No. 21-848

IN THE
Supreme Court of the United States

SPIRE MISSOURI INC.; SPIRE STL PIPELINE LLC,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the question whether to vacate, or remand without vacatur, arises in *every* case where a court holds agency action to be invalid and that this Court has never provided guidance on the appropriate resolution of that frequently recurring, fundamental question of administrative procedure. Nor do respondents dispute that, as FERC found, the D.C. Circuit's vacatur ruling created an "emergency" that could have resulted in the shutdown of a critical natural-gas pipeline and the "loss of gas supply potentially impacting hundreds of thousands of homes and businesses" in the St. Louis area. Order Issuing Temporary Certificate, Spire STL Pipeline LLC, 177 FERC ¶ 61,147, at 20 ¶¶ 46–47 (Dec. 3, 2021) ("December 3 Temporary Certificate Order"). And they do not dispute that this case continues to present a live controversy because, among other reasons, a court could hold that Spire STL Pipeline LLC ("Spire STL") lacks eminent-domain authority under its current temporary certificate, which, in turn, could require Spire STL to cease operating the Spire STL Pipeline (the "Project") during the ongoing remand proceedings before FERC. *See* Pets.' Supp. Br. 5. Accordingly, it is clear that the question presented has far-reaching significance for litigants challenging agency action, for federal agencies seeking to avoid vacatur of that action, and for millions of St. Louis-area residents dependent on the Project to heat their homes and businesses. *See*, *e.g.*, *Amicus* Br. of Am. Gas Ass'n et al. 5–15.

Respondents nevertheless urge the Court to deny review of this legally and practically significant question. But they cannot refute (1) that the D.C. Circuit's decision—which held that remand without vacatur is

warranted only where it is "clear" or "certain" that an agency will be able to rehabilitate its reasoning, Pet. App. 39a–40a—conflicts with the standards applied by multiple other courts; (2) that the D.C. Circuit improperly failed to consider the serious disruptive consequences of vacating authorization for an operational natural-gas pipeline essential to the energy supply of a major metropolitan region; and (3) that, in the absence of this Court's review, lower courts will be left to struggle with assessing the appropriate remedy in agency cases and hundreds of thousands of households and businesses in the St. Louis area will be required to live with the risk that the emergency created by the D.C. Circuit will reemerge as a result of the ongoing challenge to Spire STL's eminent-domain authority.

This Court's review thus remains urgently needed.

I. THE DECISION BELOW DEEPENS CONFUSION AMONG THE LOWER COURTS REGARDING THE REMEDIAL STANDARD IN AGENCY CASES.

The circuits apply a variety of conflicting standards—ranging from the Fifth Circuit's presumption *in favor* of remand without vacatur to the D.C. Circuit's overriding presumption *against* that relief—in assessing the appropriate remedy for deficient agency action. *See* Pet. 14–19.

In the face of these irreconcilable remedial standards, respondents emphasize that the circuits uniformly derive their approaches for evaluating whether to remand without vacatur from the D.C. Circuit's opinion in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir.

1993), which looked to both the seriousness of the decision's deficiencies and the disruptive consequences of vacatur to determine the appropriate remedy. *See* U.S. Br. 13; EDF Br. 16. But *Allied-Signal* merely set forth these general factors without any guidance on how to apply them. Thus, despite this common origin, the circuits' approaches have evolved over time into manifestly incompatible standards. In the D.C. Circuit, remand without vacatur is now appropriate only where it is "clear" or "certain" that an agency could rehabilitate its reasoning on remand—even where there may be "disruption as a result of" vacatur. Pet. App. 39a–40a; *see also*, *e.g.*, *Long Island Power Auth. v. FERC*, __F.4th__, 2022 WL 627780, at *8 (D.C. Cir. Mar. 4, 2022) ("disruptive consequences matter 'only insofar as the agency may be able to rehabilitate its rationale'") (citation omitted). In the Fifth Circuit, remand without vacatur is appropriate whenever "there is at least a serious possibility that the agency will be able to substantiate its decision" on remand. *Tex. Ass'n of Mfrs. v. CPSC*, 989 F.3d 368, 389 (5th Cir. 2021). And in the Second and Ninth Circuits, remand without vacatur is appropriate where "'equity demands'" that result. *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995)).

These divergent standards are not mere semantics: they produce conflicting outcomes on indistinguishable facts. *Compare*, *e.g.*, *Town of Weymouth v. Mass Dep't of Envtl. Prot.*, 973 F.3d 143, 146 (1st Cir. 2020) (per curiam) (remanding without vacatur because vacatur would leave a pipeline "out of opera-

tion"), *with* Pet. App. 39a (vacating the Project's permanent certificate even though "the pipeline is operational").[1]

Thus, it is of no moment that the Fifth Circuit has stated that it "'applie[s] the same test' as 'the D.C. Circuit's test for whether vacatur is appropriate.'" EDF Br. 18 (quoting *Texas v. Biden*, 20 F.4th 928, 1000 (5th Cir. 2021)) (alteration omitted). The Fifth Circuit's test, like that of other circuits, has its roots in *Allied-Signal*. *See Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000). The Fifth Circuit and the D.C. Circuit, however, have interpreted and applied *Allied-Signal* very differently. In the Fifth Circuit, "only in rare circumstances is remand for agency reconsideration *not* the appropriate solution," *Tex. Ass'n of Mfrs.*, 989 F.3d at 389 (emphasis added), and *both* elements of *Allied-Signal*'s two-factor test remain relevant, *see Texas*, 20 F.4th at 1000–01. But the D.C. Circuit, rather than "weigh[ing] each of the relevant equitable considerations" under *Allied-Signal*, EDF Br. 22, ignores the disruptive consequences of vacatur

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[1] EDF attempts to reconcile the D.C. Circuit's decision with *Town of Weymouth* by emphasizing that the First Circuit initially ordered vacatur in that case "on the understanding that the remand proceeding would be expedited" and that the court only amended its judgment to remand without vacatur when it became clear that the agency would not act expeditiously. EDF Br. 21 (alteration and internal quotation marks omitted). But here, the D.C. Circuit's decision to vacate the Project's permanent certificate was not based on the supposition that FERC would act quickly to remedy the situation on remand—and thereby avert the disruptive consequences of vacatur—but instead on the D.C. Circuit's conclusion that the disruption undeniably fostered by its decision was *irrelevant* because it was not "clear" or "certain" that FERC would be able to correct its errors on remand. Pet. App. 39a–40a.

in the absence of near "certain[ty]" that the agency will be able to correct its errors on remand, Pet. App. 39a.

Nor is there anything "out of context" (EDF Br. 18) about petitioners' reliance on the Fifth Circuit's unambiguous declaration in *Texas Association of Manufacturers* that vacatur is appropriate only "in rare circumstances." 989 F.3d at 389. The Fifth Circuit's disposition of that case—where it declined to vacate an agency rule because "there [was] a serious possibility that the [agency] will be able to remedy its failures," *id.*—gave effect to, and was dependent upon, the court's articulated presumption in favor of remand without vacatur. The Fifth Circuit's presumption, the standard adopted to implement it, and the resulting remedial order are all in conflict with the decision below.

Accordingly, the common provenance of the circuits' remedial standards does not ameliorate the inconsistency, confusion, and uncertainty spawned by the circuits' divergent interpretations and applications of *Allied-Signal*, which can only be resolved by this Court's adoption of an authoritative remedial standard for agency litigation. Indeed, if respondents are correct that the test applied in this case—which gives no weight to one of the two *Allied-Signal* factors unless the agency's ability to correct its errors is "clear" or "certain," Pet. App. 39a–40a—is the same as other circuits' tests, then *Allied-Signal* has become infinitely malleable and can always be manipulated to justify whatever outcome a three-judge panel prefers.

That is all the more reason for this Court to grant review and establish a remedial test that is both uniformly worded and uniformly applied.[2]

This Court has not hesitated to grant review where the circuits have diverged regarding the meaning and application of one of its own decisions. *See*, *e.g.*, *City of Arlington v. FCC*, 569 U.S. 290 (2013). Here, review is even more warranted because it is the *absence* of any direction from this Court on a basic question of administrative procedure that has left the lower courts to seek guidance from the D.C. Circuit's *Allied-Signal* opinion and to impose their own unique, and conflicting, glosses on that opinion. The Court should grant review to articulate a definitive remedial test that vindicates "the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005).

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[2] The malleability of the *Allied-Signal* test is apparent from the fact that it has generated inconsistent outcomes not only among the circuits, *see supra* p. 3, but also within the D.C. Circuit itself. *Compare*, *e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1053 (D.C. Cir. 2021) (vacating easement for operational oil pipeline), *cert. denied sub nom.*, *Dakota Access, LLC v. Standing Rock Sioux Tribe*, 2022 WL 516382 (Feb. 22, 2022), *and* Pet. App. 39a–40a (vacating permanent certificate for operational natural-gas pipeline), *with*, *e.g.*, *Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D.C. Cir. 2021) (remanding without vacatur because vacatur would have "disrupt[ed] completion" of pipeline projects), *and City of Oberlin v. FERC*, 937 F.3d 599, 611 (D.C. Cir. 2019) (remanding without vacatur because "vacatur of the Commission's orders would be quite disruptive, as the . . . pipeline is currently operational").

II. THE DECISION BELOW IMPROPERLY IGNORES THE DISRUPTIVE CONSEQUENCES OF VACATING AGENCY ACTION.

Respondents' defense of the D.C. Circuit's decision to vacate the Project's permanent certificate—which "deprive[d] petitioners of a lawful basis for operating" the Project, U.S. Br. 7—is equally unavailing.

The government characterizes the D.C. Circuit's "determination" as "reasonably debatable," U.S. Br. 14—a remarkable understatement given FERC's finding that vacatur created an "emergency" that could have resulted in "a loss of gas supply" to "hundreds of thousands of homes and business" in the St. Louis area, December 3 Temporary Certificate Order, 177 FERC ¶ 61,147, at 20 ¶¶ 46–47—and the government offers no defense at all of the D.C. Circuit's decision to ignore the disruptive effects of vacatur on the ground that it was "far from certain" and "not at all clear" to the court that FERC could cure its errors in reasoning, Pet. App. 39a–40a. In fact, notwithstanding the Solicitor General's current position, prior to issuance of the D.C. Circuit's mandate, a majority of the Commission supported seeking rehearing on the very question presented by this petition, only to be unilaterally overruled by the Chairman. *See* Pet. App. 368a & n.17.

For its part, EDF does not attempt to justify a remedial standard that gives no weight to the disruptive consequences of vacatur, nor does it dispute that the D.C. Circuit's vacatur ruling created an emergency that imperiled the health and safety of millions of St. Louis-area residents. EDF instead attempts (at 23–24) to attribute the D.C. Circuit's ruling to alleged deficiencies in the record, even though the D.C. Circuit acknowledged that "the pipeline is operational, and

thus there may be some disruption as a result of" vacatur, Pet. App. 39a—which other courts have deemed to be a sufficient basis to remand without vacatur, *see*, *e.g.*, *Town of Weymouth*, 973 F.3d at 146. The timing of petitioners' evidentiary submission substantiating the disruptive effects of vacatur had no bearing on the D.C. Circuit's decision, which was premised on a legal standard that, in conflict with other circuits, affords no significance to disruption where the court cannot be sure that the agency's errors will be corrected on remand. Indeed, the D.C. Circuit did not fault petitioners' evidentiary showing when issuing its opinion, and petitioners' submission of additional evidence on rehearing is consistent with D.C. Circuit practice. *See*, *e.g.*, *U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (remanding without vacatur in response to new evidence of disruption introduced on rehearing).[3]

EDF also falls short in its attempts to shore up the D.C. Circuit's assessment of FERC's ability to rehabilitate its reasoning on remand. EDF emphasizes that "there was uncontradicted evidence of flat demand" for natural gas in the St. Louis area. EDF Br. 23. But Spire STL did not rely on increased demand to establish market need for the Project, pointing instead to,

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[3] Moreover, several of the facts highlighted in petitioners' evidentiary submission on rehearing—such as the Project's performance during Winter Storm Uri in February 2021, *see* Pet. 26–27—occurred after the conclusion of briefing in the case and thus could not have been addressed by petitioners in prior filings. *Cf. Town of Weymouth*, 973 F.3d at 146 (amending opinion to remand without vacatur in light of developments highlighted in rehearing submissions). That occurs commonly when an agency's action is not stayed pending review: the potentially disruptive consequences have become more pronounced by the time of the decision and are appropriately highlighted on rehearing.

among other evidence, the fact that the Project would diversify the St. Louis region's natural-gas supply (which was dependent on a single pipeline for nearly 90 percent of its firm capacity), C.A. JA109, and allow Spire Missouri to retire the obsolete "propane peaking" facilities that it used to satisfy periods of peak demand, C.A. JA110. These are valid indicators of need on which FERC elected not to rely when issuing the permanent certificate. *See* FERC Certificate Policy Statement, 88 FERC ¶ 61,227, ¶ 61,748 (Sept. 15, 1999). And far from a "recognition . . . that a reissued certificate premised on the record previously adduced could not survive judicial review," EDF Br. 23, Spire STL's submission of additional evidence during the ongoing FERC remand proceedings simply reflects the fact that more than three years have passed since the prior administrative record was compiled and that relevant intervening events occurred in that time. For example, during Winter Storm Uri in February 2021, the Project shielded the St. Louis area from service disruptions experienced in other regions and generated substantial cost savings for St. Louis-area customers. *See* Pet. 26–27.

Thus, an appropriate remedial assessment in this case—taking into account *both* the disruptive consequences of vacatur and the likelihood of the agency's correcting its errors on remand—would order remand without vacatur in light of the dire, potentially life-threatening consequences of shutting down the Project, and the record evidence that could support issuance of a new permanent certificate on remand.

III. THE DECISION BELOW HAS FAR-REACHING IMPLICATIONS FOR AGENCY LITIGATION AND FOR MILLIONS OF ST. LOUIS-AREA RESIDENTS.

Although neither the government nor EDF contends that this case is moot, they call into question its "practical significance" because FERC has issued Spire STL a temporary certificate that will remain in force until FERC decides whether to issue a new permanent certificate. U.S. Br. 10; *see also* EDF Br. 25–28. But issuance of the temporary certificate was only necessary because of the "emergency" created by the D.C. Circuit's erroneous vacatur ruling, which FERC had to ameliorate by "allow[ing] maintenance of service, particularly during the winter heating season," to hundreds of thousands of St. Louis-area households and businesses that depend on the Project's natural-gas supply. December 3 Temporary Certificate Order, 177 FERC ¶ 61,147, at 20 ¶ 46. And respondents do not dispute that the emergency may reemerge in the event that a court rejects Spire STL's eminent-domain authority under the temporary certificate prior to the conclusion of remand proceedings before FERC—which are expected to last at least until the fall of 2022, *see* Pets.' Supp. Br. 3—causing Spire STL to shut down the Project, *see id.* at 5. In fact, the question whether Spire STL possesses eminent-domain authority under the temporary certificate is the subject of a petition for review of FERC's order now pending in the D.C. Circuit, *see Turman v. FERC*, No. 22-1043 (pet. filed Mar. 7, 2022), and is at issue in ongoing eminent-domain proceedings, *see* Pets.' Supp. Br. 6.

Moreover, beyond the practical impact of this case for the continued supply of natural gas to St. Louis-

area residents, respondents do not dispute that the question presented—which asks this Court to declare an authoritative remedial standard for agency litigation—has profound implications that transcend the parties to this case, which, after all, is the principal measure of whether a case has sufficient importance to warrant this Court's review. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 263 (10th ed. 2013).

The question whether to vacate an agency's flawed action, or to remand without vacatur, arises scores of times every year in courts across the country—with dramatic consequences for parties that challenge agency action, agencies that unsuccessfully defend their actions, firms whose investments in critical infrastructure may be called into question on judicial review, and members of the public whose health, welfare, and livelihood may be directly affected by courts' remedial decisions. That weighty determination should be governed by a uniform national standard that strikes an appropriate balance between the disruptive consequences of vacatur and the likelihood that the agency will be able to remedy its errors. The D.C. Circuit's one-sided approach gives no weight to disruptive impact and, in this case, created a life-threatening emergency that compelled FERC to take expedited action to ensure that the residents of the St. Louis area could heat their homes and businesses this winter.

Not all agencies possess the administrative tools to address such judicially created emergencies. It is therefore imperative that this Court grant review to ensure that courts in every circuit take account of the potentially serious disruptive consequences before deciding to vacate agency action.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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March 22, 2022