ORAL ARGUMENT HELD DECEMBER 10, 2013
DECIDED APRIL 15, 2014

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

REPLY BRIEF OF CERTAIN STATE AND INDUSTRY PETITIONERS IN SUPPORT OF THEIR JOINT MOTION TO GOVERN FURTHER PROCEEDINGS

Congress expressly limited EPA's authority to regulate power plants: before regulating, EPA must first make a finding that it is "appropriate and necessary." 42 U.S.C. § 7412(n)(1)(A). That "initial decision to regulate" must include a consideration of the costs of such regulation. *Michigan v. EPA*, 135 S. Ct. 2699, 2707–12 (2015). EPA has not fulfilled that substantive precondition. Because EPA *still* lacks the authority to promulgate the Rule, the Rule cannot be given the force of law.

ARGUMENT

I. The Rule must be vacated because EPA promulgated it without authority.

EPA attempts to escape the above syllogism, but its arguments fail for a number of reasons. First, EPA contends that the Administrative Procedure Act's mandatory command that courts "shall . . . set aside agency action . . . found to be . . . in excess of statutory . . . authority," 5 U.S.C. § 706(2)(C), does not apply. EPA Resp. 2–3. "Because the Rule was promulgated under 42 U.S.C. § 7412(d)," EPA says, "section 706 of the APA does not apply." EPA Resp. 3. Instead, EPA continues, a provision of the Clean Air Act that addresses judicial review, namely 42 U.S.C. § 7607(d), replaces that command with permissive language. But 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. *Accord* State et al. Respondents Resp. 4 n.2 (arguing that "the emissions standards themselves" are not at issue on remand); EPA Mot. to Govern 9–10 (making the same argument). A valid "appropriate" finding–a prerequisite EPA must satisfy *before* it is authorized to impose 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 right, then courts have the discretion to leave even unconstitutional agency actions—say, for example, an agency deciding whom to regulate based on the person's race or religion—in place.

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 it as mandatory would also be consistent with this Court'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 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). 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. Under the *Chevron* doctrine, " 'the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *Sierra Club v. EPA*, 551 F.3d 1019, 1026 (D.C. Cir. 2008) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). As the Supreme Court explained, Congress's unambiguously expressed intent is that EPA could not regulate power plants unless it first considered 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.") (emphasis added). 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*, 467 U.S. at 843 (emphasis added), and that means vacating the Rule.

In the end, EPA's briefs do not seriously argue that EPA had statutory authority to impose the Rule on the public. EPA never disputes, for example, the principle that when an agency defies plain statutory text, it acts without authority. Certain State and Ind. Petitioners' Mot. to Govern 2. It never attempts to explain

how a court could remain faithful to that principle if it allowed an ultra vires rule to impose enforceable legal obligations. *Id.* at 10. The *only* thing EPA had to say in defense of its authority is that it "had the authority to . . . promulgate emission standards for power plants *after* making the affirmative finding." EPA Resp. 6 (emphasis added). But even EPA's own formulation highlights the problem: it lacks authority to promulgate emission standards until *after* a valid finding. The Rule thus must be set aside.

II. Even under *Allied-Signal*, the Rule must be vacated.

EPA defends its ultra vires action by relying on this Court's "tradition" of remanding without vacatur. EPA Resp. 1. Under that tradition, the first prong of the *Allied-Signal* test examines " 'the seriousness of the order's deficiencies,' " *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). Yet none of the cases cited by EPA or its allies involved the serious deficiency at issue here—an agency's lack of authority under the underlying substantive statute.

For example, they continue to rely on cases where an agency had authority but failed to explain its reasoning. *Mississippi v. EPA*, 744 F.3d 1334, 1361 (D.C. Cir. 2013) ("EPA failed to explain"); *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1161 (D.C. Cir. 2013) ("we remand to EPA portions of its rule for further explanation"); *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 860 (D.C.

Cir. 2012) (addressing "an inadequately explained agency action" where the agency had not yet advanced an interpretation of a "hopelessly" ambiguous statute). They rely on a case involving only *as-applied* challenge to a rule, the type of challenge that inherently concedes that the agency *does* have the authority to apply the rule in a number of instances, which in turn makes it appropriate to leave the rule in effect. *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 127, 138 (D.C. Cir. 2015) (remanding in light of certain "as-applied challenges to the Transport Rule," after rejecting "all of [the] facial challenges to the Rule"). They rely on a case where an agency failed to follow the APA's procedural requirements. *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002) (remanding without vacatur based on the fact the agency "violated the APA" by "omitting notice and comment"). And they rely on cases where even the petitioners agreed to remand without vacatur. *N. Carolina v. EPA*, 550 F.3d 1176, 1179 (D.C. Cir. 2008) (Rogers, J., concurring in granting rehearing in part); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999). In short, none of these cases stand for the proposition that EPA must establish here—that even when the Rule was imposed without authority, that most serious of deficiencies can be overlooked to allow the Rule to retain the force of law. Indeed, as one commentator observed a decade ago, this Court "does not apply RWV [remand without vacatur] where it finds that the agency's rules violate the statute that the

agency is administering." Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278, 283 (2005). "RWV cases are not among those cases that failed the two-step inquiry articulated in *Chevron* . . . ." *Id.* at 283 n.22.

Turning to the second *Allied-Signal* prong, EPA also fails to establish that vacating the Rule would be disruptive. As the State, Local Government, and Public-Health Respondents point out, even if the Rule is vacated, the pollution controls that have already been implemented as a result of the Rule mean that approximately 58% to 66% of the health benefits from mercury reduction will continue to occur. *See* Sahu Decl. 6, State et. al Respondents Resp. (asserting that only "34% to 42% of the expected emissions-reduction benefit would be lost each year" in the absence of the Rule; instead of an expected mercury reduction of 20 tons per year, the reduction would actually be 11.6 to 13.2 tons per year, if the Rule is stayed). In other words, vacatur would result in an emissions-reduction benefit of between $2.32 and $2.64 million annually using EPA's numbers, instead of the $4 to $6 million in benefits that EPA calculated. That reduction in the modest benefits EPA identified is not disruptive, especially when compared to the imposition of more than $158 million in ongoing costs to achieve them.

In addition, EPA does not identify any disruptive impacts to state efforts to meet the Clean Air Act's requirements. As the State and Industry Petitioners'

explained in their brief responding to EPA's motion, none of the examples EPA or the State respondents provide have merit. Certain State and Ind. Petitioners Resp. 9–10.

Finally, EPA presents its case as if the outcome of its cost consideration is a foregone conclusion. But that assumption rests entirely on EPA's ability to rely not on benefits obtained from reducing the pollutants that § 7412(n) actually covers (i.e., hazardous air pollutants), but on benefits obtained from reducing an entirely different pollutant (fine particulate matter). *See* EPA Resp. 9, 11; *Michigan v. EPA*, 135 S. Ct. at 2706 (observing that including co-benefits increases the benefits from $4 to $6 million to $37 to $90 billion). In short, EPA is now relying on benefits it previously affirmatively disclaimed. *Id.* at 2711 ("In the Agency's own words, the administrative record 'utterly refutes [the] assertion that [ancillary benefits] form the basis for the appropriate and necessary finding.' " (quoting 77 Fed. Reg. 9323)). And EPA's refusal to rely on the asserted co-benefits (and its corresponding decision to say that cost is entirely irrelevant) suggests that even EPA recognizes that counting co-benefits is a questionable endeavor under § 7412(n), which applies only to regulating hazardous air pollutants, not other pollutants.

When EPA conducts a cost analysis for the first time in deciding whether it is appropriate and necessary to regulate, it may well turn out that the Rule will do

more harm than good. And until that step has occurred, there is no justification for imposing a rule at all.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the undersigned State and Industry Petitioners respectfully ask this Court to grant their joint motion and issue a judgment vacating the Rule.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 4, 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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