No. 15-1152

In the Supreme Court of the United States

STATE OF MICHIGAN, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In the petition and the multistate amicus brief, more than half of the States—27 all told—accused EPA of imposing a regulation on the Nation after being told by this Court that EPA had no authority to do so. And what was EPA's response? Did EPA deny that serious allegation? No. Instead, EPA argues that the States were not injured by its unauthorized rule (its standing argument). EPA argues that it is too late for this Court to do anything about EPA's unauthorized action (its mootness argument). And EPA argues that the D.C. Circuit had discretion to allow EPA to continue to impose its unauthorized rule on the Nation (its remand-without-vacatur argument).

These arguments have two things in common. First, each is wrong—the States suffer direct economic injury as a result of the rule, this Court can address the issue because it is capable of repetition yet evading review, and courts do not have the discretion to allow agencies to violate federal law. Second, the arguments do not deny that EPA lacked authority to regulate power plants before April 2016, when it finally made a finding that included some consideration of costs. EPA's four-time failure—in its opposition, in its stay response, and in two D.C. Circuit briefs on remand—to deny this allegation is striking: it is an admission that EPA chose to continue regulating the public through a rule this Court had just held was inconsistent with EPA's delegation from Congress.

Indeed, EPA's admission confirms that this case is an ideal vehicle for addressing whether a reviewing court may leave a rule in place when the agency lacked authority to promulgate it in the first place.

Given this important and recurring question of administrative law, this Court should grant certiorari to reiterate that federal agencies cannot operate outside the bounds of their governing statutes.

ARGUMENT

I. The States have standing because they, as consumers, have suffered direct economic injuries as a result of the Mercury Rule.

EPA asserts that "the Rule inflicts no concrete injury on petitioners or any other States." EPA Opp. 7. But "economic injury is a quintessential injury upon which to base standing," *Texas Democratic Party* v. *Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); see also *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262–63 (1977), and the Rule harms the States by raising the prices the States as consumers must pay for electricity. In short, quite aside from the participation of the industry parties, the States have had standing from the outset as consumers. *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.") (citation omitted).

Maryland v. *Louisiana* proves this point. 451 U.S. 725 (1981). There, Louisiana argued that the plaintiff States lacked standing to challenge a Louisiana tax on natural gas. *Id.* at 736. Because the "plaintiff States [were] substantial consumers of natural gas," this Court rejected that argument: an "annual increase in natural gas costs" amounted to "direct injuries to the plaintiff States," distinct from the concurrent "injury to the citizen consumers." *Id.* at 736 & n.12. This

Court also recognized that because the cost from the tax would be "passed on to the ultimate consumer," the costs were traceable to the tax. *Id*. Consequently, this Court thought it "clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the [relevant tax], are directly affected in a 'substantial and real' way so as to justify their exercise of this Court's original jurisdiction." *Id*. at 737.

The same reasoning applies here. The States themselves (not just their citizens) are consumers of electricity from power plants subject to the Rule. The government needs to keep the lights on in its buildings too. E.g., Transcript of Oral Argument at 50, *Nichols* v. *United States*, 136 S. Ct. 1113 (2016) (No. 15-5238) (the Chief Justice joking, when the lights went out, "I knew we should have paid that bill").

There is also no dispute that the Mercury Rule has increased electricity prices for consumers, including the States. Indeed, just two weeks before filing its brief in opposition in this case, EPA again recognized that the *annual* cost of the Mercury Rule is $9.6 billion. 81 Fed. Reg. 24,420, 24,424 (Apr. 25, 2016). This includes an "annual monitoring, reporting, and record-keeping burden" that EPA itself estimates to be $158 million, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards at 3-30 (Dec. 2011) (RIA), as well as the cost of capital expenditures and of running the additional controls imposed by the Rule. Thus, in defending its supplemental finding that the cost of the Rule is appropriate, EPA still relies on its estimate that the Rule would increase electricity rates by 3.1%. 81 Fed. Reg. at 24,424.

And EPA has also conceded that those costs are being passed on to consumers. *Id.* at 24,434 ("EPA . . . recogniz[ed] that these expenditures would ultimately be borne either by electricity consumers or electricity producers. . . . Ultimately, consumers and producers bear the costs of a regulation . . . ."); *id.* at 24,436 ("[T]he cost of compliance, including capital expenditure costs, are in many cases ultimately borne by consumers."); *id.* at 24,435 ("operating expenditures" also "borne by consumers"). Michigan alone pays (conservatively) tens of millions in electricity bills a year for the more than 5,000 buildings the State leases or owns statewide, and these costs were higher because of the Mercury Rule. The States have been harmed by the Rule, just like the plaintiff States in *Maryland* v. *Louisiana*.

In the end, at least one of the State petitioners has suffered some economic harm from the higher electricity prices that resulted from EPA's unauthorized imposition of the Mercury Rule. *Michigan* v. *EPA*, 135 S. Ct. 2699, 2711 (2016). And that is all that is necessary to establish standing. See, e.g., *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 (1973) (recognizing that economic injuries as small as a "$1.50 poll tax" are sufficient to establish standing); *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review.").

The Rule also subjects the States to ongoing regulatory burdens. Michigan, for example, operating under a delegation of authority from EPA, must "imple-

ment and enforce without changes the [§ 7412] standards promulgated by EPA," which include the Mercury Rule. 63 Fed. Reg. 64,632 (Nov. 23, 1998).

Implementing the Mercury Rule requires Michigan to incur costs (including staff time). The Department of Environmental Quality must, for example, assure power plants' compliance with the Rule's emission limits by evaluating performance tests, and it must review (every six months) power plants' compliance with the Rule's notification, recordkeeping, and reporting requirements. Mich. Comp. Laws § 324.5506(6). These regulatory burdens, including monitoring requirements, are also sufficient to establish standing. E.g., *Indiana* v. *EPA*, 796 F.3d 803, 810 (7th Cir. 2015) ("Indiana might have to test the emissions of more of its citizens' cars, or engage in more rigorous testing of those cars. That is a burden on the state itself, and so the state has standing to sue, not to protect the rights of its citizens as *parens patriae*, but rather to assert its own rights.").

II. The case is not moot because this situation is capable of repetition yet evading review.

EPA also asserts that the case is moot and denies that the States can meet the two prongs of the capable-of-repetition-yet-evading-review exception. EPA Opp. 8–11. But as the petition explained (at 21–23), the case remains live because " '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.' " *Turner* v. *Rogers*, 564 U.S. 431, 439–40 (2011) (alterations in original).

As to the first prong, in *Turner* this Court concluded that the case fell within this exception because "the 'challenged action,' Turner's imprisonment for up to 12 months, is 'in its duration too short to be fully litigated' through the state courts (and arrive here) prior to its 'expiration.' " *Id.* at 440. That same straightforward analysis applies here: the challenged action, EPA's imposition of an unauthorized rule for nine months after this Court's decision, was too short a duration to fully litigate the issue to this Court prior to it becoming authorized. See also *Burlington N. R. Co.* v. *Bhd. of Maint. of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (holding that the exception applied because disputes of the type at issue were, as here, "typically" resolved too quickly for review).

And as to the second prong, EPA is wrong to suggest that it is unreasonable to expect that the States will "ever again" be subject to an analogous remand-without-vacatur order. EPA Opp. 10. Indeed, EPA's own citations highlight that remand without vacatur is a frequently recurring issue: "the remedy of remanding without vacating the agency decision has been employed with increasing frequency," "in more than seventy decisions" by the D.C. Circuit alone, "involving over twenty federal agencies and encompassing a variety of substantive areas of law, including air pollution, telecommunications, and national security." Admin. Conf. of United States, *Recommendation 2013-6: Remand Without Vacatur* n.1 (adopted Dec. 5, 2013) (ACUS *Recommendation*) (cited by EPA Opp. 13, 16). And the report that the ACUS *Recommendation* itself relies on goes further: "EPA—by far—is the federal agency most commonly subject to remedial or-

ders from the D.C. Circuit that employ remand without vacatur." Stephanie J. Tatham, Report to ACUS, *The Unusual Remedy of Remand Without Vacatur* 22 (Nov. 14, 2013) (cited by ACUS *Recommendation* at 1 n.1). In fact, EPA benefits from remands without vacatur "in an average one to two EPA cases per year." *Id*.

Given that EPA administers, by its own count, at least 30 federal statutes (Pet. 22), and that EPA does not deny that it sought remand without vacatur in this case despite having no authority to impose the Rule (see generally EPA Opp.), it is quite reasonable to expect that at least one of the State petitioners will be subject to the same action again—perhaps even with respect to this same Rule. Pet. 23.

Without review, EPA will be "free to return to [its] old ways," *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953)—or, perhaps more accurately, to continue its current ways. "This, together with the public interest in having the legality of the practices settled, militates against a mootness conclusion." *Id*.

III. The decision below conflicts with *Michigan* v. *EPA*.

EPA denies that the D.C. Circuit's order contravenes *Michigan* v. *EPA* based on a single argument: that this Court simply reversed and did not itself order vacatur. EPA Opp. 15–16. In EPA's view, "[t]he fact that this Court ruled for petitioners on the merits does not imply any particular view about the proper remedy for EPA's failure to consider costs." EPA Opp. 16. In other words, this Court's holding that EPA had to consider costs *before* it could acquire the authority

to regulate, *Michigan* v. *EPA*, 135 S. Ct. at 2711, does not resolve whether EPA could continue to regulate even though it had not yet considered costs. This argument fails on its own terms.

And it fails as a matter of principle. EPA's argument is that if this Court tells a party that its conduct is unlawful, that party is free to continue to engage in the unlawful conduct unless this Court actually specifies the remedy; simply directing a lower court to take "further proceedings consistent with this opinion," *Michigan* v. *EPA*, 135 S. Ct. at 2712, would (under EPA's argument) allow the losing party to take actions *inconsistent* with the opinion (as EPA has done here).

What would happen, for example, if this Court held that a state constitutional amendment were invalid, but simply reversed the lower-court decision that upheld the amendment, rather than enjoining further enforcement of the amendment? Could a state government then, using EPA's reasoning that reversal does not imply any particular remedy, leave the amendment in place—and even continue to enforce it? And could a lower court acquiesce to that? One would think the answers would be obvious: no.

Yet EPA has taken actions inconsistent with this Court's decision, by continuing to regulate power plants while having not yet considered costs. The D.C. Circuit's order approving of this conduct is also inconsistent with this Court's ruling in *Michigan* v. *EPA* and thus warrants this Court's review.

IV. Remand without vacatur is an extremely important question of administrative law.

In response to the broad question whether reviewing courts may leave unauthorized rules in place, EPA responds with a narrow answer: reviewing courts may leave unauthorized rules in place under the Clean Air Act, because that Act, by saying that courts "may reverse" unlawful agency actions, leaves courts with discretion. EPA Opp. 11.

At the outset, this argument defeats EPA's attempt to provide a limiting principle to the remand-without-vacatur doctrine. If a complete lack of authority does not satisfy the first prong of the doctrine's test—"the seriousness of the order's deficiencies," *Allied-Signal*, *Inc*. v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993)—then what will? In the realm of administrative agencies, what could be a more significant deficiency than a lack of authority?

EPA's response also highlights that this case implicates important questions about the interpretation of two federal statutes. EPA argues that the Clean Air Act's judicial-review provisions (not the APA's) apply, EPA Opp. 12, because those provisions apply to "emission standard[s] or limitation[s] under section 7412(d) of this title." 42 U.S.C. § 7607(d)(1)(C). But § 7607's plain language refutes that argument. First, a finding that regulation is appropriate is not an emission standard or limitation. Second, even if an appropriate-to-regulate finding were an emission standard, it would be one under § 7412(n)(1)(A), not under § 7412(d).

The State and local government respondents take a different tack (not argued by EPA) to contend that § 7607 applies. They point to the plain language of § 7412(e)(4), which provides that an action "listing a source category or subcategory under subsection (c) of this section . . . may be reviewed under such section 7607 when the Administrator issues emission standards for such . . . category." They are right that the plain language resolves this, but the resolution is not in their favor. An appropriate-to-regulate finding under § 7412(n)(1)(A) is not a listing decision "under subsection (c)"—i.e., under § 7412(c).

EPA also argues that even if the APA applies, its command that reviewing courts "shall . . . set aside" agency action found to be unlawful does not eliminate judicial discretion to leave unlawful actions in place. EPA Opp. 12–13. Citing cases that do not involve the APA—*Miller* v. *French*, 530 U.S. 327 (2000) (interpreting the Prison Litigation Reform Act), and *The Hecht Co*. v. *Bowles*, 321 U.S. 321 (1944) (decided before the APA was enacted)—EPA contends that courts are reluctant to displace their own traditional equitable authority "absent the 'clearest command' or an 'inescapable inference' to the contrary." EPA Opp. 13 (quoting *Miller*, 530 U.S. at 340). That may be true, but EPA fails to explain why the APA's explicit command as to what the remedy must be—"[t]he reviewing court shall . . . set aside agency action," 5 U.S.C. § 706(2)—does not satisfy the "clearest command" standard.

Finally, EPA attempts no response to the fundamental point that courts can always review agency actions in excess of statutory authority, a review power

that exists because such actions must be vacated. Pet. 14–15 (citing *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)).

Two last points deserve response. First, none of the predicted premature deaths EPA relies on result from mercury or the other pollutants regulated by § 7412. Instead, those predicted deaths result from fine particulate matter, RIA at ES-3 & 5-92 to -93, which is regulated by § 7409. If EPA wants to change the standards for fine particulate matter, it can do so, as it did as recently as 2013, by changing national ambient air quality standards. See 42 U.S.C. § 7409(b)(1) & (d)(1) (allowing EPA to set standards for particulate matter at a level it believes provides an "adequate margin of safety" to protect public health). Second, EPA's response concerning the circuit split only highlights that courts are in disarray regarding when they must vacate unlawful agency actions.

* * *

In the end, EPA's response is most notable for what it does not say. It does not deny that this case involves the interpretation of important federal statutes. It does not deny that the vast majority of remand-without-vacatur orders occur in the D.C. Circuit and that the D.C. Circuit has exclusive jurisdiction over many agency actions, which confirms that D.C. Circuit law on this issue has national importance. And most fundamentally, it does not deny that it regulated without any statutory authority, even after this Court held that it had strayed far beyond any reasonable interpretation of the Clean Air Act. That fact alone—an agency's willingness to impose regulations as binding law on the citizens of this

Nation even after being told by this Court that it lacked authority to do so—shows that this case warrants this Court's review.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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