SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES OHIO, ET AL.,)) Applicants, v. آند-) No. 23A349 EPA, ET AL., , Respondents.)) KINDER MORGAN, INC., ET AL., Applicants,) v.) No. 23A350 v. EPA, ET AL., Respondents.) AMERICAN FOREST & PAPER) ASSOCIATION, ET AL.,) Applicants,) -----V.) No. 23A351 EPA, ET AL., Respondents.))) UNITED STATES STEEL CORPORATION, Applicants,) v.) No. 23A384 ET AL.,) EPA, ET AL., , Respondents.)

Pages: 1 through 98
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1 IN THE SUPREME COURT OF THE UNITED STATES 2 OHIO, ET AL., 3 Applicants,) v. . 4) No. 23A349 EPA, ET AL., Respondents.) 5) 6 KINDER MORGAN, INC., ET AL.,) 7 Applicants,)) No. 23A350 v. EPA, ET AL., 8 Respondents.) 9 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ 10 AMERICAN FOREST & PAPER) ASSOCIATION, ET AL.,)) 11 Applicants,) No. 23A351 v. 12 EPA, ET AL., Respondents.) 13 _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ UNITED STATES STEEL CORPORATION,) Applicants,) v.) 14 15) No. 23A384 EPA, ET AL.,) Respondents.) 16 . _ _ _ _ _ _ _ _ . 17 18 Washington, D.C. 19 Wednesday, February 21, 2024 20 The above-entitled matter came on for 21 22 oral argument before the Supreme Court of the 23 United States at 10:10 a.m. 24 25

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| 1 | APPEARANCES: |
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| 1 | PROCEEDINGS |
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| 2 | (10:10 a.m.) |
| 3 | CHIEF JUSTICE ROBERTS: We will hear |
| 4 | argument first this morning in Case 23A349, Ohio |
| 5 | versus the Environmental Protection Agency, and |
| 6 | the consolidated cases. |
| 7 | Ms. Sridharan. |
| 8 | ORAL ARGUMENT OF MATHURA J. SRIDHARAN |
| 9 | ON BEHALF OF THE STATE APPLICANTS |
| 10 | MS. SRIDHARAN: Mr. Chief Justice, and |
| 11 | may it please the Court: |
| 12 | The EPA set out to address the |
| 13 | contributions of 23 upwind states to downwind |
| 14 | air pollution through a single federal plan, |
| 15 | but, as commenters predicted and before the plan |
| 16 | became final, the legal predicates for the |
| 17 | federal plan, that is, the state plan |
| 18 | disapprovals, came under fire in courts all |
| 19 | around the country. |
| 20 | The specter of lesser participation in |
| 21 | the federal plan revealed yet another problem. |
| 22 | The EPA's choice of method, that is, selecting a |
| 23 | single cost threshold and applying it uniformly |
| 24 | across all 23 states to establish emissions |
| 25 | limits, has consequences; namely, the math |

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1 doesn't work when the inputs don't match the 2 outputs. 3 With the SIP disapprovals in flux and the EPA's methodology requiring full 4 participation, the EPA had an obligation to 5 6 consider what happens to the federal plan when 7 one or more states drop out, that is, when the inputs, 23 states, don't match the outputs, now 8 9 the 11 states that remain in the plan. 10 Its failure has become consequential. 11 The plan now regulates under half of the states 12 and a guarter of the emissions that the EPA 13 originally set out to regulate. Under this 14 fractured plan and without a stay, the remaining 15 states and their industries face serious harm. 16 I welcome the Court's questions. 17 JUSTICE THOMAS: Well, it seems that 18 your argument is dependent on whether or not the 19 original plan was interdependent and required all the states to be in. 20 What's your best evidence for that? 21 MS. SRIDHARAN: The best evidence for 2.2 23 that, Your Honor, is the method that the EPA 24 chose, and the method it chose has to do with 25 discerning points of diminishing marginal

1 returns, which means that when the mix of states 2 changes, in this case, when states drop out and 3 their particular technologies and industries drop out with them, those points of diminishing 4 marginal returns shift, and they shift somewhat 5 6 unpredictably, which means that the relevant 7 cost threshold for a different mix of states could be cheaper, and, with full candor to the 8 9 Court, it could be the same or even be more 10 expensive.

The problem is we don't know. 11 Tt is 12 the unpredictability that renders this plan unreasonable as to any different mix of states. 13 14 CHIEF JUSTICE ROBERTS: But --15 JUSTICE SOTOMAYOR: Could you break 16 that down? I don't understand. You started 17 your introduction by saying that the commonality 18 was cost. But I thought that cost had to do 19 with the technology and how much it costs to implement, so I don't see why that would be 20 21 different among the 50 states or marginally 2.2 important enough to be different. 23 MS. SRIDHARAN: Of course, Your Honor. 24 JUSTICE SOTOMAYOR: And to the extent 25 that the other states dropping out don't

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1 increase the cost for any of the remaining 2 states, they -- their allotment remains the same 3 regardless of how many people are participating. So I don't see how you're raising an argument, 4 frankly, not for yourself because nothing's 5 6 changed. 7 MS. SRIDHARAN: Well, Your Honor, let me take that in reverse, and I'm happy to go 8 9 down the gritty path of the technical details. 10 But, before that, the allotments may not change 11 in the way the EPA has executed the plan, but 12 the allotments themselves are wrong when the EPA 13 fails to consider what happens with lesser 14 participation. 15 And answering --16 JUSTICE SOTOMAYOR: I -- I -- say 17 it, but show me. 18 MS. SRIDHARAN: Sure, Your Honor. The 19 answer goes, again, to the methodology, which I 20 keep calling the point of diminishing marginal 21 returns question, and I'm happy to go step by 2.2 step into what is admittedly an extremely gritty 23 mathematical problem. 24 JUSTICE SOTOMAYOR: Why don't you get 25 to the end question. Nothing is changing in

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| 1 | your cost or what you have to do, meaning the |
|----|--|
| 2 | states that are involved who for whom |
| 3 | stay stays have not been given, their |
| 4 | allotment doesn't change, nothing changes. |
| 5 | MS. SRIDHARAN: Again, Your Honor, |
| 6 | you're talking about the execution of those |
| 7 | allocations, but the allocations themselves are |
| 8 | now wrong, and what I mean by that is the EPA's |
| 9 | method of selecting a single cost threshold. |
| 10 | Now that goes to looking for points on |
| 11 | a graph where an additional dollar spent |
| 12 | produces little to no additional emissions |
| 13 | reductions. Those points on that graph change |
| 14 | unpredictably, erratically, when the mix of |
| 15 | states changes. |
| 16 | CHIEF JUSTICE ROBERTS: Well, I I |
| 17 | I understand that point, but the |
| 18 | calculations, the methodology is all there, and |
| 19 | I assume you just instead of putting 23 |
| 20 | states in, you put 11 in and and, in looking |
| 21 | for whatever reduction, instead of a hundred, |
| 22 | you do the 11 percent. |
| 23 | How long do you think it would take if |
| 24 | there were a proceeding to adjust the numbers |
| 25 | along the lines that you propose or at least for |

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1 EPA to know what those numbers are and determine whether or not that's a sufficient change in --2 and it leads to a sufficient change in the 3 result? 4 MS. SRIDHARAN: I don't know how long 5 6 it'll take the EPA to recrunch the numbers. 7 What I can say --8 CHIEF JUSTICE ROBERTS: I'll bet they do it real quickly. 9 10 MS. SRIDHARAN: I'm sure they could, 11 Your Honor, but here is the problem: They 12 failed to consider any of that. I mean, this is 13 a failure to consider problem. They failed to 14 consider the most important aspect of the 15 interdependency that they introduced into the 16 program by virtue of using this particular 17 methodology. 18 What's more is, even if there ultimately is no change -- and I can't tell you 19 what that looks like, whether there is a 20 21 difference in the obligations or not -- there 2.2 are at least some examples in the record for the 23 coalition of states that I represent where there 24 could be a cheaper cost threshold. 25 But what matters is the EPA failed to

consider at all and has sort of blown past the
 problem here, saying nothing to look here, just
 go ahead and execute your obligations as they
 are.

JUSTICE KAVANAUGH: To make sure I 5 6 understand that, I think you're saying, but 7 correct me if I'm wrong, that when the EPA said the whole thing is severable in response to the 8 9 comments that the SIP disapprovals were going to 10 be problematic and that would unravel the whole 11 plan, when the EPA said, oh, don't worry about 12 it, it'll be severable, that that was not adequately explained in terms of how the subset 13 of states would work. 14

15 Is that what you're saying? 16 MS. SRIDHARAN: That is definitely 17 correct as to our position with respect to the severability provision. That is not just a 18 19 failure to explain; it just blows past the 20 problem. It is, at best, boilerplate. 21 And let me give you an example of why that's true. Had they had --2.2

JUSTICE KAVANAUGH: In other words -let me just follow up on that. In other words,
the Chief Justice's question, maybe they could

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1 do that quickly, maybe it would take them a 2 while, but they didn't do any of that, right? 3 MS. SRIDHARAN: Yes, that's exactly right, Your Honor. They've done nothing by way 4 of addressing contingencies. 5 6 JUSTICE KAGAN: The -- the argument 7 you're making now, I -- I -- I don't remember 8 that in your application. Can you point me to 9 where in your application I should look to get 10 your argument? Because, you know, the way I remember your application, you -- you -- very 11 12 high level of generality about interdependence 13 and collective responsibility and so forth, but 14 you gave us really nothing to allow us to say, 15 well, how -- how would this have been different 16 if it had been 13 rather than 21? What would 17 have changed? 18 MS. SRIDHARAN: Well, on pages 18 to 19 21 of our application, we address this methodology in, admittedly, the same broad and 20 21 capacious terms that the EPA uses in its final 2.2 rule. JUSTICE KAGAN: Well, it's -- it's --23 24 it's your burden right now to show a likelihood 25 of success. And I have to say pages 18 to 21,

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1 if I took these pages and I compared it to what 2 you're saying now, I don't think that I would 3 find a whole lot of commonality. MS. SRIDHARAN: Well, Your Honor, that 4 brings me to the second reason I'm here 5 6 discussing sort of the nitty-gritty of that 7 methodology, and that is to directly answer this 8 Court's order and the question of why lesser 9 participation matters, and in order to do that, 10 we have had to plumb the record well past what 11 is in the final rule deep into the technical 12 support documents that the EPA provided. 13 JUSTICE KAGAN: I appreciate that. Ι 14 mean, we gave you a question and you're trying 15 to answer the question. 16 I -- I -- I quess it does, though, 17 suggest to me that this is an unusual posture 18 for us to be in. No court has looked at the 19 kinds of questions that you're raising here and 20 the kinds of questions that we asked you to 21 discuss. Not a single court has addressed that 2.2 issue. 23 And yet here we are on papers that 24 also do not address the issue trying to figure 25 that out. That -- that seems quite odd to me,

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1 and I'm wondering how you think we should do 2 that. 3 MS. SRIDHARAN: Well, two reasons or two answers to that, Your Honor. 4 First of all, while these proceedings 5 6 are going on, the states and their industries 7 continue to suffer irreparable harm. And, second, perhaps this would be a different story 8 9 had the EPA refuted anything with respect to the 10 interdependencies in the plan. 11 They have not said a single word 12 saying that the interdependencies do not exist. I will -- I will concede that they keep saying, 13 14 well, you can just plow ahead with your 15 obligations. But they don't explain why those 16 obligations make sense any more under the 17 methodology that they chose. 18 JUSTICE BARRETT: Counsel, did you 19 raise this interdependence point in the 20 comments? 21 MS. SRIDHARAN: Yes, Your Honor. 2.2 Commenters did preview the fact that the federal 23 plan and its uniformity would be destroyed by 24 the SIP disapprovals and the litigation 25 surrounding that. I can point to --

1 JUSTICE SOTOMAYOR: I'm sorry. Where 2 did that happen? I thought the SIP disapprovals 3 came after the EPA had announced its plan. MS. SRIDHARAN: No, not exactly, Your 4 Honor. The SIP disapprovals are the legal 5 6 predicate for the EPA's authority to have a 7 federal plan in place. 8 JUSTICE SOTOMAYOR: I'm sorry, I misspoke. The --9 10 JUSTICE BARRETT: Stay? 11 JUSTICE SOTOMAYOR: -- the rule was 12 promulgated after -- before the SIP -- before the courts restrained it with respect to some 13 14 states? 15 MS. SRIDHARAN: Not exactly. Again, 16 Your Honor, it is our view that publication in 17 Federal -- in the Federal Register is the point 18 19 JUSTICE SOTOMAYOR: Ah. 20 MS. SRIDHARAN: -- that agency --21 JUSTICE BARRETT: Well, why is that? 22 Why wouldn't it be the finality of the rule? 23 Why is publication the date we should look at? MS. SRIDHARAN: Well, a couple of 24 25 answers to that. With respect to the Clean Air

Act itself, it ties publication in the Federal

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2 Register to final agency action that is 3 reviewable under the Clean Air Act's judicial review provisions. 4 Second, by the EPA's own words in the 5 6 prepublication notice it presented in March, the 7 EPA noted that that would not be the final rule for the purpose of compliance, and, in fact, 8 9 that would fail the second prong of this Court's 10 Bennett test because legal consequences did not flow from that. 11 12 But I also want to take a step back 13 because, even if this Court disagrees with me as 14 to whether the stays fall into or out of the 15 gambit of what the agency had to consider, the 16 fact that the commenters previewed all of the 17 problems with respect to the SIP disapprovals 18 and cautioned that the federal plan's uniformity 19 would -- would falter, and then very quickly afterwards there was confirmation of that 20 21 through litigation that popped up all around the 2.2 country before the rule even -- the federal plan 23 was in a prepublication form.

All of that cued the agency into itsobligation to address this very serious

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1 structural flaw with the federal plan. 2 JUSTICE JACKSON: Counsel -- oh, I'm 3 sorry, are you done? 4 JUSTICE BARRETT: I'm done. JUSTICE JACKSON: So we're here on 5 6 a -- a motion, your motion for emergency relief, 7 and --8 MS. SRIDHARAN: That's right. 9 JUSTICE JACKSON: -- it's fairly 10 extraordinary, I think, to be asking the Court 11 to decide this matter when you haven't even lost 12 below in terms of what is before the D.C. Circuit, and, in fact, my understanding is that 13 14 you haven't even briefed this argument yet in 15 the D.C. Circuit. So I'm trying to understand 16 what the emergency is that warrants Supreme 17 Court intervention at this point. 18 MS. SRIDHARAN: At the breakneck speed 19 we're going, in order to go -- get into 20 compliance with an unlawful federal rule, we are 21 spending immense sums, both the states as well 2.2 as our industries. And on top of that, we are 23 facing the threat of power shortages and heating 24 shortages, all of which have gone sort of --25 JUSTICE JACKSON: Imminently? I'm not

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1 -- sorry -- I'm sorry, imminently power 2 shortages and heating shortages? 3 MS. SRIDHARAN: At least some grid operators have pointed to the fact that this 4 federal rule will be directly associated with a 5 6 potential for grid unreliability. 7 JUSTICE JACKSON: Eventually. MS. SRIDHARAN: Well --8 9 JUSTICE JACKSON: We're -- we're --10 we're here on emergency relief, and I guess I --I'm worried about -- I'm worried about the 11 12 standards that this Court needs to take into 13 account when it decides whether or not to 14 entertain these kinds of motions, you know. 15 So what -- what -- what do you 16 perceive your burden to be --17 MS. SRIDHARAN: Well --18 JUSTICE JACKSON: -- with respect to 19 showing harm? Shouldn't we be seeking some sort of extraordinary harm, not just the serious harm 20 you say that states will face? 21 2.2 MS. SRIDHARAN: Well, on top of that, 23 I think, going back to the compliance burdens, 24 that every dollar that we are spending -- and 25 we've spent a lot, and I know counsel for

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1 industry is going to stand up and tell you about 2 the millions of dollars that are going to --3 JUSTICE JACKSON: Yes, but everybody who has to comply with the rule, right, has to 4 spend some -- something, I would think, in order 5 to do so. And what I'm a little concerned about 6 7 is that really your argument is just boiling down to we think we have a meritorious claim and 8 we don't want to have to follow the law while 9 10 we're challenging it. 11 And I don't understand why every single person who is challenging a rule doesn't 12 have that same set of circumstances. 13 14 MS. SRIDHARAN: I think that goes to 15 the immense sums that are spent that are not 16 recoupable. It goes to the fact that the 17 timeline is exceedingly compressed, so the 18 heating shortages we speak of, and if you go to 19 Grubb Declaration that the natural gas pipelines 20 have submitted, paragraphs 66 and 67, the harms we're talking about are serious in terms of 21 2.2 harms that --23 JUSTICE JACKSON: No, I understand. 24 But I thought there was something about 2026 25 when -- when these things have to actually come

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1 into effect? 2 MS. SRIDHARAN: Sure. The compliance 3 deadlines might be then, but what it takes to get to compliance starts now. And from the 4 states' perspective, we're the states, we've 5 6 already started and we have to start. 7 JUSTICE JACKSON: Have you asked the lower court to expedite its review? I would 8 9 think that that should be required in a 10 situation like this since you're saying stay 11 this pending their review. So are they moving 12 quickly at your request? 13 MS. SRIDHARAN: No, we have not 14 because of the nature of the proceedings before 15 this Court. We are seeking a stay at this Court 16 because of the harms that we are facing right 17 now, and we are -- we believe that our -- we 18 will both succeed on the merits, as well as we 19 face the sort of irreparable --20 JUSTICE SOTOMAYOR: That's in your 21 brief? 2.2 CHIEF JUSTICE ROBERTS: Thank you --23 thank you, counsel. 24 Justice Thomas? 25 Justice Alito?

1 Justice Sotomayor? 2 JUSTICE SOTOMAYOR: You never filed a motion for reconsideration --3 MS. SRIDHARAN: That's right, Your 4 5 Honor. 6 JUSTICE SOTOMAYOR: -- after the rule 7 was announced. The agency can only rely on 8 comments that are made during the public time, not after, which means, without a motion for 9 reconsideration, there's no record before the 10 11 agency proving the -- interdependency you're 12 claiming right now, correct? 13 MS. SRIDHARAN: No, Your Honor, there 14 is a record, and it comes from the methodology 15 that the EPA chose and explained well into its 16 technical support documents. 17 JUSTICE SOTOMAYOR: You -- but you did 18 not supply a motion for reconsideration in which 19 you laid out what these additional costs would 20 be? 21 MS. SRIDHARAN: We didn't have to, 2.2 Your Honor. 23 JUSTICE SOTOMAYOR: All right. Is it 24 an inversion of normal rules when you're seeking 25 expedition to bypass the very court who's going

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| 1 | to make the substantive decision and not even |
|----|--|
| 2 | ask them to expedite and rush to us |
| 3 | MS. SRIDHARAN: I don't |
| 4 | JUSTICE SOTOMAYOR: on an |
| 5 | incomplete record? |
| б | MS. SRIDHARAN: I don't think so, Your |
| 7 | Honor. This is not an incomplete record in the |
| 8 | with the fact that the commenters previewed |
| 9 | what's going on and litigation confirmed it very |
| 10 | quickly. It is also not an incomplete record |
| 11 | with respect to the methodology itself. |
| 12 | Now that methodology, again, goes well |
| 13 | deep into the technical support documents, in |
| 14 | part because the EPA engaged in a sort of |
| 15 | capacious way of talking about the methodology, |
| 16 | but it's there. And the ozone transport policy |
| 17 | analysis goes down the details of how the cost |
| 18 | threshold is specific to the mix of states that |
| 19 | goes into it. |
| 20 | And when that shifts, the EPA has an |
| 21 | obligation to assess why it matters or why that |
| 22 | cost threshold is still reasonably applied to |
| 23 | any remaining states. It has not done so. This |
| 24 | is the burden is on the EPA to consider the |
| 25 | inflexibilities that it introduced into the |

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1 plan, and it has failed to do so, and it 2 continues to stick its head in the sand by failing to go back to the drawing board. 3 CHIEF JUSTICE ROBERTS: Justice Kagan? 4 JUSTICE KAGAN: So, in this posture, 5 one of the things that we would -- that we are 6 7 supposed to consider is would we take cert on this case and would you be likely to prevail if 8 we did take cert. 9 10 And one of the reasons usually we 11 don't take cert on a case is if it has a lot of 12 stuff before you get to the merits issues, which 13 is the only thing that we would be concerned 14 about. And it -- it does seem to me you want to 15 -- the term "stuff," sometimes referred to as 16 vehicle issues, there are just a lot of them 17 here, right? There's the question of did you have to comment and did you comment? Then 18 19 there's the question of, well, even if you 20 couldn't comment but -- because you didn't know 21 enough, should you have filed a motion for 2.2 reconsideration? And you didn't file a motion 23 for reconsideration. Then there's this very complex issue 24

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about how your question relates to the validity

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1 of the SIP disapprovals themselves because, if 2 the SIP disapprovals were valid, you wouldn't have a leg to stand on here. So how are we 3 supposed to know that in this posture? 4 So I quess what I'm saying is there 5 6 are so many hoops that you have to go through 7 and you have to go through all of them. You have to run the table before we could even begin 8 9 to get to your merits question. Isn't that, 10 according to our usual standards, a reason to 11 deny this application? 12 MS. SRIDHARAN: Justice Kagan, you've 13 given a lot of stuff associated with this case, 14 but there's one thing I really want to talk 15 about, which is what happens if the SIP 16 disapprovals ultimately settle in a place where 17 all 23 states end up staying in the plan. That 18 doesn't change our argument. 19 The problem is the EPA failed to 20 consider in the first instance what happens when 21 there is lesser participation. This is 2.2 something that it doesn't matter what's going to 23 happen next. JUSTICE KAGAN: Well, that -- that's 24 25 sort of interesting. That doesn't seem

intuitive to me. I mean, if all these lawsuits 1 2 that the states are bringing are going to end up losing, I mean, the idea that you can be here 3 and be demanding emergency relief just because 4 states have kicked up a lot of dust seems not 5 6 the right answer to me. 7 MS. SRIDHARAN: No, that's not right, Your Honor, because, in this very unusual 8 9 circumstance under this statute, as well as the EPA's choice of method, it is relevant to look 10 11 back at what Your Honor has just termed "kicking 12 up dust." 13 But it's not kicking up dust because, 14 first of all, the legal flaws were quite 15 obvious, and they were previewed by commenters, 16 and then very shortly afterwards litigation and 17 then the stays came around, all of which the EPA 18 had an obligation to engage in rulemaking with 19 its eyes wide open. 20 Now, why that matters, I gave you two 21 reasons: the unique statutory circumstance, as 2.2 well as the EPA's choice of method. The statute 23 itself requires the EPA to look back to prior 24 predicate rulemaking in order to assert its 25 authority to have a federal plan, and

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1 necessarily baked into that is the fact that 2 there may be judicial intervention, especially 3 by the EPA's own doing. JUSTICE KAGAN: What do you think the 4 EPA should have done? I mean, there are 23 5 6 states here. 7 MS. SRIDHARAN: Mm-hmm. 8 JUSTICE KAGAN: Was the EPA required 9 to sort of consider every permutation, you know, 10 if 22 states are in the plan, if 21 states are 11 in the plan, if 13 states are in the plan, if 12 five states are in the plan? Which states are 13 they? 14 One of my clerks who does math better 15 than I do tells me that there are two to the 16 23rd power, which is like 4 million different 17 permutations. What was the EPA supposed to do? 18 MS. SRIDHARAN: Well, I'm not going to 19 go as far as to say that the EPA had to do 20 necessarily every possible permutation of two to the power of 23 minus one, but --21 2.2 JUSTICE KAGAN: Uqh. 23 (Laughter.) MS. SRIDHARAN: -- but --24 25 JUSTICE KAGAN: I have to tell my

1 clerk it's minus one. 2 (Laughter.) 3 MS. SRIDHARAN: -- but -- plus one or minus one. What the EPA had to do as a first 4 matter is acknowledge the problem. So we're 5 6 very far from talking about the line-drawing 7 things that you're talking about. What the EPA had to do was consider 8 whether, under this method, it would need to 9 address contingencies. And we're familiar in 10 11 other areas of law where -- for example, in 12 elections law, where you run a number of 13 simulations and decide, you know what, we have a 14 critical mass of a particular solution. Let's 15 apply that. Let's go ahead with that. 16 JUSTICE KAGAN: Thank you. 17 CHIEF JUSTICE ROBERTS: Justice 18 Gorsuch? 19 Justice Kavanaugh? Justice Barrett? 20 21 Justice Jackson? 2.2 JUSTICE JACKSON: So my understanding 23 is that you actually asked the D.C. Circuit to 24 delay merits briefing in this case, and I think 25 that's the opposite of what I would have

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1 expected if you are actually suffering 2 irreparable harm. You know, if you're 3 suffering, I would think you'd want the D.C. 4 Circuit to be moving as quickly as possible. So can you speak to that? 5 6 MS. SRIDHARAN: Yes, Your Honor. 7 First, because of the posture that this case has 8 gone on with respect to litigation, the fact that we can get an answer that stymies the 9 10 irreparable harm that is currently ongoing right 11 now is something that we came to this Court 12 seeking because we --13 JUSTICE JACKSON: No, but why did you 14 come to us? You're already before the D.C. 15 Circuit. And my question is, if you're 16 suffering because you're spending money related 17 to compliance with the rule that you're 18 challenging, why didn't you ask the D.C. Court 19 -- Circuit to move quickly in rendering its ruling agreeing with you that the rule is 20 21 invalid? 2.2 MS. SRIDHARAN: Well, Your Honor, I am 23 not going to get too far into some of the considerations that went into it, but the most 24 25 important one is that we wanted a rule that

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1 affects the entire country to be addressed in --2 in the first instance as quickly as possible so 3 that we can avoid the sorts of irreparable harm that we are currently suffering. 4 5 JUSTICE JACKSON: Thank you. 6 CHIEF JUSTICE ROBERTS: Thank you, 7 counsel. 8 MS. SRIDHARAN: Thank you. 9 CHIEF JUSTICE ROBERTS: Ms. Stetson. ORAL ARGUMENT OF CATHERINE E. STETSON 10 11 ON BEHALF OF THE INDUSTRY APPLICANTS 12 MS. STETSON: Mr. Chief Justice, and 13 may it please the Court: 14 EPA's authority under the Good 15 Neighbor provision is limited to regulating a 16 state's emissions that contribute significantly to downwind non-attainment. If EPA is 17 regulating beyond that authority, it is 18 19 regulating beyond the statute. 20 Ms. Sridharan has explained the 21 deficiencies in a broken rule in which 22 90 percent of power plant emissions, 75 percent 23 of total emissions, have been taken out of the plan. But the Court also asked whether the 24 25 emissions controls in the rule are reasonable

1 regardless of the number of states that are 2 involved. The answer is no for three primary 3 reasons. First, the rule selectively ignores 4 EME Homer's cost-effectiveness framework. 5 Second, the rule over-controls across a number 6 7 of industries. And, third, the rule imposes an impossible compliance timeline that will result 8 9 in reliability issues across the country. 10 I welcome the Court's questions. 11 JUSTICE THOMAS: I think one of the 12 concerns we have is that so much of this seems to depend on the interdependence of the 23 13 14 states and what happens if some of the states 15 are excluded. 16 So let me ask it in a different way. 17 Could EPA have accomplished the exact same thing by regulating the states individually as opposed 18 19 to in a -- as an interdependent group? MS. STETSON: It could not have 20 21 accomplished the exact same thing, Justice 2.2 Thomas, to the extent that it would have to 23 show, when you say "exact same thing," that the 24 outcome, the cost threshold and so forth, would 25 be the same across 11 states.

| 1 | But, to your question of Ms. |
|----|--|
| 2 | Sridharan, I think the issue that you were |
| 3 | looking for is evidence about what EPA did, and |
| 4 | I want to point you to 88 Federal Register |
| 5 | 36741. Excuse me. "When the effects of" I'm |
| 6 | quoting. "When the effects of these emissions |
| 7 | reductions are assessed collectively across the |
| 8 | hundreds of EGU and non-EGU industrial sources |
| 9 | that are subject to this rule, the cumulative |
| 10 | improvements in ozone levels at downwind |
| 11 | receptors, while they may vary to some extent, |
| 12 | are both measurable and meaningful." That is |
| 13 | the best example of the collective question that |
| 14 | EPA asked itself and answered. |
| 15 | Now, you know, Justice Sotomayor, you |
| 16 | asked the question about cost and whether the |
| 17 | obligations, for example, on Ohio would be the |
| 18 | same. But I think the question here is goes |
| 19 | back to what this Court approved in EME Homer. |
| 20 | It's not just a question about whether EPA can |
| 21 | regulate something that is inexpensive, |
| 22 | potentially inexpensive. It's not a question |
| 23 | about whether EPA can regulate emissions. It's |
| 24 | a question about whether EPA has appropriately |
| 25 | calculated what it calls that knee-in-the-curve, |

the point where the emissions contribution to a
 downwind state is controlled at a reasonable
 cost level.

So I think the exchange that you had 4 with Ms. Sridharan about where that cost issue 5 6 comes from has to do with the question about, if 7 you've got 23 states and all of their EGUs and all of the non-EGU sources that are linked into 8 9 this rule all feeding into that cost question, 10 what happens if you take out the states where 11 maybe you can control those costs most cheaply 12 and you're left with states that actually have 13 much higher cost thresholds to impose on 14 industries or on EGUs? That changes the cost 15 calculus. 16 It also changes, of course, the 17 emissions calculus. And I want to point in particular --18 19 JUSTICE KAGAN: Is -- is that in your 20 brief? 21 MS. STETSON: Yes, it is. 2.2 JUSTICE KAGAN: Where -- where --23 where is that? MS. STETSON: When -- when we discuss 24 25 the 23-state question. You can look at pages 11

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1 to 13 of the Kinder Morgan brief. You can look 2 at pages 18 to 20 and 4 to 9 of the reply. And 3 all of those go to this guestion about that difference between 23 and 11. 4 But I want to bring home the point 5 6 with a -- a couple quotes from the --7 JUSTICE KAGAN: I guess -- I guess my reaction is a little bit the same as -- that I 8 -- I -- I -- I gave to Ms. Sridharan, is, I 9 10 mean, this is at such a higher level of 11 generality than you're making the same argument 12 now. You -- you know, our briefs do not really 13 address this very complicated cost argument. 14 MS. STETSON: I think, Justice Kagan, 15 the -- the cost argument, while -- while some of 16 the metrics, I think, are complicated, things 17 like ozone modeling and so forth, the -- the bottom line is actually not that complicated. 18 19 The bottom line is what EPA was 20 supposed to do under the Good Neighbor provision 21 was to figure out, as it said in EME Homer and 2.2 as it said it was doing here, where is that cost 23 threshold. That word, "cost threshold," if you 24 go back and look at the rule in EME Homer, 25 appears 185 times.

| 1 | But what the Court did what what |
|----|--|
| 2 | the EPA did here with respect to non-EGUs in |
| 3 | particular is to look at the question about |
| 4 | average costs, which is a completely different |
| 5 | issue. Average cost is just how much do these |
| 6 | emissions control cost? Does that seem like a |
| 7 | reasonable number? Okay, we'll apply them and |
| 8 | see what emissions controls exist downwind. |
| 9 | And I'll tell you the other thing |
| 10 | important to |
| 11 | JUSTICE KAGAN: I I mean, the only |
| 12 | point I was making and I don't want to push |
| 13 | you too hard on this because it's not your fault |
| 14 | this is coming in a weird posture. I I don't |
| 15 | even seem the term "cost threshold" on these |
| 16 | pages. |
| 17 | MS. STETSON: I think the term "cost |
| 18 | threshold" is is in the EPA's brief. It's a |
| 19 | fundamental question about the way that EME |
| 20 | Homer exists. If you look at the Kinder Morgan |
| 21 | brief, there's a separate discussion of costs |
| 22 | that I think is particularly relevant to this. |
| 23 | There are two different strands, I |
| 24 | think, that we're chasing here. One of them has |
| 25 | to do with the 23 versus 11 question, what |

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1 happens when you take 12 states out. The other 2 question has to do with how EPA went about 3 calculating costs. And I think I was moving from that first question to the second. 4 JUSTICE KAVANAUGH: On -- on that 5 6 first question, this discussion that you're 7 having now, I thought the broader point was EPA was told the SIP disapprovals were going -- were 8 9 problematic and were going to be problematic and 10 could be unlawful. 11 And EPA responded, you know, no, 12 they're not, but even if they are, we don't care, it's severable. That's a fine response if 13 14 they then go on and explain why it still works 15 if it's severable, but that's goose egg. They 16 don't have an explanation there. 17 MS. STETSON: It -- it is a goose eqg. 18 Page 36693 of the Federal Register contains the 19 entirety of -- of what we'll call reasoning. 20 JUSTICE KAVANAUGH: So all this 21 discussion about the cost threshold where --2.2 that's what they should have explained if 23 they're going to make the point, which is a big 24 one, hey, even if 12 states drop out, who cares, 25 because it still works.

1 Okay. Show us how -- to Justice 2 Sotomayor's question, show us how it works. But 3 that's -- that's their burden, I think, to show -- to justify -- to not be arbitrary and 4 capricious. 5 6 MS. STETSON: Yes. And, in fact, if 7 you look at that page that I just cited, 36693, what you'll see is it says, "Should any 8 9 jurisdiction-specific aspect of this rule be found invalid, the EPA views the rule as 10 severable..." "Should any industry-specific 11 12 rule be found invalid, the EPA -- " rolls this rule -- "views this rule as severable." 13 14 This is not intended to be an 15 exhaustive list. 16 JUSTICE SOTOMAYOR: I'm sorry, whose 17 burden -- that may be their burden below. But 18 the burden here as I understand it is on you to 19 show this. 20 And we go back to what Justice Kagan said. I read the -- I read these applications 21 22 pretty carefully, and I didn't understand this cost argument at all. And I'm really 23 24 simplistic. I don't have a math degree, all 25 right? If you're sharing costs among 23 people,

your cost is going to be less. If you're
 sharing costs among 11 people, your cost is
 going to be more.

4 So, since this plan doesn't change any allocations depending on the number of people 5 6 who are in it, states are bound by the number 7 that was calculated on the larger group, how are the remaining states affected by the fact that 8 9 their cost should have been higher, but it's not because it's been fixed at this lower number? 10 11 MS. STETSON: Justice Sotomayor --12 JUSTICE SOTOMAYOR: I'm very simplistic. You know, cost divided by 23 is 13 14 always less than cost divided by 11 if your cost 15 is going to stay constant. 16 MS. STETSON: That's the question, 17 though. And -- and I think, Justice Sotomayor, 18 the answer --19 JUSTICE SOTOMAYOR: But does it 20 Meaning, if you're paying less on the matter? 21 wrong number because it was divided by 23, how 2.2 could it be that on 11 your cost is ever going to be greater than that number, than the 23 $-\!-$ 23 24 MS. STETSON: Justice Sotomayor, I --25 I think so much of it has to do with the states

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1 that would be in or out of that cost calculus. 2 So let's suppose just for -- to take your 3 example, let's -- let's suppose --JUSTICE SOTOMAYOR: No. My point is, 4 once the states drop out, it doesn't matter what 5 6 your responsibility is because the cost is going 7 to remain the same given the nature of this 8 plan. They're not changing the cost once 9 they've calculated the responsibility of the 23. 10 MS. STETSON: Justice Sotomayor --11 JUSTICE SOTOMAYOR: If 12 are not 12 paying it, what does it matter to you? 13 MS. STETSON: -- I think that is the 14 bug and not the feature of this plan. The --15 the cost was calculated where it was because EPA 16 looked at the aggregate costs of controls over 17 that -- that Federal Register cite that I read you, hundreds of EGUs across all of the states, 18 19 hundreds of industries' units across all of the 20 It figured out what that aggregate cost states. 21 was and then it decided to allocate obligations. 2.2 So we keep talking about the end of that process, what -- what obligations would 23 24 change on a state based on taking some states 25 out.

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1 JUSTICE SOTOMAYOR: Seems --2 MS. STETSON: But that's not --3 JUSTICE SOTOMAYOR: It seems to --MS. STETSON: -- the right place to 4 5 look. 6 JUSTICE SOTOMAYOR: It seems to me 7 that if the aggregate is contributing to something and there's a certain amount of people 8 9 who for whatever legal reason have been taken 10 out of the calculus, why should you pay for them 11 or not pay for them if the problem is a national 12 one really, not an individual one? 13 I think, Justice MS. STETSON: 14 Sotomayor, that that's actually EPA's argument, 15 is that, you know, it -- it makes sense to 16 impose these emissions controls across these 17 industries because it will result in what EPA calls meaningful reductions. 18 19 Now I'd encourage you to look at page 20 36743 and 36747 to figure out exactly the scope of those meaningful reductions of the 88 Federal 21 2.2 Register final rule. What we're talking about 23 when it comes to meaningful reductions is on the order of a total of .66 parts per billion 24 25 averaged across all of these receptors.

1 Now there's a bigger number involved. 2 That number is, if you add all of the reductions from the receptors from Arizona to Connecticut 3 and you add them up, then you get a bigger parts 4 per billion number, but that's like ticketing me 5 for speeding if I exceed the speed limit one 6 7 mile per hour in 23 different states. But -but let me --8 9 JUSTICE JACKSON: Ms. --10 JUSTICE BARRETT: Ms. Stetson -- oh, 11 I'm sorry. I wanted to talk about a different 12 kind of cost. I just want to talk about the 13 costs that you have incurred thus far because 14 the rule has been in effect, right, and part of 15 your argument for emergency relief is the 16 crushing costs and the risk of, you know, energy 17 disruption, et cetera. 18 What has been happening so far? 19 MS. STETSON: Justice Barrett, the 20 industries that I represent have been incurring 21 costs to try to start permitting, compliance, all -- all sorts of issues involving the run-up 2.2 23 to installation of these controls. 24 But let me pause on this because I 25 think it also responds to a question, Justice

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1 Kagan, that you asked, which is we -- we don't 2 need to show in this posture cert worthiness. 3 Nor do we need to show, Justice Jackson, you know, that this is an emergency. 4 What we need to show is for a stay 5 that we have a likelihood of success on the 6 7 merits and irreparable harm. 8 JUSTICE BARRETT: But you didn't --9 MS. STETSON: And the irreparable harm that we pointed to --10 11 JUSTICE BARRETT: -- you didn't detail 12 that that I recall. Like what -- I mean, you --13 you've talked about projected injury, projected 14 costs that you're going to incur, but, 15 presumably, I mean, the rule's been in effect 16 for a while. Why haven't you talked about that? 17 I think you're kind of shifting gears now. 18 I mean, have you incurred significant 19 financial costs that are unreasonable? Have there been -- Justice Jackson asked Ohio's 20 21 counsel about whether there have been these 2.2 kinds of disruptions to this point. 23 MS. STETSON: So let me answer the 24 cost question and the disruption question if I 25 The first on the cost is, if you look at can.

2 pipelines, you'll find explanations about what 3 costs they have to incur in the next 12 to 18 4 5 unreliable, in -- in addition to all of the 6 7 other problems that we've talked about.

But, on the question of irreparable 8 9 harm in another respect, you know, what we are 10 talking about is also the question of immediate reliability issues, and if you look at the Brown 11 12 Declaration attached to the American Forest & Paper stay application, you'll find that in the 13 14 summer of 2024, he anticipates significant 15 reliability problems because of some immediate 16 changes that need to be made to a particular 17 plant that is a critical reliability component 18 of that particular system. So the harms --19 CHIEF JUSTICE ROBERTS: Thank you, 20 counsel. 21 MS. STETSON: -- are immediate. Thank 22 you. 23 CHIEF JUSTICE ROBERTS: Justice 24 Thomas, anything? 25 Justice Alito?

1 the declarants particularly with respect to the months in order to stay in compliance with this timeline that we have pointed out is completely

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1 Justice Sotomayor? 2 Justice Kagan? 3 JUSTICE JACKSON: Yeah, I have a question. Why haven't you asked the D.C. 4 Circuit to expedite their review? I mean, if 5 6 you're suffering the harms that you're talking 7 about and you're pending before that court, I quess I'm still confused as to why we are the 8 ones who are being asked in the first instance 9 to look at this. 10 11 MS. STETSON: Justice Jackson, we --12 we did move for expedited briefing. We were not given the briefing schedule that we wished. 13 14 JUSTICE JACKSON: I thought you moved 15 for a delay in briefing until after this Court 16 had decided. 17 MS. STETSON: We initially sought 18 expedited briefing. We did not get the schedule 19 we wished. After the Court granted argument in 20 late December, we asked for a delay in order to 21 impose some order on the process between this 2.2 Court and that court. 23 JUSTICE JACKSON: All right. Well, 24 let me ask you about your representations that 25 you just have the sort of same ordinary stay

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burden in this situation. I mean, surely, the Supreme Court's emergency docket is not a viable alternative for every party that believes they have a meritorious claim against the government and doesn't want to have to comply with a rule while they're challenging it. It seems to me that even just sort of

8 irreparable harm, as we've defined it, is 9 insufficient to have the Supreme Court ask --10 acting as a first decider on the merits of an 11 issue that hasn't been addressed by the lower 12 court. So can you help me to understand what 13 the burden should be in this very unique 14 situation?

MS. STETSON: The burden should be
exactly what this Court described in Nken versus
Holder, Justice Jackson.

18JUSTICE JACKSON: But, in Nken versus19Holder, was that a situation in which the lower20court had not yet even ruled at all on the21merits of the claim?

22 MS. STETSON: It was a situation in 23 which the order of an agency came up to this 24 Court in a -- in a posture of a stay motion. 25 Or, actually, I think, that court involved the

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1 -- the standard to be applied to --JUSTICE JACKSON: Right, but --2 3 MS. STETSON: -- a motion for a stay. JUSTICE JACKSON: -- I want you to 4 appreciate the distinction that I'm making. 5 6 MS. STETSON: Yeah. 7 JUSTICE JACKSON: This is a situation in which you have filed a claim in a lower 8 court, you're -- the D.C. Circuit has not even 9 10 looked at it, and you're asking the Supreme 11 Court to essentially give a preview of its view 12 of the merits. 13 And I think that's quite 14 extraordinary, and I'm trying to understand 15 whether the same burden should apply on an 16 applicant in that situation and one in which we 17 at least have a lower court ruling that you 18 could show us and say: These people have made a 19 mistake. We don't have that here. 20 MS. STETSON: Justice Jackson, what we 21 have is an agency order in which we are saying 2.2 this agency made a significant mistake, in fact, 23 several of them that are fault lines throughout the agency order. That is exactly what was at 24 25 issue in Nken.

| 1 | If you look at Footnote 1 of Nken, |
|----|--|
| 2 | what the Court says there is and and a |
| 3 | question about staying an administrative order |
| 4 | is just like a question about staying a judicial |
| 5 | opinion. You are staying the source of the |
| 6 | authority to act until the Court has an |
| 7 | opportunity to consider it further. |
| 8 | JUSTICE JACKSON: Thank you. |
| 9 | MS. STETSON: Now, even if if if |
| 10 | I could just finish? |
| 11 | JUSTICE JACKSON: Yes. |
| 12 | MS. STETSON: Even if there is some |
| 13 | more toothsome standard that applies in this |
| 14 | circumstance, the fact that this is a national |
| 15 | rule or purported to be a national rule and |
| 16 | costs as much as it costs, billions of dollars |
| 17 | in compliance over the next 12 months, I think |
| 18 | is reason enough. |
| 19 | CHIEF JUSTICE ROBERTS: Thank you, |
| 20 | counsel. |
| 21 | MS. STETSON: Thank you. |
| 22 | CHIEF JUSTICE ROBERTS: Mr. Stewart. |
| 23 | ORAL ARGUMENT OF MALCOLM L. STEWART |
| 24 | ON BEHALF OF THE FEDERAL RESPONDENTS |
| 25 | MR. STEWART: Thank you, Mr. Chief |

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1 Justice, and may it please the Court: 2 I'd like to make three quick points at 3 the outset. First, with respect to the interests of the state applicants, I think it's 4 important to bear in mind that at this stage of 5 6 the proceedings, there are a lot more states on 7 our side than there are on theirs, and it's vital to bear in mind the equities of the 8 9 downwind states because that's the whole point 10 of the Good Neighbor provision of the Clean Air 11 Act and the Good Neighbor Plan that the EPA 12 implemented. And when we think about the interests of the downwind states, it's natural 13 to think first of their humanitarian interest in 14 15 the health and well-being of their residents. 16 But the downwind states that are out of 17 attainment also have a legal obligation to come 18 into attainment by deadlines specified by the 19 statute. 20 And to stay the rule in its entirety based on some theoretical possibility that the 21 contours of an 11-state rule might have been 2.2 23 somewhat different if EPA had anticipated all 24 the stays would be terribly unfair to the

25 downwind states.

1 The second point is that in addition 2 to the severability language that Justice 3 Kavanaugh referred to, EPA in the preamble said that it was reserving judgment on whether 4 several additional states should ultimately be 5 6 included in the plan. It said that if any of 7 the 23 states that were currently included devised compliant SIPs, they could be taken out 8 9 of the federal plan. 10 And so EPA anticipated from the outset 11 that the plan was one whose geographic 12 composition could change. And EPA devised the requirements for each state in order that they 13 would be workable if a smaller or a larger set 14 15 of states were ultimately covered. 16 And then the last thing I would say is

17 it's true that the federal plan is not currently providing the air quality benefits that EPA had 18 hoped because the stays of the SIP plan 19 disapprovals mean it's only reducing emissions 20 21 from 11 states rather than 23. But, for those 2.2 11 states, the requirements that are imposed on 23 sources are exactly the same as would have been imposed on sources in those 11 states if the 24 25 full plan had been implemented.

| 1 | And the the applicants have |
|----|--|
| 2 | suggested that it's it's possible that the |
| 3 | benefits associated with those requirements |
| 4 | might have been different if EPA had known that |
| 5 | only 11 states would have been included. But |
| 6 | there's no reason to think that that's so. As |
| 7 | as we look at it, the difference between |
| 8 | three and zero is the same as the difference |
| 9 | between 10 and seven. |
| 10 | If you think that the plan is only |
| 11 | delivering 30 percent of the the the 11 |
| 12 | states are only delivering 30 percent of the |
| 13 | benefits, they're still delivering that that |
| 14 | same quantum of air quality benefit. |
| 15 | I welcome the Court's questions. |
| 16 | JUSTICE THOMAS: Mr. Stewart, was |
| 17 | there any weight put on the interdependence of |
| 18 | the 23 states as far as the benefits of the plan |
| 19 | and the cost to the individual states? |
| 20 | MR. STEWART: I I think, when they |
| 21 | refer to interdependence, they're they're |
| 22 | referring to kind of three topics that were |
| 23 | discussed in the preamble. The first was EPA |
| 24 | took pains to point out that although it was |
| 25 | engaging in a complicated inquiry to decide what |

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1 emission controls could be cost-effectively 2 imposed on different types of industrial 3 sources, in the end, it was placing the same requirements on all of the covered states; that 4 is, to do equity, it was saying that power 5 6 plants in Indiana need to come up to the same 7 standard as power plants in Texas. 8 And so, in that sense, the plan was 9 interdependent in that EPA wanted the same 10 restrictions to apply to sources in all states, 11 but that --12 CHIEF JUSTICE ROBERTS: Thank you. 13 Just if I could --14 MR. STEWART: Sure. 15 CHIEF JUSTICE ROBERTS: -- interrupt. 16 What -- what's the smallest state among the 23? 17 The smallest state in terms of emissions? 18 MR. STEWART: I -- I'm not sure. 19 CHIEF JUSTICE ROBERTS: Well, assume 20 it's the smallest state. 21 MR. STEWART: Okay. 2.2 CHIEF JUSTICE ROBERTS: Would -- would 23 you have undertaken this program if only that state was involved? 24 25 MR. STEWART: We -- we -- if -- if

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| 1 | only the state was involved, we might have not |
|----|---|
| 2 | have thought it was worth the trouble to |
| 3 | undertake such a comprehensive inquiry. |
| 4 | Now, if if all if 22 of the |
| 5 | states had submitted compliant plans and only |
| 6 | one was left, EPA would still have had a |
| 7 | statutory obligation to promulgate |
| 8 | CHIEF JUSTICE ROBERTS: You you |
| 9 | MR. STEWART: for that state a plan |
| 10 | |
| 11 | CHIEF JUSTICE ROBERTS: Okay. It's |
| 12 | it's hard to stop you sometimes. |
| 13 | (Laughter.) |
| 14 | CHIEF JUSTICE ROBERTS: If if the |
| 15 | current plan with the current number of states |
| 16 | involved regulates 11 percent of the EGU |
| 17 | emissions that you anticipated with the 23 |
| 18 | states, would you have gone ahead with that? |
| 19 | MR. STEWART: I mean, we would |
| 20 | certainly again, if there had been any |
| 21 | states, even one, with non-compliant plans, EPA |
| 22 | would not only have had the authority but a |
| 23 | statutory obligation to promulgate a federal |
| 24 | plan for that state and to promulgate a federal |
| 25 | plan that it thought would ensure that sources |

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| 1 | within the state didn't contribute significantly |
|----|--|
| 2 | to downwind non-attainment. |
| 3 | And when I said earlier maybe if it |
| 4 | was only a smaller set of states involved, EPA |
| 5 | would think as a matter of cost/benefit analysis |
| 6 | it's not worth doing the whole enormous inquiry, |
| 7 | we can do a a quicker and |
| 8 | CHIEF JUSTICE ROBERTS: Okay. Got it. |
| 9 | MR. STEWART: But now that now that |
| 10 | |
| 11 | CHIEF JUSTICE ROBERTS: I got it. I |
| 12 | got it. |
| 13 | MR. STEWART: Okay. |
| 14 | CHIEF JUSTICE ROBERTS: Now, when |
| 15 | if if you prevail here, when will EPA address |
| 16 | the question that's raised about whether or not |
| 17 | the fact that it's a reduction in terms of the |
| 18 | number affected and a reduction in the number of |
| 19 | states, when will EPA sit down and address that, |
| 20 | and when when will they give an explanation |
| 21 | rather than the litigants here? |
| 22 | MR. STEWART: I I don't think that |
| 23 | they have any plan to do that, first of all, |
| 24 | because whatever they might have done if they |
| | |

1 now that they've done the whole analysis, there 2 would be no reason for them not to use what they 3 found in --CHIEF JUSTICE ROBERTS: Well --4 MR. STEWART: -- in devising a plan. 5 6 CHIEF JUSTICE ROBERTS: Well, the --7 it's something --MR. STEWART: But the other thing --8 CHIEF JUSTICE ROBERTS: It -- it's 9 10 something new that you only regulate 11 percent. 11 And in terms of why it's necessary to look at 12 this here, if you think it's an important 13 question, it's because EPA will not look at it until after the hundreds of millions of dollars 14 15 of costs are incurred. 16 MR. STEWART: I -- I think part of the 17 reason that we won't look -- look at it is that the -- the ground is still shifting; that is, 18 19 EPA back -- earlier in the year proposed to 20 disapprove the -- the plans of several 21 additional states, which, if that ultimately 2.2 went forward as the -- the final decision, would 23 result in the addition of those states to the 24 plan. We had a ruling from the Tenth Circuit at the end of the day on Friday saying that 25

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1 proceeding is being transferred to the D.C. Circuit, and that could result in Utah and 2 3 Oklahoma being put back into the federal plan. So part of the reason it wouldn't make 4 sense for EPA to do a sort of ground-up inquiry 5 6 is that, just as it was getting done with that, 7 it might have a new geographic composition to deal with. 8 9 JUSTICE KAVANAUGH: But it could 10 have -- in response to the comments that said 11 the SIP disapprovals were going to be 12 problematic, EPA could have come back and said: 13 Well, if some of the states are knocked out, the 14 requirements will still be the same even if 15 there are only 15 states or even if there are 16 only 10 states because and kind of explained 17 that reasoning. 18 That is, as I understand it, absent. 19 And the problem is we're not sure if the 20 requirements would be the same with 11 states as 21 with 23. And the -- and it's just not 2.2 explained. MR. STEWART: I -- I -- I think the 23 comments were raised at kind of a lower level of 24 25 specificity than -- than you might imagine.

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1 That is, there were comments to the effect that 2 your federal plan is in trouble because valid 3 SIP disapprovals are -- are a condition precedent to the federal plan and the SIP 4 disapprovals were bad. 5 6 And to -- to a point, those commenters 7 have been vindicated. That is, several states have obtained stays of their SIP disapprovals, 8 and the result has been that --9 10 JUSTICE KAVANAUGH: But -- but, when 11 the EPA came back, EPA said severability. So 12 EPA understood the comment. 13 MR. STEWART: But I -- no, no, I think 14 the comment was --15 JUSTICE KAVANAUGH: EPA understood the 16 comment and came back and said, even if we have 17 fewer states, we're going to plow ahead anyway, and then the question I think that's raised is 18 19 why and how. 20 MR. STEWART: I -- I --21 JUSTICE KAVANAUGH: And that's just 22 kind of pretend nothing happened, just go ahead with the 11 states in this instance. 23 MR. STEWART: I -- I think EPA 24 25 understood the comment to be, to the extent that

1 your SIP disapprovals are challenged and either 2 stayed or ultimately struck down, your federal plan will be less effective. I don't think any 3 commenter was saying specifically, if some 4 disapprove -- SIP disapprovals are stayed, the 5 plan will become arbitrary and capricious as to 6 7 the other states. JUSTICE KAVANAUGH: The plan will 8 9 become unworkable. The cost, the -- the 10 requirements might change. And when EPA comes 11 back, it doesn't explain anything on that. 12 MR. STEWART: I mean, we -- we know 13 that the -- the requirements don't change. That 14 is, EPA imposed equivalent requirements on 15 different -- on power plants, on steel industry 16 sources, on pipeline engines, with respect to 17 industrial facilities in -- in the same source 18 category that are located in different states. EPA imposed -- imposed exactly the same 19 20 requirements. 21 And the requirements that are imposed 2.2 on sources in Indiana and Ohio -- West Virginia 23 is out for now because they got a stay -- but, 24 in Indiana and in Ohio, they're exactly the same 25 as they would have been under an 11-state plan.

| 1 | The the only argument that the |
|----|--|
| 2 | applicants have is that maybe imposition of |
| 3 | those requirements on the same sources in the 11 |
| 4 | states will produce lower air quality benefits |
| 5 | downwind now that it's only the 11 states. |
| б | Now |
| 7 | JUSTICE GORSUCH: Mr. Stewart? |
| 8 | MR. STEWART: Yes. |
| 9 | JUSTICE GORSUCH: Just a couple of |
| 10 | simple questions. How often does EPA use a |
| 11 | severability provision like this? My my |
| 12 | understanding, and it and I just is it's |
| 13 | very rare, it's a handful of times in the last |
| 14 | 10 or 15 years out of the thousands of rules |
| 15 | it's promulgated. |
| 16 | Is that right? |
| 17 | MR. STEWART: I I don't know how |
| 18 | often they do it generally, but I do know that |
| 19 | it is it's been a recurrent feature of these |
| 20 | sorts of "Good Neighbor" plans that become |
| 21 | JUSTICE GORSUCH: Am I right, though, |
| 22 | that it's only a handful of times over the last |
| 23 | 10 or 15 years? |
| 24 | MR. STEWART: I I would be |
| 25 | surprised if it's only a handful, but I don't |

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1 have information about --JUSTICE GORSUCH: I found an article 2 3 that said between 2000 and 2014 it was seven times. Is that -- do -- do you -- do you have 4 any other information? 5 MR. STEWART: I -- I don't -- I don't 6 7 have any other evidence, but I -- I think, even with that --8 9 JUSTICE GORSUCH: Okay, okay, okay, okay. Okay. My -- my other simple question is, 10 11 could -- could EPA have done this on a 12 state-by-state basis? I mean, the -- the -when a SIP is -- fails, the obligation 13 14 statutorily is for EPA to come up with a federal 15 plan. 16 Was that an option that -- that it 17 considered? 18 MR. STEWART: I mean, in a sense, they 19 did do that. That is --JUSTICE GORSUCH: No, no, I'm -- they 20 -- they did a 23-state plan. Okay. 21 2.2 MR. STEWART: They did a 23-state --23 JUSTICE GORSUCH: So I'm -- I'm just 24 asking, did they consider doing a state-by-state 25 plan?

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1 MR. STEWART: They --2 JUSTICE GORSUCH: Yes or no? 3 MR. STEWART: Yes. JUSTICE GORSUCH: Okay. And -- and 4 why didn't they do that? 5 6 MR. STEWART: And they did it. 7 JUSTICE GORSUCH: Well, all right. MR. STEWART: They -- they -- they --8 9 they imposed --10 JUSTICE GORSUCH: I -- I -- we're 11 talking past each other. We have a 23-state 12 plan that I understand has state by state. I --I -- I get that. I'm just wondering, did they 13 14 -- did they consider doing that without respect 15 to the 23 states as a -- as a -- as a 16 collective? 17 MR. STEWART: I mean, if what you mean 18 is did they consider issuing 23 different --19 JUSTICE GORSUCH: Yes, that is my 20 question. 21 MR. STEWART: -- Federal Register 22 notices, they considered it. Part of the reason 23 they didn't do it is that they thought by making 24 it an overall federal plan, the trading program 25 for the power plants would be easier to

1 administer, it would be easier for power plants 2 in -- to trade emission allowances with power 3 plants. JUSTICE GORSUCH: Got it. Got it. 4 5 Thank you. 6 JUSTICE ALITO: Suppose they had done 7 it state by state and had -- let's take Ohio as an example -- had done the cost/benefit analysis 8 9 for Ohio separately and in isolation. 10 Is there -- would the requirements 11 that the state now faces be the same? 12 MR. STEWART: I think there's every reason to think that there would be. I don't 13 say -- think I could say that 100 percent, but I 14 15 think part of what is threatening about the --16 the applicants' position is that the applicants 17 haven't made an attempt to -- to offer a nuanced 18 showing along those lines. They haven't done 19 their analysis and said: Given where we are 20 now, the following modifications of the plan would be appropriate. 21 2.2 JUSTICE ALITO: What I understand you 23 to be saying is that it might -- the math might turn out the same, but it wouldn't necessarily 24 25 turn out the same. Is that -- that's basically

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1 what you're saying? 2 MR. STEWART: Yes, that's right. 3 And -- and, certainly, what we have now is a -a closer approximation to what an 11-state would 4 have -- plan would have looked like than zero 5 6 is. And what the applicants are asking for is 7 zero, and that isn't an option that EPA could have chosen as a matter of statute. EPA was 8 9 obligated as a matter of statute to promulgate some plan for each of the states that it found 10 11 had failed to devise compliant SIPs. 12 JUSTICE ALITO: The --13 JUSTICE KAVANAUGH: The fact --14 JUSTICE ALITO: -- the severability --15 JUSTICE KAVANAUGH: Go ahead. 16 JUSTICE ALITO: A simple question. 17 The severability rule in the D.C. Circuit as I understand it is that it's presumptive, right? 18 19 It's not conclusive. I mean, it could be -- there are 20 21 circumstances where provisions are -- are 2.2 interrelated and so that the presumption is 23 overcome. And why wouldn't that be true here? MR. STEWART: Well, I -- I think 24 25 partly because the severability inquiry in the

1 D.C. Circuit kind of as I understand it has two 2 prongs. The first is did the agency intend the rule to be severable along particular lines, 3 and, second, if the agency intended it, can what 4 remains function -- sensibly as its own rule. 5 6 And, here, we know that EPA intended it to be 7 severable. The -- the other thing I would say 8 9 about the -- the possible rarity of express 10 severability provisions is it's been a recurrent 11 feature of these plans that plans -- states 12 would drop in and out, EPA might promulgate a 13 revised Good Neighbor Plan and some of the 14 states would be included in the revised plan and 15 some would stay in the original plan. 16 So it was just understood as a feature 17 of this type of rulemaking that when the composition of the plan changed, the 18 19 requirements imposed on the remaining states would not change. 20 21 EPA decided in this rulemaking to make 2.2 that statement explicit, to say EPA regarded it 23 as severable along geographic lines. And that 24 at least pretermitted inquiry -- any inquiry as 25 what -- as to what EPA intended the rule to be,

1 but that's always been understood to be the rule 2 even when EPA doesn't say that explicitly. But 3 JUSTICE JACKSON: So, Mr. Stewart, can 4 I ask you just about their challenge? And I'm 5 6 trying to understand it because the rule was 7 enacted originally with 23 states. And was 8 there a challenge at that point about the number of states originally, when it first was enacted? 9 10 MR. STEWART: I -- I don't --11 there -- there were challenges to the antecedent 12 SIP disapprovals, and many of the states said we should not be under any "Good Neighbor Plan" 13 14 because in -- or in -- under any new "Good 15 Neighbor Plan" because we are already doing 16 enough to ensure that our sources don't 17 contribute significantly. That --18 JUSTICE JACKSON: So there was a 19 possibility they could be out? 20 There was a possibility MR. STEWART: 21 and -- and those -- those comments and those 2.2 challenges were really brought during the SIP 23 disapproval process. They were not brought as 24 -- necessarily as challenges to the -- the 25 federal plan.

| 1 | JUSTICE JACKSON: The rule. And I |
|----|--|
| 2 | guess I'm I'm I'm trying to understand the |
| 3 | interaction between a challenge being brought |
| 4 | when the rule is enacted and subsequent |
| 5 | developments like judicial stays and how we |
| 6 | think about that in terms of the ground shifting |
| 7 | and whether they can even it's even |
| 8 | judicially cognizable in this way. |
| 9 | MR. STEWART: Yes, you you would |
| 10 | think that once the rule is promulgated, once |
| 11 | it's signed and finalized by the agency, that if |
| 12 | subsequent events provide somebody thinks |
| 13 | provide good cause for EPA to reconsider what |
| 14 | it's done, we think it's a requirement as a |
| 15 | matter of justiciability that a petition for |
| 16 | reconsideration or |
| 17 | JUSTICE JACKSON: Right, because we |
| 18 | we ordinarily would say, like, the agency can't |
| 19 | supplement its reasons after the fact. We look |
| 20 | at the rule at the time it's enacted and we |
| 21 | determine whether or not there were promulgation |
| 22 | problems, right? |
| 23 | MR. STEWART: Exactly. And we think, |
| 24 | first, that's a solid basis for finding a claim |
| 25 | to be nonjusticiable. But, even if the Court |

| 1 | doesn't agree with that, we think the the |
|----|--|
| 2 | fact that it is a kind of based on subsequent |
| 3 | events should inform your consideration of the |
| 4 | merits. That is, it should be the burden of the |
| 5 | applicants to say fairly precisely here is why |
| б | the diminution of geographic coverage logically |
| 7 | warrants a change to the terms of the plan |
| 8 | JUSTICE GORSUCH: Mr. Stewart, on |
| 9 | MR. STEWART: Yes. |
| 10 | JUSTICE GORSUCH: that point, so as |
| 11 | I understand it, EPA originally proposed a |
| 12 | 23-state solution, got some comments back saying |
| 13 | it's not going to be 23 states, it might be |
| 14 | something less than that. |
| 15 | Came back with a severability |
| 16 | provision that effectively says instead of a one |
| 17 | a one 23-state solution, we're going to have |
| 18 | 23 solutions. And nobody got an opportunity to |
| 19 | comment on that. |
| 20 | And so part of the problem, it seems |
| 21 | to me what all these discussions about |
| 22 | what does it mean when we have this applied to |
| 23 | individual states, some subset of 23, is because |
| 24 | nobody got a chance to comment on that. |
| 25 | Now you might say it's a logical |

1 outgrowth, but it's a very different thing to 2 say we have 23 plans as opposed to one plan. 3 And all of these arguments, nobody had a chance 4 to have comment on. What -- what do you say to 5 that? 6 MR. STEWART: I -- I guess part of 7 what I would say is what I referred to earlier as the -- the -- the historical or legal 8 9 backdrop; that is, it had traditionally been the 10 case that the geographic composition of these 11 plans would change, some states would drop out, 12 some states might be added. It was understood that a state could always get out of a federal 13 14 plan for -- by --15 JUSTICE GORSUCH: Well, I'm not -- I'm -- I'm going to push back on that just a little 16 17 bit because, originally, it was a 23-state 18 solution. Then you got comments that said: Ah, 19 some are going to fall out. And the response 20 was a severability provision, as Justice Kavanaugh pointed out, without a whole lot of 21 2.2 explanation, and nobody got a chance to comment. 23 I mean, what -- what -- what do you 24 say to that, just to the point of the APA is all 25 about an opportunity to be heard, and nobody got

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1 a chance to be heard on the possibility that 2 you're going to apply this -- this formula to 3 one small state potentially, the same formula 4 that was dependent upon an analysis of an aggregate of 23? 5 I -- I think I would say 6 MR. STEWART: 7 people had a chance to comment -- to make comments to the effect of, if some states drop 8 9 out, the plan will become arbitrary and capricious or will need to be rethought as to 10 11 the remaining states. 12 But nobody was making that comment. 13 People were making the -- the valid comment that 14 for any particular state, the legitimacy of --15 of applying the FIP depended on a valid SIP 16 disapproval. 17 JUSTICE GORSUCH: Okay. 18 MR. STEWART: And --19 JUSTICE SOTOMAYOR: They still could 20 have filed a motion for reconsideration, 21 correct? 2.2 MR. STEWART: Yes, again, because --23 JUSTICE SOTOMAYOR: That's the avenue 24 when you're not given an opportunity to publicly 25 comment.

| 1 | MR. STEWART: And and that would be |
|----|--|
| 2 | the time at which you could say, at least for |
| 3 | now, here is the class of states that are out, |
| 4 | and so you, EPA, rather than comment on, as |
| 5 | Justice Kagan was pointing out, the what |
| 6 | would happen in the possibly millions of |
| 7 | permutations of some states being in or out, at |
| 8 | that point, they could have said to EPA: These |
| 9 | are the specific states that are out. We don't |
| 10 | think the plan makes sense as to the remaining |
| 11 | states. |
| 12 | JUSTICE SOTOMAYOR: Mr. Stewart, could |
| 13 | |
| 14 | JUSTICE ALITO: If there had been a |
| 15 | motion for |
| 16 | JUSTICE SOTOMAYOR: I'm sorry. |
| 17 | JUSTICE ALITO: Go ahead. |
| 18 | JUSTICE SOTOMAYOR: Could you |
| 19 | succinctly state for me what are the common |
| 20 | features in this plan to all 23 states? |
| 21 | MR. STEWART: I I think |
| 22 | JUSTICE SOTOMAYOR: Because, as I |
| 23 | looked at the plan, certain states were exempted |
| 24 | out because they were already meeting their |
| 25 | emission control goals. Certain states the EPA |

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1 determined would be out of it at a certain point 2 in time but not initially. 3 MR. STEWART: I'd -- I'd say --JUSTICE SOTOMAYOR: So it was very 4 individualized in many ways. So tell me what 5 6 wasn't. 7 MR. STEWART: I think -- most of it I -- there were initial determinations about which 8 states should be included, but with respect to 9 10 the states that were included, the -- the 11 requirements were -- were almost -- were mostly 12 uniform; that is, in 2024 and 2025, the plan 13 would only impose new requirements on power 14 plants, electric-generating units, and for the 15 most part, during those years, those 16 requirements would simply be that the power 17 plants operate their existing controls to the 18 maximum extent. 19 CHIEF JUSTICE ROBERTS: Thank you, 20 counsel. 21 Justice Thomas? 2.2 Justice Alito? 23 JUSTICE ALITO: Well, just two very 24 simple questions. 25 Had there been a motion for

| 1 | reconsideration by the EPA, would there have |
|----|--|
| 2 | been any deadline for the EPA to rule on that? |
| 3 | MR. STEWART: There there was one |
| 4 | there were two motions raising this issue. |
| 5 | One was a motion for reconsideration filed by |
| б | U.S. Steel, which raised this issue and also |
| 7 | raised a pretty complicated set of technical |
| 8 | challenges specific to the steel industry. And |
| 9 | there was another filed by AFPA styled a motion |
| 10 | to stay that also raised the 11 versus 12. |
| 11 | There is no deadline. There is a |
| 12 | mechanism for arguing that EPA has unreasonably |
| 13 | been has unreasonably delayed, but that |
| 14 | hasn't been invoked. |
| 15 | JUSTICE ALITO: Could the other |
| 16 | question has to do with the fact that this is an |
| 17 | emergency application. We now receive many |
| 18 | applications for stays. Sometimes your office |
| 19 | seeks a stay. Sometimes your office opposes a |
| 20 | stay. |
| 21 | What is your office's position on the |
| 22 | question whether in this context what the stay |
| 23 | applicant must show is some sort of |
| 24 | super-irreparable harm? Is the applicant |
| 25 | required simply to show irreparable harm, or is |

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1 it required to clear some much, much higher 2 threshold? 3 MR. STEWART: I -- I -- I don't think that there is any requirement that it clear a 4 higher threshold, but I think in balance -- just 5 showing irreparable harm is -- is not enough, 6 7 particularly if there are countervailing harms on the other side. 8 JUSTICE ALITO: No, I -- I understand 9 10 that. 11 MR. STEWART: And the -- the other 12 point I'd make about the stay they are seeking 13 is that they really want a stay that will 14 operate as a tolling principle. And by that, I 15 mean if -- if the Court issued a stay tomorrow 16 and then two years went by and we won in the 17 D.C. Circuit and this Court denied cert and then 18 the stay was vacated in February of 2026, the 19 usual consequence of vacating a stay would be 20 that regulated parties would thereafter be 21 subject to all the same legal requirements as 2.2 they would have been if no stay had ever been 23 issued. But that's not what they want. 24 What they want, a rule is -- is a rule 25 that says, if that happens, then all the

1 compliance deadlines in 2026 and thereafter will 2 be extended by two years in light of the fact 3 that a stay had been effect in two years. And so that would delay the operation of the most 4 stringent requirements to the detriment of the 5 6 downwind states --7 JUSTICE ALITO: All right. CHIEF JUSTICE ROBERTS: Thank -- thank 8 9 you. 10 MR. STEWART: -- even if they 11 ultimately win. 12 CHIEF JUSTICE ROBERTS: Thank you, 13 counsel. 14 Justice Sotomayor? 15 Justice Kagan? 16 JUSTICE KAGAN: Yeah. I'm just 17 wondering, Mr. Stewart, you know, how often this 18 kind of thing comes up. You know, there are a 19 lot of NAAQSs, a lot of air pollutant standards, 20 and, presumably, there's a kind of constant 21 evaluation by the EPA of how to adjust those 2.2 standards and then what SIPs are -- what SIPs 23 need to change and if -- if a FIP is necessary. 24 And this seems like a pretty regular part of the 25 EPA's business and maybe a regular part of the

1 D.C. Circuit's business because that's true. 2 And I'm -- I'm wondering if you would just say, is -- is -- is there something unusual 3 about this case? 4 I -- I mean, one of the 5 MR. STEWART: 6 ways in which this case is very different from 7 EME Homer is that in EME Homer, you had the same pattern of EPA rejecting 20-some state plans and 8 9 then implementing a federal plan, and there were 10 a very wide array of challenges to the federal 11 plan in EME Homer. They went through the D.C. 12 Circuit. They got up to this Court. 13 There -- there was very little 14 litigation about the antecedent SIP 15 disapprovals. And so I think that that's one of 16 the -- the unusual features of this case in 17 comparison to prior cases involving Good 18 Neighbor Plans. 19 JUSTICE KAGAN: So there hasn't been 20 -- there -- there haven't been other 21 circumstances in which this exact question has 2.2 come up? 23 MR. STEWART: Right. I think, in the 24 EME Homer context, there were three challenges 25 to SIP disapprovals, and I don't know that any

of them were ultimately resolved in the -- on the merits. And so there -- there wasn't this situation where preliminary orders entered in the SIP disapproval litigation caused people to argue about is the plan still rational as to the states that remain.

JUSTICE KAGAN: And do you know what the D.C. Circuit intends to do or what -- do you have a guess as to what the D.C. Circuit will do with respect to the interaction between the SIP litigations that are happening across the country and the question before it?

MR. STEWART: I -- I don't have --13 14 have a clear sense of what they will do, and I 15 think it will depend in part on how does -- do 16 the SIP litigation lawsuits progress while the 17 D.C. Circuit is considering the case; that is, by the time that the D.C. Circuit is ultimately 18 19 ready to issue a decision, we may have some or 20 all of the SIP disapproval lawsuits resolved one 21 way or the other, either in EPA's favor in which 2.2 there are more states back in the plan, or if 23 they're resolved against EPA, then the D.C. 24 Circuit can kind of take it as given that those states are out for the time being and can 25

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| 1 | consider arguments about what the consequences |
|----|--|
| 2 | should be. |
| 3 | JUSTICE KAGAN: Thank you. |
| 4 | CHIEF JUSTICE ROBERTS: Justice |
| 5 | Gorsuch? |
| 6 | Justice Kavanaugh? |
| 7 | JUSTICE KAVANAUGH: If if 11 states |
| 8 | rather than 23 were involved, does that affect |
| 9 | the trading program? |
| 10 | MR. STEWART: It will affect it to the |
| 11 | extent that there will be fewer trading |
| 12 | potential trading partners. We have a |
| 13 | declaration from Mr. Goffman in in our |
| 14 | appendix that says the trading program can still |
| 15 | work robustly. It doesn't depend on the full 23 |
| 16 | states being involved. We've certainly had |
| 17 | plenty of trading programs in the past. |
| 18 | JUSTICE KAVANAUGH: What does |
| 19 | "robustly" mean? |
| 20 | MR. STEWART: I don't know if he used |
| 21 | the term "robustly," but I think what he meant |
| 22 | is it it is still a kind of a a real and |
| 23 | viable opportunity. He said the price of |
| 24 | allowances has not gone up. |
| 25 | And and I guess the only other |

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1 thing I would say about the trading program is 2 it would be absurd to think that if EPA had 3 known there would only be an 11-state trading program, it wouldn't have regulated EGUs at all. 4 Certainly, EPA would have regulated --5 6 JUSTICE KAVANAUGH: Well, I don't 7 think -- yeah, I don't think that's the suggestion. But can I ask you a question about 8 9 maybe following up on Justice Alito's questions 10 and some of the more general questions that have 11 been raised earlier about the standard, what 12 we're doing here. 13 On an emergency stay, one of the 14 factors is irreparable harm. I think both sides 15 in my -- I'm just giving you my view -- both 16 sides have irreparable harm, so that's a wash. 17 The public interests, both sides have a strong 18 public interest in my view. 19 So then the only other factor on which we can decide this under our traditional 20 21 standard is likelihood of success on the merits. 2.2 In my view, that accounts for cert worthiness, but this is the kind of issue that would be cert 23 24 worthy ultimately. So check for me on that one. 25 Then it comes down to likelihood of

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1 success on the merits. We can't do that without 2 looking at the merits, right? 3 MR. STEWART: I -- I quess the two things I'd say in response --4 JUSTICE KAVANAUGH: Is that a -- a --5 6 can I get a yes or no on that? 7 MR. STEWART: Yeah. 8 JUSTICE KAVANAUGH: Can we -- can we determine likelihood of success on the merits 9 without at least taking a look and making some 10 11 assessment as best we can of the merits? 12 MR. STEWART: I -- I agree with that. 13 The -- the two things I would say are, first, in 14 determining likelihood of ultimate success on 15 the merits, the Court would not only have to --16 to kind of reach its own judgment about is it 17 arbitrary or not to have the current 11- versus 18 12-state disparity, it would also have to make 19 some predictive judgment about whether that 11-20 versus 12-state disparity is going to continue 21 into the future, and that would just require --2.2 JUSTICE KAVANAUGH: Right. That's --23 do you think we make a better assessment after 24 an oral argument than we do without an oral 25 argument?

1 MR. STEWART: I -- I hope so. 2 JUSTICE KAVANAUGH: Exactly. 3 MR. STEWART: And -- and -- and then the other thing I would say to your point about 4 irreparable harm, I -- I think it is the case 5 that both sides have shown some irreparable 6 7 harm. I don't agree with the idea that if they both have shown irreparable harm, it's a wash, 8 9 because I think particularly taking into account the equities of the downwind states --10 11 JUSTICE KAVANAUGH: I agree -- I agree 12 with you about the equities of the downwind states, but there's also the equities of the 13 14 upwind states and the industry, and I don't know 15 how -- I mean, they're both like major. 16 MR. STEWART: And -- and --17 JUSTICE KAVANAUGH: And so we have to 18 figure out what to do in the interim. You said 19 two years between now and 2026. That's what we 20 have to figure out. Should these costs be incurred for the 21 2.2 next two years with the benefits to that -- the 23 downwind states, or should these costs not be incurred with the detriments to the downwind 24 25 states? And the only way under our usual

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standard to figure that out, as I see it, is to 1 2 make the best evaluation we can -- and it's not easy, which is why we're here in my view -- of 3 likelihood of success on the merits. 4 MR. STEWART: And -- and I quess the 5 6 only further point of -- or maybe it's a 7 recapitulation of my point about likelihood of success is the applicants have offered 8 9 speculation that the plan might have been 10 different in some respects if it had been 11 devised as an 11-state plan, but they haven't 12 identified any concrete modification that they 13 would --JUSTICE KAVANAUGH: Well, I think --14 15 right. And this turns on -- okay, on the 16 merits, they're arguing it's arbitrary and 17 capricious. And one of the classic arbitrary 18 and capricious conclusions is a failure to 19 explain. It's not reasonable and reasonably 20 explained. 21 And one of the complaints they have, 2.2 which we have to evaluate, is whether they're 23 likely to succeed in saying that the rule as was 24 not adequately explained in considering the 25 possibility that the SIP disapprovals would be

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1 invalidated or stayed in the states and would 2 drop out a number of states. We have to 3 evaluate that, correct? 4 MR. STEWART: You have to evaluate 5 that. 6 JUSTICE KAVANAUGH: Yeah. 7 MR. STEWART: But, to -- to the extent that what they are saying is EPA behaved 8 9 arbitrarily in not reconsidering its judgment 10 afterwards in light of the fact that 12 states had been taken out, that -- that's a different 11 12 inquiry. 13 JUSTICE KAVANAUGH: And have I missed 14 any of the factors that we should be considering 15 in evaluating an application for a stay? 16 MR. STEWART: No. I -- just in terms 17 18 JUSTICE KAVANAUGH: That -- that's all 19 I have. Thank you. 20 MR. STEWART: Okay. 21 CHIEF JUSTICE ROBERTS: Justice 2.2 Barrett? 23 JUSTICE BARRETT: Mr. Stewart, I want 24 to ask you about cert worthiness. So Justice 25 Kavanaugh just pointed out that cert worthiness

| 1 | can be considered part of assessing likelihood |
|----|--|
| 2 | of success on the merits. |
| 3 | I just want to be sure I understand |
| 4 | what the position of the Solicitor General's |
| 5 | office is on that. In this posture, applicants |
| б | say cert worthiness should not be a factor, that |
| 7 | Nken standard should just Nken standard |
| 8 | should just apply without respect to cert |
| 9 | worthiness. |
| 10 | What is the Solicitor General's |
| 11 | position? |
| 12 | MR. STEWART: I think it's our view |
| 13 | that you should consider cert worthiness as |
| 14 | in a sense as part of the the likelihood of |
| 15 | |
| 16 | JUSTICE BARRETT: As Justice Kavanaugh |
| 17 | framed it? |
| 18 | MR. STEWART: Yes. And and the |
| 19 | idea is, if if likelihood of success means |
| 20 | likelihood of success in this Court, then that |
| 21 | has to be not just would the Court rule in their |
| 22 | favor if it took the case but what's the chance |
| 23 | that the Court would take the case. |
| 24 | If you think that likelihood of |
| 25 | success is a predictive judgment about what the |

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1 D.C. Circuit will --2 JUSTICE BARRETT: Would you urge us to take this case? 3 MR. STEWART: I mean, it depends on --4 5 it depends on what --6 (Laughter.) 7 MR. STEWART: -- it depends on what came out of it. Obviously, we would -- and I'm 8 9 sure --10 JUSTICE BARRETT: So do you think the 11 case is cert worthy? 12 MR. STEWART: Not in its current --13 JUSTICE BARRETT: No. 14 MR. STEWART: -- posture, but we 15 don't -- but we don't know what the D.C. Circuit 16 is going to do. It's certainly possible that 17 the D.C. Circuit will issue a ruling for or 18 against us that would raise issues of 19 overarching importance, and so the cert calculus 20 would -- would change then. 21 We don't think that the question was 2.2 EPA required to put the rule on hold and impose 23 no restrictions while it considered what changes might be warranted in light of reduced 24 25 geographic coverage, we don't think that

1 question is cert worthy.

| 2 | JUSTICE BARRETT: And do you agree |
|----|--|
| 3 | Justice Kagan pointed out some of the "stuff" or |
| 4 | the vehicle problems that might be attendant in |
| 5 | this application. Do you agree that those are |
| б | factors that we should consider in assessing |
| 7 | cert worthiness in this posture? |
| 8 | MR. STEWART: Yes, because, as I say, |
| 9 | part of the presentation at oral argument was to |
| 10 | the effect that the cost-effectiveness calculus |
| 11 | might have been different if EPA had only had 11 |
| 12 | states in mind. And to the extent that's |
| 13 | that's an empirical judgment that's just going |
| 14 | through the scientific evidence, that doesn't |
| 15 | seem like something that would ordinarily be a |
| 16 | cert a Supreme Court case. |
| 17 | JUSTICE BARRETT: Thank you. |
| 18 | CHIEF JUSTICE ROBERTS: Justice |
| 19 | Jackson? |
| 20 | JUSTICE JACKSON: Yes. I guess I I |
| 21 | don't understand why the usual traditional |
| 22 | standard could possibly suffice in this |
| 23 | situation. I mean, Justice Barrett and Justice |
| 24 | Kagan suggested cert worthiness as another |
| 25 | consideration. But I don't we have to have |

1 something so that we are not -- we, the Supreme 2 Court, is not supplanting the entirety of the 3 lower federal court system when we're looking at cases of this nature? 4 MR. STEWART: Yes, and -- and, I mean, 5 6 it may be that kind of the very unpredictability 7 of what will happen in the D.C. Circuit leads to unpredictability about whether this will 8 9 ultimately be a cert worthy case. 10 And so it may be that --11 JUSTICE JACKSON: So cert worthiness 12 could be another way of saying it. I mean, I prefer to think about whether or not there's 13 14 something extraordinarily -- extraordinarily 15 harmful going on in the situation that would 16 warrant, in the situation, in this case, the 17 Supreme Court acting as the first decider of the 18 merits of an issue like this. 19 I mean, that seems to me to be truly 20 extraordinary. And if we are going to entertain 21 every motion that someone has about being harmed 2.2 or whatnot in the lower courts before any of the 23 lower courts even get the opportunity to talk about it, I -- I feel like we have to have 24 25 something that guides our consideration of when

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1 to do that. 2 MR. STEWART: We would agree with 3 that. And we would just add the point that this is not just a case where the other side needs to 4 make an extraordinary showing. It is a case 5 6 where, if a stay is entered and the government 7 ultimately prevails on the merits, we in the downwind states will suffer a -- a very high, 8 9 high degree of continuing harm even after the 10 stay is vacated. 11 JUSTICE JACKSON: Thank you. 12 CHIEF JUSTICE ROBERTS: Thank you, 13 counsel. 14 Ms. Vale. 15 ORAL ARGUMENT OF JUDITH N. VALE 16 ON BEHALF OF THE STATE RESPONDENTS MS. VALE: Mr. Chief Justice, and may 17 18 it please the Court: 19 In the Good Neighbor provision, 20 Congress protected downwind states from 21 pollution emitted in upwind states. A stay of 2.2 the Good Neighbor rule would undermine that 23 statutory goal and the public interest by 24 sending ozone pollution into downwind states, 25 including Connecticut, Wisconsin, and New York,

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1 that receive substantial pollution from the 2 particular upwind states that are currently in 3 the rule, including Ohio and Indiana. The harms from a stay will flow to 4 both the residents of downwind states, who will 5 6 experience health dangers, and to downwind 7 industry, which pays increased costs to compensate for upwind pollution and comply with 8 9 the current, more stringent standard. 10 For example, Connecticut sources 11 currently pay up to \$13,000 per ton of ozone 12 precursor reduced while, in the near term for power point -- plants under this rule, just to 13 14 turn on controls costs about \$1,600 per ton. By 15 contrast, apply -- and that's why applying the 16 rule to the upwind states is relatively less 17 expensive and harmful. 18 I welcome the Court's questions. 19 JUSTICE THOMAS: How do you arrive at that conclusion that it's less expensive for the 20 21 upwind states? 2.2 MS. VALE: It comes from, I think, two 23 things, one on either side of the balance. For the upwind states, the rule is designed -- the 24 25 way it -- it defines "significant contribution"

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1 is for sources to do the relatively less 2 expensive controls. I understand that there are still 3 costs, but they are relatively less expensive 4 because it's based on having upwind states do 5 controls that downwind sources and many other 6 7 sources across the country have already done, for example, like turning on pollution controls 8 9 on power plants that are already installed. That's the lowest of the low-hanging fruit. 10 11 By contrast, downwind sources, as they 12 get the upwind pollution, they have to compensate for it, but they've already exhausted 13 14 a lot of the less expensive strategies, so they 15 need to turn to more and more expensive 16 strategies to find any further cuts. 17 And one of the reasons why sources 18 have exhausted their less expensive options is 19 because of the statutory consequences of non-attainment. So, in Section 7511, I believe 20 (a), little (a), it is the Clean Air Act that 21 2.2 puts on more and more stringent requirements 23 onto downwind sources as states move into worse and worse levels of non-attainment. So more and 24 25 more sources need to put on controls, smaller

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1 and smaller sources need to put on controls, and 2 the controls themselves get more stringent. By -- and -- and -- and I think that 3 that's how we get into this situation for the 4 downwind sources. And the rule right now 5 continues to provide substantial and meaningful 6 7 benefits to the downwind sources. It is not a shell or a disaster. And that's because upwind 8 pollution is not evenly distributed as it goes 9 10 downwind. So the downwind states that generally 11 get a lot of pollution from the 11 states in the 12 rule now still stand to get a lot of benefits. So, for example, in Wisconsin, the 13 14 areas that struggle with air quality get 15 approximately 40 percent of their ozone from the 16 11 states currently in the rule, 13 percent from 17 Indiana alone. And for Connecticut, the current 18 scope of the rule gets it 65 percent of the 19 emission reductions compared to the full scope 20 of the rule. 21 And that relief for downwind states is 2.2 also urgent because of the way non-attainment 23 works. Non-attainment -- those deadlines keep 24 on coming regardless of whether Good Neighbor 25 obligations are fulfilled, even though the

1 deadlines, as the D.C. Circuit has made clear, 2 are supposed to be aliqned. We --3 CHIEF JUSTICE ROBERTS: Well, what -what the -- they're -- they're asking for is 4 simply an opportunity to make the argument 5 6 before the agency. And as I understand it, the 7 burden on the agency is simply to provide a rational or reasonable explanation. 8 9 So you're making arguments on the 10 merits. We don't have those arguments made or 11 substantiated on the record by the EPA. 12 MS. VALE: Well, I think there -- the path that Congress laid out for raising these 13 14 arguments when they arose after the end of the 15 comment period is the petition for 16 reconsideration. A lot of the cost analysis 17 that I'm giving you was considered by EPA. 18 That's -- that's part of the rule. 19 I mean, the -- part of the whole idea 20 of the rule is that upwind states and upwind 21 sources really, that each source -- each source 2.2 needs to do its own significant contributions of 23 pollution, needs to take care of its own, and 24 that's defined by what each source can do using 25 certain controls. It's not defined based on

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1 some magic number of emissions reductions from 2 23 states. 3 And I think we have every reason to believe that the cost thresholds and the cost --4 the controls that went into the stringencies 5 6 would be exactly the same, no matter whether it 7 was 23 or 11 or five states, because most of these controls are well established. 8 Thev've been around for over 25 years. And downwind 9 10 sources are already using them to try to reduce 11 their emissions. 12 The -- the rule is trying to get the 13 upwind sources not to do technical innovation or 14 newfangled things but to get them into the 15 middle of the pack that downwind sources are 16 already doing. 17 JUSTICE ALITO: Suppose that one of 18 the states that is still subject to this 19 requirement is paying too much, more than it 20 would have paid if the plan had been calculated 21 based on that state's situation alone or based 2.2 on just the states that remain subject to the 23 requirement at this time. 24 I just want to make sure I understand 25 your argument, the argument that you began with.

1 Was -- was it your argument that even if that is 2 true, the -- the detriment to New York would be 3 enough to outweigh the fact that those -- that state or those remaining states are paying what 4 we might say simply, in simple terms, too much? 5 6 Was that part of your -- was that your argument? 7 MS. VALE: That is part of the argument, I -- yes. Yes, because it's -- it's 8 9 looking at -- and I think what should drive the 10 Court's analysis in this unusual stay posture, 11 what should inform it, is the statute. And the 12 statute has already done a little bit of this 13 weighing of the interests between states and is 14 highly protective. 15 The point of the statute is to protect 16 downwind states, not just the residents -- of 17 course, that's important -- but also downwind 18 industry from the free riding of upwind states. 19 JUSTICE ALITO: Well, that might be true, but does that answer the argument that the 20 21 EPA should have considered what you -- that --2.2 the argument that you just made? Did it --23 MS. VALE: I think EPA --JUSTICE ALITO: -- did it do that? 24 25 MS. VALE: Yes. Yes, EPA did consider

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1 that. That is part of the fundamental idea of 2 how -- how cost -- significant contributions of 3 pollution is defined. The point of it is to say let's get the upwind sources doing the 4 relatively less expensive controls that many 5 downwind sources and -- and sources all around 6 7 the country are already doing. So that was fundamental to the rule. 8 And I think it is also a fundamental 9 understanding of the rule that states can come 10 11 in and out. We have had experience with this 12 under many prior ozone transport rules. They 13 were all done in this sort of multi-state way. I do think EPA could have written 23 different 14 15 Federal Register notices, but I don't -- that --16 that seems like form over substance. 17 We have had states drop out. We have 18 had one state, Georgia, remaining in a trading 19 program by itself. And if I could just maybe 20 explain why the trading program is not 21 interdependent in the sense that I think 2.2 applicants are making it. Two -- two -- two 23 things there. First of all, as states drop out, 24 25 supply and demand are going down roughly even.

1 So, while there are fewer allowances, there are 2 also fewer market participants asking for -wanting allowances. 3 Second, it is -- the states are not 4 the market participants. We are not left with 5 6 10 market participants. It is the power plants 7 that are the market participants. There are currently about 360 market participants in the 8 9 trading program. That's why we have the declarations that -- that -- that's the reason 10 11 why the declarations are all able to say: Look, 12 it's working robustly. 13 CHIEF JUSTICE ROBERTS: Well -- well, 14 I mean, you --15 MS. VALE: Prices are declining. 16 CHIEF JUSTICE ROBERTS: -- you say, 17 what, it's not essential that they're 18 interdependent? Well, what they said in the --19 the rule was that they were measurable and 20 meaningful cumulative improvements in ozone 21 levels at downwind receptors when the effects of 2.2 the emissions reductions are assessed 23 collectively across the hundreds of EGU and 24 non-EGU sources. 25 MS. VALE: It is true --

1 CHIEF JUSTICE ROBERTS: So there in 2 the rule what they said is you look at it 3 cumulatively and collectively. 4 MS. VALE: Well, I -- that is one piece of the step 3 analysis. And I think what 5 6 EPA is saying there is that, yes, they do look 7 when they're doing the rule, is this going to have a meaningful effect? You don't want to do 8 a rule that's not -- that turns out it's not 9 10 doing anything. Then EPA will probably have to 11 go back to the -- the drawing board and make it 12 more stringent in order to have a meaningful 13 effect. 14 But, ultimately, we know that we 15 continue to have a meaningful effect because the 16 costs and the emission reduction benefits that come out of Ohio and Indiana and all of the 17 18 states still in the rule remain exactly the 19 same --20 JUSTICE GORSUCH: Ms. Vale --21 MS. VALE: -- no matter whether 2.2 there's 23 states or 10. 23 JUSTICE GORSUCH: Ms. Vale, if -- if a 24 lower court had entered a stay here, would you 25 have sought cert?

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1 MS. VALE: I don't know. I don't 2 know. 3 JUSTICE GORSUCH: Would you have 4 thought it cert worthy? 5 MS. VALE: Perhaps. 6 JUSTICE GORSUCH: I would have thought 7 either way --8 MS. VALE: But I think --9 JUSTICE GORSUCH: -- somebody's going to think this is cert worthy. 10 11 MS. VALE: But I think it's the 12 applicants' burden here --13 JUSTICE GORSUCH: Of course. 14 MS. VALE: Yes. Yes. To say --15 JUSTICE GORSUCH: Of course. But you 16 would have borne that burden the other way 17 around and --18 MS. VALE: Correct. 19 JUSTICE GORSUCH: -- and this is a really important thing to both sides. 20 21 MS. VALE: I understand that. But I 2.2 think that the issue here that they are raising 23 in this stay posture is this EPA should have 24 considered after arising events that are still 25 changing today --

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1
               JUSTICE GORSUCH: Sure. Sure.
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               MS. VALE: And so I don't think that
 3
     is cert worthy.
 4
               JUSTICE GORSUCH: And it just would
 5
     have been your burden rather than theirs.
               MS. VALE: Correct.
 6
7
               JUSTICE GORSUCH: Okay. Thank you.
               CHIEF JUSTICE ROBERTS: Thank you,
 8
9
     counsel.
10
               Justice Thomas, anything further?
11
               Justice Alito?
12
               Justice Sotomayor?
13
               JUSTICE SOTOMAYOR: So you could have
    both lost?
14
15
               (Laughter.)
16
               CHIEF JUSTICE ROBERTS: Justice Kagan,
17
     anything further?
18
               Justice Kavanaugh?
19
               Justice Barrett?
               Justice Jackson?
20
21
               Okay. Thank you, counsel.
22
               Ms. Stetson, rebuttal?
23
            REBUTTAL ARGUMENT OF CATHERINE E. STETSON
24
               ON BEHALF OF THE INDUSTRY APPLICANTS
25
               MS. STETSON: Three quick points, Your
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Honors, first on emissions, second on the other
 fault lines and the rule that I mentioned, and
 the third on equities.

4 The first is what you heard Ms. Vale 5 just say is that the purpose of the Good 6 Neighbor provision is to protect downwind states 7 from emissions of upwind states. No. The 8 purpose of the Good Neighbor provision is to 9 reduce the significant contribution that upwind 10 states make to downwind states.

And that why -- that's why 11, Chief Justice Roberts, versus 23 matters. That question about how many is a collective, how many hundreds of EGUs, how many hundreds of non-EGUs that are being regulated here for the first time, by the way, how many of those feed into the analysis is exactly the problem.

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19 reconsideration, Justice Gorsuch, on the 20 question about whether EPA had significantly 21 explained itself. We raised the issue, we 22 sought reconsideration in fact. EPA still 23 hasn't acted on reconsideration, which you can 24 see in Note 9 of the Goffman Declaration. We 25 had no obligation to do anything more than that.

We didn't have to seek

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It was clear in the rule as evidenced 1 2 by the fact that EPA put in a severability 3 provision announcing its intention that something be severable. Not an explanation but 4 an intention. 5 If there are 11 states in this rule, 6 7 the answer to your question, Mr. Chief Justice, is that EPA would have had to ask whether or not 8 there still would be a significant contribution, 9 10 not just an air quality benefit downwind but a 11 significant contribution given the costs on the 12 industries and power points in those -- plants 13 in those states. 14 The fault lines throughout the rule 15 I've already mentioned. I mentioned in the 16 opening it goes to your Court's second question. 17 There are over-control issues here in addition 18 to the reliability issues that were ignored by 19 EPA. 20 And the last thing I'd say is on the equities. The equities are not balanced, 21 2.2 Justice Kavanaugh. The equities here are there are hundreds of millions if not billions of 23 dollars in costs over the next 12 to 18 months 24 25 coupled against 10 percent of the .66 average

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     part per billion contribution. This is not a
 2
     very, very significant downwind problem. This
     is a --
 3
 4
               CHIEF JUSTICE ROBERTS: Thank --
 5
               MS. STETSON: -- miniscule problem.
б
     Thank you.
7
                CHIEF JUSTICE ROBERTS: Thank you,
8
     counsel.
                The case is submitted.
9
10
                (Whereupon, at 11:40 a.m., the case
11
    was submitted.)
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