No. 15-1152

In the Supreme Court of the United States

STATE OF MICHIGAN, 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 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)(9), to decline to vacate the Environmental Protection Agency rule addressed in *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015), so as to allow the agency to expeditiously cure the defect identified by this Court.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2015. The petition for a writ of certiorari was filed on March 14, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Last Term, this Court held that the Environmental Protection Agency (EPA) had acted improperly by failing to consider costs when evaluating whether it was "appropriate and necessary" to regulate hazardous air pollutant emissions from power plants under the Mercury and Air Toxics Standards (Rule), 77 Fed. Reg. 9310 (Feb. 16, 2012). *Michigan* v. *EPA*, 135 S. Ct. 2699, 2704-2705 (2015) (quoting 42 U.S.C. 7412(n)(1)(A)). On remand, the D.C. Circuit declined

to vacate the Rule, noting that EPA was proceeding expeditiously to complete a rulemaking process to address this Court's decision. On April 14, 2016, EPA finalized its consideration of costs and determined that the Rule's regulation of power-plant emissions was "appropriate and necessary," thereby curing the defect identified by this Court. 81 Fed. Reg. 24,420, 24,452 (Apr. 25, 2016). Petitioners—all of whom are States or state entities who challenged the Rule in the initial rounds of litigation before the D.C. Circuit and this Court—now challenge the D.C. Circuit's decision not to vacate the Rule.

1. The core purpose of the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). The CAA achieves this objective by, *inter alia*, requiring EPA to regulate emissions of "hazardous air pollutants" from various categories of stationary sources. 42 U.S.C. 7412. The CAA generally requires EPA to publish and revise a list of stationary source categories that emit hazardous air pollutants, and to regulate such emissions from sources within those categories. 42 U.S.C. 7412(c) and (d). The CAA specifically addresses the circumstances under which EPA must list fossil-fuel-fired power plants for regulation under the program. 42 U.S.C. 7412(n)(1)(A). That provision states in part that EPA "shall regulate [power plants] under [Section 7412], if [EPA] finds such regulation is appropriate and necessary." *Ibid.*

In 2000, EPA found that it was "appropriate and necessary" to regulate power plants, and it accordingly listed such plants under 42 U.S.C. 7412. 65 Fed.

Reg. 79,830-79,831 (Dec. 20, 2000). In 2012, EPA promulgated the Rule at issue in this case. See 77 Fed. Reg. at 9304. The Rule (1) reaffirmed EPA's prior "appropriate and necessary" finding based on new analyses, and (2) issued substantive standards limiting the emission of hazardous air pollutants—including mercury and other pollutants toxic to human health and the environment—from power plants. *Id.* at 9310-9311, 9367-9369. The Rule applied the standards directly to power plants, and it did not impose any obligations on States. When issuing the Rule, EPA expressed its view that the costs associated with the regulation of power plants "should not be considered" when making the "appropriate and necessary" finding under Section 7412(n)(1)(A). *Id.* at 9326.

2. Petitioners sought review of the Rule in the D.C. Circuit. That court consolidated their petition for review with separate petitions filed by various industry groups and regulated entities. In 2014, the court upheld the Rule in full. *White Stallion Energy Ctr., LLC* v. *EPA*, 748 F.3d 1222, 1229 (D.C. Cir.) (per curiam). This Court granted certiorari to consider "whether it was reasonable for EPA to refuse to consider cost" when making the Section 7412(n)(1)(A) "appropriate and necessary" finding. *Michigan*, 135 S. Ct. at 2704-2705. The Court ultimately held that EPA "must consider cost—including, most importantly, cost of compliance—before deciding whether regulation [of power plants] is appropriate and necessary." *Id.* at 2711. The Court made clear, however, that EPA retained discretion as to the precise way in which it would take account of costs in its "appropriate and necessary" analysis. *Ibid.*

In their merits briefs in this Court, petitioners requested that the Court vacate the Rule.[1] The Court did not grant that relief, but instead remanded the case to the D.C. Circuit "for further proceedings consistent with this opinion." *Michigan*, 135 S. Ct. at 2712. Petitioners did not seek rehearing or any other post-decision relief from this Court.

3. In response to the Court's decision, EPA commenced a new rulemaking to reevaluate its Section 7412(n)(1)(A) "appropriate and necessary" finding. On December 1, 2015, EPA published a proposal that considered costs and proposed to find that regulation of hazardous emissions from power plants remains "appropriate and necessary." 80 Fed. Reg. 75,027, 75,029-75,041. EPA subsequently received public comments on that proposal.

In the meantime, the parties had returned to the D.C. Circuit in accordance with this Court's remand order. That court solicited briefing and heard oral argument concerning the appropriate relief in light of this Court's decision and the pending EPA administrative proceedings. On December 15, 2015, the same D.C. Circuit panel that had originally heard the case issued a three-paragraph, per curiam order that unanimously remanded the proceeding to EPA, without vacating the Rule. Pet. App. 2a. As support for that disposition, the court cited its prior decision in *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993). Pet. App. 2a-3a. The court also noted EPA's representation "that

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[1] See Michigan Br. 5, 19, 48; Michigan Reply Br. 22; see also Nat'l Mining Ass'n Br. 45; Nat'l Mining Ass'n Reply Br. 15.

[EPA] is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016." *Id.* at 3a.[2]

On February 23, 2016—more than two months after the D.C. Circuit's order denying their request to vacate the Rule—petitioners filed an application with the Chief Justice seeking a stay of the Rule. Petitioners asked the Chief Justice to stay the Rule until either (1) this Court could address their not-yet-filed petition for certiorari challenging the D.C. Circuit's decision not to vacate the Rule, or (2) EPA issued a final "appropriate and necessary" determination that considered costs in accordance with this Court's prior decision in the case. Pet. Stay Appl. 15. In response to the application, EPA argued, *inter alia*, that the Court was unlikely to grant certiorari, that petitioners' challenge to the D.C. Circuit's remand order lacked merit, and that the challenge would in any event soon become moot upon EPA's final "appropriate and necessary" determination, which was expected by April 15, 2016. EPA Mem. in Opp. to Stay Appl. 8-19, 22-23. On March 3, 2016, the Chief Justice denied petitioners' stay application.

4. On April 14, 2016, EPA issued a final supplemental finding that it is "appropriate and necessary" to regulate hazardous air pollutants from power plants under Section 7412 of the CAA. 81 Fed. Reg. 24,452. That finding was published in the Federal Register and became effective on April 25, 2016. *Id.* at 24,420.

That finding reflects EPA's determination that consideration of cost does not justify any alteration of

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[2] Although Judge Kavanaugh dissented from the relevant aspects of the D.C. Circuit's original decision upholding the Rule, he joined in the D.C. Circuit's December 15, 2015, order remanding without vacatur.

its prior conclusion that regulation of hazardous emissions from power plants is "appropriate and necessary." 81 Fed. Reg. at 24,421. EPA explained that it had analyzed the cost issue in two different and independent ways, each of which supported its conclusion. First, EPA found that the compliance costs of the Rule are reasonable, and it concluded that regulation is appropriate and necessary after weighing those reasonable costs against the considerable public health and environmental advantages of regulating hazardous air pollutants from power plants. Second, EPA stated that, although it did not construe the CAA to require a formal benefit-cost analysis, its "appropriate and necessary" finding was fully supported by the benefit-cost analysis that had originally been conducted as part of the regulatory impact analysis for the Rule. *Id.* at 24,421, 24,423-24,427.

The time for seeking D.C. Circuit review of EPA's supplemental finding will expire on June 24, 2016.

ARGUMENT

Petitioners seek review of the D.C. Circuit's decision not to vacate the Rule in response to this Court's decision in *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015). The Court should deny the petition because (1) petitioners lack standing; (2) the case is moot in light of EPA's supplemental finding; (3) the D.C. Circuit's decision to remand the Rule without vacating it was an appropriate exercise of discretion under the CAA; and (4) that decision does not conflict with any decision of this Court or any other court of appeals.

1. Petitioners lack Article III standing to challenge the D.C. Circuit's remand order in this Court. To establish standing, a plaintiff must show that (1) it has suffered an individualized injury to a "legally protect-

ed interest"; (2) the injury is "fairly traceable" to the defendant's challenged conduct; and (3) the injury is redressable by a favorable decision. *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 134 (2011) (brackets, ellipses, and citation omitted). Although States are entitled to "special solicitude" to protect their sovereign interests, they must satisfy all three of those requirements in order to invoke the jurisdiction of the federal courts. *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007); see *id.* at 520-526.

Petitioners cannot show that the Rule injures any of their "legally protected interest[s]." *Arizona Christian Sch. Tuition Org.*, 563 U.S. at 134 (citation omitted). The Rule establishes substantive standards restricting the emission of hazardous air pollutants from power plants, but it does not directly regulate petitioners in any way. The Rule imposes no obligations on States, and—unlike some other CAA rules—it is not implemented through state plans. Rather, the Rule's requirements are imposed directly on individual power plants, and the Rule inflicts no concrete injury on petitioners or any other States. See 77 Fed. Reg. at 9367-9369; see generally *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.") (brackets in original) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).[3]

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[3] EPA does not dispute the standing of the industry groups and regulated entities that were aligned with petitioners in earlier proceedings in this case before the D.C. Circuit and this Court. Those other parties have standing because they (or their members) are directly regulated by the Rule. There was accordingly no

In the original proceedings before the D.C. Circuit, petitioners claimed to have standing based on cursory and unsupported contentions that the Rule would (1) "make their regulatory tasks more difficult" (by, *e.g.*, forcing changes in generating capacity); and (2) impose unreasonable costs on industry and consumers within the States. See Joint C.A. Br. of State, Indus. & Labor Pet. 24 (Oct. 23, 2012). The allegations concerning regulatory complications were entirely speculative, and in any event, the Rule on balance is more likely to *ease* regulatory burdens on States. For example, various States are currently relying on the emission reductions obtained by the Rule for regulatory planning under a number of EPA programs. See EPA Mem. in Opp. to Stay Appl. App. 23a-25a.

The second set of harms alleged by petitioners—involving costs borne by petitioners' in-state businesses and citizens—is simply irrelevant in this context. States do not have standing to raise claims of injury as *parens patriae* on behalf of their businesses or citizens in actions against the federal government. *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923)).

2. Even if the D.C. Circuit's remand-without-vacatur order had caused petitioners some cognizable injury, that order has no continuing legal effect now that EPA has issued its supplemental finding. This case is therefore moot. The Constitution requires that

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need to examine petitioners' standing in the course of the earlier proceedings. See, *e.g.*, *Massachusetts*, 549 U.S. at 518. Neither the industry groups nor any regulated entity has joined petitioners in seeking review of the D.C. Circuit's December 15, 2015, remand order.

"an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed." *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 669 (2016) (citation omitted). A case is moot when intervening circumstances make it "impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012).

a. The petition for certiorari challenges the D.C. Circuit's decision not to vacate the Rule pending EPA's consideration of costs in the "appropriate and necessary" determination in light of this Court's decision in *Michigan*. EPA's consideration of costs is now complete. On April 14, 2016, EPA finalized its supplemental determination and concluded that regulating the emission of hazardous air pollutants from power plants *is* "appropriate and necessary." 81 Fed. Reg. at 24,452. That determination—not the D.C. Circuit's decision to remand the Rule without vacatur—provides the legal authority under which the Rule is now in effect. Thus, even if this Court granted certiorari and held that the D.C. Circuit's remand order was unlawful, its decision would have no effect on the Rule's ongoing validity, and petitioners would not be entitled to any retrospective relief for the harms the Rule allegedly caused them during the pendency of the supplemental rulemaking.

b. Petitioners assert (Pet. 20) that the case is not moot because the dispute between the parties is "capable of repetition, yet evading review." Petitioners are mistaken.

The capable-of-repetition exception applies when (1) "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration," and

(2) "there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 735 (2008) (citations omitted). Petitioners cannot meet those requirements here. It is entirely speculative whether petitioners will ever again be subject to an analogous remand-without-vacatur order in a future challenge to an EPA rulemaking. And there is no reason to believe that any such future order will be in effect for so short a period of time that it would necessarily evade review. See, *e.g.*, *Alvarez* v. *Smith*, 558 U.S. 87, 93-94 (2009); *Spencer* v. *Kemna*, 523 U.S. 1, 18 (1998).

Petitioners assert (Pet. 22) that they are "subject to all sorts of regulations imposed by EPA," and they (mistakenly) attribute to EPA the view that the agency's "lack of authority to regulate poses no obstacle to its continued imposition of regulations." But that is a far cry from establishing a "reasonable expectation" that they will be subjected to a similar remand order after a successful future challenge to EPA action. *Davis*, 554 U.S. at 735. "[T]he capable-of-repetition doctrine applies only in exceptional situations," and only if "the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of L.A.* v. *Lyons*, 461 U.S. 95, 109 (1983).

c. Even if the capable-of-repetition exception were applicable here, this Court's resolution of the question presented would not affect EPA's supplemental finding that regulation of power plants under Section 7412 is "appropriate and necessary." The ultimate determination whether hazardous emissions from those sources will be regulated under Section 7412 depends

on the validity of that supplemental finding, not on whether the D.C. Circuit acted permissibly in declining to vacate the Rule during the pendency of the supplemental rulemaking. The current practical insignificance of the challenged D.C. Circuit order is a sound reason for the Court to deny review, whether or not the case is technically moot.

3. The D.C. Circuit's remand-without-vacatur order was a valid exercise of authority under the CAA's judicial-review provision, 42 U.S.C. 7607(d)(9). Petitioners' contrary arguments lack merit.

a. Section 7607(d)(9) states that, when a reviewing court determines that an EPA action subject to that provision is unlawful, it "may reverse" that action. 42 U.S.C. 7607(d)(9). That language 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) ("The word 'may' clearly connotes discretion.") (citation omitted). The D.C. Circuit has recognized that Section 7607(d)(9) permits a reviewing court in appropriate circumstances to remand an unlawful rule to EPA without vacating the rule. See, *e.g.*, *Natural Res. Def. Council* v. *EPA*, 489 F.3d 1250 (D.C. Cir. 2007). 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*, 489 F.3d at 1263 (Randolph, J., concurring).

Petitioners argue (Pet. 12-13) that this case is governed by the APA's judicial-review provision rather than by Section 7607(d)(9). Petitioners are mistaken.

Section 7607(d)(9) covers "any action of the [EPA] Administrator to which [42 U.S.C. 7607(d)] applies," 42 U.S.C. 7607(d)(9), and such actions include "the promulgation or revision of any * * * emission standard or limitation under [42 U.S.C. 7412(d)]." 42 U.S.C. 7607(d)(1)(C). EPA promulgated the Rule and reaffirmed its "appropriate and necessary" determination through a Section 7412(d) rulemaking. See generally 77 Fed. Reg. at 9304, 9310-9311 (reaffirming an earlier "appropriate and necessary" finding as part of the Section 7412(d) rulemaking based on additional analyses).[4] It was accordingly subject to review under Section 7607(d)(9), not under the APA. See 42 U.S.C. 7607(d)(1) (stating that Section 706 of Title 5 of the United States Code does not apply to actions identified in 42 U.S.C 7607(d) except as expressly provided).

In any event, remand without vacatur is permissible even in APA cases, even though 5 U.S.C. 706(2) states that reviewing courts "shall * * * set aside" unlawful agency action under the APA. *Ibid.* The D.C. Circuit and other courts of appeals have long recognized that the word "shall" in this context does not require vacatur in every case where agency action is found to be deficient.[5] That approach is consistent

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[4] Section 7607(d) also indicates that Section 7607(d)(9)'s standard applies to "any regulation under [42 U.S.C. 7412(n)]," 42 U.S.C. 7607(d)(1)(C), but EPA has taken the position, based on the statute's history, that the reference to Section 7412(n) is a scrivener's error. EPA C.A. Br. 34-35 n.9 (Apr. 8, 2013).

[5] See, *e.g.*, *Natural Res. Def. Council* v. *United States EPA*, 808 F.3d 556, 584 (2d Cir. 2015); *Black Warrior Riverkeeper, Inc.* v. *U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015); *National Org. of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001); *Central Me. Power Co.* v. *Federal Energy Regulatory Comm'n*, 252 F.3d 34, 48

with this Court's longstanding reluctance "to displace courts' traditional equitable authority absent the 'clearest command' or an 'inescapable inference' to the contrary." *Miller* v. *French*, 530 U.S. 327, 340 (2000) (citations omitted). Congress's use of the word "shall" does not unambiguously eliminate that traditional equitable discretion. See *The Hecht Co.* v. *Bowles*, 321 U.S. 321, 322, 330 (1944) (construing statutory provision stating that an injunction "shall be granted," and explaining that this language did not evince Congress's "plain" desire to depart from "traditional equity practice"); see generally Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291 (2003) (defending legitimacy of remand-without-vacatur remedy under the APA); Admin. Conference of the U.S., *Recommendation 2013-6: Remand Without Vacatur* (adopted Dec. 5, 2013) (ACUS *Recommendation*) (same).

The discretion conferred by Sections 7607(d)(9) and 706(2) is not unlimited. The D.C. Circuit has explained that "[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 (D.C. Cir. 1993) (citation omitted); see

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(1st Cir. 2001); *Central & Sw. Servs., Inc.* v. *United States EPA*, 220 F.3d 683, 692 (5th Cir. 2000), cert. denied, 532 U.S. 1065 (2001); *Idaho Farm Bureau Fed'n* v. *Babbitt*, 58 F.3d 1392, 1399, 1401, 1405-1406 (9th Cir. 1995); *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993).

Pet. App. 2a-3a. Applying that commonsense approach, the D.C. Circuit and other courts of appeals have ordered remand without vacatur in numerous cases.[6]

The D.C. Circuit's December 15, 2015, remand-without-vacatur order reflected a reasonable exercise of remedial discretion. See Pet. App. 2a-3a (citing *Allied-Signal*, 988 F.2d at 150-151). EPA had previ-

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[6] See, *e.g.*, *EME Homer City Generation, L.P.* v. *EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015) (finding the rule's emissions budgets "invalid," but remanding without vacatur in light of the "substantial disruption" vacatur would have for emissions-trading markets); *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, 135 S. Ct. 53 (2014); *National Ass'n of Clean Water Agencies* v. *EPA*, 734 F.3d 1115, 1161 (D.C. Cir. 2013) (remanding 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 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); *North Carolina* v. *EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam) (granting remand without vacatur on rehearing to "at least temporarily preserve the environmental values covered by [the rule]," notwithstanding the "fundamental flaws" identified by the court); *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" its reasoning on remand); *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405-1406 (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).

ously explained that hazardous air pollutants emitted from power plants pose serious hazards to public health and the environment. EPA Mot. to Govern Future Proceedings 12-18 (Sept. 24, 2015). EPA noted that exposure to mercury emissions in particular is extremely dangerous to children and developing fetuses. *Id.* at 13. EPA also noted that in 2016 alone the Rule is expected to result in between 4200 and 11,000 fewer premature deaths from respiratory and cardiovascular illness; 3100 fewer emergency room visits for children with asthma; over 250,000 fewer cases of respiratory symptoms and asthma exacerbation in children; and 4700 fewer non-fatal heart attacks. *Id.* at 15-16. EPA also emphasized that regulated entities would not suffer significant disruptive consequences, and that EPA was acting quickly to reevaluate its "appropriate and necessary" finding by April 15, 2016. *Id.* at 9-12, 18-20; see Pet. App. 3a (noting EPA's representation that it was "on track to issue a final finding" by that date). In those circumstances, the D.C. Circuit acted reasonably in remanding the rule to EPA without vacatur.

b. Contrary to petitioners' contention (Pet. 7-8), the D.C. Circuit's decision to remand without vacatur did not contravene this Court's ruling in *Michigan*. The *Michigan* Court neither decided whether vacatur was required nor expressed any view as to the proper resolution of that issue.

As noted above, petitioners' merits briefs asked this Court to vacate the Rule, see Michigan Br. 5, 19, 48; Michigan Reply Br. 22, but the Court did not grant that relief, see *Michigan*, 135 S. Ct. at 2712. Instead, it remanded the case to the D.C. Circuit, thereby allowing that court to consider the parties' arguments

and determine the appropriate remedy. *Ibid.* Petitioners could have sought rehearing of that aspect of the Court's decision, see Sup. Ct. R. 44, but they did not do so.

The 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 as part of the "appropriate and necessary" determination when it initially promulgated the Rule. *Michigan*, 135 S. Ct. at 2712. As noted above, the D.C. Circuit and other courts of appeals have long recognized that remand without vacatur can be an appropriate remedy in certain circumstances. See pp. 12-14, *supra*. Because the question whether that remedy is appropriate arises only when an agency action is held to be deficient in some respect, this Court's merits ruling simply posed that remedial question rather than answering it.

4. Petitioners are also wrong in arguing (Pet. 8-11) that the D.C. Circuit's remand-without-vacatur order is contrary to the law of other circuits. As the decisions cited above make clear, there is broad agreement among the circuits that remand without vacatur can be a valid remedy in appropriate circumstances. See pp. 12-14, *supra*; ACUS *Recommendation* 2 (noting that ACUS study had identified "no cases * * * in which a federal court of appeals held that remand without vacatur was unlawful under the APA or another statutory standard of review," and that "courts generally accept the remedy as a lawful exercise of equitable remedial discretion").[7] Petitioners do not

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[7] Although some judges on the D.C. Circuit have expressed disagreement with circuit precedent permitting remand without vacatur in certain circumstances, see, *e.g.*, *Milk Train, Inc.* v.

cite a single decision—applying either 42 U.S.C. 7607(d)(9) or 5 U.S.C. 706(2)—holding that vacatur is categorically required in every case where agency action is held to be unlawful.[8]

Petitioner's reliance (Pet. 10) on *American Forest & Paper Ass'n* v. *United States EPA*, 137 F.3d 291 (5th Cir. 1998), is misplaced. That decision neither applied the CAA judicial-review provision nor established a bright-line, mandatory rule that unlawful agency action must always be vacated. Rather, it simply vacated the portion of an EPA rule that had exceeded EPA's authority by imposing an extra-statutory condition for approval of state permitting plans under the Clean Water Act. *Id.* at 294, 297-298. Given the court's merits holding that the statute barred EPA from imposing that condition, *id.* at 297-298, there was no prospect that the agency might re-impose the condition after further analysis, and thus no justification for continuing it in effect during the remand proceedings. Here, by contrast, the Court in *Michigan* did not hold that EPA is foreclosed from

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Veneman, 310 F.3d 747, 756-758 (2002) (Sentelle, J., dissenting); *Checkosky* v. *Securities & Exch. Comm'n*, 23 F.3d 452, 490-493 (1994) (per curiam) (Randolph, J.), "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[8] Petitioners cite (Pet. 11-12) two decisions in which this Court has used mandatory language to paraphrase the APA's judicial-review provision. In neither of those decisions, however, did the Court consider—let alone decide—the question whether Section 706(2) precludes remand without vacatur when an agency rule is found to be unlawful. Nor did either decision discuss Section 7607(d)(9), the CAA judicial-review provision actually at issue here.

regulating hazardous emissions from power plants under Section 7412, only that the agency must consider cost in determining whether such regulation is "appropriate and necessary." In any event, the Fifth Circuit has subsequently made clear that it views remand-without-vacatur as a legitimate remedial option in appropriate cases. See *Central & Sw. Servs., Inc.* v. *United States EPA*, 220 F.3d 683, 692 (2000), cert. denied, 532 U.S. 1065 (2001).

The D.C. Circuit's remand order likewise does not conflict with the Eighth Circuit's decision in *Iowa League of Cities* v. *EPA*, 711 F.3d 844 (2013). See Pet. 9-10. In *Iowa League of Cities*, the court of appeals vacated two EPA rules after concluding that EPA had (1) failed to follow the APA's notice-and-comment procedures with respect to either rule, and (2) exceeded its statutory authority with respect to one of the rules. 711 F.3d at 875-878. But the court did not hold that vacatur is *always* required, and it neither addressed nor rejected the argument that the remand-without-vacatur remedy might be valid in appropriate circumstances. Indeed, EPA did not even argue—in either its merits brief or in its petition for rehearing en banc in that case—that the appropriate remedy for those violations was to leave the rules intact pending further agency action. The Eighth Circuit had previously employed the remand-without-vacatur remedy, see *United States Steel Corp.* v. *EPA*, 649 F.2d 572, 576-577 (1981), and nothing in *Iowa League of Cities* purported to overrule that precedent. The Eighth Circuit's decision in *Iowa League of Cities* therefore does not conflict with the D.C. Circuit's unpublished remand order in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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