No. 15-1152

In the Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* THE STATES OF COLORADO, GEORGIA, LOUISIANA, MONTANA, NEVADA, SOUTH DAKOTA, AND WISCONSIN IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Like many statutes intended to protect the environment, the Clean Air Act establishes a system of cooperative federalism. Under this system, States have "primary responsibility" for air pollution prevention and control. *See* 42 U.S.C. §§ 7401(a)(3), 7407(a). They design and adopt implementation plans for air quality standards, *id.* §§ 7407, 7410; assess and collect penalties for violation of the Act, *id.* § 7420; and enforce their own state laws regarding air quality. *See, e.g.*, Colo. Rev. Stat. §§ 25-7-101 to -139 (Colorado Air Pollution Prevention and Control Act); *see also* 42 U.S.C. § 7416 (affirming, with some exceptions, "the right of any State ... to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution").

Yet even while States play a primary role in the federal statutory scheme, they are still subject to federal regulations promulgated by the Environmental Protection Agency and can be subject to severe penalties for failing to satisfy those regulations. *See, e.g.*, 42 U.S.C. § 7506. Unless, of course, a court stays or vacates the regulations as unlawful.

Like the Petitioner States, the *amici* States have both a sovereign and a practical interest in assuring that federal agencies implement regulations lawfully and do not stray beyond the bounds of the authority granted them by Congress. States and their citizens are harmed when, as this Court held occurred in this very case, federal agencies abandon "reasoned decisionmaking" and act beyond the scope of their lawful authority. *See Michigan v. EPA*, 135 S. Ct. 2699,

2706 (2015). That harm is exacerbated when a court improperly leaves the agencies' unlawful regulations in force rather than vacating them.

In the interest of protecting the rights of sovereign States, local governments, and individual citizens, the *amici* States urge this Court to grant the Petition for writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Regardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quotation omitted). Last term, this Court held that EPA violated that principle and failed to "operate within the bounds of reasonable interpretation" when it refused to consider costs in determining whether to regulate power plant emissions. *Michigan*, 135 S. Ct. at 2707. 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 (emphases added).

In the wake of this Court's decision, the D.C. Circuit, rather than vacating EPA's unlawful regulation, remanded the regulation to EPA "without vacatur." Pet. App. 2a. This left the unlawful regulation in force pending remand proceedings before the agency. The D.C. Circuit's unpublished order contains little analysis or explanation for why it left the rule intact, although the court "note[d] that EPA has

represented that it is on track to issue a final finding ... by April 15, 2016." Pet. App. 2a–3a.

In other words, the D.C. Circuit endorsed a "no harm, no foul" concept for unlawful federal regulations. In that court's view, a regulation adjudged unlawful may stay in place, and continue to bind States and the public, so long as the agency will promulgate another similar regulation to take its place (which might also be challenged in court). But when agencies like EPA act unlawfully, there is no such thing as "no harm." Real, tangible harm often accrues as a matter of fact and, in every case, the enforcement of an illegal regulation erodes the rule of law.

Here, for example, EPA itself has calculated the undisputed tangible harm—in the form of monitoring, reporting, and recordkeeping costs—that its unlawful rule has been imposing on the public: $158 million annually. *See* Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, EPA-HQOAR-2009-0234-20131, at 3-30 (averaging costs over the first three years the Rule is in effect). These compliance costs alone dwarf EPA's projected annual $4 to $6 million in environmental benefits from the Rule's anticipated reduction of hazardous-air-pollutant emissions. *See Michigan*, 135 S. Ct. at 2706.

And even putting these tangible costs aside, remand without vacatur harms the rule of law. Federal administrative agencies wield awesome power—the power to issue binding rules that are enforceable through both civil and criminal penalties. EPA, for example, has the power to fundamentally reshape the American economy and impose huge costs on States and their citizens. *See Whitman v. Am. Trucking*

Ass'ns, 531 U.S. 457, 475 (2001) (noting that air standards set by EPA "affect the entire national economy"). It is rare indeed, and perhaps unique, for a government actor to be given not only the power to promulgate binding substantive rules but also the power to require compliance with those rules after the judicial branch has adjudged them to be illegal. Yet that is precisely the power the court below gave to EPA.

And yet the "remand without vacatur" device is not novel. The lower court's decision here is one of dozens of decisions—primarily in the D.C. Circuit—remanding agency action without vacating it. This is a relatively new phenomenon: "Until recently, reviewing courts routinely vacated agency actions that they found to have been rendered unlawfully. That practice was generally accepted and essentially taken for granted." Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 298 (2003); *see also* Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 507, 568 (1985) ("Traditionally, courts faced with an arbitrary and capricious regulatory decision ... normally vacate[] the decision and remand[] the matter to the agency....").

The D.C. Circuit formalized the no-harm-no-foul "remand without vacatur" device in the prominent case of *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, where it held that "[a]n inadequately supported rule ... need not necessarily be vacated." 988 F.2d 146, 150 (D.C. Cir. 1993). *Allied-Signal* has been criticized by judges and scholars but continues to be applied, most commonly in cases where the agency did

not sufficiently explain the rationale for its action. Courts are divided, however, as to whether remand without vacatur is a permissible device where the agency action has been determined to be unlawful. And this case is remarkable in that it appears to be the first in which a lower court, following a decision by this Court holding a rule unlawful, has allowed the rule to stand while the agency promulgates a replacement.

The Court should grant certiorari to (1) make clear that when an agency has exceeded its statutory authority in adopting a regulation, it may not continue to enforce that regulation, and (2) resolve the uncertainty regarding whether and when use of remand without vacatur is permissible.

ARGUMENT

I. This case is an ideal vehicle for deciding whether a federal agency has the power to enforce an unlawful rule, and that question is one of exceptional importance.

Regardless of whether remand without vacatur may be an appropriate device in some contexts—such as if an agency acted within its statutory authority but failed to fully explain its reasoning, *see, e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 462 (D.C. Cir. 1994) (opinion of Silberman, J.)—the Court should grant the Petition to clarify whether that device is permissible where agency action has been held unlawful. This Court should hold that it is not.

A. This case is an ideal vehicle for answering the question.

The D.C. Circuit is the most frequent user of remand without vacatur, and EPA is the most frequent beneficiary of the device. *See* Stephanie J. Tatham, Admin. Conf. of the U.S., *The Unusual Remedy of Remand Without Vacatur* 22 (Jan. 3, 2014) ("EPA—by far—is the federal agency most commonly subject to remedial orders from the D.C. circuit that employ remand without vacatur."). This case is thus a particularly appropriate vehicle for addressing whether remand without vacatur is proper for agency action adjudged to be unlawful.

Further, no extraneous issues will muddy the waters and prevent the Court from focusing on the question presented. The merits of the rule have been resolved. There is no dispute whether EPA needed to provide additional explanation for its decision to ignore costs and no dispute whether the challenged final agency action was unlawful. This Court conclusively resolved those matters just last term. *See Michigan*, 135 S. Ct. at 2711–12. The only question before the D.C. Circuit was the question of the appropriate remedy: whether EPA's unlawful action should be set aside in whole, in part, or not at all. That is the precise question raised by the Petition.

B. Vacatur of unlawful rules is necessary to induce agencies to act within their statutory authority.

Judges and scholars recognize that vacatur often provides a necessary incentive for the agency to do its work with care and to take necessary steps to remedy

unlawful rules. *See In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) ("[E]xperience suggests that [remand without vacatur] sometimes invites agency indifference."); *Natural 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."); *Comcast Corp. v. FCC*, 579 F.3d 1, 12 (D.C. Cir. 2009) (Randolph, J., concurring) ("Agencies do not necessarily give remand-only decisions high priority and may delay action for lengthy periods."); *see also* Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. Rev. 278, 301 (2005) ("Agencies do not gain very much from revising inadequate explanations because they already have the authority to continue implementing the challenged rules."). As explained by Dean Rodriguez, "[T]here are good reasons to suppose that an agency will be motivated both ex ante and ex post to adopt rules in a manner that will pass muster if they know that they face the prospect of vacatur if they fail." Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 Ariz. St. L.J. 599, 620 (2004).

In re Core Communications is a case in point. There, the D.C. Circuit had remanded without vacating an FCC rule because, the court concluded, "there was a 'non-trivial likelihood' the Commission would be able to state a valid legal basis for its rule." 531 F.3d at 850. After a *six-year* delay, during which the remanded rule remained in force, the D.C. Circuit finally granted a writ of mandamus setting a short, hard deadline

vacating the rule if the agency did not provide its legal authority. *Id.* at 862. The court regretfully noted that the agency had, through its delay, "effectively nullified our determination that its interim rules are invalid" and that the court's prior remand without vacatur had enabled the agency to "insulate[] its nullification of our decision from further review." *Id.* at 856. *Cf. Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1056 (7th Cir. 1992) (declining to remand without vacatur "because of the Commission's history of procrastination in dealing with the [disputed] issue").

Although *In re Core Communications* may be an extreme example, remand without vacatur causes similar harms in all cases in which it is employed. While an unlawful rule remains unvacated, States and their citizens must continue to comply with it. *See* Tatham, *The Unusual Remedy* at 1 (describing remand without vacatur as "remarkable" because "it can permit agency decisions to remain in effect despite errors that are prejudicial to the interests of challenging parties"). Requiring a State to comply with a rule that has been declared an unlawful exercise of agency authority—particularly where that declaration was made by this Court—is a clear infringement on State sovereignty. And until the agency withdraws or revises the rule on remand, there is little recourse to further judicial review. *See In re Core Commc'ns*, 531 F.3d at 856 (noting that, until the agency responds to the remand, the regulated party "cannot mount a challenge to th[e] rule[]"). Furthermore, because remand without vacatur denies meaningful relief to a litigant who has shown agency action to be unlawful, use of the device reduces the public's incentive to challenge illegal agency action. These concerns are particularly acute

where, as commonly occurs (and as occurred here), the remanding court does not explain its reasoning or impose any deadlines on the agency. *See id.* at 862 (Griffith, J., concurring) (criticizing the use of "open-ended remand without vacatur"); Tatham, *The Unusual Remedy*, at 25 ("Imposition of timeframes within which the agency must respond is the exception rather than the rule.").[1]

C. Recent aggressive agency actions show the need for clear limits.

Michigan v. EPA forecloses any argument that EPA's attempted regulation of power plants was lawful and consistent with its statutory authority.[2] However, the agency nonetheless maintains that the regulations it adopted—without authority—should remain in force and that States and other parties should remain bound by them.

That aggressive stance is only one of several recent instances in which EPA and other federal agencies have sought to force ongoing compliance with regulations despite serious questions as to their validity. For example:

- ***EPA's "Clean Power Plan."*** EPA's "Clean Power Plan" rule contains aggressive compliance deadlines and penalties meant "to assure that

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[1] Even where the agency represents that it can legitimize the rule on remand, *see* Pet. App. 3a (anticipating EPA action by April 15, 2016), any revised rule may still be subject to legal challenge.

[2] In the remand proceedings before the D.C. Circuit, EPA did not deny that its rule is unlawful. *See* Pet. 8.

states begin to address the urgent needs for [carbon] reductions quickly." Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,675 (Oct. 23, 2015). In seeking to avoid a stay of that rule, EPA argued to the D.C. Circuit that a stay was not justified because the costs of compliance with the allegedly illegal rule were "an inherent and foreseeable consequence" of the Clean Air Act. EPA's Opp. to Stay Mot. at 55, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Dec. 3, 2015). And, even though this Court has now stayed the rule, *West Virginia v. EPA*, 136 S. Ct. 1000 (2016), EPA is still implying that States must comply with the rule and all of its aggressive deadlines. Two weeks after the stay was granted, the EPA Administrator stated that despite the stay, "we will keep moving the Clean Power Plan forward." Gina McCarthy, Remarks at IHS Energy CERAWeek (Feb. 24, 2016), https://www.youtube.com/watch?v=knlDVXS2n2A (hosting video). Several days later, she reiterated her view that the Clean Power Plan is "alive and well" and that this Court's stay "doesn't mean that really anything on the ground has changed." Gina McCarthy, Remarks at Harvard School of Public Health Voices in Leadership Event (Feb. 29, 2016), http://www.hsph.harvard.edu/voices/events/mccarthy (hosting video and transcript). EPA has even implied that this Court's order will not protect States that decline to comply with the rule while litigation is pending. *See* Abby Smith & Doug Obey, *EPA Reportedly Hints ESPS Compliance Date Could*

Remain Despite Stay, InsideEPA.com, Feb. 18, 2016 (noting that EPA is "privately hinting to states that it may still be able to maintain a 2022 start date to the rule's compliance period should the stay eventually be lifted"). In other words, in EPA's view, its policies trump this Court's orders.

- ***EPA's "Clean Water Rule."*** A federal district court in North Dakota issued a preliminary injunction against the "Clean Water Rule," concluding that EPA had likely "violated its Congressional grant of authority" and "failed to comply with APA requirements" in promulgating the rule. *North Dakota v. EPA*, No. 3:15-cv-59, 2015 U.S. Dist. LEXIS 113831 (D.N.D. Aug. 27, 2015). EPA responded by publishing a "Litigation Statement" asserting that it would continue to force compliance with the rule in all states that were not plaintiffs in the North Dakota action. *See* Notice of Suppl. Information, *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D. 2015), ECF No. 73; *see also* http://bit.ly/236RtLc (hosting a copy of the "Litigation Statement").[3]

- ***BLM's "Fracking Rule."*** A federal district court in Wyoming issued a nationwide preliminary injunction against BLM's rule

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[3] The Sixth Circuit eventually stayed implementation of the rule nationwide. *Ohio v. U.S. Army Corps of Eng'rs*, No. 15-3751, at 4–5 (6th Cir. Oct. 9, 2015) (order granting stay) (concluding that EPA's rulemaking was "facially suspect" and expressing concern over the "burden [the rule would impose] ... on governmental bodies, state and federal, as well as private parties—and ... the public").

regarding hydraulic fracturing. *Wyoming v. U.S. Dep't of Interior*, No. 2:15-CV-043-SWS, 2015 U.S. Dist. LEXIS 135044, at *82 (D. Wyo. Sep. 30, 2015). The court concluded that "Congress has not authorized or delegated to the BLM authority to regulate hydraulic fracturing" and that BLM had likely acted in an arbitrary manner in promulgating the rule. *Id.* at *41, 79. On appeal, BLM has argued that even if the injunction is upheld, it should be restricted to the four plaintiff states, and that the rule should remain in force in all other states. Op. Br. for Fed. Appellants at 56, *Wyoming v. S.M.R. Jewell*, Nos. 15-8126, 15-8134 (10th Cir. Mar. 21, 2016).

- ***EPA's "Mercury and Air Toxics Rule."*** As to the very rule challenged by Michigan and the other States in this case, EPA extracted nearly $10 billion a year in compliance costs from power plants before this Court could review (and repudiate) the rule. On June 30, 2015—the day after this Court held in *Michigan v. EPA* that the rule is unlawful—EPA boasted in an official blog post that given the rule's aggressive compliance deadlines and the years of litigation preceding this Court's ruling, "the majority of power plants are already in compliance or well on their way to compliance" with the unlawful rule. *See* Janet McCabe, *In Perspective: The Supreme Court's Mercury and Air Toxics Rule Decision,* EPA Connect (June 30, 2015), https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision.

Although these cases do not involve the precise issue raised here—whether remand without vacatur is appropriate for an unlawful rule—they illustrate that federal agencies do not simply defer to the judiciary. Rather, the agencies commonly seek ways to avoid court rulings and to diminish the role of the judiciary in ensuring administrative agencies operate within the bounds of the law.

Regardless of the precise circumstances in which an agency tries to enforce an unlawful rule, States and their citizens suffer compliance and regulatory burdens from ongoing enforcement. More importantly, ongoing enforcement of unlawful federal rules infringes the sovereign interests of the States, especially when they have "primary responsibility" in the regulated area. *See, e.g.*, 42 U.S.C. § 7401(a)(3). These harms are at their zenith in a case where this Court has held an agency regulation unlawful, yet a lower court on remand—without any justification—allows the regulation to remain in force. Certiorari is merited to clarify whether federal agencies such as EPA may continue their aggressive push to force compliance *after* the relevant rules have been held unlawful.

II. The Court should resolve whether and under what circumstances "remand without vacatur" is permissible.

Whether the device of remand without vacatur is permissible—despite being contrary to the text of the APA and although this Court has never approved the practice—is the subject of significant uncertainty. Lower courts are divided as to whether and how the device may be used. This Court should grant certiorari to put an end to the confusion.

A. Remand without vacatur is contrary to the text of the APA and has never been approved by this Court.

Remand without vacatur is contrary to the plain text of the APA. That text leaves no room for courts to allow unlawful rules to remain in effect and to continue to be enforced: a reviewing court "*shall* ... set aside agency action" found to violate one of the APA's specified standards of review. 5 U.S.C. § 706(2)(A) (emphasis added). The meaning of this language is not ambiguous; it does not admit of any exceptions. *See, e.g.*, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' ... normally creates an obligation impervious to judicial discretion."); *Shall*, Black's Law Dictionary (6th ed. 1990) ("As used in statutes ... ['shall'] is generally imperative or mandatory.").

This Court's opinions support the APA's plain text and appear to preclude remand without vacatur. For example, in *Camp v. Pitts*, the Court reviewed the denial of a banking application under the APA. 411 U.S. 138 (1973) (per curiam). The Court held that where there is a "failure to explain administrative action" such that the agency's "finding is not sustainable on the administrative record made," then the agency decision "*must be vacated* and the matter remanded ... for further consideration." *Id.* at 142–43 (emphasis added). Other opinions say the same thing. *E.g.*, *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) ("In all cases agency action *must be set aside* if the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.") (citation and quotation omitted; emphasis added); *Fed.*

Power Comm'n v. Transcon. Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) ("[I]f the decision of the agency is not sustainable on the administrative record made, then the ... decision *must be vacated* and the matter remanded.") (quotation omitted, emphasis added).

Indeed, this Court has *never* approved—in any context—the practice of remanding agency rules without vacatur. *See* Tatham, *The Unusual Remedy* at 8 (courts employing the device "act without direct guidance on or endorsement of the remedy by the Supreme Court"). Because the Court has not directly addressed and decided the issue, lower courts—as well as the agencies themselves and litigants affected by unlawful agency action—are left without guidance as to whether remand without vacatur is permissible.[4] Certiorari is warranted in this case to address the clear, undeniable conflict between the text of the APA and the practice of courts that apply the device of "remand without vacatur," apparently without any legal authority.

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[4] The issue was raised in a 2010 petition, *see* Pet. Cert., *Council Tree Investors v. FCC*, No. 10-834, 2010 U.S. S. Ct. Briefs LEXIS 4666 (Dec. 22, 2010), but the Court denied certiorari, 131 S. Ct. 1784 (2011). That case was a poor vehicle, however, because—unlike here—the Circuit Court had *declined* to grant remand without vacatur. *See Council Tree Commc'ns v. FCC*, 619 F.3d 235, 258 n.13 (3d Cir. 2010) ("Because we find remand without vacatur to be inappropriate on the facts of this case, we express no view as to whether we are authorized to order this remedy.").

B. Courts are divided as to whether remand without vacatur is permissible and, if so, when it may be ordered.

There is a clear divide in the lower courts as to the legality and appropriateness of remand without vacatur. The cases fall into three categories. First, the D.C. Circuit—by far the most frequent user of remand without vacatur—is internally divided. Some judges on that court have criticized the device as improper. Second, courts elsewhere that have applied the device have done so inconsistently and under different rationales. Finally, other courts are divided as to whether the device is permissible in the first instance.

Disagreement and inconsistency in the D.C. Circuit. The D.C. Circuit routinely orders remand without vacatur, often failing to acknowledge its uncertain legal footing, or even to express a coherent view of when such a device is appropriate. It is all but impossible to discern from the case law a common standard governing remand-without-vacatur orders. *Compare, e.g.*, *Allied-Signal*, 988 F.2d at 150–51 ("The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.") (quotation omitted) *with Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) ("We find it plausible that FERC can redress its failure of explanation on remand while reaching the same result.") *and Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) ("[V]acatur is not necessarily indicated even if an agency acts arbitrarily and capriciously in promulgating a rule.").

But the court is not without its dissenters. Several judges on the D.C. Circuit have criticized remand without vacatur as a violation of the APA. In their view, the APA speaks "in the clearest possible terms" in requiring vacatur of unlawful rules. *Checkosky*, 23 F.3d at 491 (Randolph, J., separate opinion); *see also Comcast*, 579 F.3d at 11 (Randolph, J., concurring). Those clear terms require a reviewing court, once it "determines that the agency has not adequately explained its decision," to "vacate the agency's action." *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (quotation omitted). The judge-made device of remanding without vacating, on the other hand, "rests on thin air." *Checkosky*, 23 F.3d at 490 (Randolph, J., separate opinion). Not only does "[n]o statute governing judicial review of agency action permit[] such a disposition," but "the controlling statute—5 U.S.C. § 706(2)(A)—flatly prohibits it." *Id.*; *see also In re Core Commc'ns, Inc.*, 531 F.3d at 862 (Griffith, J., concurring) (noting the "disputed legality of remand without vacatur under the Administrative Procedure Act").

Indeed, one panel of the D.C. Circuit came close to formally breaking with *Allied-Signal*. In a 2004 opinion, the panel held that "the judicial review provisions [of the Clean Air Act] ... authorize us only to vacate, rather than remand" an agency rule. *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1373 (D.C. Cir. 2004); *see also id.* at 1374 ("[O]ur power is limited to 'reversing,' and hence vacating, the offending portions of EPA's rule below."). The opinion recognized that circuit precedent authorized remand without vacatur in some circumstances, but held that "vacatur ... is the only remedy we are authorized to impose to correct the

error in the rule." *Id.* Ultimately, the posture of the case prevented the panel from reaching the issue. On reconsideration, the panel withdrew the relevant part of the opinion because it was "unnecessary to decide" in that case whether vacatur was the only available remedy. 393 F.3d 1315, 1316 (D.C. Cir. 2005) (per curiam).

Some Circuit Courts have ordered remand without vacatur but have applied inconsistent standards. Some courts have followed the D.C. Circuit's lead and remanded agency action without vacatur. But they cannot agree on when that device is legally appropriate.

In *Idaho Farm Bureau Federation v. Babbitt*, for example, the Ninth Circuit remanded but refused to set aside unlawful agency action, relying entirely on extra-statutory notions of equity. 58 F.3d 1392, 1405 (9th Cir. 1995) ("Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid. However, when equity demands, the regulation can be left in place while the agency follows the necessary procedures."). Other circuits have used the device, but only in more narrow circumstances. The Eleventh Circuit, for example, held that the device was available in a case where it was "not at all clear that the agency's error incurably tainted the agency's decisionmaking process," but declined to "decide whether remand without vacatur is permissible when the agency has erred to such an extent as to indicate that its ultimate decision was unlawful." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015). Still other Circuits have approved the device in

even narrower circumstances—where "the only identified defect in a standard is the lack of an adequate statement of reasons." *See, e.g.*, *Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 191–92 (3d Cir. 2009); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001) ("It may be that the agency can provide a reasonable explanation for its decision .... But it has not yet done so.").[5]

Until now, it seemed that at least one category of cases was categorically ineligible for the device: cases in which this Court has held an administrative rule to be unlawful. Based on the *amici* States' research, the present case is the first in which a lower court, following a decision by this Court, has allowed an unlawful rule to stand while the agency promulgates a replacement.

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[5] Commentators have noted the inconsistent standards used in application of remand without vacatur; and some have also directly criticized the D.C. Circuit test. *See* Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L. Rev. 108, 151 (2001) ("[T]he text of the APA, along with the legislative history, statutory purpose, canons of construction, and judicial precedent demonstrate the illegality of remanding without vacating."); Daugirdas, 80 N.Y.U. L. Rev. at 293 (noting the "inconsistent and overinclusive application of the remedy"); *id.* at 305 ("Instead of the D.C. Circuit becoming better at applying [remand without vacatur] as it accumulates more experience with it, the care with which the D.C. Circuit applies the remedy has eroded, thus making the remedy less effective and less justified ...."); *see also* Levin, 53 Duke L.J. at 380 (although approving of remand without vacatur, noting that "the case law does not disclose a consistent pattern regarding the way in which the two prongs of the *Allied-Signal* formula fit together").

Some Circuit Courts have eschewed remand without vacatur. Other circuits have held that vacatur is required where an agency action is unsupported, in contrast to the approach of the D.C. and other Circuits. In addition to the decisions of the Eighth and Fifth Circuits identified by Petitioner, *see* Pet. 9–10, the First Circuit has expressly declined to remand an insufficiently explained agency decision. *See Harrington v. Chao*, 280 F.3d 50 (1st Cir. 2002). In *Harrington*, the Secretary of Labor declined to initiate a union enforcement action and issued a brief "Statement of Reasons" for its action. *Id.* at 52. On APA review, the First Circuit concluded that the Statement failed to sufficiently explain the reasoning for the decision and vacated the Secretary's decision. *Id.* at 61. The court held that "vacation is a proper remedy when an agency fails to explain its reasoning adequately" and cited an article that "criticiz[es] the practice of remanding without vacating." *Id.* at 60 (citing Prestes, 32 Seton Hall L. Rev. 108).[6] Thus, courts are divided not only as to *when* remand without vacatur can be applied, but as to whether it is an appropriate device at all.

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The uncertainty surrounding the permissibility and application of remand without vacatur is incapable of resolution except by this Court and should not be allowed to persist. The APA is intended to establish a

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[6] In *Schurz Commc'ns*, 982 F.2d at 1056, the Seventh Circuit also declined to remand an agency rule without vacatur, although the parties there did not dispute the court's discretion to use the device.

uniform regime of judicial review of agency action, and an unlawful agency rule should be subject to the same remedies regardless of where the action is brought. As stated in one leading treatise, "the Supreme Court needs to resolve the growing dispute about the range of remedies available to a reviewing court when the court detects one or more flaws or gaps in an agency's reasoning in support of a rule." Richard J. Pierce, Jr., Administrative Law Treatise § 7.13, at 693 (5th ed. 2010). This is an ideal case to provide that resolution.

CONCLUSION

This Court should grant the Petition for writ of certiorari.

Respectfully submitted,

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