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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23A349, Ohio versus the Environmental Protection Agency, and the consolidated cases.

Ms. Sridharan.

ORAL ARGUMENT OF MATHURA J. SRIDHARAN
ON BEHALF OF THE STATE APPLICANTS

MS. SRIDHARAN: Mr. Chief Justice, and may it please the Court:

The EPA set out to address the contributions of 23 upwind states to downwind air pollution through a single federal plan, but, as commenters predicted and before the plan became final, the legal predicates for the federal plan, that is, the state plan disapprovals, came under fire in courts all around the country.

The specter of lesser participation in the federal plan revealed yet another problem. The EPA's choice of method, that is, selecting a single cost threshold and applying it uniformly across all 23 states to establish emissions limits, has consequences; namely, the math

1 doesn't work when the inputs don't match the
2 outputs.

3 With the SIP disapprovals in flux and
4 the EPA's methodology requiring full
5 participation, the EPA had an obligation to
6 consider what happens to the federal plan when
7 one or more states drop out, that is, when the
8 inputs, 23 states, don't match the outputs, now
9 the 11 states that remain in the plan.

10 Its failure has become consequential.
11 The plan now regulates under half of the states
12 and a quarter of the emissions that the EPA
13 originally set out to regulate. Under this
14 fractured plan and without a stay, the remaining
15 states and their industries face serious harm.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Well, it seems that
18 your argument is dependent on whether or not the
19 original plan was interdependent and required
20 all the states to be in.

21 What's your best evidence for that?

22 MS. SRIDHARAN: The best evidence for
23 that, Your Honor, is the method that the EPA
24 chose, and the method it chose has to do with
25 discerning points of diminishing marginal

1 returns, which means that when the mix of states
2 changes, in this case, when states drop out and
3 their particular technologies and industries
4 drop out with them, those points of diminishing
5 marginal returns shift, and they shift somewhat
6 unpredictably, which means that the relevant
7 cost threshold for a different mix of states
8 could be cheaper, and, with full candor to the
9 Court, it could be the same or even be more
10 expensive.

11 The problem is we don't know. It is
12 the unpredictability that renders this plan
13 unreasonable as to any different mix of states.

14 JUSTICE SOTOMAYOR: Could you break
15 that down? I don't understand. You started
16 your introduction by saying that the commonality
17 was cost. But I thought that cost had to do
18 with the technology and how much it costs to
19 implement, so I don't see why that would be
20 different among the 50 states or marginally
21 important enough to be different.

22 MS. SRIDHARAN: Of course, Your Honor.

23 JUSTICE SOTOMAYOR: And to the extent
24 that the other states dropping out don't
25 increase the cost for any of the remaining

1 states, they -- their allotment remains the same
2 regardless of how many people are participating.
3 So I don't see how you're raising an argument,
4 frankly, not for yourself because nothing's
5 changed.

6 MS. SRIDHARAN: Well, Your Honor, let
7 me take that in reverse, and I'm happy to go
8 down the gritty path of the technical details.
9 But, before that, the allotments may not change
10 in the way the EPA has executed the plan, but
11 the allotments themselves are wrong when the EPA
12 fails to consider what happens with lesser
13 participation.

14 And answering --

15 JUSTICE SOTOMAYOR: I -- I -- I -- say
16 it, but show me.

17 MS. SRIDHARAN: Sure, Your Honor. The
18 answer goes, again, to the methodology, which I
19 keep calling the point of diminishing marginal
20 returns question, and I'm happy to go step by
21 step into what is admittedly an extremely gritty
22 mathematical problem.

23 JUSTICE SOTOMAYOR: Why don't you get
24 to the end question. Nothing is changing in
25 your cost or what you have to do, meaning the

1 states that are -- who -- for whom stay -- stays
2 have not been given, their allotment doesn't
3 change, nothing changes.

4 MS. SRIDHARAN: Again, Your Honor,
5 you're talking about the execution of those
6 allocations, but the allocations themselves are
7 now wrong, and what I mean by that is the EPA's
8 method of selecting a single cost threshold.

9 Now that goes to looking for points on
10 a graph where an additional dollar spent
11 produces little to no additional emissions
12 reductions. Those points on that graph change
13 unpredictably, erratically, when the mix of
14 states changes.

15 CHIEF JUSTICE ROBERTS: Well, I -- I
16 -- I understand that point, but the
17 calculations, the methodology is all there, and
18 I assume you just -- instead of putting 23
19 states in, you put 11 in and -- and, in looking
20 for whatever reduction, instead of a hundred,
21 you do the 11 percent.

22 How long do you think it would take if
23 there were a proceeding to adjust the numbers
24 along the lines that you propose or at least for
25 EPA to know what those numbers are and determine

1 whether or not that's a sufficient change in --
2 leads to a sufficient change in the result?

3 MS. SRIDHARAN: I don't know how long
4 it'll take the EPA to recrunch the numbers.
5 What I can say --

6 CHIEF JUSTICE ROBERTS: I'll bet they
7 do it real quickly.

8 MS. SRIDHARAN: I'm sure they could,
9 Your Honor, but here is the problem: They
10 failed to consider any of that. I mean, this is
11 a failure to consider problem. They failed to
12 consider the most important aspect of the
13 interdependency that they introduced into the
14 program by virtue of using this particular
15 methodology.

16 What's more is, even if there
17 ultimately is no change -- and I can't tell you
18 what that looks like, whether there is a
19 difference in the obligations or not -- there
20 are at least some examples in the record for the
21 coalition of states that I represent where there
22 could be a cheaper cost threshold.

23 But what matters is the EPA failed to
24 consider at all and has sort of blown past the
25 problem here, saying nothing to look here, just

1 go ahead and execute your obligations as they
2 are.

3 JUSTICE KAVANAUGH: To make sure I
4 understand that, I think you're saying, but
5 correct me if I'm wrong, that when the EPA said
6 the whole thing is severable in response to the
7 comments that the SIP disapprovals were going to
8 be problematic and that would unravel the whole
9 plan, when the EPA said, oh, don't worry about
10 it, it'll be severable, that that was not
11 adequately explained in terms of how the subset
12 of states would work.

13 Is that what you're saying?

14 MS. SRIDHARAN: That is definitely
15 correct as to our position with respect to the
16 severability provision. That is not just a
17 failure to explain; it just blows past the
18 problem. It is, at best, boilerplate.

19 And let me give you an example of why
20 that's true. Had they had --

21 JUSTICE KAVANAUGH: In other words --
22 let me just follow up on that. In other words,
23 the Chief Justice's question, maybe they could
24 do that quickly, maybe it would take them a
25 while, but they didn't do any of that, right?

1 MS. SRIDHARAN: Yes, that's exactly
2 right, Your Honor. They've done nothing by way
3 of addressing contingencies.

4 JUSTICE KAGAN: The argument you're
5 making now, I -- I don't remember that in your
6 application. Can you point me to where in your
7 application I should look to get your argument?
8 Because, you know, the way I remember your
9 application, you -- very high level of
10 generality about interdependence and collective
11 responsibility and so forth, but you gave us
12 really nothing to allow us to say, well, how --
13 how would this have been different if it had
14 been 13 rather than 21? What would have
15 changed?

16 MS. SRIDHARAN: Well, on pages 18 to
17 21 of our application, we address this
18 methodology in, admittedly, the same broad and
19 capacious terms that the EPA uses in its final
20 rule.

21 JUSTICE KAGAN: Well, it's -- it's --
22 it's your burden right now to show a likelihood
23 of success. And I have to say pages 18 to 21,
24 if I took these pages and I compared it to what
25 you're saying now, I don't think that I would

1 find a whole lot of commonality.

2 MS. SRIDHARAN: Well, Your Honor, that
3 brings me to the second reason I'm here
4 discussing sort of the nitty-gritty of that
5 methodology, and that is to directly answer this
6 Court's order and the question of why lesser
7 participation matters, and in order to do that,
8 we have had to plumb the record well past what
9 is in the final rule deep into the technical
10 support documents that the EPA has filed.

11 JUSTICE KAGAN: I appreciate that. I
12 mean, we gave you a question and you're trying
13 to answer the question.

14 I -- I -- I guess it does, though,
15 suggest to me that this is an unusual posture
16 for us to be in. No court has looked at the
17 kinds of questions that you're raising here and
18 the kinds of questions that we asked you to
19 discuss. Not a single court has addressed that
20 issue.

21 And yet here we are on papers that
22 also do not address the issue trying to figure
23 that out. That seems quite odd to me, and I'm
24 wondering how you think we should do that.

25 MS. SRIDHARAN: Well, two reasons or

1 two answers to that, Your Honor.

2 First of all, while these proceedings
3 are going on, the states and their industries
4 continue to suffer irreparable harm. And,
5 second, perhaps this would be a different story
6 had the EPA refuted anything with respect to the
7 interdependencies in the plan.

8 They have not said a single word
9 saying that the interdependencies do not exist.
10 I will -- I will concede that they keep saying,
11 well, you can just plow ahead with your
12 obligations. But they don't explain why those
13 obligations make sense any more under the
14 methodology that they chose.

15 JUSTICE BARRETT: Counsel, did you
16 raise this interdependence point in the
17 comments?

18 MS. SRIDHARAN: Yes, Your Honor.
19 Commenters did preview the fact that the federal
20 plan and its uniformity would be destroyed by
21 the SIP disapprovals and the litigation
22 surrounding that. I can point to --

23 JUSTICE SOTOMAYOR: I'm sorry. Where
24 did that happen? I thought the SIP disapprovals
25 came after the EPA had announced its plan.

1 MS. SRIDHARAN: No, not exactly, Your
2 Honor. The SIP disapprovals are the legal
3 predicate for the EPA's authority to have a
4 federal plan in place.

5 JUSTICE SOTOMAYOR: I'm sorry, I
6 misspoke. The --

7 JUSTICE BARRETT: Stay?

8 JUSTICE SOTOMAYOR: -- the rule was
9 promulgated after -- before the SIP -- before
10 the courts restrained it with respect to some
11 states?

12 MS. SRIDHARAN: Not exactly. Again,
13 Your Honor, it is our view that publication in
14 Federal -- in the Federal Register is the point
15 --

16 JUSTICE SOTOMAYOR: Ah.

17 MS. SRIDHARAN: -- where the agency --

18 JUSTICE BARRETT: Well, why is that?
19 Why wouldn't it be the finality of the rule?
20 Why is publication the date we should look at?

21 MS. SRIDHARAN: Well, a couple of
22 answers to that. With respect to the Clean Air
23 Act itself, it ties publication in the Federal
24 Register to final agency action that is
25 reviewable under the Clean Air Act's judicial

1 review provisions.

2 Second, by the EPA's own words in the
3 prepublication notice it presented in March, the
4 EPA noted that that would not be the final rule
5 for the purpose of compliance, and, in fact,
6 that would fail the second prong of this Court's
7 Bennett test because legal consequences did not
8 flow from that.

9 But I also want to take a step back
10 because, even if this Court disagrees with me as
11 to whether the stays fall into or out of the
12 gambit of what the agency had to consider, the
13 fact that the commenters previewed all of the
14 problems with respect to the SIP disapprovals
15 and cautioned that the federal plan's uniformity
16 would -- would falter, and then very quickly
17 afterwards there was confirmation of that
18 through litigation that popped up all around the
19 country before the rule even -- the federal plan
20 was in a prepublication form.

21 All of that cued the agency into its
22 obligation to address this very serious
23 structural flaw with the federal plan.

24 JUSTICE JACKSON: Counsel -- oh, I'm
25 sorry, are you done?

1 JUSTICE BARRETT: I'm done.

2 JUSTICE JACKSON: So we're here on
3 a -- a motion, your motion for emergency relief,
4 and --

5 MS. SRIDHARAN: That's right.

6 JUSTICE JACKSON: -- it's fairly
7 extraordinary, I think, to be asking the Court
8 to decide this matter when you haven't even lost
9 below in terms of what is before the D.C.
10 Circuit, and, in fact, my understanding is that
11 you haven't even briefed this argument yet in
12 the D.C. Circuit. So I'm trying to understand
13 what the emergency is that warrants Supreme
14 Court intervention at this point.

15 MS. SRIDHARAN: At the breakneck speed
16 we're going, in order to go -- get into
17 compliance with an unlawful federal rule, we are
18 spending immense sums, both the states as well
19 as our industries. And on top of that, we are
20 facing the threat of power shortages and heating
21 shortages, all of which have gone sort of --

22 JUSTICE JACKSON: Imminently? I'm
23 sorry, imminently power shortages and heating
24 shortages?

25 MS. SRIDHARAN: At least some grid

1 operators have pointed to the fact that this
2 federal rule will be directly associated with a
3 potential for grid unreliability.

4 JUSTICE JACKSON: Eventually.

5 MS. SRIDHARAN: Well --

6 JUSTICE JACKSON: We're -- we're --
7 we're here on emergency relief, and I guess I --
8 I'm worried about -- I'm worried about the
9 standards that this Court needs to take into
10 account when it decides whether or not to
11 entertain these kinds of motions, you know.

12 So what -- what do you perceive your
13 burden to be --

14 MS. SRIDHARAN: Well --

15 JUSTICE JACKSON: -- with respect to
16 showing harm? Shouldn't we be seeking some sort
17 of extraordinary harm, not just the serious harm
18 you say that states will face?

19 MS. SRIDHARAN: Well, on top of that,
20 I think, going back to the compliance burdens,
21 that every dollar that we are spending -- and
22 we've spent a lot, and I know counsel for
23 industry is going to stand up and tell you about
24 the millions of dollars that are going to --

25 JUSTICE JACKSON: Yes, but everybody

1 who has to comply with the rule, right, has to
2 spend some -- something, I would think, in order
3 to do so. And what I'm a little concerned about
4 is that really your argument is just boiling
5 down to we think we have a meritorious claim and
6 we don't want to have to follow the law while
7 we're challenging it.

8 And I don't understand why every
9 single person who is challenging a rule doesn't
10 have that same set of circumstances.

11 MS. SRIDHARAN: I think that goes to
12 the immense sums that are spent that are not
13 recoupable. It goes to the fact that the
14 timeline is exceedingly compressed, so the
15 heating shortages we speak of, and if you go to
16 Grubb declaration that the natural gas pipelines
17 have submitted, paragraphs 66 and 67, the harms
18 we're talking about are serious in terms of
19 harms that --

20 JUSTICE JACKSON: No, I understand.
21 But I thought there was something about 2026
22 when -- when these things have to actually come
23 into effect?

24 MS. SRIDHARAN: Sure. The compliance
25 deadlines might be then, but what it takes to

1 get to compliance starts now. And from the
2 states' perspective, we're the states, we've
3 already started and we had to start.

4 JUSTICE JACKSON: Have you asked the
5 lower court to expedite its review? I would
6 think that that should be required in a
7 situation like this since you're saying stay
8 this pending their review. So are they moving
9 quickly at your request?

10 MS. SRIDHARAN: No, we have not
11 because of the nature of the proceedings before
12 this Court. We are seeking a stay of this Court
13 because of the harms that we are facing right
14 now, and we are -- we believe that our -- we
15 will both succeed on the merits, as well as we
16 face the sort of irreparable --

17 JUSTICE SOTOMAYOR: That's in your
18 brief?

19 CHIEF JUSTICE ROBERTS: Thank you --
20 thank you, counsel.

21 Justice Thomas?

22 Justice Alito?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: You never filed a
25 motion for reconsideration --

1 MS. SRIDHARAN: That's right, Your
2 Honor.

3 JUSTICE SOTOMAYOR: -- after the rule
4 was announced. The agency can only rely on
5 comments that are made during the public time,
6 not after, which means, without a motion for
7 reconsideration, there's no record before the
8 agency proving the interdependency you're
9 claiming right now, correct?

10 MS. SRIDHARAN: No, Your Honor, there
11 is a record, and it comes from the methodology
12 that the EPA chose and explained well into its
13 technical support documents.

14 JUSTICE SOTOMAYOR: You -- but you did
15 not supply a motion for reconsideration in which
16 you laid out what these additional costs would
17 be?

18 MS. SRIDHARAN: We didn't have to,
19 Your Honor.

20 JUSTICE SOTOMAYOR: All right. Is it
21 an inversion of normal rules when you're seeking
22 expedition to bypass the very court who's going
23 to make the substantive decision and not even
24 ask them to expedite and rush to us --

25 MS. SRIDHARAN: I don't --

1 JUSTICE SOTOMAYOR: -- on an
2 incomplete record?

3 MS. SRIDHARAN: I don't think so, Your
4 Honor. This is not an incomplete record in the
5 -- with the fact that the commenters previewed
6 what's going on and litigation confirmed it very
7 quickly. It is also not an incomplete record
8 with respect to the methodology itself.

9 Now that methodology, again, goes well
10 deep into the technical support documents, in
11 part because the EPA engaged in a sort of
12 capacious way of talking about the methodology,
13 but it's there. And the ozone transport policy
14 analysis goes down the details of how the cost
15 threshold is specific to the mix of states that
16 goes into it.

17 And when that shifts, the EPA has an
18 obligation to assess why it matters or why that
19 cost threshold is still reasonably applied to
20 any remaining states. It has not done so. This
21 is -- the burden is on the EPA to consider the
22 inflexibilities that it introduced into the
23 plan, and it has failed to do so, and it
24 continues to stick its head in the sand by
25 failing to go back to the drawing board.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: So, in this posture,
3 one of the things that we would -- that we are
4 supposed to consider is would we take cert on
5 this case and would you be likely to prevail if
6 we did take cert.

7 And one of the reasons usually we
8 don't take cert on a case is if it has a lot of
9 stuff before you get to the merits issues, which
10 is the only thing that we would be concerned
11 about. And it -- it does seem to me you want to
12 -- the term "stuff," sometimes referred to as
13 vehicle issues, there are just a lot of them
14 here, right? There's the question of did you
15 have to comment and did you comment? Then
16 there's the question of, well, even if you
17 couldn't comment but -- because you didn't know
18 enough, should you have filed a motion for
19 reconsideration? And you didn't file a motion
20 for reconsideration.

21 Then there's this very complex issue
22 about how your question relates to the validity
23 of the SIP disapprovals themselves because, if
24 the SIP disapprovals were valid, you wouldn't
25 have a leg to stand on here. So how are we

1 supposed to know that in this posture?

2 So I guess what I'm saying is there
3 are so many hoops that you have to go through
4 and you have to go through all of them. You
5 have to run the table before we could even begin
6 to get to your merits question. Isn't that,
7 according to our usual standards, a reason to
8 deny this application?

9 MS. SRIDHARAN: Justice Kagan, you've
10 given a lot of stuff associated with this case,
11 but there's one thing I really want to talk
12 about, which is what happens if the SIP
13 disapprovals ultimately settle in a place where
14 all 23 states end up staying in the plan. That
15 doesn't change our argument.

16 The problem is the EPA failed to
17 consider in the first instance what happens when
18 there is lesser participation. This is
19 something that it doesn't matter what's going to
20 happen next.

21 JUSTICE KAGAN: Well, that's sort of
22 interesting. That doesn't seem intuitive to me.
23 I mean, if all these lawsuits that the states
24 are bringing are going to end up losing, I mean,
25 the idea that you can be here and be demanding

1 emergency relief just because states have kicked
2 up a lot of dust seems not the right answer to
3 me.

4 MS. SRIDHARAN: No, that's not right,
5 Your Honor, because, in this very unusual
6 circumstance under the statute, as well as the
7 EPA's choice of method, it is relevant to look
8 back at what Your Honor has just termed "kicking
9 up dust."

10 But it's not kicking up dust because,
11 first of all, the legal flaws were quite
12 obvious, and they were previewed by commenters,
13 and then very shortly afterwards litigation and
14 then the stays came around, all of which the EPA
15 had an obligation to engage in rulemaking with
16 its eyes wide open.

17 Now, why that matters, I gave you two
18 reasons: the unique statutory circumstance, as
19 well as the EPA's choice of method. The statute
20 itself requires the EPA to look back to prior
21 predicate rulemaking in order to assert its
22 authority to have a federal plan, and
23 necessarily baked into that is the fact that
24 there may be judicial intervention, especially
25 by the EPA's own doing.

1 JUSTICE KAGAN: What do you think the
2 EPA should have done? I mean, there are 23
3 states here.

4 MS. SRIDHARAN: Mm-hmm.

5 JUSTICE KAGAN: Was the EPA required
6 to sort of consider every permutation, you know,
7 if 22 states are in the plan, if 21 states are
8 in the plan, if 13 states are in the plan, if
9 five states are in the plan? Which states are
10 they?

11 One of my clerks who does math better
12 than I do tells me that there are two to the
13 23rd power, which is like 4 million different
14 permutations. What was the EPA supposed to do?

15 MS. SRIDHARAN: Well, I'm not going to
16 go as far as to say that the EPA had to do
17 necessarily every possible permutation of two to
18 the power of 23 minus one, but --

19 JUSTICE KAGAN: Ugh.

20 (Laughter.)

21 MS. SRIDHARAN: -- but --

22 JUSTICE KAGAN: I have to tell my
23 clerk it's minus one.

24 (Laughter.)

25 MS. SRIDHARAN: -- but -- plus one or

1 minus one. What the EPA had to do as a first
2 matter is acknowledge the problem. So we're
3 very far from talking about the line-drawing
4 things that you're talking about.

5 What the EPA had to do was consider
6 whether, under this method, it would need to
7 address contingencies. And we're familiar in
8 other areas of law where -- for example, in
9 elections law, where you run a number of
10 simulations and decide, you know what, we have a
11 critical mass of a particular solution. Let's
12 apply that. Let's go ahead with that.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 Justice Jackson?

19 JUSTICE JACKSON: So my understanding
20 is that you actually asked the D.C. Circuit to
21 delay merits briefing in this case, and I think
22 that's the opposite of what I would have
23 expected if you are actually suffering
24 irreparable harm. You know, if you're
25 suffering, I would think you'd want the D.C.

1 Circuit to be moving as quickly as possible.

2 So can you speak to that?

3 MS. SRIDHARAN: Yes, Your Honor.

4 First, because of the posture that this case has
5 gone on with respect to litigation, the fact
6 that we can get an answer that stymies the
7 irreparable harm that is currently ongoing right
8 now is something that we came to this Court
9 seeking because we --

10 JUSTICE JACKSON: No, but why did you
11 come to us? You're already before the D.C.
12 Circuit. And my question is, if you're
13 suffering because you're spending money related
14 to compliance with the rule that you're
15 challenging, why didn't you ask the D.C. Circuit
16 to move quickly in rendering its ruling agreeing
17 with you that the rule is invalid?

18 MS. SRIDHARAN: Well, Your Honor, I am
19 not going to get too far into some of the
20 considerations that went into it, but the most
21 important one is that we wanted a rule that
22 affects the entire country to be addressed in --
23 in the first instance as quickly as possible so
24 that we can avoid the sorts of irreparable harm
25 that we are currently suffering.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MS. SRIDHARAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Ms. Stetson.

6 ORAL ARGUMENT OF CATHERINE E. STETSON

7 ON BEHALF OF THE INDUSTRY APPLICANTS

8 MS. STETSON: Mr. Chief Justice, and
9 may it please the Court:

10 EPA's authority under the Good
11 Neighbor provision is limited to regulating a
12 state's emissions that contribute significantly
13 to downwind non-attainment. If EPA is
14 regulating beyond that authority, it is
15 regulating beyond the statute.

16 Ms. Sridharan has explained the
17 deficiencies in a broken rule in which
18 90 percent of power plant emissions, 75 percent
19 of total emissions, have been taken out of the
20 plan. But the Court also asked whether the
21 emissions controls in the rule are reasonable
22 regardless of the number of states that are
23 involved. The answer is no for three primary
24 reasons.

25 First, the rule selectively ignores

1 EME Homer's cost-effectiveness framework.
2 Second, the rule over-controls across a number
3 of industries. And, third, the rule imposes an
4 impossible compliance timeline that will result
5 in reliability issues across the country.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: I think one of the
8 concerns we have is that so much of this seems
9 to depend on the interdependence of the 23
10 states and what happens if some of the states
11 are excluded.

12 So let me ask it in a different way.
13 Could EPA have accomplished the exact same thing
14 by regulating the states individually as opposed
15 to in a -- as a interdependent group?

16 MS. STETSON: It could not have
17 accomplished the exact same thing, Justice
18 Thomas, to the extent that it would have to
19 show, when you say "exact same thing," that the
20 outcome, the cost threshold and so forth, would
21 be the same across 11 states.

22 But, to your question of Ms.
23 Sridharan, I think the issue that you were
24 looking for is evidence about what EPA did, and
25 I want to point you to 88 Federal Register

1 36741. Excuse me. "When the effects of" -- I'm
2 quoting. "When the effects of these emissions
3 reductions are assessed collectively across the
4 hundreds of EGU and non-EGU industrial sources
5 that are subject to this rule, the cumulative
6 improvements in ozone levels at downwind
7 receptors, while they may vary to some extent,
8 are both measurable and meaningful." That is
9 the best example of the collective question that
10 EPA asked itself and answered.

11 Now, you know, Justice Sotomayor, you
12 asked the question about cost and whether the
13 obligations, for example, in Ohio would be the
14 same. But I think the question here is -- goes
15 back to what this Court approved in EME Homer.
16 It's not just a question about whether EPA can
17 regulate something that is inexpensive,
18 potentially inexpensive. It's not a question
19 about whether EPA can regulate emissions. It's
20 a question about whether EPA has appropriately
21 calculated what it calls that knee in the curve,
22 the point where the emissions contribution to a
23 downwind state is controlled at a reasonable
24 cost level.

25 So I think the exchange that you had

1 with Ms. Sridharan about where that cost issue
2 comes from has to do with the question about, if
3 you've got 23 states and all of their EGUs and
4 all of the non-EGU sources that are linked into
5 this rule all feeding into that cost question,
6 what happens if you take out the states where
7 maybe you can control those costs most cheaply
8 and you're left with states that actually have
9 much higher cost thresholds to impose on
10 industries or on EGUs? That changes the cost
11 calculus.

12 It also changes, of course, the
13 emissions calculus. And I want to point in
14 particular --

15 JUSTICE KAGAN: Is that in your brief?

16 MS. STETSON: Yes, it is.

17 JUSTICE KAGAN: Where -- where is
18 that?

19 MS. STETSON: When -- when we discuss
20 the 23-state question. You can look at pages 11
21 to 13 of the Kinder Morgan brief. You can look
22 at pages 18 to 20 and 4 to 9 of the reply. And
23 all of those go to this question about that
24 difference between 23 and 11.

25 But I want to bring home the point

1 with a couple quotes from the --

2 JUSTICE KAGAN: I guess -- I guess my
3 reaction is a little bit the same as -- that I
4 -- I gave to Ms. Sridharan, is, I mean, this is
5 at such a higher level of generality than you're
6 making the same argument now. You know, our
7 briefs do not really address this very
8 complicated cost argument.

9 MS. STETSON: I think, Justice Kagan,
10 the -- the cost argument, while -- while some of
11 the metrics, I think, are complicated, things
12 like ozone modeling and so forth, the -- the
13 bottom line is actually not that complicated.

14 The bottom line is what EPA was
15 supposed to do under the Good Neighbor provision
16 was to figure out, as it said in EME Homer and
17 as it said it was doing here, where is that cost
18 threshold. That word, "cost threshold," if you
19 go back and look at the rule in EME Homer,
20 appears 185 times.

21 But what the Court did -- what -- what
22 the EPA did here with respect to non-EGUs in
23 particular is to look at the question about
24 average costs, which is a completely different
25 issue. Average cost is just how much do these

1 emissions control cost? Does that seem like a
2 reasonable number? Okay, we'll apply them and
3 see what emissions controls exist downwind.

4 And I'll tell you the other thing
5 important to --

6 JUSTICE KAGAN: I mean, the only point
7 I was making -- and I don't want to push you too
8 hard on this because it's not your fault this is
9 coming in a weird posture. I -- I don't even
10 seem the term "cost threshold" on these pages.

11 MS. STETSON: I think the term "cost
12 threshold" is -- is in the EPA's brief. It's a
13 fundamental question about the way that EME
14 Homer exists. If you look at the Kinder Morgan
15 brief, there's a separate discussion of costs
16 that I think is particularly relevant to this.

17 There are two different strands, I
18 think, that we're chasing here. One of them has
19 to do with the 23 versus 11 question, what
20 happens when you take 12 states out. The other
21 question has to do with how EPA went about
22 calculating costs. And I think I was moving
23 from that first question to the second.

24 JUSTICE KAVANAUGH: On -- on that
25 first question, this discussion that you're

1 having now, I thought the broader point was EPA
2 was told the SIP disapprovals were going -- were
3 problematic and were going to be problematic and
4 could be unlawful.

5 And EPA responded, you know, no,
6 they're not, but even if they are, we don't
7 care, it's severable. That's a fine response if
8 they then go on and explain why it still works
9 if it's severable, but that's goose egg. They
10 don't have an explanation there.

11 MS. STETSON: It -- it is a goose egg.
12 Page 36693 of the Federal Register contains the
13 entirety of -- of what we'll call reasoning.

14 JUSTICE KAVANAUGH: So all this
15 discussion about the cost threshold, that's what
16 they should have explained if they're going to
17 make the point, which is a big one, hey, even if
18 12 states drop out, who cares, because it still
19 works.

20 Okay. Show us how -- to Justice
21 Sotomayor's question, show us how it works. But
22 that's -- that's their burden, I think, to
23 show -- to justify -- to not be arbitrary and
24 capricious.

25 MS. STETSON: Yes. And, in fact, if

1 you look at that page that I just cited, 36693,
2 what you'll see is it says, "Should any
3 jurisdiction-specific aspect of this rule be
4 found invalid, the EPA views the rule as
5 severable. Should any industry-specific rule be
6 found invalid, the EPA rolls this rule -- views
7 this rule as severable."

8 This is not intended to be an
9 exhaustive list.

10 JUSTICE SOTOMAYOR: I'm sorry, whose
11 burden -- that may be their burden below. But
12 the burden here as I understand it is on you to
13 show this.

14 And we go back to what Justice Kagan
15 said. I read the -- I read these applications
16 pretty carefully, and I didn't understand this
17 cost argument at all. And I'm really
18 simplistic. I don't have a math degree, all
19 right? If you're sharing costs among 23 people,
20 your cost is going to be less. If you're
21 sharing costs among 11 people, your cost is
22 going to be more.

23 So, since this plan doesn't change any
24 allocations depending on the number of people
25 who are in it, states are bound by the number

1 that was calculated on the larger group, how are
2 the remaining states affected by the fact that
3 their cost should have been higher, but it's not
4 because it's been fixed at this lower number?

5 MS. STETSON: Justice Sotomayor --

6 JUSTICE SOTOMAYOR: I'm very
7 simplistic. You know, cost divided by 23 is
8 always less than cost divided by 11 if your cost
9 is going to stay constant.

10 MS. STETSON: That's the question,
11 though. And -- and I think, Justice Sotomayor,
12 the answer --

13 JUSTICE SOTOMAYOR: But does it
14 matter? Meaning, if you're paying less on the
15 wrong number because it was divided by 23, how
16 could it be that on 11 your cost is ever going
17 to be greater than that number, than the 20 --

18 MS. STETSON: Justice Sotomayor, I --
19 I think so much of it has to do with the states
20 that would be in or out of that cost calculus.
21 So let's suppose just for -- to take your
22 example, let's -- let's suppose --

23 JUSTICE SOTOMAYOR: No. My point is,
24 once the states drop out, it doesn't matter what
25 your responsibility is because the cost is going

1 to remain the same given the nature of this
2 plan. They're not changing the cost once
3 they've calculated the responsibility of the 23.

4 MS. STETSON: Justice Sotomayor --

5 JUSTICE SOTOMAYOR: If 12 are not
6 paying it, what does it matter to you?

7 MS. STETSON: -- I think that is the
8 bug and not the feature of this plan. The --
9 the cost was calculated where it was because EPA
10 looked at the aggregate costs of controls over
11 that -- that Federal Register cite that I read
12 you, hundreds of EGUs across all of the states,
13 hundreds of industries' units across all of the
14 states. It figured out what that aggregate cost
15 was and then it decided to allocate obligations.

16 So we keep talking about the end of
17 that process, what -- what obligations would
18 change on a state based on taking some states
19 out.

20 JUSTICE SOTOMAYOR: It seems --

21 MS. STETSON: But that's not --

22 JUSTICE SOTOMAYOR: It seems to --

23 MS. STETSON: -- the right place to
24 look.

25 JUSTICE SOTOMAYOR: It seems to me

1 that if the aggregate is contributing to
2 something and there's a certain amount of people
3 who for whatever legal reason have been taken
4 out of the calculus, why should you pay for them
5 or not pay for them if the problem is a national
6 one really, not an individual one?

7 MS. STETSON: I think, Justice
8 Sotomayor, that that's actually EPA's argument,
9 is that, you know, it -- it makes sense to
10 impose these emissions controls across these
11 industries because it will result in what EPA
12 calls meaningful reductions.

13 Now I'd encourage you to look at page
14 36743 and 36747 to figure out exactly the scope
15 of those meaningful reductions of the '88
16 Federal Register final rule. What we're talking
17 about when it comes to meaningful reductions is
18 on the order of a total of .66 parts per billion
19 averaged across all of these receptors.

20 Now there's a bigger number involved.
21 That number is, if you add all of the reductions
22 from the receptors from Arizona to Connecticut
23 and you add them up, then you get a bigger parts
24 per billion number, but that's like ticketing me
25 for speeding if I exceed the speed limit one

1 mile per hour in 23 different states. But --
2 but let me --

3 JUSTICE BARRETT: Ms. Stetson -- oh,
4 I'm sorry. I wanted to talk about a different
5 kind of cost. I just want to talk about the
6 costs that you have incurred thus far because
7 the rule has been in effect, right, and part of
8 your argument for emergency relief is the
9 crushing costs and the risk of, you know, energy
10 disruption, et cetera.

11 What has been happening so far?

12 MS. STETSON: Justice Barrett, the
13 industries that I represent have been incurring
14 costs to try to start permitting, compliance,
15 all sorts of issues involving the run-up to
16 installation of these controls.

17 But let me pause on this because I
18 think it also responds to a question, Justice
19 Kagan, that you asked, which is we -- we don't
20 need to show in this posture cert worthiness.

21 Nor do we need to show, Justice
22 Jackson, you know, that this is an emergency.

23 What we need to show is for a stay
24 that we have a likelihood of success on the
25 merits and irreparable harm.

1 JUSTICE BARRETT: But you didn't --

2 MS. STETSON: And the irreparable harm
3 that we point to --

4 JUSTICE BARRETT: -- you didn't detail
5 that that I recall. Like what -- I mean, you --
6 you've talked about projected injury, projected
7 costs that you're going to incur, but,
8 presumably, I mean, the rule's been in effect
9 for a while. Why haven't you talked about that?
10 I think you're kind of shifting gears now.

11 I mean, have you incurred significant
12 financial costs that are unreasonable? Have
13 there been -- Justice Jackson asked Ohio's
14 counsel about whether there have been these
15 kinds of disruptions to this point.

16 MS. STETSON: So let me answer the
17 cost question and the disruption question if I
18 can. The first on the cost is, if you look at
19 the declarants particularly with respect to the
20 pipelines, you'll find explanations about what
21 costs they have to incur in the next 12 to 18
22 months in order to stay in compliance with this
23 timeline that we have pointed out is completely
24 unreliable, in addition to all of the other
25 problems that we talked about.

1 But, on the question of irreparable
2 harm in another respect, you know, what we are
3 talking about is also the question of immediate
4 reliability issues, and if you look at the Brown
5 declaration attached to the American Forest &
6 Paper stay application, you'll find that in the
7 summer of 2024, he anticipates significant
8 reliability problems because of some immediate
9 changes that need to be made to a particular
10 plant that is a critical reliability component
11 of that particular system. So the harms --

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MS. STETSON: -- are immediate. Thank
15 you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas, anything?

18 Justice Alito?

19 Justice Sotomayor?

20 Justice Kagan?

21 JUSTICE JACKSON: Yeah, I have a
22 question. Why haven't you asked the D.C.
23 Circuit to expedite their review? I mean, if
24 you're suffering the harms that you're talking
25 about and you're pending before that court, I

1 guess I'm still confused as to why we are the
2 ones who are being asked in the first instance
3 to look at this.

4 MS. STETSON: Justice Jackson, we --
5 we did move for expedited briefing. We were not
6 given the briefing schedule that we wished.

7 JUSTICE JACKSON: I thought you moved
8 for a delay in briefing until after this Court
9 had decided.

10 MS. STETSON: We initially sought
11 expedited briefing. We did not get the schedule
12 we wished. After the Court granted argument in
13 late December, we asked for a delay in order to
14 impose some order on the process between this
15 Court and that court.

16 JUSTICE JACKSON: All right. Well,
17 let me ask you about your representations that
18 you just have the sort of same ordinary stay
19 burden in this situation. I mean, surely, the
20 Supreme Court's emergency docket is not a viable
21 alternative for every party that believes they
22 have a meritorious claim against the government
23 and doesn't want to have to comply with a rule
24 while they're challenging it.

25 It seems to me that even just sort of

1 irreparable harm, as we've defined it, is
2 insufficient to have the Supreme Court ask --
3 acting as a first decider on the merits of an
4 issue that hasn't been addressed by the lower
5 court. So can you help me to understand what
6 the burden should be in this very unique
7 situation?

8 MS. STETSON: The burden should be
9 exactly what this Court described in *Nken* versus
10 Holder, Justice Jackson.

11 JUSTICE JACKSON: But, in *Nken* versus
12 Holder, was that a situation in which the lower
13 court had not yet even ruled at all on the
14 merits of the claim?

15 MS. STETSON: It was a situation in
16 which the order of an agency came up to this
17 Court in a -- in a posture of a stay motion.
18 Or, actually, I think, that court involved the
19 standard to be applied to --

20 JUSTICE JACKSON: Right, but --

21 MS. STETSON: -- a motion for a stay.

22 JUSTICE JACKSON: -- I want you to
23 appreciate the distinction that I'm making.

24 MS. STETSON: Yeah.

25 JUSTICE JACKSON: This is a situation

1 in which you have filed a claim in a lower
2 court, you're -- the D.C. Circuit has not even
3 looked at it, and you're asking the Supreme
4 Court to essentially give a preview of its view
5 of the merits.

6 And I think that's quite
7 extraordinary, and I'm trying to understand
8 whether the same burden should apply on an
9 applicant in that situation and one in which we
10 at least have a lower court ruling that you
11 could show us and say: These people have made a
12 mistake. We don't have that here.

13 MS. STETSON: Justice Jackson, what we
14 have is an agency order in which we are saying
15 this agency made a significant mistake, in fact,
16 several of them that are fault lines throughout
17 the agency order. That is exactly what was at
18 issue in Nken.

19 If you look at Footnote 1 of Nken,
20 what the Court says there is -- and -- and a
21 question about staying an administrative order
22 is just like a question about staying a judicial
23 opinion. You are staying the source of the
24 authority to act until the Court has an
25 opportunity to consider it further.

1 JUSTICE JACKSON: Thank you.

2 MS. STETSON: Now, even if -- if I
3 could just finish?

4 JUSTICE JACKSON: Yes.

5 MS. STETSON: Even if there is some
6 more toothsome standard that applies in this
7 circumstance, the fact that this is a national
8 rule or purported to be a national rule and
9 costs as much as it costs, billions of dollars
10 in compliance over the next 12 months, I think
11 is reason enough.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 MS. STETSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Stewart.

16 ORAL ARGUMENT OF MALCOLM L. STEWART
17 ON BEHALF OF THE FEDERAL RESPONDENTS

18 MR. STEWART: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 I'd like to make three quick points at
21 the outset. First, with respect to the
22 interests of the state applicants, I think it's
23 important to bear in mind that at this stage of
24 the proceedings, there are a lot more states on
25 our side than there are on theirs, and it's

1 vital to bear in mind the equities of the
2 downwind states because that's the whole point
3 of the Good Neighbor provision of the Clean Air
4 Act and the "Good Neighbor Plan" that the EPA
5 implemented. And when we think about the
6 interests of the downwind states, it's natural
7 to think first of their humanitarian interest in
8 the health and well-being of their residents.
9 But the downwind states that are out of
10 attainment also have a legal obligation to come
11 into attainment by deadlines specified by the
12 statute.

13 And to stay the rule in its entirety
14 based on some theoretical possibility that the
15 contours of an 11-state rule might have been
16 somewhat different if EPA had anticipated all
17 the stays would be terribly unfair to the
18 downwind states.

19 The second point is that in addition
20 to the severability language that Justice
21 Kavanaugh referred to, EPA in the preamble said
22 that it was reserving judgment on whether
23 several additional states should ultimately be
24 included in the plan. It said that if any of
25 the 23 states that were currently included

1 devised compliant SIPs, they could be taken out
2 of the federal plan.

3 And so EPA anticipated from the outset
4 that the plan was one whose geographic
5 composition could change. And EPA devised the
6 requirements for each state in order that they
7 would be workable if a smaller or a larger set
8 of states were ultimately covered.

9 And then the last thing I would say is
10 it's true that the federal plan is not currently
11 providing the air quality benefits that EPA had
12 hoped because the stays of the SIP plan
13 disapprovals mean it's only reducing emissions
14 from 11 states rather than 23. But, for those
15 11 states, the requirements that are imposed on
16 sources are exactly the same as would have been
17 imposed on sources in those 11 states if the
18 full plan had been implemented.

19 And the -- the applicants have
20 suggested that it's -- it's possible that the
21 benefits associated with those requirements
22 might have been different if EPA had known that
23 only 11 states would have been included. But
24 there's no reason to think that that's so. As
25 we look at it, the difference between three and

1 zero is the same as the difference between 10
2 and seven.

3 If you think that the plan is only
4 delivering 30 percent of the -- the -- the 11
5 states are only delivering 30 percent of the
6 benefits, they're still delivering that -- that
7 same quantum of air quality benefit.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Stewart, was
10 there any weight put on the interdependence of
11 the 23 states as far as the benefits of the plan
12 and the cost to the individual states?

13 MR. STEWART: I think, when they refer
14 to interdependence, they're -- they're referring
15 to kind of three topics that were discussed in
16 the preamble. The first was EPA took pains to
17 point out that although it was engaging in a
18 complicated inquiry to decide what emission
19 controls could be cost-effectively imposed on
20 different types of industrial sources, in the
21 end, it was placing the same requirements on all
22 of the covered states; that is, to do equity, it
23 was saying that power plants in Indiana need to
24 come up to the same standard as power plants in
25 Texas.

1 And so, in that sense, the plan was
2 interdependent in that EPA wanted the same
3 restrictions to apply to sources in all states,
4 but that --

5 CHIEF JUSTICE ROBERTS: Thank you.
6 Just if I could interrupt. What -- what's the
7 smallest state among the 23? The smallest state
8 in terms of emissions?

9 MR. STEWART: I -- I'm not sure.

10 CHIEF JUSTICE ROBERTS: Well, assume
11 it's the smallest state.

12 MR. STEWART: Okay.

13 CHIEF JUSTICE ROBERTS: Would -- would
14 you have undertaken this program if only that
15 state was involved?

16 MR. STEWART: We -- we -- if -- if
17 only the state was involved, we might have not
18 have thought it was worth the trouble to
19 undertake such a comprehensive inquiry.

20 Now, if all -- if 22 of the states had
21 submitted compliant plans and only one was left,
22 EPA would still have had a statutory obligation
23 to promulgate --

24 CHIEF JUSTICE ROBERTS: You -- you --

25 MR. STEWART: -- for that state a plan

1 --

2 CHIEF JUSTICE ROBERTS: Okay. It's
3 hard to stop you sometimes.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: If the current
6 plan with the current number of states involved
7 regulates 11 percent of the EGU emissions that
8 you anticipated with the 23 states, would you
9 have gone ahead with that?

10 MR. STEWART: I mean, we would
11 certainly -- again, if there had been any
12 states, even one, with non-compliant plans, EPA
13 would not only have had the authority but a
14 statutory obligation to promulgate a federal
15 plan for that state and to promulgate a federal
16 plan that it thought would ensure that sources
17 within the state didn't contribute significantly
18 to downwind non-attainment.

19 And when I said earlier maybe if it
20 was only a smaller set of states involved, EPA
21 would think as a matter of cost/benefit analysis
22 it's not worth doing the whole enormous inquiry,
23 we can do a -- a quicker and --

24 CHIEF JUSTICE ROBERTS: Okay. Got it.

25 MR. STEWART: But now that -- now that

1 --

2 CHIEF JUSTICE ROBERTS: I got it. I
3 got it.

4 MR. STEWART: Okay.

5 CHIEF JUSTICE ROBERTS: Now, when --
6 if -- if you prevail here, when will EPA address
7 the question that's raised about whether or not
8 the fact that it's a reduction in terms of the
9 number affected and a reduction in the number of
10 states, when will EPA sit down and address that,
11 and when -- when will they give an explanation
12 rather than the litigants here?

13 MR. STEWART: I don't think that they
14 have any plan to do that, first of all, because
15 whatever they might have done if they had been
16 studying only 11 states at the outset, now that
17 they've done the whole analysis, there would be
18 no reason for them not to use what they found in
19 --

20 CHIEF JUSTICE ROBERTS: Well --

21 MR. STEWART: -- in devising a plan.

22 CHIEF JUSTICE ROBERTS: Well, it's
23 something --

24 MR. STEWART: But the other thing --

25 CHIEF JUSTICE ROBERTS: It's something

1 new that you only regulate 11 percent. And in
2 terms of why it's necessary to look at this
3 here, if you think it's an important question,
4 it's because EPA will not look at it until after
5 the hundreds of millions of dollars of costs are
6 incurred.

7 MR. STEWART: I think part of the
8 reason that we won't look -- look at it is that
9 the ground is still shifting; that is, EPA
10 earlier in the year proposed to disapprove the
11 -- the plans of several additional states,
12 which, if that ultimately went forward as the --
13 the final decision, would result in the addition
14 of those states to the plan. We had a ruling
15 from the Tenth Circuit at the end of the day on
16 Friday saying that that proceeding is being
17 transferred to the D.C. Circuit, and that could
18 result in Utah and Oklahoma being put back into
19 the federal plan.

20 So part of the reason it wouldn't make
21 sense for EPA to do a sort of ground-up inquiry
22 is that, just as it was getting done with that,
23 it might have a new geographic composition to
24 deal with.

25 JUSTICE KAVANAUGH: But it could

1 have -- in response to the comments that said
2 the SIP disapprovals were going to be
3 problematic, EPA could have come back and said:
4 Well, if some of the states are knocked out, the
5 requirements will still be the same even if
6 there are only 15 states or even if there are
7 only 10 states because and kind of explained
8 that reasoning.

9 That is, as I understand it, absent.
10 And the problem is we're not sure if the
11 requirements would be the same with 11 states as
12 with 23. And -- and it's just not explained.

13 MR. STEWART: I -- I -- I think the
14 comments were raised at kind of a lower level of
15 specificity than -- than you might imagine.
16 That is, there were comments to the effect that
17 your federal plan is in trouble because valid
18 SIP disapprovals are a condition precedent to
19 the federal plan and the SIP disapprovals were
20 bad.

21 And to -- to a point, those commenters
22 have been vindicated. That is, several states
23 have obtained stays of their SIP disapprovals,
24 and the result has been that --

25 JUSTICE KAVANAUGH: But -- but, when

1 the EPA came back, EPA said severability. So
2 EPA understood the comment.

3 MR. STEWART: But I -- no, no, I think
4 the comment was --

5 JUSTICE KAVANAUGH: EPA understood the
6 comment and came back and said, even if we have
7 fewer states, we're going to plow ahead anyway,
8 and then the question I think that's raised is
9 why and how.

10 MR. STEWART: I -- I --

11 JUSTICE KAVANAUGH: And that's just
12 kind of pretend nothing happened, just go ahead
13 with the 11 states in this instance.

14 MR. STEWART: I think EPA understood
15 the comment to be, to the extent that your SIP
16 disapprovals are challenged and either stayed or
17 ultimately struck down, your federal plan will
18 be less effective. I don't think any commenter
19 was saying specifically, if some disapprove --
20 SIP disapprovals are stayed, the plan will
21 become arbitrary and capricious as to the other
22 states.

23 JUSTICE KAVANAUGH: The plan will
24 become unworkable. The cost, the requirements
25 might change. And when EPA comes back, it

1 doesn't explain anything on that.

2 MR. STEWART: I mean, we -- we know
3 that the -- the requirements don't change. That
4 is, EPA imposed equivalent requirements on
5 different -- on power plants, on steel industry
6 sources, on pipeline engines, with respect to
7 industrial facilities in the same source
8 category that are located in different states.
9 EPA imposed exactly the same requirements.

10 And the requirements that are imposed
11 on sources in Indiana and Ohio -- West Virginia
12 is out for now because they got a stay -- but,
13 in Indiana and Ohio, they're exactly the same as
14 they would have been under an 11-state plan.

15 The -- the only argument that the
16 applicants have is that maybe imposition of
17 those requirements on the same sources in the 11
18 states will produce lower air quality benefits
19 downwind now that it's only the 11 states.

20 Now --

21 JUSTICE GORSUCH: Mr. Stewart?

22 MR. STEWART: Yes.

23 JUSTICE GORSUCH: Just a couple of
24 simple questions. How often does EPA use a
25 severability provision like this? My -- my

1 understanding, and it -- and I just -- is it's
2 very rare, it's a handful of times in the last
3 10 or 15 years out of the thousands of rules
4 it's promulgated.

5 Is that right?

6 MR. STEWART: I -- I don't know how
7 often they do it generally, but I do know that
8 it is -- it's been a recurrent feature of these
9 sorts of "Good Neighbor" plans that become --

10 JUSTICE GORSUCH: Am I right, though,
11 that it's only a handful of times over the last
12 10 or 15 years?

13 MR. STEWART: I -- I would be
14 surprised if it's only a handful, but I don't
15 have information about --

16 JUSTICE GORSUCH: I found an article
17 that said between 2000 and 2014 it was seven
18 times. Is that -- do -- do you -- do you have
19 any other information?

20 MR. STEWART: I don't -- I don't have
21 any other evidence, but I -- I think, even with
22 that --

23 JUSTICE GORSUCH: Okay, okay, okay,
24 okay. Okay. My other simple question is,
25 could -- could EPA have done this on a

1 state-by-state basis? I mean, when a SIP is --
2 fails, the obligation statutorily is for EPA to
3 come up with a federal plan.

4 Was that an option that -- that it
5 considered?

6 MR. STEWART: I mean, in a sense, they
7 did do that. That is --

8 JUSTICE GORSUCH: No, no, I'm -- they
9 -- they did a 23-state plan. Okay.

10 MR. STEWART: They did a 23-state --

11 JUSTICE GORSUCH: So I'm just asking,
12 did they consider doing a state-by-state plan?

13 MR. STEWART: They --

14 JUSTICE GORSUCH: Yes or no?

15 MR. STEWART: Yes.

16 JUSTICE GORSUCH: Okay. And -- and
17 why didn't they do that?

18 MR. STEWART: And they did it.

19 JUSTICE GORSUCH: Well, all right.

20 MR. STEWART: They -- they -- they --
21 they imposed --

22 JUSTICE GORSUCH: I -- I -- I -- we're
23 talking past each other. We have a 23-state
24 plan that I understand has state by state. I
25 get that. I'm just wondering, did they -- did

1 they consider doing that without respect to the
2 23 states as a -- as a -- as -- as a collective?

3 MR. STEWART: I mean, if what you mean
4 is did they consider issuing 23 different --

5 JUSTICE GORSUCH: Yes, that is my
6 question.

7 MR. STEWART: -- Federal Register
8 notices, they considered it. Part of the reason
9 they didn't do it is that they thought by making
10 it an overall federal plan, the trading program
11 for the power plants would be easier to
12 administer, it would be easier for power plants
13 in -- to trade emission allowances with power
14 plants.

15 JUSTICE GORSUCH: Got it. Got it.
16 Thank you.

17 JUSTICE ALITO: Suppose they had done
18 it state by state and had -- let's take Ohio as
19 an example -- had done the cost/benefit analysis
20 for Ohio separately and in isolation.

21 Is there -- would the requirements
22 that the state now faces be the same?

23 MR. STEWART: I think there's every
24 reason to think that there would be. I don't
25 say -- think I could say that 100 percent, but I

1 think part of what is threatening about the --
2 the applicants' position is that the applicants
3 haven't made an attempt to -- to offer a nuanced
4 showing along those lines. They haven't done
5 their analysis and said: Given where we are
6 now, the following modifications of the plan
7 would be appropriate.

8 JUSTICE ALITO: What I understand you
9 to be saying is that it might -- the math might
10 turn out the same, but it wouldn't necessarily
11 turn out the same. Is that -- that's basically
12 what you're saying?

13 MR. STEWART: Yes, that's right.
14 And -- and, certainly, what we have now is a
15 closer approximation to what an 11-state would
16 have -- plan would have looked like than zero
17 is. And what the applicants are asking for is
18 zero, and that isn't an option that EPA could
19 have chosen as a matter of statute. EPA was
20 obligated as a matter of statute to promulgate
21 some plan for each of the states that it found
22 had failed to devise compliant SIPs.

23 JUSTICE ALITO: The --

24 JUSTICE KAVANAUGH: The fact --

25 JUSTICE ALITO: -- the severability --

1 JUSTICE KAVANAUGH: Go ahead.

2 JUSTICE ALITO: A simple question.

3 The severability rule in the D.C. Circuit as I
4 understand it is that it's presumptive, right?
5 It's not conclusive.

6 I mean, it could be -- there are
7 circumstances where provisions are -- are
8 interrelated and so that the presumption is
9 overcome. Why wouldn't that be true here?

10 MR. STEWART: Well, I -- I think
11 partly because the severability inquiry in the
12 D.C. Circuit kind of as I understand it has two
13 prongs. The first is did the agency intend the
14 rule to be severable along particular lines,
15 and, second, if the agency intended it, can what
16 remains function sensibly as its own rule. And,
17 here, we know that EPA intended it to be
18 severable.

19 The -- the other thing I would say
20 about the possible rarity of express
21 severability provisions is it's been a recurrent
22 feature of these plans that plans -- states
23 would drop in and out, EPA might promulgate a
24 revised "Good Neighbor Plan" and some of the
25 states would be included in the revised plan and

1 some would stay in the original plan.

2 So it was just understood as a feature
3 of this type of rulemaking that when the
4 composition of the plan changed, the
5 requirements imposed on the remaining states
6 would not change.

7 EPA decided in this rulemaking to make
8 that statement explicit, to say EPA regarded it
9 as severable along geographic lines. And that
10 at least pretermitted inquiry -- any inquiry as
11 what -- as to what EPA intended the rule to be,
12 but that's always been understood to be the rule
13 even when EPA doesn't say that explicitly.

14 JUSTICE JACKSON: So, Mr. Stewart, can
15 I ask you just about their challenge? And I'm
16 trying to understand it because the rule was
17 enacted originally with 23 states. And was
18 there a challenge at that point about the number
19 of states originally, when it first was enacted?

20 MR. STEWART: I -- I don't -- there
21 were challenges to the antecedent SIP
22 disapprovals, and many of the states said we
23 should not be under any "Good Neighbor Plan"
24 because -- or in -- under any new "Good Neighbor
25 Plan" because we are already doing enough to

1 ensure that our sources don't contribute
2 significantly. That --

3 JUSTICE JACKSON: So there was a
4 possibility they could be out?

5 MR. STEWART: There was a possibility
6 and -- and those -- those comments and those
7 challenges were really brought during the SIP
8 disapproval process. They were not brought as
9 -- necessarily as challenges to the -- the
10 federal plan.

11 JUSTICE JACKSON: The rule. And I
12 guess I'm -- I'm -- I'm trying to understand the
13 interaction between a challenge being brought
14 when the rule is enacted and subsequent
15 developments like judicial stays and how we
16 think about that in terms of the ground shifting
17 and whether they can even -- it's even
18 judicially cognizable in this way.

19 MR. STEWART: Yes, you -- you would
20 think that once the rule is promulgated, once
21 it's signed and finalized by the agency, that if
22 subsequent events provide -- somebody thinks
23 provide good cause for EPA to reconsider what
24 it's done, we think it's a requirement as a
25 matter of justiciability that a petition for

1 reconsideration or --

2 JUSTICE JACKSON: Right, because we --
3 we ordinarily would say, like, the agency can't
4 supplement its reasons after the fact. We look
5 at the rule at the time it's enacted and we
6 determine whether or not there were promulgation
7 problems, right?

8 MR. STEWART: Exactly. And we think,
9 first, that's a solid basis for finding a claim
10 to be nonjusticiable. But, even if the Court
11 doesn't agree with that, we think the fact that
12 it is a kind of based on subsequent events
13 should inform your consideration of the merits.
14 That is, it should be the burden of the
15 applicants to say fairly precisely here is why
16 the diminution of geographic coverage logically
17 warrants a change to the terms of the plan --

18 JUSTICE GORSUCH: Mr. Stewart, on that
19 point, so as I understand it, EPA originally
20 proposed a 23-state solution, got some comments
21 back saying it's not going to be 23 states, it
22 might be something less than that.

23 It came back with a severability
24 provision that effectively says instead of a one
25 -- a one 23-state solution, we're going to have

1 23 solutions. And nobody got an opportunity to
2 comment on that.

3 And so part of the problem, it seems
4 to me -- what -- all these discussions about
5 what does it mean when we have this applied to
6 individual states, some subset of 23, is because
7 nobody got a chance to comment on that.

8 Now you might say it's a logical
9 outgrowth, but it's a very different thing to
10 say we have 23 plans as opposed to one plan.
11 And all of these arguments, nobody had a chance
12 to have comment on. What -- what do you say to
13 that?

14 MR. STEWART: I guess part of what I
15 would say is what I referred to earlier as the
16 -- the historical or legal backdrop; that is, it
17 had traditionally been the case that the
18 geographic composition of these plans would
19 change, some states would drop out, some states
20 might be added. It was understood that a state
21 could always get out of a federal plan for -- by
22 --

23 JUSTICE GORSUCH: Well, I'm not -- I'm
24 going to push back on that just a little bit
25 because, originally, it was a 23-state solution.

1 Then you got comments that said: Ah, some are
2 going to fall out. And the response was a
3 severability provision, as Justice Kavanaugh
4 pointed out, without a whole lot of explanation,
5 and nobody got a chance to comment.

6 I mean, what do you say to that, just
7 to the point of the APA is all about an
8 opportunity to be heard, and nobody got a chance
9 to be heard on the possibility that you're going
10 to apply this -- this formula to one small state
11 potentially, the same formula that was dependent
12 upon an analysis of an aggregate of 23?

13 MR. STEWART: I think I would say
14 people had a chance to comment -- to make
15 comments to the effect of, if some states drop
16 out, the plan will become arbitrary and
17 capricious or will need to be rethought as to
18 the remaining states.

19 But nobody was making that comment.
20 People were making the -- the valid comment that
21 for any particular state, the legitimacy of --
22 of applying the FIP depended on a valid SIP
23 disapproval. And --

24 JUSTICE SOTOMAYOR: They still could
25 have filed a motion for reconsideration,

1 correct?

2 MR. STEWART: Yes, again, because --

3 JUSTICE SOTOMAYOR: That's the avenue
4 when you're not given an opportunity to publicly
5 comment.

6 MR. STEWART: And that would be the
7 time at which you could say, at least for now,
8 here is the class of states that are out, and so
9 you, EPA, rather than comment on, as Justice
10 Kagan was pointing out, what would happen in the
11 possibly millions of permutations of some states
12 being in or out, at that point, they could have
13 said to EPA: These are the specific states that
14 are out. We don't think the plan makes sense as
15 to the remaining states.

16 JUSTICE SOTOMAYOR: Mr. Stewart, could
17 --

18 JUSTICE ALITO: Has there been a
19 motion for --

20 JUSTICE SOTOMAYOR: I'm sorry.

21 JUSTICE ALITO: Go ahead.

22 JUSTICE SOTOMAYOR: Could you
23 succinctly state for me what are the common
24 features in this plan to all 23 states?

25 MR. STEWART: I think --

1 JUSTICE SOTOMAYOR: Because, as I
2 looked at the plan, certain states were exempted
3 out because they were already meeting their
4 emission control goals. Certain states the EPA
5 determined would be out of it at a certain point
6 in time but not initially.

7 MR. STEWART: I'd -- I'd say --

8 JUSTICE SOTOMAYOR: So it was very
9 individualized in many ways. So tell me what
10 wasn't.

11 MR. STEWART: I think -- most of it I
12 -- there were initial determinations about which
13 states should be included, but with respect to
14 the states that were included, the -- the
15 requirements were -- were almost -- were mostly
16 uniform; that is, in 2024 and 2025, the plan
17 would only impose new requirements on power
18 plants, electric-generating units, and for the
19 most part, during those years, those
20 requirements would simply be that the power
21 plants operate their existing controls to the
22 maximum extent.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Well, just two very
3 simple questions.

4 Had there been a motion for
5 reconsideration by the EPA, would there have
6 been any deadline for the EPA to rule on that?

7 MR. STEWART: There -- there was one
8 -- there were two motions raising this issue.
9 One was a motion for reconsideration filed by
10 U.S. Steel, which raised this issue and also
11 raised a pretty complicated set of technical
12 challenges specific to the steel industry. And
13 there was another filed by AFPA styled a motion
14 to stay that also raised the 11 versus 12.

15 There is no deadline. There is a
16 mechanism for arguing that EPA has unreasonably
17 been -- has unreasonably delayed, but that
18 hasn't been invoked.

19 JUSTICE ALITO: Okay. The other
20 question has to do with the fact that this is an
21 emergency application. We now receive many
22 applications for stays. Sometimes your office
23 seeks a stay. Sometimes your office opposes a
24 stay.

25 What is your office's position on the

1 question whether in this context what the stay
2 applicant must show is some sort of
3 super-irreparable harm? Is the applicant
4 required simply to show irreparable harm, or is
5 it required to clear some much, much higher
6 threshold?

7 MR. STEWART: I -- I don't think that
8 there is any requirement that it clear a higher
9 threshold, but I think in balance -- just
10 showing irreparable harm is -- is not enough,
11 particularly if there are countervailing harms
12 on the other side.

13 JUSTICE ALITO: No, I -- I understand
14 that.

15 MR. STEWART: And the other point I'd
16 make about the stay they are seeking is that
17 they really want a stay that will operate as a
18 tolling principle. And by that, I mean if -- if
19 the Court issued a stay tomorrow and then two
20 years went by and we won in the D.C. Circuit and
21 this Court denied cert and then the stay was
22 vacated in February of 2026, the usual
23 consequence of vacating a stay would be that
24 regulated parties would thereafter be subject to
25 all the same legal requirements as they would

1 have been if no stay had ever been issued. But
2 that's not what they want.

3 What they want, a rule is -- is a rule
4 that says, if that happens, then all the
5 compliance deadlines in 2026 and thereafter will
6 be extended by two years in light of the fact
7 that a stay had been effect in two years. And
8 so that would delay the operation of the most
9 stringent requirements to the detriment of the
10 downwind states --

11 CHIEF JUSTICE ROBERTS: All right.
12 Thank -- thank you.

13 MR. STEWART: -- even if they
14 ultimately win.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Sotomayor?

18 Justice Kagan?

19 JUSTICE KAGAN: Yeah. I'm just
20 wondering, Mr. Stewart, you know, how often this
21 kind of thing comes up. You know, there are a
22 lot of NAAQSs, a lot of air pollutant standards,
23 and, presumably, there's a kind of constant
24 evaluation by the EPA of how to adjust those
25 standards and then what SIPs are -- what SIPs

1 need to change and if -- if a FIP is necessary.
2 And this seems like a pretty regular part of the
3 EPA's business and maybe a regular part of the
4 D.C. Circuit's business because that's true.

5 And I'm -- I'm wondering if you would
6 just say, is -- is -- is there something unusual
7 about this case?

8 MR. STEWART: I -- I mean, one of the
9 ways in which this case is very different from
10 EME Homer is that in EME Homer, you had the same
11 pattern of EPA rejecting 20-some state plans and
12 then implementing a federal plan, and there were
13 a very wide array of challenges to the federal
14 plan in EME Homer. They went through the D.C.
15 Circuit. They got up to this Court.

16 There -- there was very little
17 litigation about the antecedent SIP
18 disapprovals. And so I think that that's one of
19 the -- the unusual features of this case in
20 comparison to prior cases involving Good
21 Neighbor Plans.

22 JUSTICE KAGAN: So there hasn't been
23 -- there -- there haven't been other
24 circumstances in which this exact question has
25 come up?

1 MR. STEWART: Right. I think, in the
2 EME Homer context, there were three challenges
3 to SIP disapprovals, and I don't know that any
4 of them were ultimately resolved in the -- on
5 the merits. And so there -- there wasn't this
6 situation where preliminary orders entered in
7 the SIP disapproval litigation caused people to
8 argue about is the plan still rational as to the
9 states that remain.

10 JUSTICE KAGAN: And do you know what
11 the D.C. Circuit intends to do or do you have a
12 guess as to what the D.C. Circuit will do with
13 respect to the interaction between the SIP
14 litigations that are happening across the
15 country and the question before it?

16 MR. STEWART: I -- I don't have a
17 clear sense of what they will do, and I think it
18 will depend in part on how does -- do the SIP
19 litigation lawsuits progress while the D.C.
20 Circuit is considering the case; that is, by the
21 time that the D.C. Circuit is ultimately ready
22 to issue a decision, we may have some or all of
23 the SIP disapproval lawsuits resolved one way or
24 the other, either in EPA's favor in which there
25 are more states back in the plan, or if they're

1 resolved against EPA, then the D.C. Circuit can
2 kind of take it as given that those states are
3 out for the time being and can consider
4 arguments about what the consequences should be.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Gorsuch?

8 Justice Kavanaugh?

9 JUSTICE KAVANAUGH: If -- if 11 states
10 rather than 23 were involved, does that affect
11 the trading program?

12 MR. STEWART: It will affect it to the
13 extent that there will be fewer trading --
14 potential trading partners. We have a
15 declaration from a Mr. Goffman in -- in our
16 appendix that says the trading program can still
17 work robustly. It doesn't depend on the full 23
18 states being involved. We certainly had plenty
19 of trading programs in the past.

20 JUSTICE KAVANAUGH: What does
21 "robustly" mean?

22 MR. STEWART: I don't know if he used
23 the term "robustly," but I think what he meant
24 is it -- it is still a kind of real and viable
25 opportunity. He said the price of allowances

1 has not gone up.

2 And -- and I guess the only other
3 thing I would say about the trading program is
4 it would be absurd to think that if EPA had
5 known there would only be an 11-state trading
6 program, it wouldn't have regulated EGUs at all.
7 Certainly, EPA would have regulated --

8 JUSTICE KAVANAUGH: I don't think --
9 yeah, I don't think that's the suggestion. But
10 can I ask you a question about maybe following
11 up on Justice Alito's questions and some of the
12 more general questions that have been raised
13 earlier about the standard, what we're doing
14 here.

15 On an emergency stay, one of the
16 factors is irreparable harm. I think both sides
17 in my -- I'm just giving you my view -- both
18 sides have irreparable harm, so that's a wash.
19 The public interest, both sides have a strong
20 public interest in my view.

21 So then the only other factor on which
22 we can decide this under our traditional
23 standard is likelihood of success on the merits.
24 In my view, that accounts for cert worthiness,
25 but this is the kind of issue that would be cert

1 worthy ultimately. So check for me on that one.

2 Then it comes down to likelihood of
3 success on the merits. We can't do that without
4 looking at the merits, right?

5 MR. STEWART: I guess the two things
6 I'd say in response --

7 JUSTICE KAVANAUGH: Is that -- can I
8 get a yes or no on that?

9 MR. STEWART: Yeah.

10 JUSTICE KAVANAUGH: Can we -- can we
11 determine likelihood of success on the merits
12 without at least taking a look and making some
13 assessment as best we can of the merits?

14 MR. STEWART: I -- I agree with that.
15 The -- the two things I would say are, first, in
16 determining likelihood of ultimate success on
17 the merits, the Court would not only have to --
18 to kind of reach its own judgment about is it
19 arbitrary or not to have the current 11- versus
20 12-state disparity, it would also have to make
21 some predictive judgment about whether that 11-
22 versus 12-state disparity is going to continue
23 into the future, and that would just require --

24 JUSTICE KAVANAUGH: Right. That's --
25 do you think we make a better assessment after

1 an oral argument than we do without an oral
2 argument?

3 MR. STEWART: I -- I hope so.

4 JUSTICE KAVANAUGH: Exactly.

5 MR. STEWART: And -- and -- and then
6 the other thing I would say to your point about
7 irreparable harm, I -- I think it is the case
8 that both sides have shown some irreparable
9 harm. I don't agree with the idea that if they
10 both have shown irreparable harm, it's a wash,
11 because I think particularly taking into account
12 the equities of the downwind states --

13 JUSTICE KAVANAUGH: I agree -- I agree
14 with you about the equities of the downwind
15 states, but there's also the equities of the
16 upwind states and the industry, and I don't know
17 how -- I mean, they're both like major.

18 MR. STEWART: And -- and --

19 JUSTICE KAVANAUGH: And so we have to
20 figure out what to do in the interim. You said
21 two years between now and 2026. That's what we
22 have to figure out.

23 Should these costs be incurred for the
24 next two years with the benefits to the -- the
25 downwind states, or should these costs not be

1 incurred with the detriments to the downwind
2 states? And the only way under our usual
3 standard to figure that out, as I see it, is to
4 make the best evaluation we can -- and it's not
5 easy, which is why we're here in my view -- of
6 likelihood of success on the merits.

7 MR. STEWART: And -- and I guess the
8 only further point or maybe it's a
9 recapitulation of my point about likelihood of
10 success is the applicants have offered
11 speculation that the plan might have been
12 different in some respects if it had been
13 devised as an 11-state plan, but they haven't
14 identified any concrete modification that they
15 would --

16 JUSTICE KAVANAUGH: Well, I think --
17 right. And this turns on -- okay, on the
18 merits, they're arguing it's arbitrary and
19 capricious. And one of the classic arbitrary
20 and capricious conclusions is a failure to
21 explain. It's not reasonable and reasonably
22 explained.

23 And one of the complaints they have,
24 which we have to evaluate, is whether they're
25 likely to succeed in saying that the rule was

1 not adequately explained in considering the
2 possibility that the SIP disapprovals would be
3 invalidated or stayed in the states and would
4 drop out a number of states. We have to
5 evaluate that, correct?

6 MR. STEWART: You have to evaluate
7 that.

8 JUSTICE KAVANAUGH: Yeah.

9 MR. STEWART: But, to -- to the extent
10 that what they are saying is EPA behaved
11 arbitrarily in not reconsidering its judgment
12 afterwards in light of the fact that 12 states
13 had been taken out, that's a different inquiry.

14 JUSTICE KAVANAUGH: And have I missed
15 any of the factors that we should be considering
16 in evaluating an application for a stay?

17 MR. STEWART: No. Just in terms --

18 JUSTICE KAVANAUGH: That's all I have.
19 Thank you.

20 MR. STEWART: Okay.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: Mr. Stewart, I want
24 to ask you about cert worthiness. So Justice
25 Kavanaugh just pointed out that cert worthiness

1 can be considered part of assessing likelihood
2 of success on the merits.

3 I just want to be sure I understand
4 what the position of the Solicitor General's
5 office is on that. In this posture, applicants
6 say cert worthiness should not be a factor, that
7 Nken standard should just -- Nken standard
8 should just apply without respect to cert
9 worthiness.

10 What is the Solicitor General's
11 position?

12 MR. STEWART: I think it's our view
13 that you should consider cert worthiness as --
14 in a sense as part of the -- the likelihood of
15 --

16 JUSTICE BARRETT: As Justice Kavanaugh
17 framed it?

18 MR. STEWART: Yes. And -- and the
19 idea is, if -- if likelihood of success means
20 likelihood of success in this Court, then that
21 has to be not just would the Court rule in their
22 favor if it took the case but what's the chance
23 that the Court would take the case.

24 If you think that likelihood of
25 success is a predictive judgment about what the

1 D.C. Circuit will --

2 JUSTICE BARRETT: Would you urge us to
3 take this case?

4 MR. STEWART: I mean, it depends on --
5 it depends on what --

6 (Laughter.)

7 MR. STEWART: -- it depends on what
8 came out of it. Obviously, we would -- and I'm
9 sure --

10 JUSTICE BARRETT: So do you think the
11 case is cert worthy?

12 MR. STEWART: Not in its current
13 posture, but we don't -- but we don't know what
14 the D.C. Circuit is going to do. It's certainly
15 possible that the D.C. Circuit will issue a
16 ruling for or against us that would raise issues
17 of overarching importance, and so the cert
18 calculus would -- would change then.

19 We don't think that the question was
20 EPA required to put the rule on hold and impose
21 no restrictions while it considered what changes
22 might be warranted in light of reduced
23 geographic coverage, we don't think that
24 question is cert worthy.

25 JUSTICE BARRETT: And do you agree --

1 Justice Kagan pointed out some of the stuff or
2 the vehicle problems that might be attendant in
3 this application. Do you agree that those are
4 factors that we should consider in assessing
5 cert worthiness in this posture?

6 MR. STEWART: Yes, because, as I say,
7 part of the presentation at oral argument was to
8 the effect that the cost-effectiveness calculus
9 might have been different if EPA had only had 11
10 states in mind. And to the extent that's --
11 that's an empirical judgment that's just going
12 through the scientific evidence, that doesn't
13 seem like something that would ordinarily be a
14 cert -- a Supreme Court case.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: Yes. I guess I -- I
19 don't understand why the usual traditional
20 standard could possibly suffice in this
21 situation. I mean, Justice Barrett and Justice
22 Kagan suggested cert worthiness as another
23 consideration. But don't we have to have
24 something so that we are not -- we, the Supreme
25 Court, is not supplanting the entirety of the

1 lower federal court system when we're looking at
2 cases of this nature?

3 MR. STEWART: Yes, and -- and, I mean,
4 it may be that kind of the very unpredictability
5 of what will happen in the D.C. Circuit leads to
6 unpredictability about whether this will
7 ultimately be a cert worthy case.

8 And so it may be that --

9 JUSTICE JACKSON: So cert worthiness
10 could be another way of saying it. I mean, I
11 prefer to think about whether or not there's
12 something extraordinarily -- extraordinarily
13 harmful going on in the situation that would
14 warrant, in this situation, in this case, the
15 Supreme Court acting as the first decider of the
16 merits of an issue like this.

17 I mean, that seems to me to be truly
18 extraordinary. And if we are going to entertain
19 every motion that someone has about being harmed
20 or whatnot in the lower courts before any of the
21 lower courts even get the opportunity to talk
22 about it, I -- I feel like we have to have
23 something that guides our consideration of when
24 to do that.

25 MR. STEWART: We would agree with

1 that. And we would just add the point that this
2 is not just a case where the other side needs to
3 make an extraordinary showing. It is a case
4 where, if a stay is entered and the government
5 ultimately prevails on the merits, we in the
6 downwind states will suffer a very high, high
7 degree of continuing harm even after the stay is
8 vacated.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Ms. Vale.

13 ORAL ARGUMENT OF JUDITH N. VALE

14 ON BEHALF OF THE STATE RESPONDENTS

15 MS. VALE: Mr. Chief Justice, and may
16 it please the Court:

17 In the Good Neighbor provision,
18 Congress protected downwind states from
19 pollution emitted in upwind states. A stay of
20 the Good Neighbor rule would undermine that
21 statutory goal and the public interest by
22 sending ozone pollution into downwind states,
23 including Connecticut, Wisconsin, and New York,
24 that receive substantial pollution from the
25 particular upwind states that are currently in

1 the rule, including Ohio and Indiana.

2 The harms from a stay will flow to
3 both the residents of downwind states, who will
4 experience health dangers, and to downwind
5 industry, which pays increased costs to
6 compensate for upwind pollution and comply with
7 the current, more stringent standard.

8 For example, Connecticut sources
9 currently pay up to \$13,000 per ton of ozone
10 precursor reduced while, in the near term for
11 power plants under this rule, just to turn on
12 controls costs about \$1,600 per ton. By
13 contrast, apply -- and that's why applying the
14 rule to the upwind states is relatively less
15 expensive and harmful.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: How do you arrive at
18 that conclusion that it's less expensive for the
19 upwind states?

20 MS. VALE: It comes from, I think, two
21 things, one on either side of the balance. For
22 the upwind states, the rule is designed -- the
23 way it -- it defines "significant contribution"
24 is for sources to do the relatively less
25 expensive controls.

1 I understand that there are still
2 costs, but they are relatively less expensive
3 because it's based on having upwind states do
4 controls that downwind sources and many other
5 sources across the country have already done,
6 for example, like turning on pollution controls
7 on power plants that are already installed.
8 That's the lowest of the low-hanging fruit.

9 By contrast, downwind sources, as they
10 get the upwind pollution, they have to
11 compensate for it, but they've already exhausted
12 a lot of the less expensive strategies, so they
13 need to turn to more and more expensive
14 strategies to find any further cuts.

15 And one of the reasons why sources
16 have exhausted their less expensive options is
17 because of the statutory consequences of
18 non-attainment. So, in Section 7511, I believe
19 (a), little (a), it is the Clean Air Act that
20 puts on more and more stringent requirements
21 onto downwind sources as states move into worse
22 and worse levels of non-attainment. So more and
23 more sources need to put on controls, smaller
24 and smaller sources need to put on controls, and
25 the controls themselves get more stringent.

1 By -- and -- and -- and I think that
2 that's how we get into this situation for the
3 downwind sources. And the rule right now
4 continues to provide substantial and meaningful
5 benefits to the downwind sources. It is not a
6 shell or a disaster. And that's because upwind
7 pollution is not evenly distributed as it goes
8 downwind. So the downwind states that generally
9 get a lot of pollution from the 11 states in the
10 rule now still stand to get a lot of benefits.

11 So, for example, in Wisconsin, the
12 areas that struggle with air quality get
13 approximately 40 percent of their ozone from the
14 11 states currently in the rule, 13 percent from
15 Indiana alone. And for Connecticut, the current
16 scope of the rule gets it 65 percent of the
17 emission reductions compared to the full scope
18 of the rule.

19 And that relief for downwind states is
20 also urgent because of the way non-attainment
21 works. Non-attainment -- those deadlines keep
22 on coming regardless of whether Good Neighbor
23 obligations are fulfilled, even though the
24 deadlines, as the D.C. Circuit has made clear,
25 are supposed to be aligned. We --

1 CHIEF JUSTICE ROBERTS: And what the
2 -- they're -- they're asking for is simply an
3 opportunity to make the argument before the
4 agency. And as I understand it, the burden on
5 the agency is simply to provide a rational or
6 reasonable explanation.

7 So you're making arguments on the
8 merits. We don't have those arguments made or
9 substantiated on the record by the EPA.

10 MS. VALE: Well, I think there -- the
11 path that Congress laid out for raising these
12 arguments when they arose after the end of the
13 comment period is the petition for
14 reconsideration. A lot of the cost analysis
15 that I'm giving you was considered by EPA.
16 That's -- that's part of the rule.

17 I mean, the -- part of the whole idea
18 of the rule is that upwind states and upwind
19 sources really, that each source -- each source
20 needs to do its own significant contributions of
21 pollution, needs to take care of its own, and
22 that's defined by what each source can do using
23 certain controls. It's not defined based on
24 some magic number of emissions reductions from
25 23 states.

1 And I think we have every reason to
2 believe that the cost thresholds and the -- the
3 controls that went into the stringencies would
4 be exactly the same, no matter whether it was 23
5 or 11 or five states, because most of these
6 controls are well established. They've been
7 around for over 25 years. And downwind sources
8 are already using them to try to reduce their
9 emissions.

10 The -- the rule is trying to get the
11 upwind sources not to do technical innovation or
12 newfangled things but to get them into the
13 middle of the pack that downwind sources are
14 already doing.

15 JUSTICE ALITO: Suppose that one of
16 the states that is still subject to this
17 requirement is paying too much, more than it
18 would have paid if the plan had been calculated
19 based on that state's situation alone or based
20 on just the states that remain subject to the
21 requirement at this time.

22 I just want to make sure I understand
23 your argument, the argument that you began with.
24 Was -- was it your argument that even if that is
25 true, the -- the detriment to New York would be

1 enough to outweigh the fact that those -- that
2 state or those remaining states are paying what
3 we might say simply, in simple terms, too much?
4 Was that part of your -- was that your argument?

5 MS. VALE: That is part of the
6 argument, yes. Yes, because it's -- it's
7 looking at -- and I think what should drive the
8 Court's analysis in this unusual stay posture,
9 what should inform it, is the statute. And the
10 statute has already done a little bit of this
11 weighing of the interests between states and is
12 highly protective.

13 The point of the statute is to protect
14 downwind states, not just the residents -- of
15 course, that's important -- but also downwind
16 industry from the free riding of upwind states.

17 JUSTICE ALITO: Well, that might be
18 true, but does that answer the argument that the
19 EPA should have considered what you -- that --
20 the argument that you just made? Did it --

21 MS. VALE: I think EPA --

22 JUSTICE ALITO: -- did it do that?

23 MS. VALE: Yes. Yes, EPA did consider
24 that. That is part of the fundamental idea of
25 how -- how cost -- significant contributions of

1 pollution is defined. The point of it is to say
2 let's get the upwind sources doing the
3 relatively less expensive controls that many
4 downwind sources and -- and sources all around
5 the country are already doing.

6 So that was fundamental to the rule.
7 And I think it is also a fundamental
8 understanding of the rule that states can come
9 in and out. We have had experience with this
10 under many prior ozone transport rules. They
11 were all done in this sort of multi-state way.
12 I do think EPA could have written 23 different
13 Federal Register notices, but I don't -- that --
14 that seems like form over substance.

15 We have had states drop out. We have
16 had one state, Georgia, remaining in a trading
17 program by itself. And if I could just maybe
18 explain why the trading program is not
19 interdependent in the sense that I think
20 applicants are making it. Two -- two -- two
21 things there.

22 First of all, as states drop out,
23 supply and demand are going down roughly even.
24 So, while there are fewer allowances, there are
25 also fewer market participants asking for --

1 wanting allowances.

2 Second, it is -- the states are not
3 the market participants. We are not left with
4 10 market participants. It is the power plants
5 that are the market participants. There are
6 currently about 360 market participants in the
7 trading program. That's why we have the
8 declarations that -- that's the reason why the
9 declarations are all able to say: Look, it's
10 working robustly.

11 CHIEF JUSTICE ROBERTS: Well -- well,
12 I mean, you --

13 MS. VALE: Prices are declining.

14 CHIEF JUSTICE ROBERTS: -- you say,
15 what, it's not essential that they're
16 interdependent? Well, what they said in the --
17 the rule was that they were measurable and
18 meaningful cumulative improvements in ozone
19 levels at downwind receptors when the effects of
20 the emissions reductions are assessed
21 collectively across the hundreds of EGU and
22 non-EGU sources.

23 MS. VALE: It is true --

24 CHIEF JUSTICE ROBERTS: So there in
25 the rule what they said is you look at it

1 cumulatively and collectively.

2 MS. VALE: Well, I -- that is one
3 piece of the step 3 analysis. And I think what
4 EPA is saying there is that, yes, they do look
5 when they're doing the rule, is this going to
6 have a meaningful effect? You don't want to do
7 a rule that's not -- that turns out it's not
8 doing anything. Then EPA will probably have to
9 go back to the -- the drawing board and make it
10 more stringent in order to have a meaningful
11 effect.

12 But, ultimately, we know that we
13 continue to have a meaningful effect because the
14 costs and the emission reduction benefits that
15 come out of Ohio and Indiana and all of the
16 states still in the rule remain exactly the
17 same --

18 JUSTICE GORSUCH: Ms. Vale --

19 MS. VALE: -- no matter whether
20 there's 23 states or 10.

21 JUSTICE GORSUCH: Ms. Vale, if -- if a
22 lower court had entered a stay here, would you
23 have sought cert?

24 MS. VALE: I don't know. I don't
25 know.

1 JUSTICE GORSUCH: Would you have
2 thought it cert worthy?

3 MS. VALE: Perhaps.

4 JUSTICE GORSUCH: I would have thought
5 either way --

6 MS. VALE: But I think --

7 JUSTICE GORSUCH: -- somebody's going
8 to think this is cert worthy.

9 MS. VALE: But I think it's the
10 applicants' burden here --

11 JUSTICE GORSUCH: Of course.

12 MS. VALE: Yes. Yes. To say --

13 JUSTICE GORSUCH: Of course. But you
14 would have borne that burden the other way
15 around and --

16 MS. VALE: Correct.

17 JUSTICE GORSUCH: -- and this is a
18 really important thing to both sides.

19 MS. VALE: I understand that. But I
20 think that the issue here that they are raising
21 in this stay posture is this EPA should have
22 considered after arising events that are still
23 changing today --

24 JUSTICE GORSUCH: Sure. Sure.

25 MS. VALE: And so I don't think that

1 is cert worthy.

2 JUSTICE GORSUCH: And it just would
3 have been your burden rather than theirs.

4 MS. VALE: Correct.

5 JUSTICE GORSUCH: Okay. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas, anything further?

9 Justice Alito?

10 Justice Sotomayor?

11 JUSTICE SOTOMAYOR: So you could have
12 both lost?

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: Justice Kagan,
15 anything further?

16 Justice Kavanaugh?

17 Justice Barrett?

18 Justice Jackson?

19 Okay. Thank you, counsel.

20 Ms. Stetson, rebuttal?

21 REBUTTAL ARGUMENT OF CATHERINE E. STETSON

22 ON BEHALF OF THE INDUSTRY APPLICANTS

23 MS. STETSON: Three quick points, Your
24 Honors, first on emissions, second on the other
25 fault lines and the rule that I mentioned, and

1 the third on equities.

2 The first is what you heard Ms. Vale
3 just say is that the purpose of the Good
4 Neighbor provision is to protect downwind states
5 from emissions of upwind states. No. The
6 purpose of the Good Neighbor provision is to
7 reduce the significant contribution that upwind
8 states make to downwind states.

9 And that why -- that's why 11, Chief
10 Justice Roberts, versus 23 matters. That
11 question about how many is a collective, how
12 many hundreds of EGUs, how many hundreds of
13 non-EGUs that are being regulated here for the
14 first time, by the way, how many of those feed
15 into the analysis is exactly the problem.

16 We didn't have to seek
17 reconsideration, Justice Gorsuch, on the
18 question about whether EPA had significantly
19 explained itself. We raised the issue, we
20 sought reconsideration in fact. EPA still
21 hasn't acted on reconsideration, which you can
22 see in Note 9 of the Goffman declaration. We
23 had no obligation to do anything more than that.

24 It was clear in the rule as evidenced
25 by the fact that EPA put in a severability

1 provision announcing its intention that
2 something be severable. Not an explanation but
3 an intention.

4 If there are 11 states in this rule,
5 the answer to your question, Mr. Chief Justice,
6 is that EPA would have had to ask whether or not
7 there still would be a significant contribution,
8 not just an air quality benefit downwind but a
9 significant contribution given the costs on the
10 industries and power points in those -- plants
11 in those states.

12 The fault lines throughout the rule
13 I've already mentioned. I mentioned in the
14 opening it goes to your Court's second question.
15 There are over-control issues here in addition
16 to the reliability issues that were ignored by
17 EPA.

18 And the last thing I'd say is on the
19 equities. The equities are not balanced,
20 Justice Kavanaugh. The equities here are there
21 are hundreds of millions if not billions of
22 dollars in cost over the next 12 to 18 months
23 coupled against 10 percent of the .66 average
24 part per billion contribution. This is not a
25 very, very significant downwind problem. This

1 is a --

2 CHIEF JUSTICE ROBERTS: Thank --

3 MS. STETSON: -- miniscule problem.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,

6 counsel.

7 The case is submitted.

8 (Whereupon, at 11:40 a.m., the case

9 was submitted.)

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<p style="text-align: center;">\$</p> <p>\$1,600 [1] 84:12 \$13,000 [1] 84:9</p> <hr/> <p style="text-align: center;">1</p> <p>1 [1] 44:19 10 [7] 48:1 53:7 56:3,12 91:4 92:20 96:23 10:10 [2] 1:23 4:2 100 [1] 58:25 11 [32] 5:9 8:19,21 29:21 31:20,24 33:19 35:21 36:8,16 47:14,15,17,23 48:4 50:7 51:16 52:1 53:11 54:13 55:17,19 68:14 73:9 75:19,21 81:9 86:9,14 88:5 95:9 96:4 11-state [5] 46:15 55:14 59:15 74:5 77:13 11:40 [1] 97:8 12 [8] 33:20 34:18 37:5 40:21 45:10 68:14 78:12 96:22 12-state [2] 75:20,22 13 [4] 11:14 25:8 31:21 86:14 15 [3] 53:6 56:3,12 18 [5] 11:16,23 31:22 40:21 96:22 185 [1] 32:20</p> <hr/> <p style="text-align: center;">2</p> <p>20 [2] 31:22 36:17 20-some [1] 71:11 2000 [1] 56:17 2014 [1] 56:17 2024 [3] 1:19 41:7 67:16 2025 [1] 67:16 2026 [4] 18:21 69:22 70:5 76:21 21 [5] 1:19 11:14,17,23 25:7 22 [2] 25:7 49:20 23 [38] 4:13,24 5:8 8:18 23:14 25:2,18 29:9 31:3,24 33:19 35:19 36:7,15 37:3 39:1 46:25 47:14 48:11 49:7 50:8 53:12 58:2,4 61:17 63:21 64:1,6,10 65:12 66:24 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