remand for record development. That question is important, and this case is an ideal vehicle for resolving it. The EPA's contrary arguments miss the mark.

A. The question presented is important for litigation under the Clean Air Act.

Recall this case's history. The EPA promulgated a regulation under the Clean Air Act (a federal-implementation plan) that set air-quality standards for twenty-three upwind States. *Ohio v. EPA*, 603 U.S. 279, 284–89 (2024). But the EPA failed to consider "[w]hat happens" if "many of the upwind States fall out" of the federal plan. *Id.* at 293. Because the EPA failed to consider that important aspect of the problem, this Court stayed the plan. *Id.* at 293–94, 300. As part of its stay analysis, the Court recognized that "the Clean Air Act prevents" judges "from consulting *explanations* and information offered after the rule's promulgation." *Id.* at 295 n.11 (citing §7607(d)(6)(C), emphasis added). The Court further recognized that, if the challengers were to show the EPA's action was "arbitrary or capricious on the *existing record*," the challengers would "be entitled to 'reversal'" of the federal plan. *Id.* at 294 & 295 n.11 (quoting §7607(d)(9), emphasis added, alterations accepted).

The D.C. Circuit, however, did not reverse the federal plan. Nor did it analyze the lawfulness of the

federal plan on the existing record. It instead granted a remand without a merits decision. The court specifically explained that it was remanding "the record" so that the EPA could "further respond to comments" concerning its plan. Pet.App.2a. The EPA took up that invitation. EPA BIO 7. It authored a "supplemental response" to "provide an 'amplified articulation' of the [EPA's] methodology." 89 Fed. Reg. 99105, 99105–06 (Dec. 10, 2024). This "amplified" response purports to answer questions that had not been answered at promulgation, *accord Ohio*, 603 U.S. at 293–94.

This Court should accept review to clarify whether the Clean Air Act permits such a do-over. That clarification matters a great deal for future cases. As all agree, federal rulemaking under the Clean Air Act is an oft-litigated area. *See* Pet.23 (collecting cases); EPA BIO 15 (same). The D.C. Circuit—the sole forum available to challenge "nationally applicable regulations," §7607(b)(1)—claims authority to remand matters to the EPA for record supplementation in Clean-Air-Act cases. *See, e.g.*, *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019) (*per curiam*); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015); *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (*per curiam*). But that claim of judicial power in the Clean-Air-Act context runs afoul of the Act's text, *see* §7607(d), *and* this Court's reading of that text, *see Ohio*, 603 U.S. at 294 & 295 n.11. It follows that this matter warrants the Court's sustained attention.

B. This case's interlocutory posture is a strength, not a weakness.

The EPA incants the typical vehicle issues, but inspections reveal each criticism is superficial.

The agency's main push is for this Court to follow its "usual practice" of not reviewing interlocutory orders. EPA BIO 8. That position starts on decent footing: this Court is often "wary of taking cases in an interlocutory posture." *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (Thomas, J., statement regarding the denial of certiorari). But that apprehension sometimes gives way to other considerations that tilt this Court *toward* review of interlocutory decisions that present important legal questions. *See*, *e.g.*, *Oklahoma v. EPA*, No. 23-1067; *U.S. v. Skrmetti*, No. 23-477; *Moody v. NetChoice, LLC*, 603 U.S. 707, 721–22 (2024); *Biden v. Nebraska*, 600 U.S. 477, 488–89 (2023); *Fulton v. City of Philadelphia*, 593 U.S. 522, 531–32 (2021); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 663 (2020); *Nielsen v. Preap*, 586 U.S. 392, 400 (2019); *Trump v. Hawaii*, 585 U.S. 667, 681–82 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 704 (2014).

The Court should grant such review here. This is the rare case where an interlocutory posture is an advantage. The judicial practice of remanding a matter to an agency while leaving the challenged rule in place usually occurs after the court reaches the merits of a rule's lawfulness. Appeals from such decisions thus typically focus on a rule's merits—leaving remand questions as an afterthought. That is presumably why, despite general interest in the subject, *see* Pet.17–18, the practice of remanding rules to agencies has received little attention from this Court. Here,

however, the D.C. Circuit remanded the federal plan to the EPA without reaching the plan's lawfulness. That posture isolates the remand question. That, in turn, makes this case a rare chance to focus on a recurring—but overlooked—question about post-promulgation record supplementation under the Clean Air Act.

The question presented can be cleanly resolved in this posture. Because this case involves a discrete legal issue, further development will *not* assist the Court in answering the question presented. Quite the opposite is true. As the Court no doubt remembers from stay proceedings, the regulated industries have identified several problems with the federal plan, many of which are highly technical. *See Ohio*, 603 U.S. at 294 n.10; *id.* at 321 (Barrett, J., dissenting). If the proceedings below continue, those arguments will eventually sideline—and perhaps completely overwhelm—the legal question presented here. While the EPA suggests that awaiting review has no downside, *see* EPA BIO 9–10, it is actually nudging the Court to avoid the question altogether.

The EPA's other avoidance arguments fare no better. For example, the EPA briefly mentions the lack of a circuit split. EPA BIO 8. But the agency rightly does not dwell on that point. The D.C. Circuit is the forum for most (but not all) cases involving rulemaking under the Clean Air Act. *See* §7607(b)(1). That shrinks the chance of a circuit split, reducing the point of waiting for further percolation. To be sure, there is a widely held belief among the circuits that judges have the power to remand unlawful regulations—while still leaving them in place—to allow agencies to "cure" problems. *See* EPA BIO 15–16 n.3. But that reflexive belief provides more reason for this Court's

review. Regardless of whether courts possess the broad remand power in typical administrative-law cases, Congress took sides in that debate in the Clean Air Act when it expressly prohibited the EPA from belatedly curing problems with its record. *See* §7607(d); *Ohio*, 603 U.S. at 295 n.11. The Court should therefore step in to prevent entrenched views about judicial power, taken from *ordinary* administrative-law cases, from overriding *this Act's* textual mandate.

Three further points about this case as a vehicle bear mention. *First*, this case differs from those to which the EPA compares it. Take, for example, this Court's denial of certiorari in *Michigan v. EPA*, 579 U.S. 903 (2016). The question there was whether a reviewing court can leave an unlawful rule in place for further proceedings after determining that the rule was promulgated without statutory authority. *Michigan v. EPA*, No. 15-1152, 2016 WL 1043192, at *i (U.S. Mar. 14, 2016). Because that question differs fundamentally from the one here, the analysis differed in critical respects. The *Michigan* petition centered on the "basic question" in *any* administrative-law case "of whether a court may leave an unauthorized agency action in place." *Id.* at *11. And, in a post-merits-decision posture, much of that discussion focused on thorny questions of remedy in administrative-law challenges. *Id.* at *11–20. Consequently, the petition did not focus on the question of post-promulgation, and pre-merits-review, *record development* under the Clean Air Act. It did not address §7607(d)(6)(C)—the keystone of the argument here—at all. The comparison is thus inapposite.

Second, contrary to the state respondents' suggestions, the States have appellate standing. *See* NY BIO 5–7. Notably, the EPA does not press this standing

argument—for good reason. The States have standing to challenge the federal plan because, among other things, the plan injures them by "impair[ing] their sovereign interests in regulating their own industries and citizens." *See Ohio*, 603 U.S. at 291. While the States obtained a stay of the plan, they have not yet "won" this case and permanently prevented such injuries. *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). With the case unfinished, the States have every right to appeal an adverse ruling that benefits the opposing party—the EPA—by allowing it to unlawfully expand the record.

Third, as all seem to agree, this appeal presents no mootness concern. That is no small matter. Today's age of cyclical agency rulemaking, challenges thereto, and nationwide injunctions, often leaves the regulatory landscape in flux. *Cf. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring in grant of stay). Consequently, agencies commonly claim that legal challenges to their actions have become moot. *E.g.*, *Ohio v. EPA*, 969 F.3d 306, 308 (6th Cir. 2020). But here, neither the EPA nor the state respondents claim that, if this Court takes up this case now, it is likely to become moot before this Court decides it. By contrast, if the Court awaits the prospect of review after more proceedings below, the odds are strong that regulatory developments will shift the focus of litigation. If such a shift occurs, the important problem this case presents will go unsolved.

II. The D.C. Circuit erred by granting a mid-litigation remand.

The EPA spends a large portion of its response discussing the merits of the question presented. *See* EPA BIO 11–17. Its arguments are wrong, both as a

matter of statutory text and under this Court's reasoning in *Ohio v. EPA*, 603 U.S. 279.

A. The remand violated both the Clean Air Act's text and this Court's earlier guidance.

One "basic" rule of administrative law is that an "agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020); *accord SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). It is perhaps true, as the EPA posits, that this general rule does not "freeze[] an agency's exercise of its judgment after an initial decision has been made." *See* EPA BIO 12–13 (quoting *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006)). But whatever the guiding principle for most administrative-law cases, the Clean Air Act takes things further by limiting the EPA's rulemaking to "information or data" included "in the docket" by the "date of … promulgation." §7607(d)(6)(C). Surrounding text reinforces the limit. A nearby provision restricts the "record for judicial review … exclusively" to the "material" supporting the rule's promulgation. §7607(d)(7)(A). Another nearby provision addresses the remedies permissible under the Clean Air Act. It says that courts "may reverse" an unlawful agency action, §7607(d)(9). A "remand to supplement the record" is not on the judicial menu.

The Court already confronted this provision in its stay decision. Before that decision, the EPA had tried to provide "further explanations" for its federal plan after promulgation. *Ohio*, 603 U.S. at 295 n.11. But, the Court explained, the Clean Air Act's text "prevent[ed]" it "from consulting explanations and information offered after the rule's promulgation." *Id.*

That limit, the Court presciently warned, also applied to other "courts that may in the future assess the [federal plan's] merits." *Id.* In other words, this Court explained that the ultimate decision regarding the federal plan's legality would be made "on the existing record." *Id.*

Nonetheless, the D.C. Circuit remanded "the record" to the agency. Pet.App.2a. The purpose of this remand, the circuit explained, was for the EPA to offer "further" explanation in the light of "comments in the record." *Id.* Unsurprisingly, the EPA ran with that latitude. It recently unveiled an "amplified articulation" of its "methodology." *See* 89 Fed. Reg. at 99106, 99123. The EPA did just what the Court forewarned, "offer[ing]" "explanations and information … after the rule's promulgation." *Ohio*, 603 U.S. at 295 n.11. The D.C. Circuit should have never allowed a maneuver that the Act forbids.

B. The EPA's contrary arguments are unpersuasive.

For starters, most of the authority the EPA cites does *not* involve the Clean Air Act. *E.g.*, EPA BIO 11 (citing *Calcutt v. FDIC*, 598 U.S. 623, 628–29 (2023) (*per curiam*)). That matters because, regardless of whether federal courts possess broad remand powers in *typical* administrative-law cases—also an important question, to be sure—the *Clean Air Act* prohibits post-promulgation expansion of the administrative record. §7607(d)(6)(C); *see* Pet.18. It follows that the EPA cannot import general rules from other contexts, such as cases involving the Administrative Procedure Act.

The EPA's discussion of the statutory text is half-hearted. The agency suggests that the remand here

did not violate the Clean Air Act because the agency did not add any new facts or data to the record. *See* EPA BIO 7, 13. But the statutory limit is broader than the EPA suggests. Recall that the text prohibits the EPA from adding "any information"—not just raw "data"—that "has not been placed in the docket as of the date of … promulgation." §7607(d)(6)(C). And the ordinary meaning of "'information' is broad." *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 751 n.4 (2023). "Information" includes not only "purely factual information," but also refers "to all 'knowledge obtained from investigation, study, or instruction.'" *Id.* (quoting Webster's New Collegiate Dictionary 592 (1975)). Here, the "knowledge obtained from" the EPA's expanded articulation of its methods, found nowhere in the original rule, falls within that ordinary meaning. Unsurprisingly, this Court confirmed that reviewing courts cannot consult new "explanations" under §7607(d)(6)(C). *Ohio*, 603 U.S. at 295 n.11.

The EPA is also too quick to dismiss this Court's stay analysis. *See* EPA BIO 17. That analysis, the agency stresses, was in a "preliminary posture" and focused on the challengers' likelihood of success. *Id.* That is true, but it oversimplifies what happened during the stay proceedings. The issues presented at that stage were predominantly legal, and this Court decided them after voluminous briefing and a lengthy argument. *Ohio*, 603 U.S. at 290. Most important for present purposes, the Court explained why the ultimate merits analysis in this case would turn on whether the federal plan "was arbitrary and capricious on the existing record." *Id.* at 295 n.11. Again, the Court directly warned "[lower] courts that may in the future assess the [federal plan's] merits" that they

could not consult "explanations and information offered after the rule's promulgation." *Id.* Apparently, in the EPA's view, that warning was just wasted words.

At bottom, the EPA encourages this Court to replace congressional authority with judicial authority. The agency asks this Court to rubberstamp the D.C. Circuit's "commonsense approach" for deciding when remands are appropriate in Clean-Air-Act cases. EPA BIO 15–16. Under that approach, which was derived originally from general, ordinary administrative-law cases not subject to the Clean Air Act's specific requirements, federal judges have broad discretion to (1) decide how serious a regulation's unlawfulness really is and (2) how disruptive it will be for the agency to change course from its unlawful action. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). The EPA promises that this approach has real limits. EPA BIO 15. But it is hard to spot them. Tellingly, in recent years, the D.C. Circuit has used this framework to make policy calls about whether a limited remand is needed to avoid "significant harm to the public health or the environment." *See Wisconsin*, 938 F.3d at 336. Thus, at day's end, the EPA's preferred approach coincides with judges' policy beliefs displacing the Clean Air Act's text. But because "policy preferences" have no place in "judging," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2268 (2024), that is a sure sign that this Court's review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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