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No. 12-1100 (and consolidated cases)

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WHITE STALLION ENERGY CENTER, LLC, et al.

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

Respondents.

On remand from the United States Supreme Court

JOINT MOTION TO GOVERN FURTHER PROCEEDINGS FOR CERTAIN STATE AND INDUSTRY PETITIONERS

These motions address a simple question: after the Supreme Court has held that an agency exceeded its statutory authority when promulgating a rule, may this Court on remand allow the rule to remain in effect? When a rule has a deficiency this serious, the answer is equally simple: no. An agency's rule cannot continue to have the force of law, imposing binding obligations on private citizens, when it has been declared unlawful and ultra vires.

It is a basic principle of the *Chevron* doctrine that when an agency defies plain statutory text, it acts without authority. *E.g.*, *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005) (" '*Chevron* is principally concerned with whether an agency has authority to act under a statute.' "). Here, the Supreme Court ruled that EPA exceeded its authority under 42 U.S.C. § 7412(n)(1)(A) when it promulgated the Mercury and Air Toxics Standards (the "MATS Rule" or "Rule"): "We hold that EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants." *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015); *see also id.* at 2713 (Thomas, J., concurring) ("[W]e hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents . . . .").

EPA acted without authority by finding that it was "appropriate" under § 7412(n)(1)(A) to regulate power plants without first considering the costs and by then promulgating the Rule based on that unreasonable finding. EPA thus failed to answer the threshold question Congress directed it to consider *before* regulating the emission of hazardous air pollutants from power plants: Is such regulation worth it—that is, are the benefits of regulation worth the costs?

EPA's refusal to satisfy that prerequisite before regulating power plants under § 7412 means that EPA acted without authority, and this serious deficiency renders the entire Rule is invalid. Power plants and their customers should not have to bear the ongoing expense of complying with a regulation that has no legal foundation. Instead of indefinitely staying the Supreme Court's decision—which is what a remand without vacatur would do—this Court must vacate the illegal Rule.

BACKGROUND

I. Statutory and Regulatory Background

The Clean Air Act establishes a program to limit the emission of hazardous air pollutants from stationary sources. For sources other than electric utility steam generating units (power plants), Congress required that EPA promulgate emission standards for "major sources" (such as refineries and cement plants) based on the quantity of hazardous air pollutants they emit. § 7412(c)(1)–(2). Congress also required EPA to regulate smaller "area sources" that "present[] a threat of adverse effects to human health of the environment . . . warranting regulation." § 7412(c)(3).

Congress adopted a different approach for power plants. *Michigan*, 135 S. Ct. at 2707. In the 1990 Amendments to the Clean Air Act, Congress added a separate program to control power plant emissions that contribute to acid rain. §§ 7651–7651o. Those requirements were expected to have the ancillary effect of reducing emissions of hazardous air pollutants. *Michigan*, 135 S. Ct. at 2705. Congress therefore required EPA to conduct a study of the public health hazards "reasonably anticipated to occur" as a result of power plants' emission of hazardous air pollutants "after imposition of the requirements" of the Act. § 7412(n)(1)(A). Congress also provided that EPA may regulate power plants under § 7412, but only "if the Administrator finds such regulation is appropriate and necessary after considering the results of the study." *Id.* In other words, before EPA would have the authority to establish emission standards and to require power plants to incur substantial costs (here, $9.6 *billion* each year) to limit their remaining emissions of hazardous air pollutants, Congress required EPA to first decide whether such regulation is both "appropriate" and "necessary." *Michigan*, 135 S. Ct. at 2706.

EPA refused to consider costs when deciding whether regulating power plants is appropriate. Although EPA calculated the costs and benefits of the MATS Rule to comply with an executive order, EPA concluded that " 'costs should not be considered' " when deciding whether power plants should be regulated under § 7412. *Id.* at 2705 (quoting 77 Fed. Reg. 9304, 9326 (Feb. 16, 2012)).

Pursuant to the executive order, EPA estimated annual compliance costs of $9.6 billion. 77 Fed. Reg. at 9306. EPA identified certain health benefits from reducing hazardous-air-pollutant emissions that it could quantify (such as IQ-related effects), but admitted that it could not quantify other health effects (such as genetic, autoimmune, or cardiovascular effects) "because the literature is either contradictory or incomplete." Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, EPA-HQ-OAR-2009-0234-20131, at 4-65, Table 4-8. For those health benefits that it was able to quantify, EPA calculated benefits of only $4 to $6 million per year. 77 Fed. Reg. at 9306. As the Supreme Court noted, "[t]he costs to power plants were thus between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants." *Michigan*, 135 S. Ct. at 2706.

Despite this gross imbalance of costs and benefits, EPA refused to consider costs when making the initial decision whether to regulate. Instead, the agency found regulation was "appropriate" because power plants' remaining emissions of hazardous air pollutants pose hazards to public health and the environment and because controls are available to address those hazards. 77 Fed. Reg. at 9363. EPA also determined regulation was "necessary" because the Act's other requirements did not eliminate those hazards. *Id.*

II. Decisions of the D.C. Circuit and the Supreme Court

Numerous petitioners (including 23 States, one Governor, and energy-industry parties) sought review of the MATS Rule in this Court. As relevant here, they maintained that EPA unreasonably interpreted the term "appropriate" in § 7412(n)(1)(A) when it concluded that costs are irrelevant to the initial decision whether to regulate power plants.

This Court upheld EPA's decision not to consider costs. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (2014) (per curiam). Judge Kavanaugh dissented. He concluded it was "entirely unreasonable for EPA to exclude consideration of costs." *Id.* at 1261 (Kavanaugh, J., dissenting). In addition, Judge Kavanaugh emphasized

that under EPA's unreasonable interpretation of "appropriate," it is "*entirely irrelevant how large the costs are or whether the benefits outweigh the costs*[.]" *Id.* at 1263.

The Supreme Court reversed. It held that "EPA interpreted § 7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants." *Michigan*, 135 S. Ct. at 2712. Agency action, the Court noted, must be " 'within the scope of its lawful authority' " and must rest on a " 'consideration of the relevant factors.' " *Id.* at 2706 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983)). "Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate," and "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id.* at 2707.

The Supreme Court determined that, under § 7412(n)(1)(A), the "Agency must consider costs—including, most importantly, costs of compliance—before deciding whether regulation is appropriate and necessary." *Id.* at 2711. EPA, however, "refused to consider whether

the costs of regulation outweighed the benefits." *Id.* at 2706. It "gave cost no thought *at all*, because it considered cost irrelevant to its initial decision to regulate." *Id.* The Court therefore concluded that "EPA strayed far beyond" " 'the bounds of reasonable interpretation' " under *Chevron* "when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants." *Id.* at 2707 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014)).

ARGUMENT

I. The Supreme Court's decision that the MATS Rule is unlawful means the Rule must be vacated.

The Supreme Court's decision establishes that the MATS Rule is invalid in its entirety and must be vacated. The Court determined that § 7412(n)(1)(A) requires EPA to consider costs when making the "initial decision" whether it is appropriate to regulate hazardous air pollutants from power plants. *Id.* at 2706. The Supreme Court's ruling conclusively shows that EPA cannot regulate power plants under § 7412 until it first considers not only the benefits but also the costs of regulation: "the agency must consider cost—including, most importantly, cost of compliance—*before* deciding whether regulation is appropriate and

necessary." *Id.* at 2711 (emphasis added). EPA exceeded its statutory authority by promulgating the Rule without first weighing "the advantages *and* the disadvantages" of regulation and deciding whether the benefits of regulation are worth the costs. *Id.* at 2707. EPA's failure to satisfy that threshold requirement means that the MATS Rule lacks a lawful foundation. EPA therefore lacked the authority to promulgate the Rule and all of its expensive mandates.

When an agency exceeds the bounds of reasonable statutory interpretation, it is acting without authority. *See, e.g., City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868 (2013) ("[T]he question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*."); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (agency "exceed[ed] [its] authority" under the Clean Water Act when it promulgated a rule based on its unreasonable interpretation of the statute). Indeed, this Court has repeatedly recognized that "*Chevron* is principally concerned with whether an agency has authority to act under a statute." *Am. Library Ass'n*, 406 F.3d at 699 (quotations

omitted); *see also, e.g.*, *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166 (D.C. Cir. 2003); *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995). Without authority delegated by a statute, an agency—that is, part of the *executive* branch—has no authority to pass what are in effect binding *laws*. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1119, 1204 (2015) (rules promulgated after notice and comment have the " 'force and effect of law' "). To state what should be obvious, an unlawful rule cannot impose enforceable legal obligations.

The Administrative Procedure Act affirmatively states that a "reviewing court *shall* . . . (2) hold unlawful and *set aside agency action*, findings, and conclusions found to be . . . (C) in excess of statutory . . . authority . . . ." 5 U.S.C. § 706(2)(C) (emphasis added). The Supreme Court has taken this statutory command at face value: "In *all* cases agency action *must* be set aside if the action was . . . not in accordance with law' or if the action failed to meet statutory . . . requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) (emphasis added); *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).

Consider this point from another angle: the situation presented in this case is in some ways the inverse of a recent decision of this Court. In *In re Murray Energy*, 788 F.3d 330 (D.C. Cir. 2015), this Court rejected a challenge to a proposed EPA rule because the rule had not yet taken effect: "Proposed rules . . . do not determine 'rights or obligations,' or impose 'legal consequences.' " *Id.* at 334. If a *proposed* rule does not have the effect of law, then it is even less appropriate for an *unlawful* rule to be left in place and to have the effect of law—to determine rights or obligations or to impose legal consequences.

The Supreme Court ruled that EPA's refusal to consider costs failed to meet the statutory requirements of § 7412(n)(1)(A). The unlawful MATS Rule must therefore be set aside and vacated.

II. The unusual remedy of remand without vacatur is not appropriate in this case.

Despite the Supreme Court's determination that "EPA strayed far beyond" " 'the bounds of reasonable interpretation,' " 135 S. Ct. at 2707, and therefore beyond the bounds of its authority, EPA has already

informed this Court that it "intends to seek remand without vacatur." EPA's Opp'n to Second Mot. of Tri-State for Suspension of its Compliance Obligation (hereinafter "EPA Second Opp'n") at 15.

That avenue is not applicable here. This Circuit has held that it has the discretion to remand federal regulations without vacating them if the Court cannot tell whether the agency's action is valid because the agency has not explained sufficiently the grounds for its action. *See, 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."); *Checkosky v. SEC*, 23 F.3d 452, 454 (D.C. Cir. 1994) (per curiam) ("The case is remanded to the Commission for a more adequate explanation of its interpretation of Rule 2(e)(1)(ii) and its application to this case."); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) ("An inadequately supported rule, however, need not necessarily be vacated. . . . [T]here is at least a serious possibility that the Commission will be able to substantiate its decision on remand.").

In the situation where the Court cannot tell whether the challenged rule is unlawful, it may make sense to develop the record further before reaching a final ruling. *Checkosky*, 23 F.3d at 463 (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); *but see 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 this case does not present uncertainty about the Rule's lawfulness. Quite the opposite: here, EPA fully explained its reasoning, and the Supreme Court held that EPA's reasoning is inconsistent with the plain language of the statute. Here, there is no uncertainty as to whether EPA unreasonably interpreted "appropriate" when it deemed costs irrelevant to its decision whether to regulate hazardous air pollutants emitted from power plants. Instead, EPA explained at

length its view that "costs should not be considered" when making its initial decision whether it is "appropriate" to regulate power plants under § 7412, 77 Fed. Reg. at 9326, and the Supreme Court, after fully considering EPA's explanation, held that EPA's action is unlawful. Because EPA's explanation was complete and the Supreme Court specifically rejected it, remand without vacatur is not available.

EPA must go back and examine the substantive precondition that Congress required it answer *before* it would have the authority to regulate: whether regulating power plants is appropriate and necessary when taking into account "cost—including, most importantly, cost of compliance." *Michigan*, 135 S. Ct. at 2711. In fact, leaving the Rule in place while EPA considers that open question would assume that the costs *will* justify the regulation. But the very gravamen of the Supreme Court's holding is that a finding prerequisite to regulation has never been made, and regulation may *not* be warranted (which may explain why EPA has gone to such lengths to avoid considering costs).

Further, applying this Court's two-factor test for deciding whether to vacate agency action on remand demonstrates that remand without vacatur is not appropriate for a rule that has been definitively declared

unlawful. Under that test, "[t]he 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.' " *Allied-Signal*, 988 F.2d at 150–51 (quoting *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 967 (D.C. Cir. 1990)).

Neither *Allied-Signal* factor is satisfied here. As to the first, it is hard to see what could be a more serious deficiency in an agency action than the fact that the agency exceeded its authority—in more direct words, that an executive agency imposed what is in effect a law, without any delegated authority from the legislature. That presumably is why Congress directed in the APA that such actions must be vacated. 5 U.S.C. § 706 ("The reviewing court *shall* . . . hold unlawful and *set aside* agency action . . . found to be . . . in excess of statutory . . . authority . . . .") (emphasis added). And there is no "doubt" about "whether the agency chose correctly" when a court (here, the Supreme Court) has fully examined the agency's choice (and its best efforts to explain that choice) and then concluded that the agency action was unlawful.

As to the second factor, vacating the MATS Rule would not be disruptive because it would not eliminate many of the Rule's beneficial effects. Many coal-fired power plants have already been retired. U.S. Energy Information Administration, Today in Energy, *AEO2014 Projects More Coal-Fired Power Plant Retirements by 2016 Than Have Been Scheduled* (Feb. 14, 2014), *available at* http://www.eia.gov/todayinenergy/detail.cfm?id=15031. Other coal-fired plants have already been converted to natural gas-fired plants. Michael Niven & Neil Powell, *Coal unit retirements, conversions continue to sweep through power sector*, SNL Financial (Oct. 14, 2014), *available at* https://www.snl.com/InteractiveX/Article.aspx?cdid=A-29431641-13357. Vacating the rule will not return the retired plants to service, nor will it reverse the completed natural-gas conversions. Vacatur will therefore not "temporarily defeat . . . the enhanced protection of the environmental values covered by" the MATS Rule. *Cf. Envt'l Def. Fund, Inc. v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990).

Further, vacating the MATS Rule will not result in disruptive consequences beyond the scope of the Rule itself. In that regard, this case is substantially different from *North Carolina v. EPA*, 550 F.3d

1176 (D.C. Cir. 2008). In *North Carolina*, this Court remanded but did not vacate the Clean Air Interstate Rule where vacatur would have affected "planning by states and industry with respect to interference with the states' ability to meet deadlines for attaining national ambient air quality standards for PM2.5 and 8-hour ozone[.]" *Id.* at 1178–79 (Rogers, J., concurring in granting rehearing in part). There are no such disruptive impacts here.

Moreover, EPA's assertion—that this Court should remand without vacatur because the Rule has environmental benefits, *see* EPA Second Opp'n at 18–19—nullifies the point of the Supreme Court's ruling. Under EPA's reasoning, no environmental regulation that provides any benefits should ever be vacated, even when there is no doubt that the regulation is unlawful. Under EPA's view, it can pass a rule despite a lack of statutory authority, and then leave the rule in place, imposing binding obligations on private citizens, until such time as EPA manages to promulgate the rule in a lawful manner. But environmental benefits cannot justify illegal rules. If they could, then EPA would have unlimited authority to pass whatever rules it saw fit, regardless of what Congress thinks. That is especially true in this case

where the foundation for the entire Rule—the finding that regulation is "appropriate" regardless of its cost—is contrary to the Clean Air Act.

III. Remand without vacatur would impose substantial costs that lack a lawful basis.

Remand without vacatur is also inappropriate because it would require power plants and their customers to bear the ongoing costs of complying with an illegal rule. While the economy will never recover the lost time-value of the billions of dollars of capital costs that power plants have already spent to comply with the unlawful Rule (even if some version of the Rule were to be lawfully promulgated in the future), the ongoing compliance costs are also significant. For example, EPA calculated that the cost to comply with the Rule's monitoring, reporting, and recordkeeping requirements is $158 million each year (averaged over the first three years the Rule is in effect). Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, EPA-HQ-OAR-2009-0234-20131, at 3-30. In addition, EPA found that the Rule would result in power plants installing new air pollution control devices (e.g., flue gas desulfurization, activated carbon injection, and fabric

filters). *Id.* at 3-13 to 3-16 (reprinted in Joint App., at JA02297–300). Operating that new equipment will impose more costs. *Id.*

These ongoing costs—more than $158 million annually—to comply with an illegal rule far exceed the $4 to $6 million in health benefits that EPA calculated would result from reducing power plants' emissions of hazardous air pollutants. 77 Fed. Reg. at 9306. As a matter of principle, it is not appropriate to require power plants and their customers to bear *any* expense from a regulation that the Supreme Court has determined has no legal foundation. And as a practical matter, the imbalance between the Rule's expenses and its modest health benefits further reinforces the conclusion that the Rule should be vacated.

Remand without vacatur is also inappropriate because it grants EPA an indefinite stay of the Supreme Court's ruling against it. Indeed, EPA has already told this Court that the indefinite stay will last at least six months: EPA's "plan" and "aim"—words that convey a certain tentativeness to its commitment—is "to complete the required consideration of costs for the 'appropriate and necessary' finding *by spring of next year*." EPA Second Opp'n at 15 (emphasis added). As this "aim" signals and as members of this Court have observed, remands

without vacatur offer agencies little incentive to act promptly. *E.g.*, *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1264 (D.C. Cir. 2007) (Randolph, J., concurring) ("A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such."); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) (granting mandamus against an agency that took six years to put its rationale in writing and explaining "experience suggests that this remedy [remand without vacatur] sometimes invites agency indifference"). In short, EPA should not be allowed to turn the Supreme Court's ruling that EPA acted outside the scope of any lawful authority into a "game of 'administrative keep-away,' " *In re Core Commc'ns*, 531 F.3d at 859, where an agency's unlawful edict continues to have the force of law on the theory that it *may* be able to enact a rule in a lawful manner sometime in the future.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the undersigned State and Industry Petitioners respectfully request that this Court grant this joint motion to govern further proceedings and issue a judgment vacating the Rule.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 24, 2015, the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system.

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