No. 21A539

In the Supreme Court of the United States

STATE OF LOUISIANA; STATE OF ARKANSAS; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; STATE OF TEXAS; AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *and* NATIONAL HYDROPOWER ASSOCIATION,
APPLICANTS,
v.
AMERICAN RIVERS; MICHAEL S. REGAN; *and* U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.
RESPONDENTS.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING APPEAL

On Application For Stay, Or, In The Alternative, On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Ninth Circuit

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

In their Response to the Application, Federal Respondents finally concede that Applicants were correct all along: "the district court lacked authority to vacate the 2020 Rule without first determining that the Rule was invalid." Fed. Resp.13. Had Federal Respondents taken this approach below, the Rule would likely still be in place today. Instead, Federal Respondents—cynically hoping to end prematurely a rule that the current Administration opposes—offered only the most token resistance to the unlawful vacatur of the Rule before the district court, *then* refused to appeal that vacatur to the Ninth Circuit, *and then* attempted to thwart Applicants' appeal by raising meritless finality arguments that, if taken seriously, would render unreviewable every unlawful vacatur-without-adjudicating-the-merits ruling.

Respondents' various arguments against Applicants' stay request all fail, especially given Federal Respondents' concession. As to the merits, only State and Environmental Group Respondents ("State Respondents") attempt to defend the district court's authority to vacate the Rule outside of the APA's strictures, but their reliance on certain pre-APA cases fails on its own terms, and—in any event—cannot possibly survive the APA's plain statutory text. As for considerations of irreparable harm and the equities, State Respondents defeat their own argument by *correctly* describing the Rule as a "dramatic[ ]" change to the prior regime, "restrict[ing]" the considerations certification authorities' may take into account in granting or denying certifications and the period of time for decision-making on a certification request. State Resp.6. Just so. Applicants strongly agree that the Section 401 Rule was a

dramatic change from the status quo, which is precisely why unlawful judicial invalidation of the Rule harms Applicants, who are the direct beneficiaries of the Rule's significant changes.

ARGUMENT

I. The APA's Text And This Court's Caselaw Plainly Prohibited The District Court's Decision To Vacate The Section 401 Rule

Under the APA's plain text, federal courts may only set aside federal agencies' actions "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," after a "review [of] the whole record." 5 U.S.C. § 706(2). This specific statutory authorization satisfies the requirement that courts can only vacate agency action "for substantial procedural or substantive reasons as mandated by statute." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (citation omitted); Stay Appl.17–18. Violating these clear statutory limitations and this Court's caselaw, the district court below vacated the landmark Section 401 Rule nationwide, without finding *any* aspect of the Rule unlawful, based upon its own mere doubts about the Rule's propriety. Stay Appl.21–22; *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) ("Even if" one aspect of policy is "illegal," it "could not be rescinded in full 'without any consideration whatsoever' of a" policy with only the remaining provisions. (citation omitted)).

Before this Court, Federal Respondents *finally* concede that Applicants were correct all along that the district court lacked authority to vacate the Section 401 Rule

without finding that Rule unlawful. Before the district court, Federal Respondents did not support Applicants' core argument that the courts cannot vacate a rule without finding it unlawful under the APA, instead merely making some equitable arguments against vacatur, while asking in a footnote for the opportunity to submit additional briefing regarding the *scope* of vacatur. App. 452 n.2. Then, before the Ninth Circuit, Federal Respondents only "generally agree[d]" that "where the agency does not confess error, vacatur should be ordered only after the court has resolved the merits and carefully considered the appropriate scope of relief." App. 765. But now, Federal Respondents admit what Applicants have argued all along on the core legal issue in dispute: "the district court lacked authority to vacate the 2020 Rule without first determining that the Rule was invalid." Fed. Resp.13; *see id.* at 22.*

State Respondents do attempt to defend the legality of the district court's indefensible vacatur, claiming that district courts have a non-statutory, equitable authority to vacate rules outside of the APA's strictures. State Resp.12–13. But a federal court can only vacate agency action where "*mandated by statute*, not simply because the court is unhappy with the result reached," *Vt. Yankee*, 435 U.S. at 558 (emphasis added; citation omitted). State Respondents' pre-APA precedent reinforces that principle, thereby defeating their argument. *See* State Resp.12–14. In each

* This is not the first time a new Administration has finally conceded before *this Court* that a district court had unlawfully vacated a rule issued by the immediately prior Administration, but then both declined to appeal the district court's decision and attempted to thwart other parties from defending the rule. *See* Oral Arg. Tr. 75–76, *Arizona v. City & Cnty. of San Francisco*, No. 20-1775 (U.S. Feb. 23, 2022).

case, this Court recognized the availability of vacatur *after* an actual finding of actual procedural or substantive unlawfulness, not *before* such a finding. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 372–73 (1939) (no need for court "to examine other grounds of attack" on the "merits" of agency decision, where board's adoption of "decision proposed by its subordinates" without its own consideration and findings or "opportunity [for petitioner] to be heard thereon" was sufficient grounds to remand and set aside); *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946) (in exercising equitable authority over agency, district court may "upon a proper showing" order preliminary relief, or after "decid[ing] all relevant matters in dispute . . . award complete relief"); *see also United States v. Morgan*, 307 U.S. 183, 185, 188, 198 (1939) (after this Court "set aside" agency action "without consideration of the merits, for failure of the Secretary to follow the procedure prescribed by the statute" in *Morgan v. United States*, 304 U.S. 1 (1938), "the full record of the Secretary's proceedings" on remand, "including findings supported by evidence," would give district court "the appropriate basis" to exercise its equitable discretion over impounded funds). In any event, the "inescapable inference" of the APA is that this statute "restricts the court's jurisdiction in equity" to set aside or vacate a rule, *Porter*, 328 U.S. at 398, to only circumstances where the court finds a specific statutory ground to do so, 5 U.S.C. § 706(2). Thus, Congress was "clear," *Webster v. Doe*, 486 U.S. 592, 603 (1988), that it intended to foreclose equitable remedies beyond those which the APA permits.

Similarly unhelpful to State Respondents is their red-herring, bizarre suggestion that a court's decision to remand a rulemaking back to the agency operates

outside of the confines of the APA's judicial-review procedures. State Resp.13–14. State Respondents claim that any court "considering an agency's request for remand"—with or without vacatur—"is not engaging in judicial review of the challenged rule" and so the APA's judicial-review provisions, *see* 5 U.S.C. §§ 701–06, do not apply, State Resp.13. But, of course, the APA's judicial review provisions apply to "*any* applicable form of legal action" concerning an agency action reviewable under the APA, 5 U.S.C. § 703 (emphasis added), unless review by the courts is precluded by statute or the agency's decision "is committed to agency discretion by law," 5 U.S.C. § 701(a). That is why State Respondents invoked the judicial-review provisions of the APA in filing this lawsuit, App. 118, 132, and the district court purported to base its erroneous decision on these APA provisions, App. 557–58.

State Respondents argue that nothing in 5 U.S.C. § 702 limits a district court's authority to order vacatur *before* a finding of unlawfulness. State Resp.15–16. But whether a court may *deny* relief on a challenge to agency action under the APA is both textually permitted, 5 U.S.C. § 702 ("Nothing herein . . . shall affect . . . the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground[.]"), and irrelevant to whether a court can vacate a rule without complying with the APA's limitations on invalidating rulemaking, 5 U.S.C. § 706(2).

No more relevant are State Respondents' concerns that without vacatur before a finding of unlawfulness, agencies will be able to "withdraw dubious actions from judicial review" and leave plaintiffs without a remedy. State Resp.17. Permitting an

agency to reconsider a rulemaking without vacatur when doing so is not "frivolous or in bad faith," State Resp.17 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)), is consistent with a court's obligation under the APA to "*deny relief* on any other appropriate legal or equitable ground," 5 U.S.C. § 702 (emphasis added). Of course, a court may simply decline an agency's request for remand that it believes is "frivolous or in bad faith," *SKF USA Inc.*, 254 F.3d at 1029, or "issue all necessary and appropriate process to . . . preserve status or rights," 5 U.S.C. § 705, if faced with a sufficiently "dubious" agency action, State Resp.17. But under no circumstances may a court simply vacate a rulemaking without any adjudication of lawfulness. *See Vt. Yankee*, 435 U.S. at 558. The district court's own actions below—vacating an agency rule nationwide after two other courts declined to do so, App. 568–69; Stay Appl.13–14, unilaterally undoing EPA's rulemaking work of "more than 125,000 comments on the proposed rule from a broad spectrum of interested parties," *Clean Water Act Section 401 Certification Rule*, 85 Fed. Reg. 42,210, 42,213 (July 13, 2020), without following the APA's mandatory process for invalidating rules, 5 U.S.C. § 706(2)—shows starkly why that must be so.

Finally, State Respondents also have no answer to the APA's limited waiver of sovereign immunity, lamely pointing to the fact that Federal Respondents have not raised that immunity. State Resp.15–16. But Federal Respondents now agree with Applicants that "the district court lacked authority to vacate the 2020 Rule without first determining that the Rule was invalid" under the APA, Fed. Resp.13, and, in any event, "Congress alone has power to waive or qualify" sovereign immunity.

United States v. Chem. Found., 272 U.S. 1, 20 (1926); *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 299 (2012) ("When waiving the Government's sovereign immunity, *Congress* must speak unequivocally." (emphasis added)).

II. Petitioners Will Suffer Irreparable Harm Absent Stay Relief, And All Equitable Considerations And The Public Interest Call Out For A Stay

A. As Applicants explained, they will suffer irreparable harm absent relief from this Court and the balance of equities and public interest all support a stay. Stay Appl.25–29. The district court's unlawful vacatur has deprived Applicants—the States and industry actors *most affected by* the prior abuses that occurred before the Rule's enactment—of the multiple new and crucial protections that Applicants successfully obtained by convincing EPA to adopt the Rule in the first place. Stay Appl.25–26. As a result of the vacatur's removal of all of these protections, Applicants and other industry participants will continue to face substantial disruptions from the district court's unilateral repeal of the Rule's corrective regulatory regime. Stay Appl.26–27. Moreover, vacatur harms Applicant States' sovereignty, permitting sister States to control Applicant States' commerce via free-wheeling certification decisions that go beyond the CWA's text. Stay Appl.27–28. Without this Court's intervention now, Applicants are highly unlikely ever to be able to obtain relief from the district court's unlawful actions, as a practical matter, given the length of the Ninth Circuit proceedings and EPA's ongoing rulemaking. Stay Appl.27. State Respondents have no equitable interest in the district court's unlawful vacatur, Stay Appl.28, while the public is well served by a stay, Stay. Appl.28–29. And given how

clearly the district court erred, Stay Appl.17–25; *supra* pp. 2–3, this Court need not "weigh . . . tradeoffs" in the equities, which do "not justify withholding interim relief." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.* ("*NFIB*"), 142 S. Ct. 661, 666 (2022).

B. Respondents' equitable arguments attempt to have it both ways, arguing that the Rule is hugely consequential, while paradoxically asserting that the very entities that the Rule protects suffer no harm from the Rule's sudden judicial repeal. Respondents' characterization of the Rule as hugely consequential is correct, which is exactly why their arguments on the equities are wrong, assuming this Court agrees with Applicants on the merits. *Id.* For example, State Respondents correctly argue that the Rule was a "dramatic[ ]" change from the prior regime, "restrict[ing]" the considerations certification authorities' may take into account in granting or denying certifications and the period of time for decisionmaking on a certification request, State Resp.6, which is Applicants' point. The district court's vacatur decision deprived Applicants of these "dramatic[ ]," State Resp.6, and highly sought-after corrections to the pre-Rule regime, and it is that complete deprival of those corrections that harms Applicants. Thus, if this Court agrees with Applicants on the merits of the issues presented, Applicants are entitled to a stay of the unlawful vacatur decision. *NFIB*, 142 S. Ct. at 666.

Respondents contend that this Court should deny interim relief because Applicants have not shown irreparable harm, State Resp.20; Fed. Resp.14–19, but they are wrong. The Rule established numerous real and substantial changes in the

Section 401 certification process, and Applicants and their member entities were particular beneficiaries of the Rule and its important clarifying regulations, App. 1–115. To take just two important protections, the Rule (1) precludes States and other certifying authorities from delaying their consideration of a certification request through various stratagems that seek to defeat the "not [to] exceed one year" limitation in 33 U.S.C. § 1341(a)(1), 40 C.F.R. § 121.6, and (2) prohibits States from including non-water-quality obligations in certification applications, 40 C.F.R. § 121.3. *See* 85 Fed. Reg. at 42,232, 42,236. Through these and other protections, the Rule "promote[s] consistent implementation of section 401 and streamline[s] federal license and permit processes," and "eliminates the possibility of inconsistent interpretation and enforcement of the certification conditions in the federal license or permit," 85 Fed. Reg. at 42,220, 42,276, which are the exact benefits that Applicants received from the Rule, and the unlawful, nationwide vacatur deprives them of all of these protections. Applicants cannot effectively remedy the abuses that EPA designed the Rule to combat by "challeng[ing] individual certification decisions in state or federal court." State Resp.21. Even if Applicants could successfully challenge these varied and continual abuses as they inevitably come up, the Rule's core design was to create a *uniform* approach to remedying such abuses. 85 Fed. Reg. at 42,220.

Take just one example of the benefits of the Rule's uniform protections and the harms forcing litigants to re-fight State abuses one-by-one. In a case currently pending in the D.C. Circuit, *Turlock Irrigation Dist. v. FERC*, No. 21-1120 (D.C. Cir.), the State of California engaged in a denial-without-prejudice scheme aimed plainly

at evading 33 U.S.C. § 1341(a)(1)'s one-year limit. *See Turlock Irrigation Dist. & Modesto Irrigation Dist.*, 175 FERC ¶ 61,144, 61,926–27 PP 1–7 (May 21, 2021) (Danly, Comm'r, dissenting). That evasive scheme is contrary to the Rule, *see* 40 C.F.R. §§ 121.5–9; 85 Fed. Reg. at 42,236, but Turlock and Modesto—both members of Applicant National Hydropower Association—could not rely upon the Rule's protections because of the district court's vacatur below, as the Federal Energy Regulatory Commission pointed out, *see* FERC Resp. Br.47, *Turlock Irrigation Dist. v. FERC*, No. 21-1120 (D.C. Cir. Dec. 8, 2021) (citing *In re Clean Water Act Rulemaking*, ___ F. Supp. 3d ___, 2021 WL 4924844 (N.D. Cal. Oct. 21, 2021)).

Similarly, under the pre-Section 401 Rule regime, States regularly inserted non-water quality conditions into certifications, scuttling projects based upon ancillary, non-water-quality-related concerns. *See* Stay Appl.6–7; App. 110, 497–548. Under the Rule, that would be unambiguously forbidden. 40 C.F.R. § 121.3; 85 Fed. Reg. at 42,232. But after the district court's vacatur decision, States can resume these very practices, forcing Applicants to battle against these inevitable, non-water-quality conditions in expensive, uncertain litigation.

Respondents also contend that harms to Applicant States' sovereign interests are too speculative to be irreparable. Fed. Resp.18–19. But again, they simply brush aside the *example* case Applicants provided to this Court showing the exact harms Applicants will face after vacatur, merely claiming that that case is now "moot." Fed. Resp.18–19. That case is only moot because "Millennium and its parent company, Lighthouse, declared bankruptcy" during the pendency of the State of Washington's

gamesmanship and "thus abandoned its proposal to build a coal-export terminal on that property," negating "any interest in the fate of its application for Section 401 certification for that project." U.S. Amicus Br.12, *Montana & Wyoming v. Washington*, No. 22O152 (U.S. May 25, 2021).

Respondents argue that Applicants have failed to move swiftly enough in this case, and that somehow shows that their harms are not irreparable. State Resp.19–20; Fed. Resp.15–16, 24–25. But Applicants have not come to this Court in an emergency stay posture, and have explained that they asked this Court to issue a stay pending appeal because that is their only option to obtain relief from the district court's unlawful vacatur, which vacatur has important consequences for the Nation. Contrary to Respondents' assertions, State Resp.19–20; Fed. Resp.15–16, there is nothing Applicants can do before the Ninth Circuit to obtain expedition of this case. The Ninth Circuit's rules provide that a request to expedite an appeal will be granted when, as relevant here, "irreparable harm may occur" without such expedition. 9th Cir. R. 27-12. But the Ninth Circuit already denied Applicants' prior request for a stay because it wrongly concluded that Applicants had "not demonstrate[d] a sufficient likelihood of irreparable harm." App. 802. As for any delay below, it was *Respondents* who sought—successfully—to delay the Ninth Circuit's consideration of Applicants' stay motion by extending their stay briefing deadlines in the Ninth Circuit, *see* ECF Nos. 21, 22, *In re: Clean Water Act Rulemaking*, No. 21-16958 (9th Cir. Dec. 17, 2021), over Applicants' fervent objections, *see* ECF No. 24, *In re: Clean Water Act Rulemaking*, No. 21-16958 (9th Cir. Dec. 20, 2021).

Respondents' arguments on the balance of the equities and public interest are similarly meritless. Such considerations do not come into play here given the clear illegality of the district court's vacatur decision, *NFIB*, 142 S. Ct. at 666, and Respondents have no answer for this Court's recent holding in *NFIB* reinforcing this principle. While State Respondents contend that the Rule would create "significant environmental harms," State Resp.23, the legal way that State Respondents can remedy any claims of environmental harms is to actually litigate the Rule's legality, as the APA plainly requires, Stay Appl.17–25; *supra* pp. 2–3.

No better are Federal Respondents' arguments that staying the vacatur would require EPA to expend resources clarifying the applicable regulatory scheme. Fed. Resp.23. Federal Respondents now "agree with applicants that the district court lacked authority to vacate the 2020 Rule without first determining that the Rule was invalid," Fed. Resp.13, so they cannot be heard to argue that complying with the law is too much trouble. In any event, EPA already had guidance in place regarding the Rule after its promulgation, and returning to that regime could happen quickly and simply, without any massive undertaking by the agency. Indeed, EPA was able to issue necessary clarification on compliance with Section 401 regulations less than two months after the district court's surprise, unlawful vacatur, *compare* App. 552–69, *with* Fed. Resp.23, and a return to the Rule would be much easier.

III. The Solicitor General's Undeveloped Suggestion That Only The Agency Can Appeal From Vacatur Of A Rule Only Further Illustrates The Cynical Evasion Of The APA At Issue In The Question Presented

Contrary to the Federal Respondents undeveloped suggestion, Fed. Resp. 19–21, the district court's decision is final for purposes of appeal. Section 1291 gives the Courts of Appeals jurisdiction over appeals from "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. In evaluating whether a decision is final, this Court takes a "practical rather than a technical construction," while noting that "the statute's core application is to rulings that terminate an action." *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 409 (2015) (quoting *Mohawk Industries, Inc. v. Carpenter*, 588 U.S. 100, 106 (2009)). "The archetypal final decision is one[ ] that trigger[s] the entry of judgment," and "any litigant armed with a final judgment from a lower federal court is entitled to take an appeal." *Hall v. Hall*, 138 S. Ct. 1118, 1124 (2018) (citations omitted; alterations in original); *see also Catlin v. United States*, 324 U.S. 229, 233 (1945). Appellate courts thus clearly have jurisdiction over Applicants' challenge to the vacatur decision. The district court terminated the action on the merits, giving the plaintiffs the only relief they sought by "vacating the Final Rule," App. 146, 191, 222, 568, and left "nothing for the court to do but execute the judgment," *Catlin*, 324 U.S. at 233, which it thereafter did "to ensure appealability," App. 570, further confirming that its decision is final, *see Hall*, 138 S. Ct. at 1124. Accordingly, Respondents' vague claim that there is somehow doubt about appellate jurisdiction here is a transparent effort to distract from the core issue in this

Application, which is why Respondents do not actually attempt to develop the argument about finality before this Court.

If anything, Respondents' half-hearted claim that the district court's order is somehow not a final, appealable order only further highlights the lawlessness of how Respondents acted below. An agency must provide notice to the public of a proposed legislative rule and an opportunity to comment, 5 U.S.C. § 553(b), (c), including before repealing a rule, 5 U.S.C. § 551(5). Respondents' appellate jurisdiction argument raised below, if taken seriously by any court, would provide a simple recipe for any agency to evade the APA's fundamental notice-and-comment requirements for repeal of a rule enacted by a prior administration: litigants friendly to a new Administration seek vacatur of the prior Administration's rule in as many courts around the country as needed, and once a single district court grants a nationwide vacatur as part of the remand, the new Administration declines to take an appeal, putting an unreviewable end to the rule. That is obviously not the law.

IV. Summary Reversal Is Particularly Appropriate Here Given Federal Respondents' Belated Concession That The District Court's Decision Is Legally Indefensible And The Posture Of This Case

Especially given that Federal Respondents now belatedly agree that the district court had no authority to vacate the Rule without first finding it unlawful, Fed. Resp.13, summary reversal is a particularly suitable course. There is no textual argument that the APA authorizes the district court's actions, and State Respondents' appeals to inapposite, pre-APA cases are irrelevant. *Supra* pp. 3–4. Meanwhile, cases presenting the problem here—a new Administration effectively

abandoning the defense of a prior Administration's rule, while at the same time working to repeal that rule administratively—are unlikely ever to come up for this Court's review in the normal course, given the timeframes involved, as this case starkly illustrates. Thus, given the "imperative public importance" of establishing clear precedent guiding a district court's limited ability to vacate rules under the APA, Sup. Ct. R. 11; 28 U.S.C. § 2101(e), summary reversal here is particularly appropriate.

Federal Respondents' objections to summary reversal here are meritless. As explained above, *see supra* Part III, Federal Respondents are incorrect when they vaguely claim there may be jurisdictional barriers to this Court's consideration of the legal issue before it. Fed. Resp.24. Federal Respondents are also wrong to contend that the Ninth Circuit could "correct the district court's error in the normal course," Fed. Resp.24–25, given the timeframes involved in the Ninth Circuit's review and the ongoing administrative repeal-and-replacement process, *supra* p. 11. Federal Respondents also incorrectly claim that this case is not "of such imperative public importance." Fed. Resp.25. But State Respondents acknowledged that the effects of the Rule were a "dramatic[ ]" shift from the 1971 regime, State Resp.6, importantly "limit[ing]" certification authorities' scope and time for decisionmaking, Fed. Resp.6. And even apart from the importance of the Rule itself, the legal principle at stake—whether a district court has the atextual, non-statutory authority to vacate agency rulemaking without finding the rule unlawful under the APA—is of nationwide importance, Sup. Ct. R. 11.

CONCLUSION

This Court should stay the vacatur of the Rule or, in the alternative, construe this Application as a petition for a writ of certiorari, grant the petition, and summarily reverse the district court.

Respectfully submitted,

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