No. _____

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

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Neil D. Gordon
Assistant Attorney General
Environment, Natural
Resources, and Agriculture
Division

Attorneys for Petitioners

[additional counsel listed inside]

QUESTION PRESENTED

In *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015), this Court held that the Clean Air Act required EPA to consider costs before it could impose regulations on power plants. On remand, the D.C. Circuit refused to vacate the regulations EPA has imposed on power plants, even though EPA has still not made the statutorily required determination that, after considering costs, it is "appropriate and necessary" to regulate power plants. 42 U.S.C. § 7412(n)(1). The question presented, on which the circuits have split, is:

When an agency promulgates a rule without any statutory authority, may a reviewing court leave the unlawful rule in place?

PARTIES TO THE PROCEEDING

Petitioners are the States of Michigan, Alabama, Alaska, Arizona, Arkansas (ex rel. Dustin McDaniel, Attorney General), Idaho, Iowa (Terry E. Branstad, Governor of the State of Iowa on behalf of the People of Iowa), Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming, and the Texas Commission on Environmental Quality, the Texas Public Utility Commission, and the Railroad Commission of Texas. Each petitioner was also a petitioner in the court of appeals, in court of appeals Nos. 12-1186, 12-1190, or 12-1196.

Respondents who were petitioners in the courts of appeals are (by court of appeals case number):

No. 12-1100: White Stallion Energy Center, LLC

No. 12-1101: National Mining Association

No. 12-1102: National Black Chamber of Commerce and Institute for Liberty

No. 12-1147: Utility Air Regulatory Group

No. 12-1170: Eco Power Solutions (USA) Corporation (voluntarily dismissed on December 6, 2012)

No. 12-1172: Midwest Ozone Group

No. 12-1173: American Public Power Association

No. 12-1174: Julander Energy Company

No. 12-1175: Peabody Energy Corporation

No. 12-1176: Deseret Power Electric Cooperative

No. 12-1177: Sunflower Electric Power Corporation

No. 12-1178: Tri-State Generation and Transmission Association, Inc.

No. 12-1180: Tenaska Trailblazer Partners, LLC

No. 12-1181: ARIPPA

No. 12-1182: West Virginia Chamber of Commerce Incorporated; Georgia Association of Manufacturers, Inc.; Indiana Chamber of Commerce, Inc.; Indiana Coal Council, Inc.; Kentucky Chamber of Commerce, Inc.; Kentucky Coal Association, Inc.; North Carolina Chamber; Ohio Chamber of Commerce; Pennsylvania Coal Association; South Carolina Chamber of Commerce; The Virginia Chamber of Commerce; The Virginia Coal Association, Incorporated; West Virginia Coal Association, Inc.; and Wisconsin Industrial Energy Group, Inc.

No. 12-1183: United Mine Workers of America

No. 12-1184: Power4Georgians, LLC

No. 12-1185: State of Indiana

No. 12-1186: The Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas

No. 12-1187: Oak Grove Management Company LLC

No. 12-1188: Gulf Coast Lignite Coalition

No. 12-1189: Puerto Rico Electric Power Authority

No. 12-1190: State of Indiana

No. 12-1191: Chase Power Development, LLC

No. 12-1192: FirstEnergy Generation Corp.

No. 12-1193: Edgecombe Genco, LLC; Spruance Genco, LLC

No. 12-1194: Chesapeake Climate Action Network, Conservation Law Foundation, Environmental Integrity Project, and Sierra Club

No. 12-1195: Wolverine Power Supply Cooperative, Inc.

No. 12-1196: States of Florida and Indiana, Commonwealths of Pennsylvania and Virginia.

Respondents who were respondents in the courts of appeals are: the Environmental Protection Agency (the respondent in all of the cases that were consolidated below), and Lisa P. Jackson, Administrator, EPA (who was named as a respondent in Nos. 12-1174, 12-1189, and 12-1191).

Respondents who were intervenors in support of the courts of appeals respondents are:

No. 12-1100: The Commonwealth of Massachusetts, the States of Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Rhode Island, and Vermont, the District of Columbia, the City of New York, the American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, Natural Resources Council of Maine, Natural Resources Defense Council, Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, Waterkeeper Alliance, Calpine Corporation, Exelon Corporation, Public Service Enterprise Group, Inc., the States of California, Minnesota and Oregon, the County of Erie in the State of New York, the City of Baltimore in the State of Maryland, the City of Chicago in the State of Illinois, and the National Association for the Advancement of Colored People

No. 12-1147: The State of North Carolina, National Grid Generation LLC

No. 12-1170: Utility Air Regulatory Group and Oak Grove Management Company LLC (both also in Nos. 12-1174, and 12-1194)

No. 12-1174: White Stallion Energy Center, LLC; Deseret Power Electric Cooperative; Sunflower Electric Power Corporation; Tri-State Generation and Transmission Association, Inc.; Tenaska Trailblazer Partners, LLC; Power4Georgians, LLC; Peabody Energy Corporation (also in No. 1194), National Mining Association (also in No. 1194)

No. 12-1194: Eco Power Solutions (USA) Corporation, National Black Chamber of Commerce, and Institute for Liberty, Sunflower Electric Power Corporation, Gulf Coast Lignite Coalition, Lignite Energy Council, White Stallion Energy Center, LLC, Chase Power Development, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the D.C. Circuit (App. 1a–3a) is unreported.

JURISDICTION

The order of the court of appeals was entered on December 15, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY INVOLVED

The relevant provisions of the Administrative Procedure Act and of the Clean Air Act are set forth in an appendix to this petition. App., *infra*, 4a (5 U.S.C. § 706), 5a–6a (42 U.S.C. § 7412(n)(1)), & 6a–10a (42 U.S.C. § 7607(d)(1) & (d)(9)).

INTRODUCTION

It is a foundational principle of our constitutional system that the federal government is "one of enumerated powers." *McCulloch* v. *Maryland*, 4 Wheat. 316, 405 (1819). That limitation extends to agencies too. Just as the federal government has only the authority granted it in the Constitution, so too federal agencies have only the authority granted them by Congress. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

So what happens when a federal agency promulgates a rule without first receiving authority from Congress? The answer should be clear: agency action, taken without any authority, cannot be left in place to have the effect of binding law. Instead, the agency itself, to say nothing of the reviewing courts, should recognize that the rule must be vacated.

But here, EPA refused to retract and the D.C. Circuit refused to vacate EPA's regulation, even after this Court held that EPA had overstepped its authority. In *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015), this Court held that EPA had "strayed far beyond" any reasonable interpretation of the Clean Air Act and that "[EPA] must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." *Id.* at 2707, 2711. Despite the facts that both Congress and this Court have required EPA to consider costs *before* it may impose any regulation on power plants (including the Mercury and Air Toxics Standards Rule), and that EPA has not completed this step, the Rule remains in place.

The petition warrants this Court's review for a number of reasons. For one, the D.C. Circuit's decision conflicts with this Court's decision in *Michigan* v. *EPA* and effectively thwarts it: this Court held that EPA must consider costs before it can regulate, yet EPA continues to regulate even though it still has not considered costs. For another, it conflicts with decisions of two other circuits—the Eighth and the Fifth—that have vacated agency actions taken in excess of statutory authority.

For yet another, the issue presented—whether a court must vacate an unauthorized agency action—is an issue of exceptional importance. It involves the interpretation of two major federal statutes, specifically the judicial-review provisions of the Administrative Procedure Act (which the State petitioners believe governs and mandates vacating the regulation) and judicial-review provisions of the Clean Air Act (which EPA believes governs and allows courts to leave unauthorized agency actions in place). It involves basic questions about constitutional limitations on agency authority. And it involves a question of administrative law that arises far more frequently in the D.C. Circuit than it does in other circuits, because the D.C. Circuit has exclusive jurisdiction over many agency actions, including national rules and regulations promulgated under at least six different statutes.

Finally, this is a case of national importance, not just because it involves 39 States, but because EPA, an agency charged with administering (by its own count) 30 federal laws, believes that its lack of authority does not bar it from imposing regulations on the Nation. This Court should grant review and reverse.

STATEMENT OF THE CASE

In the Clean Air Act, Congress established a regulatory program (the National Emissions Standards for Hazardous Air Pollutants Program) to control "hazardous air pollutants" from stationary sources. *Michigan* v. *EPA*, 135 S. Ct. at 2704. Congress itself decided that "major sources" (those that emit certain quantities of one or more pollutants) must be regulated, and that "area sources" must be regulated if they present a threat of adverse effects to human health or the environment warranting regulation. *Id.* at 2705; 42 U.S.C. § 7412(a)(1)–(2), (c)(1)–(3).

Congress created a different, "unique" procedure for determining whether to apply this hazardous-air-pollution program to power plants. *Michigan* v. *EPA*, 135 S. Ct. at 2705. Under § 7412(n)(1), it required EPA to make a finding before it would have the authority to regulate: "[i]f the Agency 'finds . . . regulation is appropriate and necessary after considering the results of [a health-hazards] study,' it 'shall regulate [power plants] under [§ 7412].'" *Id.* (quoting § 7412(n)(1)(A)).

After initially finding in 2000 that regulation was appropriate and necessary, and then reversing that finding in 2005, EPA in 2012 made the finding that such regulation was appropriate and necessary. *Id.* at 2705; 77 Fed. Reg. 9304, 9308, 9311. In reaching this finding, "EPA concluded that 'costs should not be considered' when deciding whether power plants should be regulated under § 7412." *Id.* at 2705. The same day it issued this finding, EPA promulgated the Mercury and Air Toxics Rule to establish emissions standards for power plants. *Id.*

Twenty-three States and other petitioners sought review of the Mercury Rule in the D.C. Circuit challenging, along with aspects of the Rule itself, EPA's failure to consider costs when making the threshold decision whether it was appropriate to regulate at all. Sixteen States supported the Rule. The D.C. Circuit rejected all of the challenges to the Rule, including upholding EPA's threshold decision not to consider costs. *Id.* at 2706; *White Stallion Energy Ctr., LLC* v. *EPA*, 748 F.3d 1222, 1229 (D.C. Cir. 2014).

In *Michigan* v. *EPA*, this Court reversed the D.C. Circuit's decision on the costs issue. At the outset, this Court recognized that an agency's actions must " 'be within the scope of its lawful authority.' " *Id.* (quoting *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 374 (1998)). The Court explained that even under the "deferential standard" set out in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), " 'agencies must operate within the bounds of reasonable interpretation.' " *Id.* at 2707 (quoting *Utility Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2442 (2014)). This Court concluded that EPA exceeded its lawful authority: "EPA strayed far beyond those bounds when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants." *Id.* The Court held that EPA "must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary." *Id.* at 2711. This Court then "reverse[d] the judgment of the Court of Appeals for the D.C. Circuit and remand[ed] the cases for further proceedings consistent with this opinion." *Id.* at 2712.

The D.C. Circuit did not immediately vacate the Rule. Instead, it called for briefing on whether it should vacate the Rule or remand without vacatur. After briefing and oral argument, the D.C. Circuit issued an order leaving the Rule in place. Its explanation for its decision consisted of the following:

> [I]t is ORDERED that the proceeding be remanded to EPA without vacatur of the Mercury and Air Toxics Standards final rule. See *Allied-Signal, Inc.* v. *Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). In so doing, we note that EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016. [App. 2a–3a.]

The 20 undersigned States accordingly asked the Chief Justice to stay application of the unauthorized Mercury Rule pending the filing of this petition. After calling for a response, the Chief Justice denied the stay application.

In its response to the stay application, EPA never disputed that it lacked authority under § 7412(n)(1) to regulate power plants. EPA Mem. in Opp. 1–26. Instead, EPA argued that the Clean Air Act does not *require* courts to vacate unauthorized rules, *id.* at 9–10, that the Rule should be left in place because of "the Rule's significant contributions to protecting public health and the environment," *id.* at 3, and that a stay would have little practical effect because EPA will in the near future make a § 7412(n)(1) finding that does take into account the cost of the Rule, *id.* at 23.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's remand decision conflicts with *Michigan* v. *EPA*.

The central point of this Court's decision in *Michigan* v. *EPA* was that EPA exceeded its statutory authority by deciding it was appropriate to regulate power plants without considering the costs of such regulation:

> [A]gencies must operate within the bounds of reasonable interpretation. EPA strayed far beyond those bounds when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants. [135 S. Ct. at 2707 (citations and quotation marks omitted).]

This holding—that EPA went far beyond the bounds of the statute authorizing it to regulate power plants—necessarily means that EPA had no authority to impose the Mercury Rule as a regulation on power plants. "It is axiomatic," after all, "that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). As the D.C. Circuit itself previously explained (in an ironically named case), "EPA is a federal agency—a creature of statute. It has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress. . . . Thus, if there is no statute conferring authority, a federal agency has none." *Michigan* v. *EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

In the remand proceedings that followed this Court's decision and in the stay application, the State petitioners have filed four briefs, and each of those briefs has explained that EPA lacked authority to regulate power plants because it had not yet completed a valid "appropriate and necessary" finding under § 7412(n)(1). But in the three responsive briefs EPA has filed so far, EPA has yet to dispute this serious accusation that it is acting without any authority; it has yet to argue that it actually *has* authority to regulate power plants. It does not even deny that its decision to leave the unauthorized regulation in place thwarts this Court's decision in *Michigan* v. *EPA*. See EPA Mem. in Opp. 1–26.

Certiorari is therefore warranted because the D.C. Circuit's refusal to vacate the Rule conflicts with this Court's decision and with its order for the D.C. Circuit on remand to act in a manner "consistent with this opinion." *Michigan* v. *EPA*, 135 S. Ct. at 2712; see S. Ct. Rule 10(c); see also, e.g., *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (granting certiorari "to resolve an apparent conflict with this Court's precedents"); *United States* v. *Doe*, 465 U.S. 605, 610 (1984) (granting certiorari "to resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's holding in *Fisher*").

II. The D.C. Circuit's decision conflicts with the decisions of other circuits that have vacated agency rules imposed without authority.

Other circuits have recognized that when EPA exceeds its authority, its actions cannot be left in place.

In *Iowa League of Cities* v. *EPA*, 711 F.3d 844 (8th Cir. 2013), the League challenged agency actions that imposed new regulatory requirements on water treatment processes at municipally owned sewer systems. *Id.* at 854, 855. Relying on the Administrative Procedure Act, specifically 5 U.S.C. § 706(2)(C), "the League ask[ed] [the Eighth Circuit] to find not only that the EPA's actions are procedurally invalid [for failing to follow notice-and-comment requirements] but also to go one step further and set aside the rules as imposing regulatory requirements that *surpass the EPA's statutory authority*." *Id.* at 855 (emphasis added).

After concluding that EPA's letters amounted to the promulgation of a regulation "because they have a binding effect on regulated entities," *id.* at 863, the Eighth Circuit concluded that the APA required vacating particular rules not just on procedural grounds, *id.* at 875 (vacating a rule about bacteria mixing zones because EPA "bypassed notice and comment procedures") and at 876 (vacating a rule about "blending peak weather flows" because EPA failed to follow notice and comment), but also because one of the rules exceeded EPA's substantive authority. Setting the stage, the Eighth Circuit recounted the League's argument: the rules should be "set aside . . . [as] in excess of statutory jurisdiction, authority, . . . or short of statutory right" and the Eighth Circuit should "find that the EPA exceeded its statutory authority under the [Clean Water Act]." *Id.* at 876 (quoting 5 U.S.C. § 706(2)(C)). The Eighth Circuit concluded that "the blending rule clearly exceeds the EPA's statutory authority." *Id.* at 877. Based on this conclusion, the Eighth Circuit proceeded, without needing to cite § 706(2)(C) a second time, to the obvious conclusion:

"we vacate [the blending rule] as exceeding the EPA's statutory authority." *Id.* at 877, 878. The Eighth Circuit did not entertain any arguments about whether the unauthorized rule should be left in place because it would have beneficial effects. In the Eighth Circuit, then, agency actions taken in excess of statutory authority must be vacated.

The Fifth Circuit took the same approach in *American Forest & Paper Association* v. *EPA*, 137 F.3d 291 (5th Cir. 1998). In that case, the Association challenged an EPA final rule "as exceeding EPA's authority under the [Clean Water Act]." *Id.* at 294. EPA contended it could deny a state's proposed program for permitting the discharge of pollutants "based on a criterion—the protection of endangered species—that is not enumerated in [33 U.S.C. § 1342(b)]." *Id.* at 297. The Fifth Circuit rejected that conclusion: "Congress could have, but did not, grant EPA an analogous veto power to protect endangered species." *Id.* at 298. After discussing and rejecting several arguments EPA offered to suggest it did have authority, the Fifth Circuit vacated the rule. *Id.* at 299. The Fifth Circuit did not even see a need to cite any statute or case about judicial review for the basic proposition that unauthorized agency actions must be vacated. *Id.* at 294 ("Because we agree that EPA lacked statutory authority, we grant the petition for review and vacate and remand the portion of the rule that imposes the consultation requirement . . . .").

If either the Eighth Circuit or the Fifth Circuit had been able to review the Mercury Rule, each would have vacated the Rule because it exceeded EPA's statutory authority.

EPA may attempt to distinguish these cases by pointing out that they do not involve the Clean Air Act. But these cases establish that a circuit split exists on the basic question of whether a court may leave an unauthorized agency action in place. And it is hard to see how a circuit split could arise under the Clean Air Act when the D.C. Circuit has exclusive jurisdiction under many of the Clean Air Act's provisions. 42 U.S.C. § 7607(b)(1).

III. The petition raises an important question of administrative law and of the interpretation of two federal statutes—the Administrative Procedure Act and the Clean Air Act.

In addition to its conflict with this Court's precedent and with the decisions of other circuits, the D.C. Circuit's decision raises important questions of federal law.

It is a fundamental principle of administrative law that agency actions taken without statutory authority must be vacated. This principle is embodied in the central provision of the Administrative Procedure Act: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory . . . authority." 5 U.S.C. § 706. In fact, this Court, specifically citing this language from § 706, has reiterated that "[i]n *all cases* agency action must be set aside . . . if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971) (emphasis added), abrogated on other grounds by *Califano* v. *Sanders*, 430 U.S. 99 (1977); see also *FCC* v. *NextWave Personal*

Commc'ns, *Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act *requires* federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A).") (emphasis added). On remand, then, the only course of action available to the D.C. Circuit that was consistent with this Court's mandate was to vacate the Rule.

During remand proceedings and also when opposing the stay application in this Court, EPA has argued that the APA's mandatory "shall" does not apply. Instead, EPA contends that a provision of the Clean Air Act that addresses judicial review, namely 42 U.S.C. § 7607(d), replaces that command with permissive language. § 7607(d)(9) ("the court may reverse such action found to be . . . in excess of statutory jurisdiction [or] authority").

At the outset, it is unclear how an agency that had no authority to regulate under the terms of the Clean Air Act itself—which requires EPA to complete a valid "appropriate and necessary" finding before it can regulate power plants—could use that statute as a shield to leave in place its rule, where the rule is not authorized by the statute in the first place.

But even on EPA's own terms, § 7607(d) does not apply to the issue under review here—EPA's "appropriate" finding. Section 7607(d)(1) applies to "emission standard[s]" promulgated under § 7412(d). The decision whether it is "appropriate" to regulate is not an emission standard, as both EPA and its allies correctly conceded in their D.C. Circuit briefing. State et al. Respondents C.A. Resp. 4 n.2 (arguing that "the emissions standards themselves" are not at issue on

remand); EPA C.A. Resp. re Mot. to Govern 5–7 (arguing that this Court's decision was limited to the "appropriate" finding and did not evaluate the technical substance of the emissions standards). A valid "appropriate" finding—a prerequisite EPA must satisfy *before* it is authorized to impose any emissions standards on power plants—is therefore not covered by § 7607(d).

Even if § 7607(d)(9) did apply, consider what accepting EPA's argument would mean. The "may reverse" standard in § 7607(d)(9) applies not only to whether a decision is arbitrary and capricious. It also applies to agency actions that are contrary to the Constitution. § 7607(d)(9)(B) ("contrary to constitutional right, power, privilege, or immunity"). If EPA is correct about what "may" means, then courts have the discretion to leave in place even unconstitutional agency actions—say, for example, an agency deciding whom to regulate based on the person's race or religion.

That cannot have been Congress's intent. To the contrary, § 7607(d)(9)'s use of the word "may" does not eliminate a court's obligation to follow the Constitution or other laws. In this context, where the statute is conferring on courts the power to review agency actions for the purpose of protecting the public, the word "may" means "shall." See, e.g., *United States* v. *Thoman*, 156 U.S. 353, 359 (1895) ("It is familiar doctrine that, where a statute confers a power to be exercised for the benefit of the public or of a private person, the word 'may' is often treated as imposing a duty, rather than conferring a discretion."); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 n.9 (1995)

(explaining that " 'shall' and 'may' are 'frequently treated as synonyms' and their meaning depends on context" and that " '[c]ourts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa' "). The United States has made this argument itself a number of times. See, e.g., *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2259 (2013) ("[T]he United States expressed the view that the phrase 'may require only' in § 1973gg–7(b)(1) means that the EAC '*shall require* information that's necessary, but may only require that information.' "); *Smithmeyer* v. *United States*, 147 U.S. 342, 357 (1893). As applied here, the Court therefore *must* reverse to protect the public from EPA's action taken in excess of its authority. And reading "may reverse" as mandatory would also be consistent with the D.C. Circuit's observation in other cases that " 'the standard we apply is essentially the same under either Act,' the CAA or the APA." *Delaware Dep't of Natural Res. & Envtl. Control* v. *EPA*, 785 F.3d 1, 11 (D.C. Cir. 2015); see also *Davis Cnty. Solid Waste Mgmt.* v. *EPA*, 101 F.3d 1395, 1401 (D.C. Cir. 1996) ("We must vacate the 1995 standards if they are 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.' " (citing both 42 U.S.C. § 7607(d)(9)(C) and 5 U.S.C. § 706(2)(C))), opinion amended on reh'g on other grounds, 108 F.3d 1454, 1460 (D.C. Cir. 1997).

Indeed, even if Congress were to try to place an agency entirely outside the scope of judicial review (outside both § 706 and § 7607), this Court has previously recognized (and the D.C. Circuit has acknowledged) that courts must always determine whether an agency was acting outside the scope of its statutory

authority: " 'Even where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions *in excess of jurisdiction*." *Aid Ass'n for Lutherans* v. *U.S. Postal Serv.*, 321 F.3d 1166, 1172–73 (D.C. Cir. 2003) (emphasis added) (citing *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)). And an agency action taken in excess of its jurisdiction must be vacated.

In any event, there is another command in play beyond the APA's mandate. As this Court explained, Congress's expressed intent in the Clean Air Act is that EPA may not regulate power plants unless it first considers the cost of doing so. *Michigan* v. *EPA*, 135 S. Ct. at 2711 ("The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary."). Allowing the rule to remain in effect would be allowing EPA to regulate power plants without having first considered costs, and that directly contradicts Congress's express intent. "[T]he *court*, as well as the agency, *must* give effect to the unambiguously expressed intent of Congress," *Chevron*, *U.S.A.*, *Inc.* v. *Nat. Res. Def. Council*, *Inc.*, 467 U.S. 837, 842–43 (1984) (emphasis added), and that means vacating the Rule.

Certiorari is warranted to resolve these questions about the interpretation of the APA and the Clean Air Act.

IV. Whether the D.C. Circuit may leave an unauthorized agency action in place is an issue of exceptional importance because of its jurisdiction over many agency actions.

Because of the outsized role the D.C. Circuit plays in administrative law, its conclusion that an unauthorized agency action may be left in place warrants review now, even apart from the circuit split already discussed.

The D.C. Circuit has exclusive jurisdiction over many agency actions. To give just a few examples, it has exclusive jurisdiction over the following:

- Actions of the EPA Administrator in promulgating standards, requirements, regulations, or rules under numerous provisions of the Clean Air Act, 42 U.S.C. § 7607(b)(1);

- Regulations promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(a);

- Appeals from decisions and orders of the Federal Communications Commission in 10 categories of cases, 47 U.S.C. § 402(b);

- Actions of the Secretary of the Interior promulgating national rules or regulations pursuant to certain provisions of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1276(a)(1);

- Actions of the EPA Administrator in promulgating regulations or requirements under the

Solid Waste Disposal Act, 42 U.S.C. § 6976(a)(1).

In short, the D.C. Circuit's belief that unauthorized agency actions may be left in place will apply to regulations not just by EPA, but also by the Secretary of the Interior, the Federal Communications Commission, and numerous other federal agencies. E.g., 30 U.S.C. § 816(a)(1) (giving the D.C. Circuit concurrent jurisdiction over orders of the Federal Mine Safety and Health Review Commission); 15 U.S.C. § 57a(e)(5)(B) (giving the D.C. Circuit concurrent jurisdiction over Federal Trade Commission rules defining deceptive acts or practices).

Here, the D.C. Circuit decided to remand without vacating, apparently because it expects EPA "to issue a final finding under 42 U.S.C. § 7412(n)(1)(A)"—i.e., a finding that regulation is appropriate and necessary—"by April 15, 2016." App. 3a. So it left the unlawful, unauthorized Rule in place indefinitely, based on the hope that EPA will at some point in the future—hopefully soon—complete the finding with a consideration of costs.

The problem with this approach is that a proper appropriate-to-regulate finding is a prerequisite to imposing regulation, and EPA has never fulfilled that precondition. When it imposed the Mercury Rule in 2012, it relied on a finding that intentionally disregarded the costs. *Michigan* v. *EPA*, 135 S. Ct. at 2705 ("EPA concluded that 'costs should not be considered' when deciding whether power plants should be regulated under § 7412."). That means the Rule has been in place for over four years now, even though EPA never had authority to impose it in the first place.

It is no answer to this lack of authority to say that EPA "aims" and "intends" (as EPA put it in its remand briefing) to comply with the Clean Air Act at some point in the future by making a finding that considers costs. What other governmental entity could, in the absence of authority, impose a rule that binds private citizens? Imagine if a court did what EPA did. Imagine if a federal court issued a permanent injunction when the court lacked jurisdiction. No reviewing court would leave that ultra vires injunction in place on the theory that the lower court might acquire jurisdiction at some point in the future.

That situation directly parallels this one: like federal courts, federal agencies have limited authority. *Bowen*, 488 U.S. at 208. And just as courts cannot issue permanent injunctions without first having authority, here EPA lacks authority—still, to this day—to regulate power plants because it has not yet fulfilled the substantive precondition imposed by Congress of considering costs.

The only other reasoning suggested by the D.C. Circuit's order is its citation to its own precedent, *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150 (D.C. Cir. 1993). In *Allied-Signal*, the agency failed to provide "a reasoned explanation" for its rule, and the D.C. Circuit stated that "[a]n inadequately supported rule . . . need not necessarily be vacated." *Id.* The court then set out a two-part test: "The decision whether to vacate depends on [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." *Id.* at 150–51. The D.C.

Circuit has applied this test for years in instances where an agency has failed to adequately explain the basis for its administrative action. E.g., *Milk Train, Inc.* v. *Veneman*, 310 F.3d 747, 755 (D.C. Cir. 2002) ("[A]s the administrative record now stands, the court is unable to determine whether the Secretary's interpretation of the regulations was inconsistent with the plain language of the 2000 Appropriations Act, and as such, contrary to law."); *Heartland Reg'l Med. Ctr.* v. *Sibelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."); *Black Oak Energy, LLC* v. *FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (remanding without vacatur where there was a "failure of explanation").

Perhaps that approach has merit in instances where the agency had authority for its action but failed to adequately explain its reasoning, thereby making it difficult for a court to determine whether the action was arbitrary and capricious. Compare *Checkosky* v. *SEC*, 23 F.3d 452, 463 (D.C. Cir. 1994) (opinion of Silberman, J.) ("Since 'courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review,' reviewing courts will often and quite properly pause before exercising full judicial review and remand to the agency for a more complete explanation of a troubling aspect of the agency's decision.") (citation omitted), with *id.* at 491 (opinion of Randolph, J.) ("Once a reviewing court determines that the agency has not adequately explained its decision, the [APA] requires the court—in the absence of any contrary statute—to vacate the agency's action.").

But leaving an agency rule in place cannot be justified when the agency has fully explained its reasoning and had that reasoning rejected by this Court in a decision that establishes the agency lacked authority to promulgate the rule in the first place. Indeed, applying the D.C. Circuit's *Allied-Signal* test *after* a court has found a rule to be unauthorized essentially takes the stay analysis that would apply *before* judicial review and inverts it—it ignores the factors relating to the likelihood of success (even though the regulation has already been found to be unlawful) and focuses on the balance of equities of leaving the unlawful Rule in place (even though the party that acted unlawfully—EPA—should be the one bearing any risk of error). Even worse, its weighing of the equities is focused on only the "interim change," *Allied-Signal*, 988 F.2d at 150–51, and therefore ignores the most significant equitable fact in this case—that *billions* of dollars have already been spent in an effort to meet the unauthorized Rule's future compliance deadlines.

V. Even if EPA eventually acquires authority by completing a valid finding, this issue will not be moot because it is capable of repetition yet evading review.

EPA is likely to contend that this case will become moot if it completes a valid finding under § 7412(n)(1) that it is appropriate and necessary, considering costs, to regulate power plants, and that this new finding will justify the Mercury Rule that has been in place since 2012. But this case will not be moot because it is a situation that is capable of repetition yet evading review.

The capable-of-repetition-yet-evading-review exception to the mootness doctrine arose in the context of administrative law. In fact, it arose in the context of a challenge to an agency action that would be in effect for only a short period (as here). *Weinstein* v. *Bradford*, 423 U.S. 147, 148–49 (1975) (explaining that the doctrine arose "because of the short duration of the Interstate Commerce Commission order challenged," which meant "it was virtually impossible to litigate the validity of the order prior to its expiration"); *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) (the first case to enunciate the exception). "A dispute falls into that [exception], and a case based on that dispute remains 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 subjected to the same action again.' " *Turner* v. *Rogers*, 131 S. Ct. 2507, 2515 (2011) (alterations in original) (quoting *Weinstein*, 423 U.S. at 149).

This situation meets both parts of the test. As to the first, the time period between when a lower court leaves an unauthorized regulation in place and when the agency is able correct its lack of authority will often be too short to be fully litigated prior to the correction. See *Turner*, 131 S. Ct. at 2515 (listing time periods up to two years as being sufficiently short to evade review). Here, for example, EPA says it will be able to correct its lack of authority in the four-month period from December 15, 2016 (when the D.C. Circuit decided on remand not to vacate the unauthorized Rule) and April 15, 2016 (when EPA expects to have completed a valid § 7412(n)(1)(A) finding). That four-

month duration is too short for review by this Court. This situation thus parallels the short-term administrative orders that gave rise to the doctrine in the first place. *See S. Pac. Terminal Co.*, 219 U.S. at 515.

The case satisfies the second part of the test as well, because there is a reasonable expectation that the same parties will be subject to the same action again. The 21 States that bring this petition are subject to all sorts of regulations imposed by EPA. EPA, by its own count, administers at least 30 federal statutes, including the Atomic Energy Act, the Clean Air Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Endangered Species Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the National Environmental Policy Act, the Nuclear Waste Policy Act, the Ocean Dumping Act, the Oil Pollution Act, the Pollution Prevention Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Shore Protection Act, and the Toxic Substances Act. EPA, *Laws and Executive Orders*, http://www.epa.gov/laws-regulations/laws-and-executive-orders.

The petitioning States are subject to regulations under a number of these laws. In light of EPA's position in this case—that its lack of authority to regulate poses no obstacle to its continued imposition of regulations—this type of unlawful agency action is capable of repetition. E.g., *Nat. Res. Def. Council, Inc.* v. *EPA*, 595 F. Supp. 1255, 1263 (S.D.N.Y. 1984) (recognizing that even "when an administrative agency withdraws an order"—unlike here—"while still maintaining that the legal position is justified"—as here—"repetition is likely and the claim should not be considered moot").

Indeed, there is even the possibility in this very case that EPA's promised § 7412(n)(1) finding will exceed its authority under the Clean Air Act (by relying on co-benefits from regulating pollutants that are not hazardous air pollutants and that are therefore outside the scope of § 7412's authorization to regulate emissions of certain enumerated hazardous air pollutants). In short, review of this important issue of agency authority is not moot.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

Neil D. Gordon
Assistant Attorney General
Environment, Natural
Resources, and Agriculture
Division

Attorneys for Petitioners

Dated: MARCH 2016

ADDITIONAL COUNSEL

Luther Strange
Attorney General
State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7445
Counsel for the State of Alabama

Craig W. Richards
Attorney General
State of Alaska
Steven E. Mulder
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501-1994
Counsel for the State of Alaska

Mark Brnovich
Attorney General
State of Arizona
John Lopez
Solicitor General
James T. Skardon
Assistant Attorney General
Environmental Enforcement Section
1275 West Washington
Phoenix, AZ 85007
(602) 542-8535
James.Skardon@azag.gov
Counsel for the State of Arizona

Leslie Rutledge
Attorney General
State of Arkansas
Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-5310
Counsel for the State of Arkansas, ex rel. Dustin McDaniel, Attorney General

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010
Counsel for the State of Idaho

Michael Bousselot
1007 East Grand Avenue
Des Moines, IA 50319
Michael.Bousselot@iowa.gov
Counsel for Terry E. Branstad, Governor of the State of Iowa on behalf of the People of Iowa

Derek Schmidt
Attorney General
State of Kansas
Jeffrey A. Chanay
Chief Deputy Attorney General
Office of the Attorney General of Kansas
120 SW 10th Avenue, 3rd Floor
Topeka, KS 66612-1597
(785) 368-8435
jeff.chanay@ag.js.gov
Counsel for the State of Kansas

Jack Conway
Attorney General
Commonwealth of Kentucky
700 Capital Avenue, Suite 188
Frankfort, KY 40601
Counsel for Jack Conway, Attorney General of Kentucky

Jim Hood
Attorney General
State of Mississippi
Harold E. Pizzetta III
Assistant Attorney General
Director, Civil Litigation Division
550 High Street, Suite 1100, P.O. Box 220
Jackson, MS 39205-0220
(601) 359-3816
hpizz@ago.state.ms.us
Counsel for the State of Mississippi

Chris Koster
Attorney General
State of Missouri
James R. Layton
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
James.Layton@ago.mo.gov
Counsel for the State of Missouri

Douglas J. Peterson
Attorney General
State of Nebraska
Dave Bydalek
Chief Deputy Attorney General
Justin D. Lavene
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
Justin.Lavene@nebraska.gov
Counsel for the State of Nebraska

Wayne Stenehjem
Attorney General
State of North Dakota
Margaret I. Olson
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
(701) 328-3640
maiolson@nd.gov
Counsel for the State of North Dakota

Michael DeWine
Attorney General
State of Ohio
30 E. Broad Street, 17th Floor
Columbus, OH 43215
Counsel for the State of Ohio

E. Scott Pruitt
Attorney General
State of Oklahoma
Patrick Wyrick
Solicitor General
P. Clayton Eubanks
Deputy Solicitor General
Office of the Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 522-8992
clayton.eubanks@oag.ok.gov
Patrick.wyrick@oag.ok.gov
Counsel for the State of Oklahoma

Alan Wilson
Attorney General
State of South Carolina
Robert D. Cook
Solicitor General
James Emory Smith, Jr.
Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Counsel for the State of South Carolina

Ken Paxton
Attorney General
State of Texas
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2012
Counsel for the State of Texas, Texas Commission on Environmental Quality, Texas Public Utility Commission, and Railroad Commission of Texas

Sean D. Reyes
Attorney General
State of Utah
350 North State Street, #230
Salt Lake City, UT 84114-2320
(801) 538-1191
Counsel for the State of Utah

Patrick Morrisey
Attorney General
State of West Virginia
State Capitol
Building 1, Room E-26
Charleston, WV 25305
(304) 558-2021
Counsel for the State of West Virginia

Peter K. Michael
Attorney General
State of Wyoming
Michael J. McGrady
Senior Assistant Attorney General
123 State Capitol
Cheyenne, WY 82002
Counsel for the State of Wyoming

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1100

September Term, 2015
EPA-77FR9304
Filed On: December 15, 2015

White Stallion Energy Center, LLC,
Petitioner
v.
Environmental Protection Agency,
Respondent

American Academy of Pediatrics, et al.,
Intervenors

Consolidated with 12-1101, 12-1102, 12-1147, 12-1172, 12-1173, 12-1174, 12-1175, 12-1176, 12-1177, 12-1178, 12-1180, 12-1181, 12-1182, 12-1183, 12-1184, 12-1185, 12-1186, 12-1187, 12-1188, 12-1189, 12-1190, 12-1191, 12-1192, 12-1193, 12-1194, 12-1195, 12-1196

BEFORE: Garland, Chief Judge; Rogers and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of the joint motion of Certain State and Industry petitioners to govern further proceedings, the motion of Tri-State Generation and Transmission Association Inc. to govern proceedings

on remand from the U.S. Supreme Court and supplement thereto, the joint motion of the State, Local Government, and Public Health respondent-intervenors for remand without vacatur, the motion of respondent EPA to govern future proceedings, the motion of Industry respondent-intervenors to govern future proceedings, the response of EPA to petitioners' motions to govern future proceedings, the response of Certain State and Industry petitioners to motions to govern further proceedings of respondent and respondent-intervenors, the response of Tri-State Generation and Transmission Association Inc. to motions to govern and the supplement thereto, the joint response of the State, Local Government, and Public Health respondent-intervenors to State and Certain Industry petitioners' motions to govern, the consolidated response of Industry respondent-intervenors to petitioners' motions to govern future proceedings, the response of the Utility Air Regulatory Group ("UARG") to federal respondent's motion to govern future proceedings, the joint reply brief of the State, Local Government, and Public Health respondent-intervenors, the reply brief of Certain State and Industry petitioners in support of their joint motion to govern further proceedings, the reply of Tri-State Generation and Transmission Association Inc. and the supplement thereto, the reply of EPA in support of its motion to govern future proceedings, the reply of Industry respondent-intervenors in support of their motion to govern future proceedings, and the oral arguments of counsel, it is

ORDERED that the proceeding be remanded to EPA without vacatur of the Mercury and Air Toxics Standards final rule. *See Allied-Signal, Inc.* v. *Nuclear Regulatory Commission*, 988 F.2d 146, 150-51

(D.C. Cir. 1993). In so doing, we note that EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016.

Pursuant to D.C. Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold the issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

1. 5 U.S.C. § 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 42 U.S.C. § 7412(n)(1) provides:

(n) Other provisions

(1) Electric utility steam generating units

(A) The Administrator shall perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by electric utility steam generating units of pollutants listed under subsection (b) of this section after imposition of the requirements of this chapter. The Administrator shall report the results of this study to the Congress within 3 years after November 15, 1990. The Administrator shall develop and describe in the Administrator's report to Congress alternative control strategies for emissions which may warrant regulation under this section. The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this subparagraph.

(B) The Administrator shall conduct, and transmit to the Congress not later than 4 years after November 15, 1990, a study of mercury emissions from electric utility steam

generating units, municipal waste combustion units, and other sources, including area sources. Such study shall consider the rate and mass of such emissions, the health and environmental effects of such emissions, technologies which are available to control such emissions, and the costs of such technologies.

(C) The National Institute of Environmental Health Sciences shall conduct, and transmit to the Congress not later than 3 years after November 15, 1990, a study to determine the threshold level of mercury exposure below which adverse human health effects are not expected to occur. Such study shall include a threshold for mercury concentrations in the tissue of fish which may be consumed (including consumption by sensitive populations) without adverse effects to public health.

3. 42 U.S.C.. § 7607 provides, in relevant part:

* * * * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance undersection 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard undersection 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3)of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated undersection 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel

vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

* * * * *

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

* * * * *