No. 24-450

In the Supreme Court of the United States

STATE OF OHIO, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had authority under the Clean Air Act, 42 U.S.C. 7607(d), to remand to the agency the record of the Environmental Protection Agency (EPA) rule that this Court addressed in *Ohio* v. *EPA*, 603 U.S. 279, so that EPA could expeditiously clarify an explanation that the Court had found was likely inadequate.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. A prior order of the court of appeals is available at 2023 WL 6285159.

JURISDICTION

The order of the court of appeals was entered on September 12, 2024. The petition for a writ of certiorari was filed on October 18, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Last Term, this Court held that the Environmental Protection Agency (EPA) had likely acted improperly by "offer[ing] no reasoned response" to certain comments on a final rule (the Rule) implementing the Clean Air Act's (CAA or Act), 42 U.S.C. 7401 *et seq.*, "'Good

Neighbor Provision.'" *Ohio* v. *EPA*, 603 U.S. 279, 284, 293. The Court therefore stayed "[e]nforcement of EPA's rule" against petitioners and other applicants pending D.C. Circuit litigation over the Rule "and any petition for writ of certiorari." *Id.* at 300. The D.C. Circuit subsequently remanded the rulemaking record to EPA so that the agency could attempt to offer the reasoned response to comments that this Court had found was likely lacking. Pet. App. 2a. Petitioners now challenge the D.C. Circuit's remand order.

1. The CAA is intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare," 42 U.S.C. 7401(b)(1), and to control air pollution through a system of shared federal and state responsibility, see *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). Title I of the Act requires EPA to establish national ambient air quality standards (air quality standards) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. The Act also directs States to submit to EPA state implementation plans to meet those standards. 42 U.SC. 7410(a). If EPA determines that a particular state plan is inadequate, or if a State fails to submit a plan, EPA must issue a federal implementation plan for that State at any time within two years after making that determination. 42 U.S.C. 7410(c)(1). Those provisions reflect Congress's effort to "sharply increase[] federal authority and responsibility in the continuing effort to combat air pollution." *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 64 (1975).

The Act's requirements for state plans recognize that "[a]ir pollution is transient, heedless of state boundaries," and may be "transported by air currents"

from upwind to downwind States. *EPA* v. *EME Homer City Generation, L. P.*, 572 U.S. 489, 496 (2014). When air pollution travels beyond the originating State's borders, that State is "relieved of the associated costs," which are "borne instead by the downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution." *Ibid.* To account for that "complex challenge," *ibid.*, state plans must include "adequate provisions * * * prohibiting * * * any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will * * * contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [air quality standard]," 42 U.S.C. 7410(a)(2)(D)(i)(I). This statutory requirement, known as the Good Neighbor Provision, is Congress's chosen method of balancing the interests of upwind and downwind States. *EME Homer*, 572 U.S. at 498-499.

EPA has engaged in numerous rulemakings pursuant to the Good Neighbor Provision. In 1998, EPA limited the emissions of nitrogen oxides—a precursor to ozone—for both power plants and other sources in 23 upwind States upon finding those States' existing plans inadequate. See 63 Fed. Reg. 57,356, 57,358 (Oct. 27, 1998). The D.C. Circuit largely upheld that regulation. See generally *Michigan* v. *U.S. EPA*, 213 F.3d 663 (2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001). More recently, this Court upheld a rule that curtailed emissions of 27 upwind States to assist downwind attainment of three different air quality standards. See *EME Homer*, 572 U.S. at 524.

2. In 2015, EPA revised the applicable air quality standard for ozone, triggering the States' obligations to

submit implementation plans to comply with that standard. Upon reviewing those submissions, EPA disapproved 21 state plans for failing to satisfy the Good Neighbor Provision. 88 Fed. Reg. 9336, 9337-9338 (Feb. 13, 2023). Each of those States had proposed to take no action to assist downwind neighbors. *Ibid.* On March 15, 2023, EPA then promulgated federal implementation plans covering those 21 States, as well as two other States that had failed to submit plans altogether. 88 Fed. Reg. 36,654 (June 5, 2023). EPA's rule applied the same regulatory framework as the rule that the Court had upheld in *EME Homer*. See 572 U.S. at 524. The Rule also contained a severability provision stating that, "[s]hould any jurisdiction-specific aspect of the final rule be found invalid," the Rule can "continue to be implemented as to any remaining jurisdictions." 88 Fed. Reg. at 36,693.

In separate litigation, various States and industry groups challenged EPA's state-plan disapproval action with respect to 12 state plans by filing petitions for review in various federal courts of appeals. In the months after EPA had promulgated the Rule implementing the federal plans, those courts stayed the challenged state-plan disapprovals pending further review. See 603 U.S. at 288-289. Because EPA's authority to promulgate a federal plan in those States depended on the agency's antecedent determinations that the covered States had not submitted adequate state plans, EPA recognized that those stays precluded application (for the time being) of the Rule to the 12 States for which stays of their state-plan disapproval had been entered. EPA issued interim final rules to partially stay the Rule and ensure adherence to preexisting requirements in those States while the stays remain in effect. See 88 Fed. Reg.

49,295 (July 31, 2023); 88 Fed. Reg. 67,102 (Sept. 29, 2023).

3. Petitioners, along with members of industries subject to the Rule, petitioned for review of the Rule in the D.C. Circuit. Shortly thereafter, they moved for a stay of the Rule pending the disposition of their petitions for review. The D.C. Circuit denied their applications. See 23-1157 C.A. Orders (Sept. 25, 2023 and Oct. 11, 2023).

This Court then stayed the enforcement of the Rule against the applicants. See 603 U.S. at 300. The Court found that the Rule was likely arbitrary or capricious, see 42 U.S.C. 7607(d)(9)(A), because EPA had likely failed to explain whether "the way [it] chose to determine which emissions 'contribute[d] significantly' to downwind States' difficulty meeting national ozone standards" would remain appropriate if not all 23 upwind States were subject to the Rule. 603 U.S. at 293 (quoting 42 U.S.C. 7410(a)(2)(D)(i)(I)). The Court stated "that EPA's plan rested on an assumption that all 23 upwind States would adopt emissions-reduction tools up to a 'uniform' level of 'costs' to the point of diminishing returns." *Ibid.* (citation omitted). In the Court's view, that method raised a question about "[w]hat happens—as in fact did happen—when many of the upwind States fall out of the planned [federal implementation plan] and it may now cover only a fraction of the States and emissions EPA anticipated." *Ibid.*

The Court concluded that "commenters posed this concern to EPA during the notice and comment period," and that EPA had likely "offered no reasoned response" to those comments. 603 U.S. at 293. The Court acknowledged that there could be "some explanation why the number and identity of participating States does not

affect what measures maximize cost-effective downwind air-quality improvements." *Ibid.* But the Court found it likely that no adequate explanation of that point "appear[s] in the final rule." *Id.* at 294.

The Court recognized that EPA had included "a 'severability' provision [in] its final rule in which the agency announced that the [federal implementation plan] would 'continue to be implemented' without regard to the number of States remaining." 603 U.S. at 294 (citation omitted). But in the Court's view, neither the severability provision, "nor anything else EPA said in support of its severability provision, addresses whether and how measures" would function properly "when many fewer States, responsible for a much smaller amount of the originally targeted emissions, might be subject to the agency's plan." *Id.* at 295.

In a footnote, this Court observed that after oral argument, EPA had issued a decision denying requests for reconsideration based on the stays granted in the 12 States, "in which [EPA] sought to provide further explanations for the course it pursued." 603 U.S. at 295 n.11. But the Court declined to "consult this analysis in assessing the validity of the final rule," instead "look[ing] to only 'the grounds that the agency invoked when it' promulgated the [Rule]." *Ibid.* (citation omitted). The Court further determined that "on the existing record," the Rule was likely "arbitrary or capricious" due to what it viewed as EPA's inadequate explanation. *Ibid.* Accordingly, the Court concluded that "[e]nforcement of EPA's rule against the applicants shall be stayed pending the disposition of the applicants' petitions for review" in the D.C. Circuit and "any petition for writ of certiorari." *Id.* at 300.

4. After this Court issued its decision granting the stay, EPA moved in the D.C. Circuit for a partial voluntary remand to enable the agency "to fully consider and respond to the relevant comments" about severability referenced in this Court's decision—a process that EPA anticipated it would complete "by November 30, 2024." Pet. App. 15a. EPA explained that it did "not intend to make any other changes to the" Rule or to "introduc[e] new facts or data into the record" "as a result of the partial voluntary remand." *Id.* at 18a. EPA emphasized that vacatur of the Rule during the remand was "not needed to address any prejudice given [this] Court's stay." *Id.* at 15a n.2.

The D.C. Circuit ordered "that the record be remanded to permit [EPA] to further respond to comments in the record related to the severability" of the Rule. Pet. App. 2a. The court made clear that "the rule is not vacated" during the pendency of the remand. *Ibid.* And the court held the consolidated cases challenging the Rule in abeyance, while directing the parties to file motions "within 30 days after completion of the proceedings on remand or December 30, 2024, whichever is earlier." *Ibid.*

On December 3, 2024, EPA completed its action on remand responding to comments. See EPA, *Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards; Notice on Remand of the Record of the Good Neighbor Plan to Respond to Certain Comments* (Notice on Remand), https://perma.cc/UA8H-E262. In its remand notice, EPA further explained that "states' obligations" under the Rule would not "have been different, had the rule been promulgated for, or if it covered, a smaller or different group of states than the 23 states that were included in * * * the rule."

Id. at 2. EPA "elaborated upon" the "reasons" that were already "provided in the record" supporting its conclusions. *Ibid.* And EPA "provide[d] a fuller response" to relevant comments by "relying solely on the information and data available in the record at the time the [Rule] was signed by the EPA Administrator and promulgated on March 15, 2023." *Id.* at 3-4; see *ibid.* (explaining that the remand notice "consolidat[es] material and discussions from the existing administrative record at the time the EPA issued the action").

ARGUMENT

Petitioners seek review of the D.C. Circuit's order remanding the rulemaking record to EPA so that the agency could address the likely deficient explanation identified by this Court in *Ohio* v. *EPA*, 603 U.S. 279. This Court should follow its usual practice of declining to review interlocutory orders. That practice is particularly apt here because enforcement of the Rule is currently stayed, petitioners identify no harm that they have suffered as a result of the remand order, and EPA's action on remand is now complete. The D.C. Circuit's remand order is also fully consistent with the CAA and with basic administrative-law principles. And petitioners allege no circuit conflict or any other reason why this Court's review of the question presented is warranted at this juncture. The petition should be denied.

1. The current interlocutory posture of this case provides a sufficient reason for this Court to deny review. "This Court is rightly wary of taking cases in" such a posture. *Harrel* v. *Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement of Thomas, J.); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari) (noting that "the interlocutory posture

is a factor counseling against this Court's review"). That approach makes sense, because "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893).

Here, for instance, there will be no need to address the legality of the D.C. Circuit's remand order if that court ultimately finds that EPA's responses to comments on remand were inadequate, since in that event the remand will have no practical impact on the disposition of the petitions for review. And if the remand issue turns out to have continuing practical significance later in the case, petitioners may raise that issue "again after entry of final judgment," at which point the question "will be better suited for certiorari review." *Abbott* v. *Veasey*, 580 U.S. 1104, 1105 (2017) (statement of Roberts, C.J., respecting the denial of certiorari).

There is no sound basis for departing from the Court's usual practice here. This Court has already stayed enforcement of the Rule against petitioners. That stay has remained in effect throughout the remand to the agency, and it will remain in effect through any D.C. Circuit decision and subsequent petition for certiorari. See 603 U.S. at 300. Petitioners have not explained how they have suffered any harm as a result of the D.C. Circuit's remand order. And EPA's action on remand is now complete, meaning that the D.C. Circuit litigation over the Rule can resume shortly.

For similar reasons, this case is a particularly poor vehicle for considering "[w]hether courts may grant remands back to the Agency to fix a defective rule while leaving it in place." Pet. 17. Here, the Rule has not been conclusively found to be defective. Instead, this Court,

in the context of a "[s]tay application," found only that EPA had "likely" provided an inadequate explanation for the agency's severability analysis. 603 U.S. at 290-291, 293. Indeed, although petitioners claim (Pet. 4) that the remand order eliminates "reversal of the agency's action" as the "remedy under the Act," this case currently raises no remedial question at all because it has not yet been finally adjudicated on the merits. And because of the stay, the Rule imposes no present obligations on petitioners and thus is not currently "in place," Pet. 17.

In any event, the remand to EPA has not caused substantial delay. The D.C. Circuit issued its remand order on September 12, 2024, and EPA completed its responses to comments on remand on December 3, 2024. EPA now plans to promptly seek supplemental briefing. And merits briefing on all other issues in the consolidated cases is already complete. Petitioners offer no reason why the brief pause occasioned by the remand order has prejudiced them, particularly since this Court's stay order means that any delay in the D.C. Circuit proceedings is more likely to benefit petitioners than to harm them. And it is far more efficient for the courts and litigants to be able to consider EPA's further responses to comments contemporaneously with all the other issues in the case. See *Ethyl Corp.* v. *Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (explaining that the D.C. Circuit "commonly grant[s]" remand motions, "preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete").

2. The D.C. Circuit's remand order is fully consistent with the CAA, 42 U.S.C. 7607(d). Petitioners' contrary arguments lack merit.

a. "It is a well-established maxim of administrative law that '[i]f the record before the agency does not support the agency action, [or] if the agency has not considered all relevant factors, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Calcutt* v. *FDIC*, 598 U.S. 623, 628-629 (2023) (per curiam) (quoting *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985)); see, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971) (approving a remand so that the agency could provide an explanation for an inadequately articulated decision). As the D.C. Circuit has long held, "[i]f a reviewing court finds the record inadequate to support a finding of reasoned analysis by an agency," the agency may "submit[] an amplified articulation" to support its action. *Local 814* v. *NLRB*, 546 F.2d 989, 992 (1976) (per curiam), cert. denied, 434 U.S. 818 (1977); see *Alpharma, Inc.* v. *Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006) (Garland, J.).

This Court's decision in *DHS* v. *Regents of the University of California*, 591 U.S. 1 (2020), confirms the propriety of that longstanding practice. There, the Court explained that, if an agency's grounds for decision "are inadequate, a court may remand for the agency" to "offer 'a fuller explanation of the agency's reasoning *at the time of the agency action*.'" *Id.* at 20 (citation omitted). On remand, the agency therefore may "elaborat[e] on its prior reasoning." *Id.* at 21; see *id.* at 67 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("[T]he ordinary judicial remedy for an agency's insufficient explanation is to

remand for further explanation by the relevant agency personnel.").

The D.C. Circuit's remand order here fully complies with these principles. The order states that the record should "be remanded to permit the [EPA] to further respond to comments in the record related to the severability" of the Rule. Pet. App. 2a. Thus, the remand order allows EPA only to provide "a fuller explanation" of its earlier determination that the Rule is geographically severable—and workable for each covered State—so that judicial orders precluding the Rule's application to certain States that it originally covered should not prevent its continued application to the remaining States. *Regents*, 591 U.S. at 20 (citation omitted); see 88 Fed. Reg. at 36,693. The remand order does not suggest that EPA may "provide new" reasons to justify its severability decision. *Regents*, 591 U.S. at 21. Nor has EPA done so. Rather, in further responding to the relevant comments, EPA has provided "a fuller explanation of its reasoning at the time of its action" and has "rel[ied] solely on the information and data available in the record at the time" the Rule was promulgated, without "supplement[ing] the record of the [Rule] with new findings, information, [or] data." Notice on Remand
1, 4.

Contrary to petitioners' submission (Pet. 20), the D.C. Circuit's remand order does not risk "a *Chenery* violation." To the contrary, this Court in *Regents* specifically explained that remanding for a fuller explanation of a prior agency action is consistent with the principles set forth in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). See *Regents*, 591 U.S. at 20-21. Thus, the *Chenery* "rule is not a time barrier which freezes an

agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning." *Alpharma*, 460 F.3d at 6 (citation omitted). Indeed, petitioners' own cited sources (Pet. 17-18) agree that remanding for the agency to provide further explanation "is consistent with *Chenery* because it does not require the court to make the same administrative determinations that the agency would have to make." Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 371-372 (2003) (emphasis omitted).

Petitioners are also wrong (Pet. 19-21) in suggesting that the D.C. Circuit's remand order violates Section 7607(d)(6)(C), which states that "[t]he promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation," 42 U.S.C. 7607(d)(6)(C). The remand order here satisfies the text of Section 7607(d)(6)(C) because the order does not contemplate the addition of any new "information or data" to the rulemaking record, *ibid.* Instead, the order simply contemplates a fuller response to the relevant comments, based on the *existing* information and data that were in the record when the rule was promulgated, see Pet. App. 2a. And as noted, the action that EPA recently took on remand does just that. See p. 12, *supra*.

Likewise, the remand order satisfies the text of Section 7607(d)(7)(A) because, following the remand, the "record for judicial review" will still "consist exclusively" of the appropriate record materials. 42 U.S.C. 7607(d)(7)(A). Contra Pet. 19. Specifically, the remand order authorizes EPA only to provide a fuller "response to each of the significant comments." 42 U.S.C.

7607(d)(6)(B). And again, that is what EPA has done. See Notice on Remand 3 (explaining that the remand notice "provides a fuller response" to prior "comments" about the Rule's "application and severability on a state-by-state basis"); *id.* at 4 (explaining that the remand notice "provide[s] an 'amplified articulation' of the methodology underlying the design of the Good Neighbor Plan").[1]

b. The D.C. Circuit also acted appropriately in remanding to the agency without vacating the Rule. See Pet. App. 2a. Section 7607(d)(9) states that, when a reviewing court determines that an EPA action subject to that provision is unlawful, the court "may reverse" that action. 42 U.S.C. 7607(d)(9). But the Rule has not been found unlawful. Rather, this Court, in ruling on the stay applications, held only that the Rule *likely* lacked an adequate explanation as to one particular issue. See 603 U.S. at 300. The petitions for review of the Rule remain pending before the court of appeals, and that court's remand order did not reflect a determination that any aspect of the Rule is actually invalid. There was consequently no reason for the court of appeals to award petitioners any relief beyond the stay that this Court has already granted.

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[1] Petitioners' reliance (Pet. 20-21) on Section 7607(d)'s legislative history is misplaced. That history suggests that Congress sought to change the preexisting CAA regime, which did "not require the establishment of a clearly defined" rulemaking record *at all*. H.R. Rep. No. 294, 95th Cong., 1st Sess. 318 (1977). But it says nothing about whether Congress intended to bar courts from remanding to EPA so that the agency could further explain its existing reasoning after a court had found the prior explanation likely insufficient. Nor does that history suggest that the CAA "is more protective than *Chenery*," Pet. 20; if anything, it simply suggests an intent to codify *Chenery*'s basic rule against *post hoc* justifications.

In any event, even in cases where EPA actions are definitively found to be deficient, Section 7607(d)'s "may reverse" language, 42 U.S.C. 7607(d)(9), indicates that courts have discretion to fashion an appropriate remedy in response to a successful challenge to agency action under the CAA. See, *e.g.*, *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) ("[T]he word 'may' clearly connotes discretion.") (citation omitted). The D.C. Circuit has repeatedly recognized that Section 7607(d)(9) permits a reviewing court in appropriate circumstances to remand an unlawful rule to EPA without vacating the rule, including in cases involving the Good Neighbor Provision. See, *e.g.*, *Wisconsin* v. *EPA*, 938 F.3d 303, 336 (2019) (per curiam); *EME Homer City Generation, L.P.* v. *EPA*, 795 F.3d 118, 138 (2015) (Kavanaugh, J.); *North Carolina* v. *EPA*, 550 F.3d 1176, 1178 (2008) (per curiam). Judge Randolph, who has criticized the remand-without-vacatur remedy in cases governed by the Administrative Procedure Act (APA) judicial-review provision, 5 U.S.C. 706(2), agrees that Section 7607(d)(9) grants courts "remedial discretion" in CAA cases. *Natural Res. Def. Council* v. *EPA*, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J., concurring). Petitioners ignore Section 7607(d)(9)'s discretionary language when suggesting that reversal is "*the* remedy available under the Act." Pet. 21 (emphasis added).

The discretion conferred by Section 7607(d)(9) (and by the APA's judicial-review provision, 5 U.S.C. 706(2)) is not unlimited.[2] The D.C. Circuit has explained that

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[2] This case is governed by Section 7607 alone. See 42 U.S.C. 7607(d)(1) (stating that the APA "shall not * * * apply to" specified actions under the CAA). But in appropriate circumstances, remand without vacatur is also permissible under the APA, 5 U.S.C. 706(2).

"[t]he decision whether to vacate depends" on both (1) "'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly),'" and (2) "'the disruptive consequences of an interim change that may itself be changed [by the agency on remand].'" *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (1993) (citation omitted). Applying that commonsense approach, the D.C. Circuit and other courts of appeals have frequently ordered remand without vacatur under both the CAA and the APA.[3]

See, *e.g.*, *Black Warrior Riverkeeper, Inc.* v. *U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) (citing cases).

[3] See, *e.g.*, *Sierra Club* v. *United States EPA*, 60 F.4th 1008, 1023 (6th Cir. 2023) (finding that "vacatur [was] not justified" where "EPA intend[ed] to complete its reevaluation * * * within twelve months of remand"); *Diné Citizens Against Ruining Our Env't* v. *Haaland*, 59 F.4th 1016, 1049 (10th Cir. 2023) (adopting "the test set out by the D.C. Circuit in *Allied-Signal* for determining whether vacatur is necessary"); *National Parks Conservation Ass'n* v. *United States EPA*, 803 F.3d 151, 157 (3d Cir. 2015) (noting that the court had granted EPA's "motion for voluntary remand without vacatur in order to consider and respond in greater detail to the Conservation Groups' concerns"); *Black Warrior Riverkeeper*, 781 F.3d at 1290 (explaining that "the remedy of remand without vacatur is surely appropriate" where "it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process"); *Mississippi* v. *EPA*, 744 F.3d 1334, 1362 (D.C. Cir. 2013) (per curiam) (remanding final rule to EPA because the rule's flaw was a "curable defect," and explaining that "vacating a standard because it may be insufficiently protective would sacrifice such protection as it now provides") (citation omitted), cert. denied, 574 U.S. 814 (2014); *National Ass'n of Clean Water Agencies* v. *EPA*, 734 F.3d 1115, 1161 (D.C. Cir. 2013) (remanding without vacatur EPA environmental standards for further explanation); *California Cmtys. Against Toxics* v. *United States EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (per curiam) (declaring EPA's action invalid after EPA conceded flaws in

Petitioners also assert (Pet. 21) that the D.C. Circuit's remand-without-vacatur order here is inconsistent with this Court's decision in *Ohio*. But as already explained, the Court in *Ohio* did not definitively resolve the merits, but simply granted a stay pending further review in the D.C. Circuit and this Court, based in part on the Court's determination that the applicants were *likely* to prevail on a particular challenge. See 603 U.S. at 300. Because of that preliminary posture, the Court did not decide any remedial question—let alone whether vacatur is required under the CAA. Although the Court noted in passing that the stay applicants would be "entitle[d]" to "'revers[al]'" of the Rule's "mandates on them" if they ultimately showed that the Rule "was arbitrary or capricious on the existing record," *id.* at 295 n.11 (citation omitted; second set of brackets in original), the Court did not purport to hold that reversal or vacatur is required under the CAA. Indeed, the Court did not quote the word "may" in Section 7607(d)(9) at all. 42 U.S.C. 7607(d)(9) ("the court *may* reverse any such action found to be [unlawful]") (emphasis added).

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its reasoning, but remanding without vacatur because vacatur would be "economically disastrous" for the affected industry party); *Natural Res. Def. Council* v. *EPA*, 571 F.3d 1245, 1276 (D.C. Cir. 2009) (per curiam) (considering whether EPA could "cure" the legal flaws in a rule when deciding to vacate some, but not all, of the rule's provisions); *Sierra Club* v. *United States EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (declining to vacate rule because "EPA may be able to explain" the agency's reasoning on remand); *Idaho Farm Bureau Fed'n* v. *Babbitt*, 58 F.3d 1392, 1405-1406 (9th Cir. 1995) (finding a "significant procedural error" that would normally render the action "invalid," but remanding without vacatur in order to preserve a species listed as endangered).

3. The petition does not otherwise warrant this Court's review. As the decisions cited above make clear, there is broad agreement among the circuits that remanding to an agency for further explanation without vacatur can be a valid approach in appropriate circumstances. See pp. 16-17 n.3, *supra*. Petitioners do not cite a single decision holding that remand without vacatur is categorically impermissible in cases where agency action is held to be unlawful—much less where (as here) an agency action was merely preliminarily stayed on the basis of a likely inadequate explanation. To the contrary, petitioners concede (Pet. 24) that such remands "are commonly granted as a remedy to rulemaking violations under the Act."

Accordingly, this Court previously denied a petition raising a similar question after the D.C. Circuit remanded to EPA in the aftermath of this Court's decision in *Michigan* v. *EPA*, 576 U.S. 743 (2015). See *Michigan* v. *EPA*, 579 U.S. 903 (2016) (denying petition for certiorari). The same course is warranted here.

Finally, the stay previously entered by this Court makes this case an unsuitable vehicle for deciding any question concerning the general propriety of remand without vacatur. The usual consequence of remand without vacatur is that a challenged agency rule remains in effect even though the rule (or some aspect of it) has been found deficient. In this case, however, the Court's stay order independently renders the Rule inoperative as to petitioners during the pendency of judicial-review proceedings, including the disposition of any certiorari petition. In arguing that the court of appeals was required to vacate the Rule when the court remanded the matter to the agency, petitioners make

no effort to explain why this Court's stay order is insufficient to protect their interests.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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