IN THE

Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION INC., AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

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

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QUESTION PRESENTED

The Clean Air Act, 42 U.S.C. § 7607(b)(1), provides a 60-day period for initiating petitions for review of Environmental Protection Agency (EPA) regulations. Petitions for review filed outside that period are jurisdictionally barred. The District of Columbia Circuit has adopted a "constructive reopening" doctrine that permits a challenge to longstanding regulations regardless of a failure to challenge the regulation within the statutorily authorized period, whenever regulatory changes have "changed the calculus for petitioners in seeking judicial review." Pet. App. 12a. Other courts of appeals have permitted petitions for review in such circumstances only after the petitioner has first filed a petition with the agency to alter or rescind its regulation. The question presented is:

Whether a petitioner may challenge a Clean Air Act regulation after the Act's 60-day time period for judicial review has expired, on the ground that the regulatory context of the regulation has changed sufficiently to alter the stakes for judicial review, without first filing a petition with the EPA to rescind or alter the regulation.

PARTIES TO THE PROCEEDING

The Petitioner in Nos. 02-1135 and 03-1219 below was Sierra Club.

The Petitioners in No. 06-1215 below were Friends of Hudson, Environmental Integrity Project, Louisiana Environmental Action Network and Coalition for a Safe Environment.

The Petitioner in No. 07-1201 below was Coalition for a Safe Environment.

The Respondents in these consolidated cases below were the United States Environmental Protection Agency and Stephen L. Johnson, Administrator.

The Intervenors in these consolidated cases below were American Chemistry Council, National Environmental Development Association's Clean Air Project, Alliance of Automobile Manufacturers, National Paint and Coatings Association, Coalition for Clean Air Implementation, Clean Air Implementation Project, Air Permitting Forum, American Forest and Paper Association, American Petroleum Institute and National Petrochemical & Refiners Association, all in support of Respondent EPA.

RULE 29.6 STATEMENT

Petitioner American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper and wood products industry.

Petitioner American Petroleum Institute ("API") is a nationwide, not-for-profit association.

National Petrochemical & Refiners Association ("NPRA") is a national trade association.

The AF&PA, API, and NPRA have no parent companies, and no publicly-held company has a 10% or greater ownership interest in either the AF&PA, API, or NPRA.

The American Chemistry Council ("ACC") is a not-for-profit trade association. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners American Chemistry Council, American Forest and Paper Association Inc., American Petroleum Institute, and National Petrochemical & Refiners Association respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 551 F.3d 1019 and is reproduced in the appendix to this petition (Pet. App.) at 1a–21a. The orders of the court denying the petitions for rehearing and rehearing en banc are unreported, and are reprinted at Pet. App. 22a–25a.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. A timely petition for rehearing was denied on July 30, 2009. Pet. App. 22a–23a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

Section 112, 42 U.S.C. § 7412, section 302, 42 U.S.C. § 7602, and section 307, 42 U.S.C. § 7607, of the Clean Air Act, and 40 C.F.R. § 63.6, in relevant parts, are reproduced in the appendix at 26a–35a.

STATEMENT

In this case, a divided panel of the D.C. Circuit invalidated a 1994 air pollution rule at the Sierra Club's request, even though the Clean Air Act's 60–day window for seeking judicial review of the rule

had long since passed. The court reasoned that, notwithstanding the text of the Clean Air Act, Sierra Club should be allowed to challenge the 1994 rule because later rulemakings had changed the context in which the earlier adopted rule operates, which has supposedly altered the "stakes of judicial review." The panel held that the rule had been "constructively reopened," while conceding that it had not been "actually reopened."

The holding below raises a square conflict among the circuits: the consensus of the Fifth, Eighth, Ninth, and Eleventh Circuits is that, in these circumstances, Sierra Club should have first presented its case to the agency, petitioning the Environmental Protection Agency (EPA) to rescind its rule. If EPA had denied its petition to rescind, all circuits agree that the Sierra Club could have challenged this denial and the agency's reasoning in federal court. This petition-to-rescind procedure would have caused Sierra Club no harm and would have avoided several harms caused by the D.C. Circuit's ruling.

First, the D.C. Circuit's ruling defies the plain text of the Clean Air Act (CAA). Under CAA section 307(b)(1), Sierra Club had 60 days within which to file its petition for review, 42 U.S.C. § 7607(b)(1); here, it waited eight years.

Second, the decision below unravels the normal procedure for administrative rulemaking. In the normal rulemaking process the agency notifies the public of a proposed rule change; the stakeholders comment on the proposal; the agency compiles these comments in a record; and finally the agency makes a considered decision on the basis of that record. At that point, the decision is subject to judicial review for a specified period of time. The "constructive

reopening" doctrine, which allows a party to challenge a longstanding regulation in court anytime that the context of the regulation changes, bypasses and undercuts this process. It allows a petitioner to raise a new challenge in court, without notice to other stakeholders or comments from them, without a record, without agency consideration of the views of all interested parties, and without a reasoned agency decision made in a nonlitigation context.

Third, the D.C. Circuit severely compounded this problem in its substantive ruling by invalidating the 1994 rule on the basis that EPA had supposedly admitted that it did not comply with statutory requirements. Regardless of whether EPA actually admitted anything, an agency cannot "admit" the meaning of a statute. Allowing an agency to admit to the meaning of a statute means that an agency can reverse a longstanding rule in its litigation papers. In this case, the court held that a few sentences in a legal brief in 2008 negated a rule promulgated 14 years earlier after careful deliberation through notice-and-comment procedures. If the agency wishes to reverse position, it should do so following regular rulemaking procedures open to all stakeholders.

Fourth, invalidating this particular rule threatens regulated industries and businesses with substantial liability, and the economy with unnecessary disruption. The 1994 rule had provided that during startup, shutdown, and malfunction (SSM) events, businesses had to follow good work practices for minimizing emissions, rather than meeting the otherwise applicable standards for emissions of hazardous air pollutants developed for normal operations. EPA promulgated this rule because it recognized that startup, shutdown, and malfunction periods present unique and disparate challenges.

Acknowledging that these idiosyncrasies often make it impossible for businesses to meet the otherwise applicable emission standard, or for EPA to prescribe a different standard for such events, EPA directed that all sources follow "good air pollution control practices for minimizing emissions," during startup, shutdown, and malfunction events. 40 C.F.R. § 63.6(e)(1)(i). The ruling below means businesses will be liable for noncompliance with standards that EPA has acknowledged they will be unable to meet during certain SSM periods. This is a significant threat to these businesses because both the government and ordinary citizens may sue them under the Clean Air Act, potentially subjecting violating businesses to substantial civil, and even criminal, penalties.

In sum, this case presents an issue of sweeping importance both to administrative law and to companies subject to the Clean Air Act—an issue on which the circuits are squarely divided. The Court should grant certiorari.

A. Statutory Background

The Clean Air Act, designed to "protect and enhance the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1), assumed its modern shape after significant amendments in 1970. It contains several programs to achieve its ends. Among the principal provisions are the Clean Air Act section 111 "standards of performance" for certain categories of new sources that "cause[], or contribute[] significantly to, air pollution" that endangers the public. 42 U.S.C. § 7411(b)(1). These section 111 standards are known as new source performance standards, or NSPS. When EPA first issued NSPS standards in the 1970s, it directed that they did not apply to periods of equipment startup, shutdown, and malfunction

(SSM), because the technologies used to meet these standards of performance often "do not reach optimum operating efficiency for some time," and because there is a "statistical probability of infrequent, unavoidable mechanical failures" that can make it impossible for a source to meet the standards during a period of malfunction. 37 Fed. Reg. 17,214 (proposed Aug. 25, 1972). Instead, sources must follow "good air pollution control practice for minimizing emissions" during SSM periods—a standard that better reflects the unique and unpredictable problems faced by extremely diverse sources during these events. 40 C.F.R. § 60.11(d).

The Clean Air Act also regulates hazardous air pollutants under section 112. 42 U.S.C. § 7412. In 1990 Congress significantly altered the hazardous air pollutant provisions of the Clean Air Act. Congress listed 189 hazardous air pollutants, *id.* § 7412(b), and directed that EPA provide "a list of all categories and subcategories" of stationary sources that emitted these pollutants by November 15, 1991. *Id.* § 7412(c). Congress also instructed EPA to promulgate emission standards for each source category on an aggressive schedule. *Id.* § 7412(d), (e). These section 112 standards are known as maximum achievable control technology, or MACT, standards. MACT standards for new sources must be at least as stringent as "the emission control that is achieved in practice by the best controlled similar source." *Id.* § 7412(d)(3). EPA has set MACT standards on a source-by-source basis for well over one hundred source categories, 40 C.F.R. pt. 63, ranging from "Wood Furniture Manufacturing Operations," 40 C.F.R. pt. 63, subpt. JJ, to "Containers" 40 C.F.R. pt. 63, subpt. PP, and from "Dry Cleaning Facilities," 40 C.F.R. pt. 63, subpt. M, to "Shipbuilding and Ship Repair," 40 C.F.R. pt. 63,

subpt. II. Thus, these section 112 standards now affect a vast array of American manufacturers.

In promulgating MACT standards during the early 1990s, EPA relied upon its experience from the NSPS program. It noted that section 112's technology-based standards for hazardous air pollutants are "essentially equivalent to [section 111] performance standards," which apply to non-hazardous air pollutants. 58 Fed. Reg. 42,760, 42,762 (proposed Aug. 11, 1993). Consequently, it adopted a similar exemption and general duty for startup, shutdown, and malfunction events. EPA stated, with no equivocation, that "it is technically impossible to properly operate" some required pollution control techniques during "unpredicted and reasonably unavoidable failures of air pollution control systems." *Id.* at 42,777. Accordingly, it required sources to comply with the general duty to follow "good air pollution control practices for minimizing emissions to the greatest extent possible consistent with safety and good air pollution control practices," during such events, 40 C.F.R. § 63.6(e)(1)(i), rather than the otherwise applicable MACT standard. National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions, 59 Fed. Reg. 12,408 (Mar. 16, 1994) ("1994 Rule").

Another provision of the 1994 Rule established "recordkeeping requirements to allow [sources] to develop a plan" for SSM events. 58 Fed. Reg. at 42,777. The 1994 Rule also provided that this plan would be incorporated into the operating permit required by the Clean Air Act, Title V. See 42 U.S.C. § 7661 *et seq.*; 59 Fed. Reg. at 12,439.

EPA's final rule was published on March 16, 1994. Clean Air Act section 307(b) directs that section 112 rules may be challenged only by a petition for review

in the D.C. Circuit within 60 days of publication—in this case the deadline for challenge was May 15, 1994. 42 U.S.C. § 7607(b)(1). Environmental groups did not petition for review of the 1994 Rule. Although industry groups did seek review of other portions of this rule,[1] no one challenged the SSM provision at issue here—that is, the requirement that a source follow the general duty to minimize emissions during SSM periods unless its MACT prescribes a more specific SSM standard. Accordingly, all stakeholders—EPA, industry, States, environmental groups, and others, viewed the SSM issue under section 112 as resolved, subject only to future agency promulgations, after notice and opportunity to comment, of new MACT emission standards for individual source categories.

After 1994, EPA promulgated MACT standards for numerous source categories. Because these standards are specific to individual types of industrial operation, they may supersede the general provisions of the 1994 Rule where applicable. Some of these MACT standards for specific industrial operations apply during SSM periods, superseding the general duty to follow good practices for minimizing emissions during such periods. See 40 C.F.R. pt. 63, subpt. L, National Emission Standards for Coke Oven Batteries; 40 C.F.R. § 63.310. This makes sense for source categories where startup, shutdown, and malfunction events create predictable emission problems that may be planned for and addressed with new technology.

Many of the MACT standards, however, do not apply during SSM events; instead, they rely on the

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[1] Industry groups' claims were largely rejected. *Nat'l Mining Ass'n* v. *U.S. EPA*, 59 F.3d 1351 (D.C. Cir. 1995) (per curiam).

general duty established in the 1994 rule to follow good air pollution control work practices for minimizing emissions at such times. This is not surprising because during startup, shutdown or malfunction, it is often literally impossible for sources to comply with the otherwise applicable MACT standards for normal operations.

For example, when, after the decision below, EPA proposed MACT standards for stationary reciprocating internal combustion engines, EPA recognized that "emissions will likely be different during periods of startup and malfunction, particularly for engines relying on catalytic controls." 74 Fed. Reg. 9698, 9710 (proposed Mar. 5, 2009). The agency determined that for some stationary internal combustion engines, it could not rely upon catalytic controls to reduce emissions during startup "because the engine exhaust temperatures need to increase up to a certain level for such controls to work effectively." *Id.* Further, EPA found that for this category of sources, add-on controls often cannot be relied upon during periods of malfunction, and relying upon the catalytic controls during this period could permanently damage the controls, rendering them unusable during normal conditions. *Id.*

Faced with the decision below, EPA could no longer rely on the general duty, and instead proposed different, less stringent standards for periods of startup, shutdown, and malfunction. *Id.* at 9702–03 (listing different proposed standards for non-emergency 2SLB, 4SLB, 4SRB, and CI sources). But *existing* MACT standards often rely on the same kinds of catalytic controls—controls that EPA has acknowledged cannot be applied during startup and malfunction. Thus, EPA was only stating the obvious years ago when it noted that "unpredicted and

reasonably unavoidable failures of air pollution control systems" could occur, making it "technically impossible" to comply with MACT standards designed for normal operation. 58 Fed. Reg. at 42,777. Indeed, applying MACT standards designed for normal operations to SSM events would violate the plain text of the CAA, which requires that such standards be "achievable." 42 U.S.C. § 7412(d)(2).

B. Proceedings Below

In 2002, 2003, and 2006 EPA promulgated new rules that changed how EPA *monitors* a source's compliance with the general duty to minimize emissions during SSM events.[2] As noted, other provisions of the 1994 Rule required sources to file SSM plans. Under these provisions, compliance with the plan provided a safe harbor from enforcement actions for violating the general duty. The 2002, 2003, and 2006 rulemakings altered these provisions so that plan requirements no longer needed to be subject to Title V review, but also provided that a source's compliance with a plan no longer provided it with a safe harbor.

Sierra Club filed petitions for review, challenging the 2002, 2003, and 2006 rules, alleging that these

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[2] National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 67 Fed. Reg. 16,582 (Apr. 5, 2002); National Emission Standards for Hazardous Air Pollutants for Source Categories: General Provisions; and Requirements for Control Technology Determinations for Major Sources in Accordance with Clean Air Act Sections, Sections 112(g) and 112(j), 68 Fed. Reg. 32,586, 32,591 (May 30, 2003); National Emission Standards for Hazardous Air Pollutants: General Provisions, 71 Fed. Reg. 20,446 (Apr. 20, 2006).

rules did not ensure compliance with the general duty. But Sierra Club also argued that the 1994 rule itself was invalid because it relied on the general duty to minimize emissions during SSM periods, rather than the otherwise applicable MACT standard. Sierra Club argued that the 1994 Rule violates section 112's requirement that EPA promulgate "emission standards" because CAA § 302(k) defines "emission standard" as a requirement that "limits the quantity, rate, or concentration of emissions of air pollutants on a *continuous* basis." 42 U.S.C. § 7602(k) (emphasis added). According to Sierra Club, the 1994 rule did not provide for emission limits on a "continuous" basis.

EPA, joined by Petitioners, noted that the court only had jurisdiction to review petitions that had been timely filed, and that the period for reviewing the 1994 Rule had long passed. The D.C. Circuit acknowledged that the petition fell outside the statutory period, and that EPA had neither reopened the 1994 Rule, nor acted in a manner that was "tantamount to an *actual* reopening" of the rule. Pet. App. 8a–9a (emphasis in original). Nevertheless, the court held that EPA had "constructively reopened" its 1994 Rule by "modifying the SSM plan requirements." *Id.* at 10a. The court asserted that changing the SSM plan requirements had "'*completely* changed the regulatory context for its SSM exemption.'" *Id.* (quoting Sierra Club brief) (emphasis in original).

Offering several extended quotations from Sierra Club's brief, and none from the Clean Air Act, the court asserted that "'EPA ha[d] eliminated all of the[] safeguards,'" that had ensured compliance with the general duty. Pet. App. 10a (quoting Sierra Club brief). The court suggested that "'the general duty requirement and the SSM plan requirements were

both elements of a package deal that EPA devised and sold to the public as adequate protection from [hazardous air pollutants] during SSM events.'" *Id.* at 12a (quoting Sierra Club brief). Thus, the court concluded that the 2002, 2003, and 2006 rules had "changed the calculus for petitioners in seeking judicial review, and thereby constructively reopened consideration of the exemption from section 112 emission standards during SSM events." *Id.* at 12a–13a (internal citation omitted).

The court next concluded that the 1994 Rule violated CAA section 112. It reasoned that the definition of "emission standard" in CAA section 302(k) meant that "there must be continuous section 112–compliant standards." Pet. App. 15a. It asserted that EPA had admitted that the general duty to follow good practices to minimize emissions was "not a section 112–compliant standard." *Id.* Thus, it invalidated the 1994 Rule, asserting that "the general duty that applies during SSM events is inconsistent with the plain text of section 112." *Id.* at 2a. Consequently, the court did not reach Sierra Club's objections to the 2002, 2003, and 2006 rules. *Id.* at 17a.

Judge Randolph dissented from the panel decision. On the constructive reopening doctrine, he noted that "[t]he majority's [constructive reopening] rationale implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from third parties." Pet. App. 19a. He also noted that there is no need for the constructive reopening doctrine: Sierra Club "may file a petition to rescind [the 1994] regulations, and if EPA denies the petition, Sierra Club may seek judicial review of EPA's action." *Id.* at 20a. Judge Randolph also dissented from the majority's

substantive ruling, noting that the majority's substantive analysis "dispose[d] of the case with an argument not addressed in the brief of either party," so "EPA never had a fair opportunity to address the issue." *Id.* at 20a–21a. A timely petition for en banc rehearing was denied on a five-to-three vote, with Senior Judge Randolph and Judge Kavanaugh not participating.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's "constructive reopening" device violates the plain text of the Clean Air Act, expanding the jurisdiction of the court of appeals beyond that granted by Congress. The decision also conflicts with the decisions of several other federal circuits. The court's disregard of the text of the Act conflicts with a long line of decisions from this Court. The decision below presents particularly important questions because the "constructive reopening" doctrine threatens to undo administrative finality in cases far beyond those involving EPA, thereby shifting the focus of agency rulemaking from notice and comment procedures, where the agency, industry, other organizations, and the public can present their views and defend their interests, to the federal courts, where litigants are incentivized to play a cat-and-mouse game with the agency and other parties in order to attack settled rules.

The need for review of the decision of the D.C. Circuit is particularly acute because of its substantive conclusion that the general duty to follow "safety and good air pollution control practices for minimizing emissions," during periods of equipment startup, shutdown, and malfunction, unambiguously violates EPA's duty to promulgate "emission standards." This aspect of the decision holds sources

experiencing unavoidable malfunctions liable for failure to comply with MACT rules that were adopted on the understanding that it would often be impossible to comply with them during malfunctions. Given that the CAA authorizes both governmental and citizen suit enforcement of the Act, the decision threatens industries with substantial, unavoidable, and unnecessary liabilities.

I. THE DECISION BELOW DEFIES THE PLAIN TEXT OF THE CLEAN AIR ACT AND UNRAVELS IMPORTANT ADMINISTRATIVE PROCEDURES.

The Clean Air Act's judicial review provision, CAA section 307(b)(1) provides: "A petition for review of action of the Administrator in promulgating . . . any emission standard or requirement under section 7412 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1).[3] It further provides:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

Id.; see also *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 572–73 (2007).

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[3] This provision dictates the review procedures for eight categories of EPA action under the CAA, as well as "any other nationally applicable regulations promulgated, or final action taken" by EPA under the Act. 42 U.S.C. § 7607(b)(1).

There is no dispute that in this case the Sierra Club's petition is not "based solely on grounds arising after" 1994. Although Sierra Club has asserted that the 2002, 2003, and 2006 rules "*completely* changed the *regulatory context* for [the] SSM exemption," Pet. App 9a (second emphasis added), Sierra Club's challenge is unquestionably aimed at the 1994 exemption itself. Whether or not Sierra Club's petition is based *partly* on grounds arising after 2002, clearly it is not based *solely* on such grounds.

The text of the Clean Air Act provides an unambiguous answer to petitioner's challenge: it is years too late. The decision below, however, discarded the statutory time limits prescribed by Congress. Instead, the court reasoned that EPA's changes to the SSM plan requirements had "significantly altered the stakes of judicial review," and thus concluded that "[t]he fact that the regulatory terms defining the general duty itself are unchanged is legally irrelevant." Pet. App. 11a (internal quotations and alteration omitted).

To support its decision, the court of appeals provided an extremely one-sided summary of the regulatory history of SSM plan requirements. But more importantly, it offered no explanation of why this regulatory history has any relevance to the text of the Clean Air Act, which bars Sierra Club's challenge. Instead, it relied on a handful of earlier D.C. Circuit cases, principally *Kennecott Utah Copper Corp.* v. *United States Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), that have employed the "constructive reopening" device. Pet. App. 9a–11a. Such a text-free approach to statutory construction conflicts with this Court's long-standing and consistent doctrine: "Where the language is plain and admits of no more than one meaning, the duty of

interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

One might imagine that such a departure from the statutory text was motivated by strong policy concerns, but there is no practical advantage to the constructive reopening device. A long-standing rule is not completely shielded from review by the running of the statutory time period for a petition. As Judge Randolph explained, "Sierra Club has another option: it may file a petition to rescind those regulations and, if EPA denies the petition, Sierra Club may seek judicial review of EPA's action." Pet. App. 20a.

While this procedure would cause Sierra Club almost no trouble, it would provide EPA, the public, and the reviewing court clear benefits. Faced with a petition to rescind, EPA could address the validity of its 1994 regulation in a non-litigation setting and within the context of its overall responsibilities under section 112. Equally important, other stakeholders, such as the States, industry, and other non-governmental organizations, could present their views and defend their interests. And, if EPA decided to rescind its regulation, it would have to do so through notice-and-comment rulemaking. *See Motor Vehicles Mfrs. Ass'n of U.S.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983). This procedure would allow the agency to make an informed decision based on the comments of all stakeholders. Finally, it would create a record that would serve as the basis for the court of appeals' review of the agency's action.

Furthermore, as Judge Randolph noted, the constructive reopening doctrine "implies that each time EPA changes an emissions regulation, it risks subjecting every related regulation to challenges from

third parties." Pet. App. 19a. And, of course, the doctrine is not limited to Clean Air Act regulation. Kennecott was a case challenging regulations issued under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* 88 F.3d 1191. In almost every area of administrative law, each new regulation changes the "regulatory context" for numerous other regulations. Thus, the statutory time limits for review contained in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, as well as other specific judicial review statutes similar to CAA section 307(b)(1), are in danger of being compromised by this ruling. Here, for example, the decision radically altered the regulatory context for current MACT standards for section 112 source categories that rely on the general duty. Before the ruling below, the otherwise applicable MACT standard did not apply during SSM events; now, under the panel's ruling, it will. There is no doubt that the decision below "'significantly alter[ed] the stakes of judicial review'" of these source-specific MACT standards. Pet. App. 11a. Under the decision below, each such standard may now be challenged regardless of the Clean Air Act's explicit deadline.

This unravels the regular ordering of the administrative process. It unfairly disadvantages those parties that rely on the notice-and-comment procedure of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* And, it rewards parties that ambush agencies in litigation before they have been able to consider their regulation in a non-litigation context. EPA's proposed MACT standard for stationary reciprocating internal combustion engines, which followed the circuit court's decision in this case, reaffirms the wisdom of allowing the agency to develop its record in a non-litigation context. For this

category of sources, the agency has been able to seek views on how long a "start up" period should be and consider the fact that use of the catalytic controls during malfunction could render them ineffective during normal operations. 74 Fed. Reg. at 9710–11. Such tailoring of the MACT standards to the applicable physical conditions has not been possible for the large number of source categories for which the decision below made the established MACT standard applicable at all times regardless of particular problems and safety considerations present during SSM events. This approach does not foster the reasoned decision-making promoted by established administrative procedures. Instead, it pushes administrative disputes into the federal courts.

II. THE CONSTRUCTIVE REOPENING DOCTRINE CREATES A CIRCUIT SPLIT.

Given that the constructive reopening doctrine violates the plain text of the Clean Air Act and the animating principles of administrative procedure, it is not surprising that it conflicts with the decisions of several circuit courts of appeals. The D.C. Circuit, of course, handles many petitions for review, so its decision, even standing alone, would warrant this Court's review because of the practical importance of its holding. But other circuits have repeatedly rejected the approach taken by the D.C. Circuit, holding that if a party wants to challenge a regulation after statutory time limits have passed, it must first petition the agency to rescind the challenged regulation.

The Fifth, Ninth, and Eleventh Circuits have emphasized that the petition-to-rescind procedure is faithful to the text of statutory time limitations, while at the same time allowing for review of older regulations that are alleged to be *ultra vires*. In

Dunn-McCampbell Royalty Interest, Inc. v. *National Park Service*, 112 F.3d 1283 (5th Cir. 1997), the Fifth Circuit addressed a 1994 challenge to 1978 National Park Service regulations. *Id.* at 1285–86. The court held that the challenge was barred by the general six-year statute of limitations for civil actions against the government, 28 U.S.C. § 2401(a). *Dunn-McCampbell*, 112 F.3d at 1286–88. It noted: "If Dunn-McCampbell were able to point to . . . an application of the regulations [to Dunn-McCampbell] here, or if they had petitioned the National Park Service to change the . . . regulations and been denied, this court might have jurisdiction to hear that case." *Id.* at 1287–88.

The Fifth Circuit relied on a Ninth Circuit decision and a 1990 decision of the D.C. Circuit:

> The Ninth Circuit, for example, has held that a challenger may contest an agency decision as exceeding constitutional or statutory authority after the limitations period, but only by petitioning the agency to review the application of the regulation to that particular challenger. *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir.1991). Although the *Wind River* Court never said so explicitly, the court treated the agency's denial of that petition as a "final agency action" sufficient to create a new cause of action under the APA.
>
> Similarly, in *Public Citizen v. Nuclear Regulatory Commission*, the D.C. Circuit held that it had jurisdiction to hear a substantive challenge after the limitations period had run. 901 F.2d 147, 152 (D.C.Cir.[1990]). In that case, the claimant filed a petition with the agency to rescind regulations, then challenged the agency's denial of the petition in federal court.

Id. at 1287 (subsequent history citation omitted).

The *Wind River* decision is similarly instructive. In 1987, the Wind River mining company petitioned the Bureau of Land Management (BLM) to rescind its 1979 decision to classify certain land as a Wilderness Study Area. *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 711–12 (9th Cir. 1991). The company alleged that the land did not meet the statutory requirements for this classification. *Id.* at 711. When BLM refused, the company filed suit in federal court. *Id.* at 712. Although the Ninth Circuit concluded that 28 U.S.C. § 2401(a)'s six-year requirement applied to the company's claim, *id.* at 713, it held that the claim was timely because of the 1987 petition to rescind. *Id.* at 716. It concluded that if "a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than six years following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger," reasoning that "[t]he government should not be permitted to avoid all challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." *Id.* at 715.

The Eleventh Circuit has also held that a litigant may challenge the substantive validity of an older regulation through the petition-to-rescind procedure. See *Legal Envtl. Assistance Found., Inc.* v. *U.S. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997) ("[I]n the course of reviewing EPA's order denying LEAF's petition, over which our jurisdiction is not questioned, we also have jurisdiction to entertain LEAF's contention that the regulations upon which EPA relies are contrary to statute and therefore invalid, regardless of the fact that LEAF's challenge is brought outside the

statutory period for a direct challenge to the regulations.") (interpreting the Safe Drinking Water Act's judicial review provision, 42 U.S.C. § 300j-7(a)(2)).

Other circuits have reached the same conclusion, on the basis that requiring an initial petition to rescind allows for creation of a record and a considered decision by the agency made outside of the litigation context. The Eighth Circuit and even the D.C. Circuit followed this reasoning in relatively early Clean Air Act cases. The courts were interpreting section 307(b)(1) of the 1970 Clean Air Act, which provided: "A petition for review .... shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day." 42 U.S.C. § 1857h–5(b)(1) (current version at 42 U.S.C. § 7607(b)(1)). The Eighth Circuit concluded that if a petitioner wanted to bring a challenge outside of the thirty day limit, it must first present the request to the agency, even if the petition was based on new grounds. *Union Elec. Co.* v. *EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976). Relying on legislative history, and the need to develop a record at the agency before an appeal, the court reasoned:

> The Senate Report indicates that it is only when the Administrator fails to act upon the basis of the new information that review is proper under § 307, implying that the information would have to be brought to the Administrator's attention. The petition for review in this circumstance would be a challenge to the Administrator's action and would require a scrutiny of the administrative record available to the Administrator to determine whether a clear error of

> judgment had been shown. It would not require that this court in the first instance develop a record on the challenges.

Id. at 220. Thus, the court concluded that "[i]t is only when the Administrator fails to act upon the basis of the new information presented to him that a petition for review is proper." *Id.*

In *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975), the D.C. Circuit adopted the Eighth Circuit's approach, stating:

> we find no substantive difference between direct review of a new information challenge and review of the Administrator's refusal to revise a standard when presented with new information. In both cases a revision would be ordered only if it would be arbitrary and capricious to do otherwise. We think, however, that review of the Administrator's refusal is a considerably more desirable approach. Such a procedure would avoid litigation when the Administrator acceded to a request and, when he did not, it would present us with an administrative record, including the Administrator's views in a nonlitigation context, a judicially recognized distinction of importance.

Id. at 666. Ordinarily, the Court is not concerned when there appears to be an intra-circuit conflict and thus the presence of an earlier D.C. Circuit ruling would not be relevant to certiorari. But given the dominance of the D.C. Circuit in reviewing agency rulemakings, tension among decisions within that Circuit should operate much the way it does when the Court is reviewing decisions of the Federal Circuit on subjects over which it has all but exclusive authority. Thus, Judge Randolph's dissent, which relies heavily

upon previous Circuit holdings, provides an unusually strong basis for this Court's review in this case.

The Fifth Circuit has also endorsed these principles in the context of the Clean Water Act in *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282 (5th Cir. 1977). The court embraced *Oljato*, noting that the petition-to-rescind procedure would "ensure orderly development of the issues and the record, as well as . . . promote the full and objective application of the agency's expertise." *Id.* at 1289.

Thus, other courts of appeals have reached agreement on the proper procedure for substantive challenges to agency regulations outside the statutorily prescribed review period: such challenges must be brought through a petition to rescind. Such a rule honors the statutory text, and the principles of administrative law. The decision below is an egregious departure from the decisions of the other circuits, and even from earlier decisions of the D.C. Circuit. And it is an extremely important departure because of the D.C. Circuit's special role in reviewing agency regulations. Accordingly, this Court should grant the petition.

III. THE PRACTICAL IMPACT OF THE DECISION BELOW MAKES IT PARTICULARLY WORTHY OF REVIEW.

The substantive conclusion of the court below reinforces the need for review. The court of appeals provided little independent reasoning for invalidating the 1994 Rule. Instead, it relied on a supposed agency admission that the general duty to follow "good air pollution control practices for minimizing emissions," 40 C.F.R. § 63.6(e)(1)(i), is "not a section 112–compliant standard." Pet. App. 15a. This

reasoning aggravates the court's mistaken reopening decision, because it means that EPA may reverse a well-settled rule without any administrative process or notice to interested parties. According to the court, EPA's appellate brief as respondent below suddenly reversed a position that the agency had adopted in notice-and-comment rulemaking and then maintained for 14 years. This reasoning is inconsistent with this Court's holdings on rescinding a regulation, see *Motor Vehicles Mfrs.*, 463 U.S. at 42–43, and with the distinction this Court has drawn between agency interpretations promulgated under delegated congressional authority and those asserted in litigation papers. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

The decision reached by this faulty reasoning threatens to overturn EPA's complex and well-developed NSPS program, which was established well over 30 years ago. As noted, the general SSM duty for section 112 is modeled on the NSPS standard under section 111. Although NSPS standards are known as "standards of performance" rather than "emission standards," the Clean Air Act defines a "standard of performance" as an "emission limitation," 42 U.S.C. § 7411(a)(1), which is defined as equivalent to an "emission standard." *Id.* § 7602(k). Thus, NSPS standards are now vulnerable to a similar challenge.

This decision also presents the unusual case of practical consequences so stark that they warrant review. The decision holds sources experiencing unavoidable malfunctions liable for failing to comply with MACT rules that were promulgated on the understanding that they would not apply during

startups, shutdowns, or malfunctions.[4] As noted, MACT standards are set so that they are at least as stringent as "the emission control that is achieved in practice by the best controlled similar source." *Id.* § 7412(d)(3). And when EPA set these standards, it generally did not consider the emission control achieved in practice by sources during SSM events, because those events were covered by the general duty to minimize emissions at such times. See 74 Fed. Reg. at 9710. Indeed, EPA still has not even collected *data* on these emissions. *Id.* But under the decision below, a source that is starting up, shutting down, or has malfunctioned will be held to the emission standards achieved by the best sources during *normal operation*, even though "it is technically impossible to properly operate" many required pollution control technologies during "unpredicted and reasonably unavoidable failures of air pollution control systems." 58 Fed. Reg. at 42,777; 74 Fed. Reg. at 9710–11.

If the D.C. Circuit's decision is implemented, the government could prosecute sources that unavoidably fail to comply with MACT limits. And even if it does not, Clean Air Act section 304 provides for citizen suits. 42 U.S.C. § 7604. Thus, any party seeking to punish an emission source for any reason, environmental or otherwise, or simply seeking attorneys fees, see *id.* § 7604(d), can sue these sources and claim a violation of section 112 that was never contemplated when the 1994 Rule was adopted. Given the CAA's

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[4] As EPA has recognized, it can take 15 to 30 minutes of operation for exhaust gas temperatures to reach the temperature levels where certain catalytic controls become effective, and attempting to use these controls during startup or malfunction could compromise their overall effectiveness. 74 Fed. Reg. at 9710.

penalties, which include civil and criminal sanctions, *id.* § 7413(b); 40 C.F.R. § 19.4; 42 U.S.C. § 7413(c)(1), this decision threatens industry with substantial, unavoidable liability and irreparable harm.

Thus, the decision below presents a particularly important question of federal law because of its implications for administrative procedure, the Clean Air Act, and the national economy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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