SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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OHIO, ET AL.,                          )
               Applicants,             )
          v.                           ) No. 23A349
EPA, ET AL.,                           )
               Respondents.            )
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KINDER MORGAN, INC., ET AL.,           )
               Applicants,             )
          v.                           ) No. 23A350
EPA, ET AL.,                           )
               Respondents.            )
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AMERICAN FOREST & PAPER                )
ASSOCIATION, ET AL.,                   )
               Applicants,             )
          v.                           ) No. 23A351
EPA, ET AL.,                           )
               Respondents.            )
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UNITED STATES STEEL CORPORATION,       )
               Applicants,             )
          v.                           ) No. 23A384
EPA, ET AL.,                           )
               Respondents.            )
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Pages: 1 through 98

Place: Washington, D.C.

Date: February 21, 2024

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16                  Respondents.       )
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18                    Washington, D.C.

19               Wednesday, February 21, 2024

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21        The above-entitled matter came on for

22    oral argument before the Supreme Court of the

23    United States at 10:10 a.m.

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1    APPEARANCES:
2    MATHURA J. SRIDHARAN, Deputy Solicitor General,
3         Columbus, Ohio, on behalf of the State Applicants.
4    CATHERINE E. STETSON, ESQUIRE, Washington, D.C.; on
5         behalf of the Industry Applicants.
6    MALCOLM L. STEWART, Deputy Solicitor General,
7         Department of Justice, Washington, D.C.; on behalf
8         of the Federal Respondents.
9    JUDITH N. VALE, Deputy Solicitor General, New York,
10        New York, on behalf of the State Respondents.
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C O N T E N T S

1   P R O C E E D I N G S

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

1   doesn't work when the inputs don't match the

2   outputs.

3   With the SIP disapprovals in flux and

4   the EPA's methodology requiring full

5   participation, the EPA had an obligation to

6   consider what happens to the federal plan when

7   one or more states drop out, that is, when the

8   inputs, 23 states, don't match the outputs, now

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 quarter 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

20   all the states to be in.

21   What's your best evidence for that?

22   MS. SRIDHARAN: The best evidence for

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

 4   drop out with them, those points of diminishing

 5   marginal returns shift, and they shift somewhat

 6   unpredictably, which means that the relevant

 7   cost threshold for a different mix of states

 8   could be cheaper, and, with full candor to the

 9   Court, it could be the same or even be more

10   expensive.

11   The problem is we don't know. It is

12   the unpredictability that renders this plan

13   unreasonable as to any different mix of states.

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

20   implement, so I don't see why that would be

21   different among the 50 states or marginally

22   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

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.

4   So I don't see how you're raising an argument,

5   frankly, not for yourself because nothing's

6   changed.

7   MS. SRIDHARAN: Well, Your Honor, let

8   me take that in reverse, and I'm happy to go

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 -- 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

22   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

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

1   EPA to know what those numbers are and determine

2   whether or not that's a sufficient change in --

3   and it leads to a sufficient change in the

4   result?

5   MS. SRIDHARAN: I don't know how long

6   it'll take the EPA to recrunch the numbers.

7   What I can say --

8   CHIEF JUSTICE ROBERTS: I'll bet they

9   do it real quickly.

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

19   ultimately is no change -- and I can't tell you

20   what that looks like, whether there is a

21   difference in the obligations or not -- there

22   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

1   consider at all and has sort of blown past the

2   problem here, saying nothing to look here, just

3   go ahead and execute your obligations as they

4   are.

5   JUSTICE KAVANAUGH: To make sure I

6   understand that, I think you're saying, but

7   correct me if I'm wrong, that when the EPA said

8   the whole thing is severable in response to the

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

13   adequately explained in terms of how the subset

14   of states would work.

15   Is that what you're saying?

16   MS. SRIDHARAN: That is definitely

17   correct as to our position with respect to the

18   severability provision. That is not just a

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

22   that's true. Had they had --

23   JUSTICE KAVANAUGH: In other words --

24   let me just follow up on that. In other words,

25   the Chief Justice's question, maybe they could

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

4   right, Your Honor. They've done nothing by way

5   of addressing contingencies.

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

11   remember your application, you -- you -- very

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

20   methodology in, admittedly, the same broad and

21   capacious terms that the EPA uses in its final

22   rule.

23   JUSTICE KAGAN: Well, it's -- it's --

24   it's your burden right now to show a likelihood

25   of success. And I have to say pages 18 to 21,

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.

4   MS. SRIDHARAN: Well, Your Honor, that

5   brings me to the second reason I'm here

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. I

14   mean, we gave you a question and you're trying

15   to answer the question.

16   I -- I -- I guess 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

22   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,

1   and I'm wondering how you think we should do

2   that.

3   MS. SRIDHARAN: Well, two reasons or

4   two answers to that, Your Honor.

5   First of all, while these proceedings

6   are going on, the states and their industries

7   continue to suffer irreparable harm. And,

8   second, perhaps this would be a different story

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.

13   I will -- I will concede that they keep saying,

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.

22   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 --

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 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.

 4              MS. SRIDHARAN:  No, not exactly, Your

 5    Honor.  The SIP disapprovals are the legal

 6    predicate for the EPA's authority to have a

 7    federal plan in place.

 8              JUSTICE SOTOMAYOR:  I'm sorry, I

 9    misspoke.  The --

10              JUSTICE BARRETT:  Stay?

11              JUSTICE SOTOMAYOR:  -- the rule was

12    promulgated after -- before the SIP -- before

13    the courts restrained it with respect to some

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?

24              MS. SRIDHARAN:  Well, a couple of

25    answers to that.  With respect to the Clean Air
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1   Act itself, it ties publication in the Federal

2   Register to final agency action that is

3   reviewable under the Clean Air Act's judicial

4   review provisions.

5   Second, by the EPA's own words in the

6   prepublication notice it presented in March, the

7   EPA noted that that would not be the final rule

8   for the purpose of compliance, and, in fact,

9   that would fail the second prong of this Court's

10   Bennett test because legal consequences did not

11   flow from that.

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

20   afterwards there was confirmation of that

21   through litigation that popped up all around the

22   country before the rule even -- the federal plan

23   was in a prepublication form.

24   All of that cued the agency into its

25   obligation to address this very serious

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.

5   JUSTICE JACKSON: So we're here on

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.

13   Circuit, and, in fact, my understanding is that

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

22   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

1   -- sorry -- I'm sorry, imminently power

2   shortages and heating shortages?

3   MS. SRIDHARAN: At least some grid

4   operators have pointed to the fact that this

5   federal rule will be directly associated with a

6   potential for grid unreliability.

7   JUSTICE JACKSON: Eventually.

8   MS. SRIDHARAN: Well --

9   JUSTICE JACKSON: We're -- we're --

10   we're here on emergency relief, and I guess I --

11   I'm worried about -- I'm worried about the

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

20   of extraordinary harm, not just the serious harm

21   you say that states will face?

22   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

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

4   who has to comply with the rule, right, has to

5   spend some -- something, I would think, in order

6   to do so. And what I'm a little concerned about

7   is that really your argument is just boiling

8   down to we think we have a meritorious claim and

9   we don't want to have to follow the law while

10   we're challenging it.

11   And I don't understand why every

12   single person who is challenging a rule doesn't

13   have that same set of circumstances.

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

21   we're talking about are serious in terms of

22   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

1   into effect?

2   MS. SRIDHARAN: Sure. The compliance

3   deadlines might be then, but what it takes to

4   get to compliance starts now. And from the

5   states' perspective, we're the states, we've

6   already started and we have to start.

7   JUSTICE JACKSON: Have you asked the

8   lower court to expedite its review? I would

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?

22   CHIEF JUSTICE ROBERTS: Thank you --

23   thank you, counsel.

24   Justice Thomas?

25   Justice Alito?

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1              Justice Sotomayor?
2              JUSTICE SOTOMAYOR:  You never filed a
3      motion for reconsideration --
4              MS. SRIDHARAN:  That's right, Your
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,
9      not after, which means, without a motion for
10     reconsideration, there's no record before the
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,
22     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?

6   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

1   plan, and it has failed to do so, and it

2   continues to stick its head in the sand by

3   failing to go back to the drawing board.

4   CHIEF JUSTICE ROBERTS: Justice Kagan?

5   JUSTICE KAGAN: So, in this posture,

6   one of the things that we would -- that we are

7   supposed to consider is would we take cert on

8   this case and would you be likely to prevail if

9   we did take cert.

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

18   have to comment and did you comment? Then

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

22   reconsideration? And you didn't file a motion

23   for reconsideration.

24   Then there's this very complex issue

25   about how your question relates to the validity

 1   of the SIP disapprovals themselves because, if

 2   the SIP disapprovals were valid, you wouldn't

 3   have a leg to stand on here. So how are we

 4   supposed to know that in this posture?

 5   So I guess what I'm saying is there

 6   are so many hoops that you have to go through

 7   and you have to go through all of them. You

 8   have to run the table before we could even begin

 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

22   something that it doesn't matter what's going to

23   happen next.

24   JUSTICE KAGAN: Well, that -- that's

25   sort of interesting. That doesn't seem

1   intuitive to me. I mean, if all these lawsuits

2   that the states are bringing are going to end up

3   losing, I mean, the idea that you can be here

4   and be demanding emergency relief just because

5   states have kicked up a lot of dust seems not

6   the right answer to me.

7   MS. SRIDHARAN: No, that's not right,

8   Your Honor, because, in this very unusual

9   circumstance under this statute, as well as the

10   EPA's choice of method, it is relevant to look

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

22   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

1   necessarily baked into that is the fact that

2   there may be judicial intervention, especially

3   by the EPA's own doing.

4   JUSTICE KAGAN: What do you think the

5   EPA should have done? I mean, there are 23

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

21   the power of 23 minus one, but --

22   JUSTICE KAGAN: Ugh.

23   (Laughter.)

24   MS. SRIDHARAN: -- but --

25   JUSTICE KAGAN: I have to tell my

1   clerk it's minus one.

2   (Laughter.)

3   MS. SRIDHARAN: -- but -- plus one or

4   minus one. What the EPA had to do as a first

5   matter is acknowledge the problem. So we're

6   very far from talking about the line-drawing

7   things that you're talking about.

8   What the EPA had to do was consider

9   whether, under this method, it would need to

10   address contingencies. And we're familiar in

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?

20   Justice Barrett?

21   Justice Jackson?

22   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

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.

5   So can you speak to that?

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

9   that we can get an answer that stymies the

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

20   ruling agreeing with you that the rule is

21   invalid?

22   MS. SRIDHARAN: Well, Your Honor, I am

23   not going to get too far into some of the

24   considerations that went into it, but the most

25   important one is that we wanted a rule that

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

4   that we are currently suffering.

5   JUSTICE JACKSON: Thank you.

6   CHIEF JUSTICE ROBERTS: Thank you,

7   counsel.

8   MS. SRIDHARAN: Thank you.

9   CHIEF JUSTICE ROBERTS: Ms. Stetson.

10   ORAL ARGUMENT OF CATHERINE E. STETSON

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

17   to downwind non-attainment. If EPA is

18   regulating beyond that authority, it is

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

24   plan. But the Court also asked whether the

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.

 4   First, the rule selectively ignores

 5   EME Homer's cost-effectiveness framework.

 6   Second, the rule over-controls across a number

 7   of industries. And, third, the rule imposes an

 8   impossible compliance timeline that will result

 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

13   to depend on the interdependence of the 23

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

18   by regulating the states individually as opposed

19   to in a -- as an interdependent group?

20   MS. STETSON: It could not have

21   accomplished the exact same thing, Justice

22   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,

1   the point where the emissions contribution to a

2   downwind state is controlled at a reasonable

3   cost level.

4   So I think the exchange that you had

5   with Ms. Sridharan about where that cost issue

6   comes from has to do with the question about, if

7   you've got 23 states and all of their EGUs and

8   all of the non-EGU sources that are linked into

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

18   particular --

19   JUSTICE KAGAN: Is -- is that in your

20   brief?

21   MS. STETSON: Yes, it is.

22   JUSTICE KAGAN: Where -- where --

23   where is that?

24   MS. STETSON: When -- when we discuss

25   the 23-state question. You can look at pages 11

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 question about that

4   difference between 23 and 11.

5   But I want to bring home the point

6   with a -- a couple quotes from the --

7   JUSTICE KAGAN: I guess -- I guess my

8   reaction is a little bit the same as -- that I

9   -- I -- I -- I gave to Ms. Sridharan, is, I

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

18   bottom line is actually not that complicated.

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

22   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

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

4   from that first question to the second.

5   JUSTICE KAVANAUGH: On -- on that

6   first question, this discussion that you're

7   having now, I thought the broader point was EPA

8   was told the SIP disapprovals were going -- were

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

13   care, it's severable. That's a fine response if

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 egg.

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 --

22   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

 4   show -- to justify -- to not be arbitrary and

 5   capricious.

 6   MS. STETSON: Yes. And, in fact, if

 7   you look at that page that I just cited, 36693,

 8   what you'll see is it says, "Should any

 9   jurisdiction-specific aspect of this rule be

10   found invalid, the EPA views the rule as

11   severable..." "Should any industry-specific

12   rule be found invalid, the EPA --" rolls this

13   rule -- "views this rule as severable."

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

21   said. I read the -- I read these applications

22   pretty carefully, and I didn't understand this

23   cost argument at all. And I'm really

24   simplistic. I don't have a math degree, all

25   right? If you're sharing costs among 23 people,

1   your cost is going to be less. If you're

2   sharing costs among 11 people, your cost is

3   going to be more.

4   So, since this plan doesn't change any

5   allocations depending on the number of people

6   who are in it, states are bound by the number

7   that was calculated on the larger group, how are

8   the remaining states affected by the fact that

9   their cost should have been higher, but it's not

10   because it's been fixed at this lower number?

11   MS. STETSON: Justice Sotomayor --

12   JUSTICE SOTOMAYOR: I'm very

13   simplistic. You know, cost divided by 23 is

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   matter? Meaning, if you're paying less on the

21   wrong number because it was divided by 23, how

22   could it be that on 11 your cost is ever going

23   to be greater than that number, than the 23 --

24   MS. STETSON: Justice Sotomayor, I --

25   I think so much of it has to do with the states

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 --

4   JUSTICE SOTOMAYOR: No. My point is,

5   once the states drop out, it doesn't matter what

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

18   you, hundreds of EGUs across all of the states,

19   hundreds of industries' units across all of the

20   states. It figured out what that aggregate cost

21   was and then it decided to allocate obligations.

22   So we keep talking about the end of

23   that process, what -- what obligations would

24   change on a state based on taking some states

25   out.

1   JUSTICE SOTOMAYOR: Seems --

2   MS. STETSON: But that's not --

3   JUSTICE SOTOMAYOR: It seems to --

4   MS. STETSON: -- the right place to

5   look.

6   JUSTICE SOTOMAYOR: It seems to me

7   that if the aggregate is contributing to

8   something and there's a certain amount of people

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   MS. STETSON: I think, Justice

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

18   calls meaningful reductions.

19   Now I'd encourage you to look at page

20   36743 and 36747 to figure out exactly the scope

21   of those meaningful reductions of the 88 Federal

22   Register final rule. What we're talking about

23   when it comes to meaningful reductions is on the

24   order of a total of .66 parts per billion

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

3   from the receptors from Arizona to Connecticut

4   and you add them up, then you get a bigger parts

5   per billion number, but that's like ticketing me

6   for speeding if I exceed the speed limit one

7   mile per hour in 23 different states. But --

8   but let me --

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,

22   all -- all sorts of issues involving the run-up

23   to installation of these controls.

24   But let me pause on this because I

25   think it also responds to a question, Justice

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

4   Jackson, you know, that this is an emergency.

5   What we need to show is for a stay

6   that we have a likelihood of success on the

7   merits and irreparable harm.

8   JUSTICE BARRETT: But you didn't --

9   MS. STETSON: And the irreparable harm

10   that we pointed to --

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

20   there been -- Justice Jackson asked Ohio's

21   counsel about whether there have been these

22   kinds of disruptions to this point.

23   MS. STETSON: So let me answer the

24   cost question and the disruption question if I

25   can. The first on the cost is, if you look at

1   the declarants particularly with respect to the

2   pipelines, you'll find explanations about what

3   costs they have to incur in the next 12 to 18

4   months in order to stay in compliance with this

5   timeline that we have pointed out is completely

6   unreliable, in -- in addition to all of the

7   other problems that we've talked about.

8   But, on the question of irreparable

9   harm in another respect, you know, what we are

10   talking about is also the question of immediate

11   reliability issues, and if you look at the Brown

12   Declaration attached to the American Forest &

13   Paper stay application, you'll find that in the

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   Justice Sotomayor?

2   Justice Kagan?

3   JUSTICE JACKSON: Yeah, I have a

4   question. Why haven't you asked the D.C.

5   Circuit to expedite their review? I mean, if

6   you're suffering the harms that you're talking

7   about and you're pending before that court, I

8   guess I'm still confused as to why we are the

9   ones who are being asked in the first instance

10   to look at this.

11   MS. STETSON: Justice Jackson, we --

12   we did move for expedited briefing. We were not

13   given the briefing schedule that we wished.

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

22   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

 1   burden in this situation. I mean, surely, the

 2   Supreme Court's emergency docket is not a viable

 3   alternative for every party that believes they

 4   have a meritorious claim against the government

 5   and doesn't want to have to comply with a rule

 6   while they're challenging it.

 7   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?

15   MS. STETSON: The burden should be

16   exactly what this Court described in Nken versus

17   Holder, Justice Jackson.

18   JUSTICE JACKSON: But, in Nken versus

19   Holder, was that a situation in which the lower

20   court had not yet even ruled at all on the

21   merits 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

1   -- the standard to be applied to --

2   JUSTICE JACKSON: Right, but --

3   MS. STETSON: -- a motion for a stay.

4   JUSTICE JACKSON: -- I want you to

5   appreciate the distinction that I'm making.

6   MS. STETSON: Yeah.

7   JUSTICE JACKSON: This is a situation

8   in which you have filed a claim in a lower

9   court, you're -- the D.C. Circuit has not even

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

22   this agency made a significant mistake, in fact,

23   several of them that are fault lines throughout

24   the agency order. That is exactly what was at

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

 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

 4   interests of the state applicants, I think it's

 5   important to bear in mind that at this stage of

 6   the proceedings, there are a lot more states on

 7   our side than there are on theirs, and it's

 8   vital to bear in mind the equities of the

 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

13   interests of the downwind states, it's natural

14   to think first of their humanitarian interest in

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

21   based on some theoretical possibility that the

22   contours of an 11-state rule might have been

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

4   that it was reserving judgment on whether

5   several additional states should ultimately be

6   included in the plan. It said that if any of

7   the 23 states that were currently included

8   devised compliant SIPs, they could be taken out

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

13   requirements for each state in order that they

14   would be workable if a smaller or a larger set

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

18   providing the air quality benefits that EPA had

19   hoped because the stays of the SIP plan

20   disapprovals mean it's only reducing emissions

21   from 11 states rather than 23. But, for those

22   11 states, the requirements that are imposed on

23   sources are exactly the same as would have been

24   imposed on sources in those 11 states if the

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

1   emission controls could be cost-effectively

2   imposed on different types of industrial

3   sources, in the end, it was placing the same

4   requirements on all of the covered states; that

5   is, to do equity, it was saying that power

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.

22   CHIEF JUSTICE ROBERTS: Would -- would

23   you have undertaken this program if only that

24   state was involved?

25   MR. STEWART: We -- we -- if -- if

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

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

25   had been studying only 11 states at the outset,

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 --

4   CHIEF JUSTICE ROBERTS: Well --

5   MR. STEWART: -- in devising a plan.

6   CHIEF JUSTICE ROBERTS: Well, the --

7   it's something --

8   MR. STEWART: But the other thing --

9   CHIEF JUSTICE ROBERTS: It -- it's

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

14   until after the hundreds of millions of dollars

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

18   the -- the ground is still shifting; that is,

19   EPA back -- earlier in the year proposed to

20   disapprove the -- the plans of several

21   additional states, which, if that ultimately

22   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

25   the end of the day on Friday saying that

1   proceeding is being transferred to the D.C.

2   Circuit, and that could result in Utah and

3   Oklahoma being put back into the federal plan.

4   So part of the reason it wouldn't make

5   sense for EPA to do a sort of ground-up inquiry

6   is that, just as it was getting done with that,

7   it might have a new geographic composition to

8   deal with.

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

22   explained.

23   MR. STEWART: I -- I -- I think the

24   comments were raised at kind of a lower level of

25   specificity than -- than you might imagine.

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

4   precedent to the federal plan and the SIP

5   disapprovals were bad.

6   And to -- to a point, those commenters

7   have been vindicated. That is, several states

8   have obtained stays of their SIP disapprovals,

9   and the result has been that --

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,

18   and then the question I think that's raised is

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

23   with the 11 states in this instance.

24   MR. STEWART: I -- I think EPA

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

3   plan will be less effective. I don't think any

4   commenter was saying specifically, if some

5   disapprove -- SIP disapprovals are stayed, the

6   plan will become arbitrary and capricious as to

7   the other states.

8   JUSTICE KAVANAUGH: The plan will

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.

19   EPA imposed -- imposed exactly the same

20   requirements.

21   And the requirements that are imposed

22   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.

6   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

1   have information about --

2   JUSTICE GORSUCH: I found an article

3   that said between 2000 and 2014 it was seven

4   times. Is that -- do -- do you -- do you have

5   any other information?

6   MR. STEWART: I -- I don't -- I don't

7   have any other evidence, but I -- I think, even

8   with that --

9   JUSTICE GORSUCH: Okay, okay, okay,

10   okay. Okay. My -- my other simple question is,

11   could -- could EPA have done this on a

12   state-by-state basis? I mean, the -- the --

13   when a SIP is -- fails, the obligation

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 --

20   JUSTICE GORSUCH: No, no, I'm -- they

21   -- they did a 23-state plan. Okay.

22   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?

1   MR. STEWART: They --

2   JUSTICE GORSUCH: Yes or no?

3   MR. STEWART: Yes.

4   JUSTICE GORSUCH: Okay. And -- and

5   why didn't they do that?

6   MR. STEWART: And they did it.

7   JUSTICE GORSUCH: Well, all right.

8   MR. STEWART: They -- they -- they --

9   they imposed --

10   JUSTICE GORSUCH: I -- I -- I -- we're

11   talking past each other. We have a 23-state

12   plan that I understand has state by state. I --

13   I -- I get that. I'm just wondering, did they

14   -- did they consider doing that without respect

15   to the 23 states as a -- as a -- as -- 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.

4   JUSTICE GORSUCH: Got it. Got it.

5 Thank you.

6   JUSTICE ALITO: Suppose they had done

7 it state by state and had -- let's take Ohio as

8 an example -- had done the cost/benefit analysis

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

13 reason to think that there would be. I don't

14 say -- think I could say that 100 percent, but I

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

21 would be appropriate.

22   JUSTICE ALITO: What I understand you

23 to be saying is that it might -- the math might

24 turn out the same, but it wouldn't necessarily

25 turn out the same. Is that -- that's basically

1   what you're saying?

2   MR. STEWART: Yes, that's right.

3   And -- and, certainly, what we have now is a --

4   a closer approximation to what an 11-state would

5   have -- plan would have looked like than zero

6   is. And what the applicants are asking for is

7   zero, and that isn't an option that EPA could

8   have chosen as a matter of statute. EPA was

9   obligated as a matter of statute to promulgate

10   some plan for each of the states that it found

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

18   understand it is that it's presumptive, right?

19   It's not conclusive.

20   I mean, it could be -- there are

21   circumstances where provisions are -- are

22   interrelated and so that the presumption is

23   overcome. And why wouldn't that be true here?

24   MR. STEWART: Well, I -- I think

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

     3   rule to be severable along particular lines,

     4   and, second, if the agency intended it, can what

     5   remains function -- sensibly as its own rule.

     6   And, here, we know that EPA intended it to be

     7   severable.

     8   The -- the other thing I would say

     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

    18   composition of the plan changed, the

    19   requirements imposed on the remaining states

    20   would not change.

    21   EPA decided in this rulemaking to make

    22   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 --

4 JUSTICE JACKSON: So, Mr. Stewart, can

5 I ask you just about their challenge? And I'm

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

9 of states originally, when it first was enacted?

10 MR. STEWART: I -- I -- I don't --

11 there -- there were challenges to the antecedent

12 SIP disapprovals, and many of the states said we

13 should not be under any "Good Neighbor Plan"

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 MR. STEWART: There was a possibility

21 and -- and those -- those comments and those

22 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

6   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

         8   as the -- the -- the historical or legal

         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

        13   that a state could always get out of a federal

        14   plan for -- by --

        15   JUSTICE GORSUCH: Well, I'm not -- I'm

        16   -- I'm going to push back on that just a little

        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

        21   Kavanaugh pointed out, without a whole lot of

        22   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

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

5   aggregate of 23?

6   MR. STEWART: I -- I think I would say

7   people had a chance to comment -- to make

8   comments to the effect of, if some states drop

9   out, the plan will become arbitrary and

10   capricious or will need to be rethought as to

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?

22   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

 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 --

 4   JUSTICE SOTOMAYOR: So it was very

 5   individualized in many ways. So tell me what

 6   wasn't.

 7   MR. STEWART: I think -- most of it I

 8   -- there were initial determinations about which

 9   states should be included, but with respect to

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?

22   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

6   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

1   it required to clear some much, much higher

2   threshold?

3   MR. STEWART: I -- I -- I don't think

4   that there is any requirement that it clear a

5   higher threshold, but I think in balance -- just

6   showing irreparable harm is -- is not enough,

7   particularly if there are countervailing harms

8   on the other side.

9   JUSTICE ALITO: No, I -- I understand

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

22   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

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 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
 4    so that would delay the operation of the most
 5    stringent requirements to the detriment of the
 6    downwind states --
 7              JUSTICE ALITO:  All right.
 8              CHIEF JUSTICE ROBERTS:  Thank -- thank
 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
22    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
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 1   D.C. Circuit's business because that's true.

 2   And I'm -- I'm wondering if you would

 3   just say, is -- is -- is there something unusual

 4   about this case?

 5   MR. STEWART: I -- I mean, one of the

 6   ways in which this case is very different from

 7   EME Homer is that in EME Homer, you had the same

 8   pattern of EPA rejecting 20-some state plans and

 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

22   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

1   of them were ultimately resolved in the -- on

2   the merits. And so there -- there wasn't this

3   situation where preliminary orders entered in

4   the SIP disapproval litigation caused people to

5   argue about is the plan still rational as to the

6   states that remain.

7   JUSTICE KAGAN: And do you know what

8   the D.C. Circuit intends to do or what -- do you

9   have a guess as to what the D.C. Circuit will do

10   with respect to the interaction between the SIP

11   litigations that are happening across the

12   country and the question before it?

13   MR. STEWART: I -- I don't have --

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,

18   by the time that the D.C. Circuit is ultimately

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

22   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

25   states are out for the time being and can

 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

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

4   program, it wouldn't have regulated EGUs at all.

5   Certainly, EPA would have regulated --

6   JUSTICE KAVANAUGH: Well, I don't

7   think -- yeah, I don't think that's the

8   suggestion. But can I ask you a question about

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

20   we can decide this under our traditional

21   standard is likelihood of success on the merits.

22   In my view, that accounts for cert worthiness,

23   but this is the kind of issue that would be cert

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 guess the two

 4   things I'd say in response --

 5   JUSTICE KAVANAUGH: Is that a -- a --

 6   can I get a yes or no on that?

 7   MR. STEWART: Yeah.

 8   JUSTICE KAVANAUGH: Can we -- can we

 9   determine likelihood of success on the merits

10   without at least taking a look and making some

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 --

22   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

4   the other thing I would say to your point about

5   irreparable harm, I -- I think it is the case

6   that both sides have shown some irreparable

7   harm. I don't agree with the idea that if they

8   both have shown irreparable harm, it's a wash,

9   because I think particularly taking into account

10   the equities of the downwind states --

11   JUSTICE KAVANAUGH: I agree -- I agree

12   with you about the equities of the downwind

13   states, but there's also the equities of the

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.

21   Should these costs be incurred for the

22   next two years with the benefits to that -- the

23   downwind states, or should these costs not be

24   incurred with the detriments to the downwind

25   states? And the only way under our usual

1   standard to figure that out, as I see it, is to

2   make the best evaluation we can -- and it's not

3   easy, which is why we're here in my view -- of

4   likelihood of success on the merits.

5   MR. STEWART: And -- and I guess the

6   only further point of -- or maybe it's a

7   recapitulation of my point about likelihood of

8   success is the applicants have offered

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 --

14   JUSTICE KAVANAUGH: Well, I think --

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,

22   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

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

8   that what they are saying is EPA behaved

9   arbitrarily in not reconsidering its judgment

10   afterwards in light of the fact that 12 states

11   had been taken out, that -- that's a different

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

22   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

6   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

 1   D.C. Circuit will --

 2   JUSTICE BARRETT: Would you urge us to

 3   take this case?

 4   MR. STEWART: I mean, it depends on --

 5   it depends on what --

 6   (Laughter.)

 7   MR. STEWART: -- it depends on what

 8   came out of it. Obviously, we would -- and I'm

 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

22   EPA required to put the rule on hold and impose

23   no restrictions while it considered what changes

24   might be warranted in light of reduced

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

6   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

 4   cases of this nature?

 5   MR. STEWART: Yes, and -- and, I mean,

 6   it may be that kind of the very unpredictability

 7   of what will happen in the D.C. Circuit leads to

 8   unpredictability about whether this will

 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

13   prefer to think about whether or not there's

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

22   or whatnot in the lower courts before any of the

23   lower courts even get the opportunity to talk

24   about it, I -- I feel like we have to have

25   something that guides our consideration of when

 1   to do that.

 2   MR. STEWART: We would agree with

 3   that. And we would just add the point that this

 4   is not just a case where the other side needs to

 5   make an extraordinary showing. It is a case

 6   where, if a stay is entered and the government

 7   ultimately prevails on the merits, we in the

 8   downwind states will suffer a -- a very high,

 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

17   MS. VALE: Mr. Chief Justice, and may

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

22   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,

1   that receive substantial pollution from the

2   particular upwind states that are currently in

3   the rule, including Ohio and Indiana.

4   The harms from a stay will flow to

5   both the residents of downwind states, who will

6   experience health dangers, and to downwind

7   industry, which pays increased costs to

8   compensate for upwind pollution and comply with

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

13   power point -- plants under this rule, just to

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

20   that conclusion that it's less expensive for the

21   upwind states?

22   MS. VALE: It comes from, I think, two

23   things, one on either side of the balance. For

24   the upwind states, the rule is designed -- the

25   way it -- it defines "significant contribution"

1   is for sources to do the relatively less

2   expensive controls.

3   I understand that there are still

4   costs, but they are relatively less expensive

5   because it's based on having upwind states do

6   controls that downwind sources and many other

7   sources across the country have already done,

8   for example, like turning on pollution controls

9   on power plants that are already installed.

10   That's the lowest of the low-hanging fruit.

11   By contrast, downwind sources, as they

12   get the upwind pollution, they have to

13   compensate for it, but they've already exhausted

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

20   non-attainment. So, in Section 7511, I believe

21   (a), little (a), it is the Clean Air Act that

22   puts on more and more stringent requirements

23   onto downwind sources as states move into worse

24   and worse levels of non-attainment. So more and

25   more sources need to put on controls, smaller

1 and smaller sources need to put on controls, and

2 the controls themselves get more stringent.

3   By -- and -- and -- and I think that

4 that's how we get into this situation for the

5 downwind sources. And the rule right now

6 continues to provide substantial and meaningful

7 benefits to the downwind sources. It is not a

8 shell or a disaster. And that's because upwind

9 pollution is not evenly distributed as it goes

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.

13   So, for example, in Wisconsin, the

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

22 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 aligned. We --

3   CHIEF JUSTICE ROBERTS: Well, what --

4   what the -- they're -- they're asking for is

5   simply an opportunity to make the argument

6   before the agency. And as I understand it, the

7   burden on the agency is simply to provide a

8   rational or reasonable explanation.

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

13   path that Congress laid out for raising these

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

22   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

 1   some magic number of emissions reductions from

 2   23 states.

 3   And I think we have every reason to

 4   believe that the cost thresholds and the cost --

 5   the controls that went into the stringencies

 6   would be exactly the same, no matter whether it

 7   was 23 or 11 or five states, because most of

 8   these controls are well established. They've

 9   been around for over 25 years. And downwind

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

22   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.

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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
4    state or those remaining states are paying what
5    we might say simply, in simple terms, too much?
6    Was that part of your -- was that your argument?
7              MS. VALE:  That is part of the
8    argument, I -- yes.  Yes, because it's -- it's
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
20   true, but does that answer the argument that the
21   EPA should have considered what you -- that --
22   the argument that you just made?  Did it --
23             MS. VALE:  I think EPA --
24             JUSTICE ALITO:  -- did it do that?
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

 4   let's get the upwind sources doing the

 5   relatively less expensive controls that many

 6   downwind sources and -- and sources all around

 7   the country are already doing.

 8   So that was fundamental to the rule.

 9   And I think it is also a fundamental

10   understanding of the rule that states can come

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.

14   I do think EPA could have written 23 different

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

22   applicants are making it. Two -- two -- two

23   things there.

24   First of all, as states drop out,

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 --

3   wanting allowances.

4   Second, it is -- the states are not

5   the market participants. We are not left with

6   10 market participants. It is the power plants

7   that are the market participants. There are

8   currently about 360 market participants in the

9   trading program. That's why we have the

10   declarations that -- that -- that's the reason

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

22   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

5   piece of the step 3 analysis. And I think what

6   EPA is saying there is that, yes, they do look

7   when they're doing the rule, is this going to

8   have a meaningful effect? You don't want to do

9   a rule that's not -- that turns out it's not

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

17   come out of Ohio and Indiana and all of the

18   states still in the rule remain exactly the

19   same --

20   JUSTICE GORSUCH: Ms. Vale --

21   MS. VALE: -- no matter whether

22   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
10    to think this is cert worthy.
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
20    really important thing to both sides.
21              MS. VALE:  I understand that.  But I
22    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.

2   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.

6   MS. VALE: Correct.

7   JUSTICE GORSUCH: Okay. Thank you.

8   CHIEF JUSTICE ROBERTS: Thank you,

9   counsel.

10   Justice Thomas, anything further?

11   Justice Alito?

12   Justice Sotomayor?

13   JUSTICE SOTOMAYOR: So you could have

14   both lost?

15   (Laughter.)

16   CHIEF JUSTICE ROBERTS: Justice Kagan,

17   anything further?

18   Justice Kavanaugh?

19   Justice Barrett?

20   Justice Jackson?

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

 1   Honors, first on emissions, second on the other

 2   fault lines and the rule that I mentioned, and

 3   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.

11   And that why -- that's why 11, Chief

12   Justice Roberts, versus 23 matters. That

13   question about how many is a collective, how

14   many hundreds of EGUs, how many hundreds of

15   non-EGUs that are being regulated here for the

16   first time, by the way, how many of those feed

17   into the analysis is exactly the problem.

18   We didn't have to seek

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.

 1   It was clear in the rule as evidenced

 2   by the fact that EPA put in a severability

 3   provision announcing its intention that

 4   something be severable. Not an explanation but

 5   an intention.

 6   If there are 11 states in this rule,

 7   the answer to your question, Mr. Chief Justice,

 8   is that EPA would have had to ask whether or not

 9   there still would be a significant contribution,

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

21   equities. The equities are not balanced,

22   Justice Kavanaugh. The equities here are there

23   are hundreds of millions if not billions of

24   dollars in costs over the next 12 to 18 months

25   coupled against 10 percent of the .66 average

1   part per billion contribution. This is not a

2   very, very significant downwind problem. This

3   is a --

4   CHIEF JUSTICE ROBERTS: Thank --

5   MS. STETSON: -- miniscule problem.

6   Thank you.

7   CHIEF JUSTICE ROBERTS: Thank you,

8   counsel.

9   The case is submitted.

10   (Whereupon, at 11:40 a.m., the case

11   was submitted.)

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