No. 15-1152

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF INDUSTRY RESPONDENTS CALPINE CORPORATION, EXELON CORPORATION, NATIONAL GRID GENERATION LLC, AND PUBLIC SERVICE ENTERPRISE GROUP INCORPORATED

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Does a reviewing court have authority to leave in place an agency rule for a short period while the agency corrects an error in its analysis supporting the rule, when the rule is explicitly authorized by statute, the agency can readily address the error and unrebutted evidence shows that vacating the rule in the interim would harm the regulated industry and the environment?

RULE 29.6 DISCLOSURE STATEMENT

Respondents Calpine Corporation, Exelon Corporation, and Public Service Enterprise Group Incorporated are publicly traded corporations and have no parent companies. No publicly-held company owns 10% or more of their stock. All of the outstanding membership interests in National Grid Generation LLC are owned by KeySpan Corporation. All of the outstanding shares of common stock of KeySpan Corporation are owned by National Grid USA, a public utility holding company with regulated subsidiaries engaged in the generation of electricity and the transmission, distribution and sale of natural gas and electricity. All of the outstanding shares of common stock of National Grid USA are owned by National Grid North America Inc. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid (US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales, with ordinary shares listed on the London Stock Exchange, and American Depositary Shares listed on the New York Stock Exchange. National Grid plc has no parent companies, and no publicly-held company holds 10% or more of its stock.

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INTRODUCTION

Adopted in 2012, the Mercury and Air Toxics Standards limit emissions of "hazardous air pollutants" from coal- and oil-fired "electric utility steam generating units" ("units" or "power plants") ("the Rule") beginning in 2015. 77 Fed. Reg. 9304 (Feb. 16, 2012). The Rule directly regulates the electric power industry, and *only* the electric power industry. Respondents Calpine Corporation, Exelon Corporation, National Grid Generation LLC and Public Service Enterprise Group Incorporated ("Industry Respondents") are members of that industry; collectively, they own nearly 75 gigawatts of generation capacity, including coal, oil, gas, nuclear, wind, solar, and other energy sources. Industry Respondents have supported the Rule throughout and support the D.C. Circuit's December 15, 2015 Order remanding the Rule to the U.S. Environmental Protection Agency ("EPA") without vacatur to address the error identified by this Court in *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (the "Remand Order"). *See* Pet. at 1a-3a.

Though many industry members and groups originally challenged the Rule, the industry has come into compliance with the Rule over the past four years. Industry members have upgraded some power plants, retired others and made countless investment decisions premised on the Rule taking effect in April 2015 or, for sources with a one-year extension, April 2016, and remaining in effect thereafter. These investments and the decisions they represent are permanent and cannot be undone, and any interruption in the Rule would jeopardize the investment-backed expectations of the industry. A temporary vacatur of the Rule, while EPA fixed the

eminently reparable error identified by this Court, would have harmed the industry but conferred no benefit on Petitioner States. As a result, the vast majority of industry members who originally challenged the Rule did not seek vacatur below after *Michigan*, and no industry member now seeks this Court's review of the Remand Order. For the only industry regulated by the Rule, the war is over.

In contrast, Petitioner States fight on. States are not regulated by the Rule. Unlike the industry, the Petitioner States have not invested real capital in complying with the Rule, and therefore it is of little consequence to Petitioners that those industry investments would be endangered by toggling the Rule's requirements off and on again. Petitioner States have nothing at stake, which poses a jurisdictional problem for this Court that did not exist when the Petitioner States were joined by industry members with undisputed standing to challenge the Rule. Petitioner States lack standing to challenge the Remand Order because they can identify no injury from the Remand Order or the Rule, redressable or otherwise, and Petitioners' claims are moot in any event, because EPA has completed its remand proceedings and reaffirmed the administrative finding supporting the Rule after considering cost as this Court directed in *Michigan*. *See* 81 Fed. Reg. 24,420 (Apr. 25, 2016).

Even if this Court finds it has jurisdiction, the Petition should nonetheless be denied. The Remand Order was entirely consistent with this Court's decision in *Michigan;* indeed it was entirely foreseeable. There is no split among the Courts of Appeals as to whether remand without vacatur is permissible. Those courts uniformly exercise their equitable power to develop case-specific, fact-bound

remedies, sometimes vacating the flawed agency action, and sometimes remanding the action without vacatur. Finally, the approach of the Courts of Appeals, and specifically the *Allied-Signal* analysis applied by the D.C. Circuit in the Remand Order, is more consistent with rules of equity and is vastly superior to the one-size-fits-all approach advocated by Petitioner States: a rule that requires vacatur of agency action for any administrative error no matter what the adverse consequences. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE[1]

Dozens of petitioners originally sought review of the Rule in the D.C. Circuit, including many members of the electric power industry. In those proceedings, petitioners also challenged EPA's determination under 42 U.S.C. § 7412(n)(1)(A) that it was "appropriate and necessary" to regulate emissions of hazardous air pollutants from power plants under section 112 of the Clean Air Act, 42 U.S.C. § 7412 (the "Finding"). The D.C. Circuit upheld the Rule and the Finding against myriad substantive and procedural challenges. *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). This Court subsequently accepted review of one issue: whether EPA was required to consider costs in evaluating whether it was "appropriate," within the meaning of 42 U.S.C. § 7412(n)(1)(A), to regulate power plants' hazardous air pollutant emissions. *Michigan*, 135 S. Ct. at 2706.

1. To avoid duplication, Industry Respondents incorporate by reference the Statement in EPA's brief in opposition to the Petition, and the Background in the Brief in Opposition of States, Local Governments, and Public Health and Environmental Organizations, and limit this discussion to matters most directly related to Industry Respondents' opposition to the Petition.

In *Michigan*, this Court decided that that the statutory direction in 42 U.S.C. § 7412(n)(1)(A) to determine whether regulation is "appropriate" requires some consideration of cost. *Id.* at 2712. However, this Court recognized that EPA would have an opportunity to reconsider the Finding in light of the Court's decision, and left it to EPA to decide how costs should be taken into account. *Id.* at 2711. The Court remanded the case to the D.C. Circuit for "further proceedings consistent with [the] opinion." *Id.* at 2712. The Court did not direct the D.C. Circuit to vacate the Rule, even though Petitioner States and others expressly requested that the Rule be vacated.[2]

On remand, the D.C. Circuit considered separate motions to govern future proceedings on the question of remedy filed by many parties, including one by a group comprised mostly of Petitioner States, another by EPA, and one by Industry Respondents. *See* Pet. at 1a-3a. EPA represented in its motion that it was reevaluating the Finding, considering cost as directed by this Court, and that it anticipated completing its review and issuing a supplemental finding by April 15, 2016.[3] Indeed, EPA published a proposed supplemental finding based on consideration of cost in the Federal Register on December 1, 2015, prior to oral argument before the D.C. Circuit on the motions to govern. 80 Fed. Reg. 75,025 (Dec. 1, 2015).

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2. *See* Brief for Petitioners State of Michigan, et al., Sup. Ct. Docket Nos. 14-46, 14-47, 14-49 at 5, 48; *see also* Opening Brief of Petitioner the National Mining Association, Sup. Ct. Docket Nos. 14-46, 14-47, 14-49, at 45.

3. Respondent's Motion to Govern Future Proceedings, Document No. 1574825 at 12, Docket No. 12-1100 (D.C. Cir. *filed* Sept. 24, 2015).

With just a few minor exceptions, members of the electric power industry who originally challenged the Rule and the Finding *did not* seek vacatur of the Rule on remand; only States and coal industry groups sought vacatur.[4] Industry Respondents opposed vacatur because of the severe disruption it would cause to power generators and electricity markets, supporting their motion with declarations establishing the nature and extent of the disruption.[5] These declarations – to which the parties seeking vacatur offered no rebuttal – demonstrated two critical facts: vacatur would not spare the regulated industry any material compliance costs because power generators had already made virtually all of the investments necessary to comply with the Rule; and vacatur during EPA's reconsideration of the Finding would harm the regulated industry by undermining the industry's investments and severely disrupting the electricity markets on which those investments depend.

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4. Reply of Industry Respondent-Intervenors in Support of Their Motion to Govern Future Proceedings, Document No. 1582027 at 3-5, Docket No. 12-1100 (D.C. Cir. *filed* Nov. 4, 2015) (noting that only Oak Grove Management Company LLC, operator of a 1.6 gigawatt power plant, White Stallion Energy Center, LLC, a prospective industry entrant who had proposed a new power plant, which it later abandoned, and Tri-State Generation and Transmission, LLC ("Tri-State"), owner of less than two gigawatts of generation capacity, had joined in the request for vacatur). Tri-State primarily sought relief for one emission limitation for one small plant. Tri-State's Reply, Document No. 1581995 at 3, Docket No. 12-1100 (D.C. Cir. *filed* Nov. 4, 2015).

5. Motion of Industry Respondent-Intervenors to Govern Future Proceedings, Document No. 1574838 at 11-19, Docket No. 12-1100 (D.C. Cir. *motion filed* Sept. 24, 2015) ("Industry Respondents' Motion to Govern").

On the first point, Industry Respondents offered the Declaration of Dr. James Staudt, an expert in the pollution control field.[6] Dr. Staudt testified that, given the long lead times for pollution control equipment, by late 2015 all contracts necessary to install equipment to comply with the Rule would have been executed and all fixed capital costs for that equipment would already have been incurred or committed. Staudt Declaration ¶¶ 3, 15; *see also* Industry Respondents' Motion to Govern at 9.

On the second point, Industry Respondents offered the Declaration of William Berg, Vice President of Wholesale Market Development for Industry Respondent Exelon Corporation.[7] Mr. Berg testified that power generators make investment decisions based on expectations of future prices, among other things. Berg Declaration ¶¶ 10-13. Pollution control costs factor into the costs that generators charge for their electricity, and thus influence expectations of future prices. *See id.* ¶¶ 10-13, 18-20. With the Rule in place since 2012, many investment decisions had already been made by 2015 in reliance on the Rule. *See id.* ¶¶ 7-9, 18-20. Supported by Mr. Berg's declaration, Industry Respondents demonstrated that disrupting the Rule, even

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6. *See* Declaration of Dr. James Staudt (attached to Industry Respondents' Motion to Govern as Exhibit 1, and attached to Memorandum in Opposition of Industry Respondent-Intervenors on Application to Stay or Enjoin the Mercury and Air Toxics Standards, U.S. Sup. Ct. Docket No. 15A-886, as Exhibit 1) ("Staudt Declaration").

7. *See* Declaration of William B. Berg (attached to Industry Respondents' Motion to Govern as Exhibit 2, and attached to Memorandum in Opposition of Industry Respondent-Intervenors on Application to Stay or Enjoin the Mercury and Air Toxics Standards, U.S. Sup. Ct. Docket No. 15A-886, as Exhibit 2) ("Berg Declaration").

temporarily, would undermine the price predictions on which those investment decisions were based, and would create uncertainty harmful to the industry. Industry Respondents' Motion to Govern at 13-16, 18. The parties seeking vacatur below offered no rebuttal to this evidence.

After hearing oral argument on the motions, the D.C. Circuit issued the Remand Order. Applying its well-established precedent in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), the D.C. Circuit concluded that the Rule should remain in effect while EPA complied with this Court's direction to consider costs, among other relevant factors, in deciding whether it is "appropriate" to regulate hazardous air pollutant emissions from power plants. *See* Pet. at 2a-3a. The Remand Order was unanimous, even though the panel had originally split on the issue ultimately decided by this Court. *See White Stallion Energy Center*, 748 F.3d at 1258-59 (Kavanaugh, J., dissenting in part).[8]

Consistent with its representation to the D.C. Circuit, after considering public comments on the proposed supplemental finding, EPA made a final determination under 42 U.S.C. § 7412(n)(1)(A) that it is appropriate to regulate power plants after including consideration of cost. Administrator McCarthy signed that determination on April 14, 2016, and notice of EPA's decision was published on April 25, 2016. 81 Fed. Reg. 24,420 (Apr. 25, 2016) ("Supplemental Finding").

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8. The D.C. Circuit panel unanimously upheld the Rule and Finding in all other respects. *White Stallion Energy Center*, 748 F.3d at 1229.

Although Petitioner States had never sought to stay the Rule before the D.C. Circuit, on February 23, 2016, more than two months after the Remand Order, Petitioners filed an application asking this Court to stay or enjoin the Rule, pending a petition for *certiorari* asking the Rule be vacated. Petitioners' Stay Appl. at 1. The Chief Justice denied that application on March 3, 2016.

REASONS FOR DENYING THE PETITION

I. The Remand Order Does Not Conflict With The Decision In *Michigan v. EPA*.

Petitioners contend that the D.C. Circuit "thwart[ed]" this Court's decision in *Michigan* (Pet. at 3, 8) by leaving the Rule in place for the four-month period between the Remand Order and the Supplemental Finding. Petitioners' argument entirely depends on their characterization of EPA's error as one that goes to the Agency's "authority" to promulgate the Rule. Pet. at 7-8, 17-20. Petitioners draw a distinction between administrative errors that go to an agency's "authority" and all other administrative errors. In their view, because EPA failed to consider one factor that this Court determined to be relevant to the Finding, EPA lacked "authority" to promulgate the Rule, and therefore no court could allow the Rule to remain in place temporarily until EPA fixed that error. Thus, Petitioners interpret this Court's decision in *Michigan* to limit the D.C. Circuit's responsibilities on remand to executing a ministerial duty to vacate the Rule.

Petitioners' argument finds no support in *Michigan*. This Court did not conclude that EPA lacks *authority* to regulate emissions of hazardous air pollutants from

power plants under 42 U.S.C. § 7412. The Clean Air Act expressly directs EPA to determine whether it is "appropriate and necessary" to regulate those emissions. 42 U.S.C. § 7412(n)(1)(A). If the Administrator decides that regulation is "appropriate," EPA must promulgate emission standards for power plants under 42 U.S.C. § 7412. *Id.* In *Michigan*, this Court ruled only that EPA had erred by concluding that costs were not among the factors relevant in deciding whether regulation was "appropriate." 135 S. Ct. at 2712. The Court's analysis focused entirely on the reasonableness of EPA's interpretation of the statute, not whether the agency had statutory authority to make a finding. Indeed, having found that EPA erred, the Court implicitly recognized that EPA has authority to fix its error, noting that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.* at 2711. Congress specifically authorized EPA to make a finding, and if that finding is affirmative, required EPA to adopt the Rule, and nothing in this Court's opinion contradicts that explicit statutory grant of authority.

Petitioners mischaracterize EPA's error as one of "authority" to argue that EPA lacked "jurisdiction" for the Rule. *See* Pet. at 18 (attempting to draw a parallel between this case and a court issuing an injunction without having jurisdiction). Petitioners would endow EPA's error here with some supreme status as going to the agency's "authority" in a way different from other mundane agency errors. That is an entirely artificial construct. No agency ever has authority to promulgate a rule that is unlawful in some respect. No agency has authority to promulgate a rule without faithfully observing procedural requirements. No agency has authority to promulgate a

rule without considering all factors Congress intended to be considered. No agency has authority to promulgate a rule that includes requirements, exemptions, or other provisions that are arbitrary or capricious. This Court rejects such artificial distinctions between nominally "jurisdictional" agency errors and other types of agency errors:

> Both [agencies'] power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*. Because the question—whether framed as an incorrect application of agency authority or as assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional."

City of Arlington v. FCC, 133 S. Ct. 1863, 1870 (2013).

With "no principled basis" for distinguishing between the flaw identified by the Court in *Michigan* and run-of-the-mill administrative errors, Petitioners are left to argue that every administrative error *requires* the reviewing court to vacate the agency action *in all cases*. As explained below, *see infra* at IV, adopting a bright-line rule requiring vacatur in all cases would have severe consequences for administrative law and for regulated parties and would overturn decades of jurisprudence.

Nothing in *Michigan* suggests that this Court intended to work such an extraordinary result. To the contrary, this Court declined to vacate the Rule even though Petitioner States and others had explicitly asked this Court to do so.[9] The Court remanded the matter to the D.C. Circuit to conduct "further proceedings consistent with [the] opinion," 135 S. Ct. at 2712, an open-ended instruction that falls far short of an unambiguous requirement that the D.C. Circuit vacate the Rule. *Cf. U.S. v. Shotwell Mfg. Co.*, 355 U.S. 233, 245 (1957) (Court providing directions "about the nature of the further proceedings in the District Court" on remand).

This Court's silence on the issue of remedy despite a specific request for vacatur indicates that the Court had no intention to cabin the broad innate discretion of the D.C. Circuit to fashion an appropriate equitable remedy, even when addressing activity that violates a statute. *See, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."). Even in the context of reviewing administrative actions on petitions for review, Courts of Appeals retain the power "to fashion the relief most appropriate to the circumstances of the case before the court." *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 576 (8th Cir. 1981). Particularly when viewed in this

9. *See supra* note 2.

context, nothing in *Michigan* supports the conclusion that the D.C. Circuit was required to vacate the Rule while EPA addressed its error. The Petition should be denied.

II. There Is No Circuit Split As To Whether A Court May Remand Without Vacatur.

A. Like the D.C. Circuit, the Fifth Circuit and Eighth Circuit Sometimes Remand Without Vacatur.

Petitioners attempt to manufacture a circuit split where none exists. Citing just one Fifth Circuit case and one Eighth Circuit case, Petitioners contend "a circuit split exists on the basic question of whether a court may leave an unauthorized agency action in place." Pet. at 11. Neither case stands for the proposition Petitioners advance here: that vacatur is necessary in all cases where an error is found. Petitioners simply ignore cases in which the Fifth Circuit and Eighth Circuit have elected to remand *without* vacatur. Like the D.C. Circuit, those courts have recognized that they have discretion to fashion appropriate remedies when an agency has acted in a manner not authorized by statute.

For example, in *U.S. Steel Corp.*, 649 F.2d at 575-76, the Eighth Circuit concluded that EPA had erred by failing to provide notice and comment before issuing a rule designating certain areas as exceeding the national ambient air quality standards, but recognized that vacatur did not necessarily follow. Invoking its authority to fashion an appropriate remedy, the Eighth Circuit remanded the challenged air quality designations but left them in effect pending completion of agency proceedings on remand. *Id.* at 576-77.

Likewise, the Fifth Circuit also recognizes that vacatur does not necessarily follow automatically when an agency has acted improperly. In *Central and South West Services, Inc. v. EPA*, 220 F.3d 683 (5th Cir. 2000), the Fifth Circuit remanded but did not vacate a rule regulating the storage of polychlorinated biphenyls because EPA had failed to address requests for a national variance for the electric power industry. *Id.* at 692. Relying on *Allied-Signal* and other precedent from the D.C. Circuit, the Fifth Circuit explained that remand without vacatur was appropriate when "'there is at least a serious possibility that the [agency] will be able to substantiate its decision'" and vacatur would be "'disruptive.'" *Id.* (citing *Radio–Television News Directors Ass'n v. FCC,* 184 F.3d 872, 888 (D.C.Cir.1999) (quoting *Allied–Signal, Inc.,* 988 F.2d at 151)).

Disregarding these precedents, Petitioners myopically rely on *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) and *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) as evidence of a circuit split, arguing that those cases demonstrate the Fifth Circuit and Eighth Circuit "would have vacated the Rule because it exceeded EPA's statutory authority." Pet. at 10. The opinions in those cases do not address at all the issue of whether to remand with or without vacatur, and so shed no light on the decisionmaking process that led those courts to vacate the rules in those cases. In the absence of a rationale, it is impossible to divine, as Petitioners insist they can, that the Fifth and Eighth Circuits would have chosen a different remedy from that chosen by the D.C. Circuit in this case.

At most, those cases stand for the unremarkable proposition that vacating a rule may be appropriate in the circumstances that arose in those cases. In *Iowa League of Cities*, the Eighth Circuit concluded that the Clean Water Act did not authorize EPA to establish effluent limitations for discharges of water from one internal treatment unit to another. 711 F.3d at 877. In *American Forest & Paper Ass'n*, the Fifth Circuit concluded that explicit language in section 402(b) of the Clean Water Act required EPA to approve a state permitting program that met nine enumerated criteria, and that EPA could not invoke a different environmental statute to impose an additional requirement. 137 F.3d at 297-98. Thus, in both of those cases, the agency error could *never* have been corrected. This case is very different, and this Court acknowledged that EPA would have an opportunity to correct its error by reconsidering the Finding in light of cost. *Michigan*, 135 S. Ct. at 2711.[10]

B. The D.C. Circuit Applies a Long-Standing, Fact-Bound Inquiry in Considering Whether to Vacate a Rule on Remand.

Like the Fifth Circuit and the Eighth Circuit, the D.C. Circuit does not apply a uniform remedy that is blind

10. Even if these decisions supported Petitioners' argument, they would not represent a circuit split because they arose under the Clean Water Act, where the Administrative Procedure Act applies, rather than the Clean Air Act, which governs review here. Industry Respondents join in the portion of the brief of the States, Local Governments, and Public Health and Environmental Organizations in opposition to the Petition explaining that Petitioners' arguments premised on the Administrative Procedure Act fail because that statute does not apply to this dispute. *See* 42 U.S.C. § 7607(d)(1) (superseding the provisions of 5 U.S.C. § 706).

to the nature of an agency error or to the consequences of vacatur. To guide its discretion in fashioning an appropriate remedy, the D.C. Circuit has long employed a two-pronged test that considers (1) "the seriousness of the [Rule'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." *Allied-Signal*, 988 F.2d at 150-51 (citation omitted); *see* Pet. at 2a-3a. In many circumstances, the D.C. Circuit has applied that test to agency actions and has concluded that vacatur is appropriate. *See, e.g.*, *Ill. Pub. Telecomm. Ass'n v. FCC*, 123 F.3d 693, 693-94 (D.C. Cir. 1997); *Davis County Solid Waste Mgmt. v. EPA*, 101 F.3d 1395, 1411 (D.C. Cir. 1996), *amended on reh'g*, 108 F.3d 1454 (D.C. Cir. 1997) (amending the remedy to vacate only the standards for small municipal waste combustion units and to leave in place the standards for large units). The D.C. Circuit has also applied the *Allied-Signal* test to determine whether vacatur is appropriate when an agency has failed to make a prerequisite finding required by statute. *See, e.g.*, *Sugar Cane Growers Coop. of Florida v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002) (declining to vacate action even though agency failed to make four prerequisite findings required by statute, including a finding regarding cost).

The D.C. Circuit reviews many agency actions, and must consider the proper remedy when it finds that an agency has erred. Accordingly, the D.C. Circuit has developed its jurisprudence on the question of remedy for administrative errors more fully than most other Courts of Appeals. Nevertheless, *Allied-Signal* and its progeny merely guide the D.C. Circuit in exercising the equitable discretion common to all courts to fashion an appropriate

remedy in the face of administrative error. There is no conflict between the approaches of the D.C. Circuit and other Courts of Appeals that warrants this Court's review.

III. Petitioners Lack Standing and Their Request for Relief From the Remand Order is Moot.

A. Petitioners Lack Standing.

For most of this litigation, there has been no reason to question Petitioner States' standing because industry members subject to the Rule have also been among the parties challenging the Rule. However, only Petitioner States, and no industry members, seek review of the Remand Order. Petitioner States alone lack standing before this Court.

For the duration of the litigation, Petitioners "'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)); *see also*, *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011). Otherwise, there no longer is a "case or controversy" under Article III, § 2 of the Constitution. *Spencer*, 523 U.S. at 7. "[The] triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998).

Petitioners cannot meet these threshold requirements. Petitioners were not harmed by the Remand Order leaving the Rule in place until EPA issued its Supplemental Finding. Indeed, Petitioners are not harmed by the Rule. The Rule applies to power plants, and not to States. The Rule does not impose any duties directly upon States. The Petition makes no reference to any injury that Petitioner States have suffered or will suffer, much less a legally cognizable injury, and so they lack standing to challenge the Remand Order here.

B. The Supplemental Finding Rendered the Case Moot.

Even if the Petitioners could have demonstrated some cognizable injury arising from the Remand Order, that injury could not be redressed at this time. The Remand Order addressed the status of the Rule during the period while EPA was completing its administrative process to correct the error this Court identified in *Michigan*. Now that EPA has published its Supplemental Finding, the question of whether the Rule should remain in place while EPA completed the administrative process is not a live controversy. *See Murphy v. Hunt*, 455 U.S. 478, 481 (1982) ("In general a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." (internal quotations omitted)).

At this stage, Petitioners cannot obtain any meaningful relief from the Remand Order, and therefore any harm that they may have suffered is not redressable. As a result, there is no longer a "case" or "controversy." *See Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) ("To ensure a case

remains 'fit for federal-court adjudication,' the parties must have the necessary stake not only at the outset of litigation, but throughout its course") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *see Spencer*, 523 U.S. at 18 ("Mootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy.").[11]

C. The Mootness Exception Cited By Petitioners Does Not Apply.

Tacitly acknowledging that their Petition became moot upon EPA's Supplemental Finding, Petitioners instead argue that this case is one of the "exceptional situations," *Spencer*, 523 U.S. at 17 (internal quotation omitted), that is not moot because it is capable of repetition but evading review (Pet. at 20-23). Under that exception, a dispute may remain live if "(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 subject to the same action again." *Spencer*, 523 U.S. at 17-18 (internal quotations omitted). Petitioners do not satisfy either prong of this exception.

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11. Petitioners may seek review of EPA's Supplemental Finding and obtain such review provided at least one petitioner can establish Article III standing. One petition for review has been filed by a mining company not regulated by the Rule. *See Murray Energy Corp. v. EPA*, Docket No. 16-1127 (D.C. Cir. petition for review filed Apr. 25, 2016). That litigation raises different issues, is in a different procedural posture, follows the development of a full administrative record and is unrelated to the question of whether the D.C. Circuit erred when it left the Rule in place while remanding to EPA.

First, Petitioners have not shown that remand orders will always, or even usually, be of such short duration that they will evade this Court's review. *See id.* at 18 ("[Petitioner] has not shown…that the time between parole revocation and expiration of sentence is always so short as to evade review."); *Southern Co. Services, Inc. v. FERC*, 416 F.3d 39, 43 (D.C. Cir. 2005) ("the question is whether such a short duration is 'typical' of the controversy"). Petitioners cite *Turner v. Rogers*, 564 U.S. 431 (2011) to suggest that a remand for up to two years might be too short to evade review (Pet. at 21), but that case addressed the timeline for a case to proceed through *state courts* before reaching this Court. 564 U.S. at 440.

The relevant question is whether all (or virtually all) remand orders from the Courts of Appeals would "by reason of [an] inherently short duration of the opportunity for remedy, [be] likely forever to evade review." *Lewis*, 494 U.S. at 481 (internal quotation omitted). Nothing supports that view, and actual experience suggests otherwise. For example, in *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008), the D.C. Circuit remanded to EPA its rule regulating the interstate transport of pollutants under the Clean Air Act, but left that rule in place pending EPA's promulgation of a replacement rule. It took EPA three years to promulgate a replacement rule (76 Fed. Reg. 48,208 (Aug. 8, 2011)), leaving the remand order in effect for the duration, and providing ample time for this Court to complete review of the order, had the parties sought *certiorari*.

Second, Petitioners have not shown there is a reasonable expectation that they will be subject to the "same action" again. Their argument on this prong is

difficult to decipher. On the one hand, Petitioners appear to argue that because States are subject to various EPA regulations under several different statutes, Petitioner States face the repeated risk that EPA will impose regulations for which the Agency "lack[s]…authority." Pet. at 22. That is, Petitioners claim the "action" capable of repetition is EPA adoption of a rule that is unlawful in some respect. But the "action" capable of repetition must be the same action that Petitioners also claim will evade review—*i.e.*, a court order remanding a rule without vacatur. *Id.* at 21. Petitioners cannot satisfy different exception criteria using different actions. Moreover, even if Petitioners' generalized concern about future EPA rules could satisfy the "repeatability" criterion, Petitioners cannot credibly argue that a hypothetical erroneous future EPA rule would be "capable of evading review" given the robust judicial review provisions in the Clean Air Act and elsewhere. *See, e.g.,* 42 U.S.C. § 7607.

If, however, Petitioners mean that they have a reasonable expectation that they will be subject to future remand orders that leave in place future rules determined to be defective in some way, their argument still fails. For one thing, Petitioners base their argument on their status as States who are subject to EPA rules (Pet. at 22), but Petitioners are not regulated directly by this Rule, which applies to coal- and oil-fired power plants, and therefore their status as States is irrelevant. Rather, by Petitioners' logic, any party subject to EPA regulation could equally be said to have a "reasonable expectation" of being subject to an order remanding a rule without vacatur. This is a very large universe of parties, but the mootness exception is designed to be narrow and applicable only in "'exceptional situations.'" *See Lewis*, 494 U.S. at 481 (quoting *Los*

Angeles v. Lyons, 461 U.S. 95, 109 (1983)). In Petitioners' expansive view, "virtually any matter of short duration would be reviewable," *Murphy*, 455 U.S. at 482, effectively reading out the second prong of the exception. The Remand Order is not one of the "exceptional situations" recognized by this Court.

IV. The Bright-Line Rule that Petitioners Advocate is Unworkable and Would Be Disruptive to Industry.

A. A Bright-Line Rule Requiring Vacatur Whenever An Agency Has Erred Would Produce Inequitable Outcomes.

In effect, Petitioners advocate a rule that would require a court to vacate agency action whenever the agency has erred. That one-size-fits-all approach ignores both the variety of administrative errors and the range of outcomes – from appropriate to disastrous – that vacatur can produce. It presumes that vacatur *always* will be the just remedy, without considering the particular, real world circumstances of the parties in interest, or the effect of vacatur on the regulated community, the public or public resources.

The most obvious example in which vacatur may be inappropriate – even when a rule is deeply flawed – is a case in which the court determines that a rule is not sufficiently stringent. This is precisely the scenario that played out in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *on petition for reh'g*, 550 F.3d 1176. In that case, the D.C. Circuit concluded that EPA's rule regulating the interstate transport of pollutants under the Clean Air Act was too lenient, and failed to assure the pollution

reductions required by law. *North Carolina*, 531 F.3d at 929 ("EPA's approach . . . is fundamentally flawed."). The court left the rule in place while EPA developed and promulgated a replacement rule, recognizing that even an inadequate rule was better than no rule at all. *North Carolina*, 550 F.3d at 1178-79. Petitioners' approach would eviscerate a reviewing court's discretion to adopt such a reasonable and appropriate remedy, notwithstanding the grave and unnecessary harm that would result.

In other cases, vacating a rule that is found to be defective in some measure could result in considerable harm to the very industry regulated by the Rule. *See, e.g.*, *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015) (remanding the Cross-State Air Pollution Rule without vacatur to avoid disrupting markets); *see also, Delaware Dep't of Natural Res. and Envtl. Control v. EPA*, 785 F.3d 1, 18-19 (D.C. Cir. 2015) (vacating portion of rule but inviting motions for alternative remedies if vacatur would "cause administrative or other difficulties").

Such is the case here. After *Michigan*, during remand proceedings in the D.C. Circuit, Industry Respondents presented a compelling case, supported by declarations, that vacating the Rule while EPA reconsidered its Finding in light of cost would impose real harm on the electric power industry.[12] In fact, virtually no electric power generators who had originally challenged the Rule asked that it be vacated while EPA reconsidered its determination that it is "appropriate" to regulate power plant emissions in

12. *See supra* note 5.

light of *Michigan*.[13] Among those who did not seek vacatur were FirstEnergy Generation Corporation, a very large power generator with approximately 17 gigawatts (17,000 megawatts) of capacity, and the Utility Air Regulatory Group, a trade association representing many large power generators.[14] Petitioner States and coal industry groups sought vacatur, but those entities are not members of the industry regulated by the Rule, and they offered no evidence to demonstrate that they would be harmed if the D.C. Circuit did not vacate the Rule during the four-month period necessary for EPA to complete the administrative process and issue the Supplemental Finding.

The record before the D.C. Circuit demonstrated that questions about the temporary status of the Rule, and about whether the Rule would be vacated on remand only to be reinstated when EPA made its Supplemental Finding (and if so, when), threatened the investment decisions that generators had made since 2012 with the understanding that virtually all coal- and oil-fired power plants would be required to comply with the Rule by April 15, 2016.[15] Generators make investment decisions based

13. *See supra* note 4.

14. *See* EPA's Response to Petitioners' Motions to Govern Future Proceedings, Document No. 1579186 at 1 n.2, Docket No. 12-1100 (D.C. Cir. *filed* Oct. 21, 2015) (listing the many petitioners who did not file motions to govern).

15. The Rule required compliance by April 15, 2015, but units could obtain a one-year extension if "necessary for the installation of controls." 42 U.S.C. § 7412(i)(3)(B); 77 Fed. Reg. at 9407. At this point, virtually all operators who intend to comply with the Rule have already complied. *See* SNL, *EPA Grants MATS Extensions to 5 Coal Plants Totaling over 2,300 MW* (Apr. 19, 2016).

on expectations of future prices, among other things. *See* Berg Declaration ¶¶ 8, 10-13. Pollution control costs factor into the costs that generators charge for their electricity, and thus influence to some degree expectations of future prices.[16] *See id.* ¶¶ 18-20.

With the Rule in place for more than four years, many investments have been made—by generators subject to the Rule, by generators not subject to the Rule, and by other industries—with the Rule in mind. *See* Berg Declaration ¶¶ 7-9, 18. Some generators have upgraded power plants with emission controls. Some generators have restructured their generation portfolios, retiring older, inefficient power plants and selling others to reduce exposure to the Rule. Companies have invested in natural gas generation, which is not covered by the Rule but which competes directly against coal-fired generation, or in forms of non-emitting generation such as solar, wind, and nuclear generation. Companies have invested in new transmission capacity to accommodate new power plants

16. In wholesale electricity markets, which cover approximately two-thirds of the country's electricity load, a regional transmission organization or independent system operator administers a competitive auction to establish wholesale prices for electricity. *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). Generators bid into the wholesale market the amount of electricity they will produce and the price they will charge for it, which typically is no more than the unit's marginal operating cost, including the cost of pollution control. The market operator accepts bids in the order of least cost until the electricity demand from utilities or other "load serving entities," who provide electricity to retail electricity consumers, is met. *See id*. at 768-69. Importantly, the market operates on the principle of the "single market clearing price:" the highest bid accepted establishes the market price that is paid to all generators whose bids are accepted. *See id.* at 769, 782.

and the retirement of existing plants. These plans are economically justified by the reasonable expectation that the Rule would remain in effect, and future electricity prices or capacity market payments would warrant the investments made in response to the Rule. *See id.*

Vacating the Rule would severely undermine the investments all generators—supporters and opponents of the Rule alike—have made with the expectation that the Rule would remain in place. Even a temporary disruption in the Rule would create a moving target that is disruptive to the industry. *See id.* ¶¶ 19-22.

On the other hand, vacating the Rule, even temporarily, would provide no benefit to Petitioner States or to any party in interest. With the Rule now in full effect, virtually all generators who intend to comply have made any substantial capital investments necessary to do so. *See* Staudt Declaration ¶¶ 3, 15; Berg Declaration ¶¶ 14-17. Vacating the Rule would not avoid those investments, and Petitioners do not suggest otherwise. Petitioners do not identify any benefit that they would reap from the temporary vacatur of the Rule.

In this circumstance, a bright-line rule mandating vacatur would not only inflict substantial harm on the regulated community, vacatur would provide no meaningful benefit. Petitioners' approach is fundamentally at odds with the long tradition of the courts to promote justice by exercising their equitable powers to craft fact-sensitive remedies. *See, e.g.*, *Weinberger*, 456 U.S. at 313, 320 (acknowledging courts' equitable powers); *Winter*, 555 U.S. at 32 (same); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944) (same). Petitioners' rule would capture

all agency rulemaking errors, whipsawing the regulated community and squandering governmental resources by forcing unnecessary and redundant rulemaking processes.

Perhaps recognizing the severe consequences of the rule they advocate, Petitioners suggest that their mandatory vacatur rule might only apply where "the agency lacked authority to promulgate the rule in the first place." *See* Pet. at 19-20. As noted above, this Court has abjured such an artificial distinction. An agency never has "authority" to act in a way or to promulgate a rule that is unlawful in any respect. *See City of Arlington*, 133 S. Ct. at 1870 (rejecting the "mental acrobatics" necessary to distinguish between whether an agency "exceed[ed] the scope of its authority" or "exceed[ed] authorized application of authority that [the agency] unquestionably has"). Petitioners' mandatory vacatur rule would apply to all administrative errors and should be rejected.

B. The *Allied-Signal* Test is Far Superior to the Bright-Line Rule Offered by Petitioners.

Unlike Petitioners' approach, the D.C. Circuit's *Allied-Signal* factors work with – not against – the traditional equitable powers of the court. The first factor considers the nature of the administrative error, distinguishing cases in which an agency might be able to correct its error and rehabilitate its rule, and cases in which an agency could not. In considering the question of remedy, the D.C. Circuit evaluates whether an agency error is correctable and the seriousness of its deficiency. *See, e.g.*, *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1139 (D.C. Cir. 2013); *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1374 (D.C. Cir. 2007); *Allied-Signal*, 988 F.2d at 150-

51. The first *Allied-Signal* factor recognizes that it may make little sense to vacate a rule temporarily when it is likely to be reinstated after the agency addresses its error.

Even when an error is correctable, *Allied-Signal* does not automatically require the court to leave a flawed rule in place. Instead, the second *Allied-Signal* factor considers the "disruptive consequences" that would result from vacating a rule, only to have it subsequently reinstated after the administrative error is corrected. *Allied-Signal*, 988 F.2d at 150-51. This factor takes into account harm to the regulated community and to the public. The inquiry necessarily involves consideration of real-world facts as they exist at the time of the remedy decision. In some cases, leaving a legally flawed rule in place until the error is corrected will avoid considerable harm. In other circumstances, even correctable errors might warrant vacating a rule. However, under the *Allied-Signal* test, the D.C. Circuit can take full account of actual consequences of the remedy it imposes, rather than reflexively apply a rule that could leave interested parties and the public worse off.

The *Allied-Signal* test involves the sort of discretionary, fact-bound inquiry that this Court ordinarily leaves to the lower courts. The error identified by this Court was eminently correctable, and has in fact been corrected. The record before the D.C. Circuit was replete with documentation of harm that even temporary vacatur would inflict on the electric power industry, the respondent state and local governments and the public health. The D.C. Circuit correctly applied its long-standing *Allied-Signal* test to the facts before it, and issued the Remand Order. The Court should decline to review the D.C. Circuit's

determination, after thorough briefing and argument, that the circumstances presented by the Rule and this Court's decision in *Michigan* warrant remand without vacatur.

CONCLUSION

The Petition should be denied.

Dated: May 6, 2016 Respectfully submitted,

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