No. 23-1059

In the Supreme Court of the United States

PETER WILLIAMS,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, petitioner Peter Williams respectfully seeks rehearing of the Court's denial of his petition for a writ of *certiorari*. Under this Court's supervening decision in *Harrow v. DOD*, 144 S.Ct. 1178 (2024), the Clean Air Act's 60-day time within which to petition for review, 42 U.S.C. § 7607(b)(1), is a claims-processing rule. Because the 60-day provision is not the jurisdictional bar on which the Court of Appeals dismissed Williams' petition, a "GVR" Order granting, vacating, and remanding is the best course to evaluate several issues unique to the Clean Air Act generally and to the specific program under which Williams petitions to review action by the Environmental Protection Agency and its Administrator ("EPA"). While this Court would have jurisdiction to review those merits issues in the first instance, the Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005). In *Harrow*, this Court held that 60-day provisions like the one at issue here are claims-processing rules, not limits on a Court of Appeals' subject-matter jurisdiction. *Harrow*, 144 S.Ct. at 1181. That warrants a GVR order here.

Further, the District of Columbia Circuit's special place within the Clean Air Act's judicial-review program[1] warrants its input on how to proceed, now that *Harrow* upends that court's longstanding

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[1] *See* 42 U.S.C. § 7607(b)(1) (review of nationally applicable rules channeled to the D.C. Circuit); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283-84 (1978) (review channeled to the "single court intimately familiar with administrative procedures" to "insur[e] that [the Clean Air Act's] substantive provisions … would be uniformly applied" nationwide).

position that the 60-day provision is jurisdictional. *See Clean Water Action Council of Northeastern Wisconsin, Inc. v. United States EPA*, 765 F.3d 749, 751-52 (7th Cir. 2014) (citing the D.C. Circuit's history of incorrectly applying the 60-day provision as jurisdictional). Williams raised this issue in opposing EPA's motion to dismiss his petition as jurisdictionally untimely, but he did not raise it in his petition for a writ of *certiorari*.[2] Thus, under Rule 44.2, the non-jurisdictional nature of the Clean Air Act's 60-day provision would be an "other substantial grounds not previously presented" that justifies rehearing, even without *Harrow*.

STATEMENT OF THE CASE

This is a case of mistaken identity in which Williams applied as an individual, but—by letter dated March 31, 2022, and noticed in the Federal Register on April 5, 2022—EPA chose to interpret his application to be on behalf of a defunct corporation. Through counsel, on April 20, 2022, Williams quickly petitioned EPA administratively to reconsider EPA's error, but EPA has not acted on the administrative petition for reconsideration in over two years. What is worse, the program in question involves an annual allocation so that each new year that EPA delays correcting its now-obvious legal and factual error delays Williams' entrance into the program.

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[2] *Compare* Pet.'s Opp'n to Mot. to Dismiss 19 (Apr. 17, 2023) (citing *Clean Water Action Council of Northeastern Wisconsin*, 765 F.3d at 751-52, and *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014)) with Order (July 7, 2023) (citing *Growth Energy v. EPA*, 5 F.4th 1, 12–13 (D.C. Cir. 2021)) (Pet. App. 2a).

Specifically, EPA's denial of Williams application assumes that his trade name ("New Era Group") as an individual made the applicant the defunct Georgia corporation New Era Group, Inc., which EPA considers ineligible for the program. Using "New Era Group" as a "dba" or trade name cannot equate an individual applicant with the corporation:

> An individual doing business under a trade name is clearly a sole proprietor distinct under Georgia law from a corporation in which that individual holds stock.

Miller v. Harco Nat'l Ins. Co., 274 Ga. 387, 390 (2001); *see also BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) ("it is obvious that there are differences between a corporation and an individual under the law"). Moreover, "[c]orporations are creatures of state law," *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Business Roundtable v. SEC*, 905 F.2d 406, 412 (D.C. Cir. 1990); *Doe v. McMaster*, 355 S.C. 306, 313 (2003); *Tr. Co. of Ga. v. State*, 109 Ga. 736, 755 (1900), and no relevant provision of law equates individuals with corporations.

REASONS TO GRANT REHEARING

The Clean Air Act's control over so many facets of the national economy and even daily life make it critical that federal courts ensure the judicial review that Congress enacted, consistent with constitutional and prudential guidelines. Under the circumstances, rehearing is warranted for several important reasons.

1. The nonjurisdictional nature of the Clean Air Act's 60-day provision allows flexibility for courts to consider not only declaratory relief, *see* Section III.B, *infra*, but also final APA action not acknowledged by the agency. *See* Section III.A, *infra*.

2. With the 60-day claims-processing rule taken outside the jurisdictional question, the Clean Air Act and APA may allow more opportunity for a court to consider the questions on prudential justiciability that Williams raised below, which the D.C. Circuit did not consider. *See* Section III.C, *infra*.

3. The court of appeals applied cases under the Clean Air Act generally, without distinguishing that the bulk of major EPA actions that fall under the Act's abbreviated review procedures under § 307(d), *see* 42 U.S.C. § 7607(d)(1)(a)-(u) (listing the EPA actions subject to § 307(d)) while EPA actions like this matter that remain subject to the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), instead. That "APA versus § 307(d)" distinction bears on the timing of judicial review of EPA action on petitions for administrative reconsideration. *See* Section III.D, *infra*.

4. The multiplicity of suits resulting from the D.C. Circuit's ruling and EPA's inaction would irreparably harm Williams. *See*, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 273-74 (1997) ("federal court's equitable jurisdiction [can be] necessary to avoid … [the] possibility of [a] multiplicity of suits causing irreparable damage") (interior quotations omitted, textual alterations in original, ellipsis added, citing Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 377-78 (1930)).

These important reasons justify this Court's granting a GVR order to allow the D.C. Circuit to begin to resolve these issues.

I. THIS COURT'S *HARROW* DECISION IS AN INTERVENING, CONTROLLING PRECEDENT THAT AFFECTS THE JUSTICIABILITY OF PETITIONER'S CLAIMS.

A rehearing of the denial of a petition for a writ of *certiorari* is appropriate to consider "intervening circumstances of a substantial or controlling effect" relative to the petition. Sup. Ct. R. 44.2. Furthermore, this Court may modify any judgment brought before it, and vacate and remand that case to the court below "as may be just under the circumstances." 28 U.S.C. § 2106. Although the Court gainfully could take the case on the merits, GVR to the D.C. Circuit is appropriate for that court to consider—in the first instance—the merits and additional justiciability issues Williams raises, now that the 60-day provision is not jurisdictional under *Harrow*. *See Cutter*, 544 U.S. at 718 n.7; *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

GVR orders have "become an integral part of this Court's practice," which the Court has issued when a recent decision affects the outcome of another case seeking the Court's review. *Id.* at 166. In *Lawrence*, this Court found that the petitioner should have the opportunity to have his claim reviewed by the lower court following an administrative re-interpretation of the statute under which the petitioner sought relief. 516 U.S. 174-75. This Court found that a GVR order was particularly appropriate in that case because the intervening change in administrative interpretation could have been outcome determinative to the petitioner. *Id.* at 174. "Giving Lawrence a chance to benefit from it furthers fairness by treating Lawrence like other future benefits applicants." *Id.* at 175.

Likewise, in this case, the Court's *Harrow* decision is a significant intervening change that undermines the D.C. Circuit's jurisdictional basis to dismiss Williams' petition. With jurisdiction set aside, other issues come into focus, including whether a court could consider Williams' argument that his petition for administrative reconsideration rendered the EPA action prudentially unripe vis-à-vis the 60-day claims-processing rule for judicial review, whether his APA action for the denial of the then-new 2023 allocation was a sufficiently final APA action to allow APA review, and whether declaratory relief was available even if Clean Air Act and APA review were not.

Under *Lawrence* and Rule 44.2, Williams' request for rehearing should be granted and the D.C. Circuit's judgment vacated and remanded for reconsideration under this Court's *Harrow* decision.

II. REHEARING IS REQUIRED TO AVOID ISSUE PRECLUSION'S DENYING THE FORUM THE CLEAN AIR ACT AND APA PROVIDE.

Jurisdictional dismissal can have issue-preclusive impact as between the parties, even if the dismissal is erroneous. *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 699 (5th Cir. 1963) ("whether right or wrong, [jurisdictional] decision[s] cannot ordinarily be attacked collaterally"); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C.. Cir. 1983) (Scalia, J.); *Durfee v. Duke*, 375 U.S. 106, 111 (1963). Petitioner is entitled to rehearing under Rule 44.2. Without a rehearing, petitioner Williams could arguably lose the right to have his claims heard under the petition-for-review process that the Clean Air Act provides. The D.C. Circuit's refusal to accept jurisdiction, if upheld,

would compel petitioner to litigate his claim first in district court—to compel EPA to act—then in the Court of Appeals to challenge EPA's action.

In this action, EPA has already wrongly withheld allocations for the 2022 and 2023 allocation years. In a new action, Williams challenges the 2024 year, and the 2025 year is forthcoming. For each allocation year that passes, petitioner either will forever lose allocations for that year or he will need to bring a separate action to recover for years unlawfully withheld or denied. Unless this Court grants the petition for rehearing, petitioner will remain in limbo, with his claims potentially fading into oblivion.[3]

III. THIS COURT SHOULD "GVR" THE CASE TO THE COURT OF APPEALS.

"Whether a GVR order is ultimately appropriate depends further on the equities of the case[.]" *Lawrence*, 516 U.S. at 167-68. Here, the equities urge that petitioner receive a GVR order. As in *Lawrence*, "the GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Id.* at 168.

A. APA action is viable.

Unlike for EPA actions under § 307(d), the APA applies to EPA actions outside § 307(d). When an APA action involves periodic relief—such as the annual allocations here—the APA allows treating inaction as to a single year as final agency action *as to that year*.

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[3] Petitioner has filed a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, against the EPA staff who denied him allocations for the 2022 and 2023 allocation years. Whether petitioner will recover damages remains an open question.

See, e.g., *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) ("the findings represented the agency's final decision that no permit would issue for the 2014 calendar year"); *Nat'l Airlines, Inc. v. C.A.B.*, 392 F.2d 504, 511 (D.C. Cir. 1968) ("effective deprivation of petitioners' rights" constitutes final action); *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589 n.8 (D.C. Cir. 1971) ("test of finality for purposes of review is … whether it imposes an obligation or denies a right with consequences sufficient to warrant review"). That is enough to reverse the dismissal of Williams' petition for review.

Specifically, finality has two prongs: (1) a consummated decisionmaking process, and (2) the agency action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (interior quotations omitted). Courts interpret finality in a "pragmatic" and "flexible" way, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149-50 (1967), "rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (construing 28 U.S.C. § 1291); *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (analogizing *Cohen* and § 1291 to statutory finality). Courts must evaluate "competing considerations underlying all questions of finality – the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). EPA's APA action was final.

B. Declaratory relief is available, even if other review is unavailable.

Once within a federal court's jurisdiction, the court also "may declare the rights and other legal

relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). While the Declaratory Judgment Act does not extend the jurisdiction of the federal courts, *California v. Texas*, 141 S.Ct. 2104, 2115 (2021), a court *otherwise with jurisdiction* "may grant declaratory relief even though it chooses not to issue an injunction or mandamus." *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *Steffel v. Thompson*, 415 U.S. 452, 457 n.7 (1974); *Zukerman v. United States Postal Serv.*, 64 F.4th 1354, 1366 (D.C. Cir. 2023); *In re Tennant*, 359 F.3d 523, 531 (D.C. Cir. 2004) ("declaratory judgment … could be entered only 'in a case of actual controversy within [our] jurisdiction'" such as mandamus under the All Writs Act) (quoting 28 U.S.C. § 2201(a), alteration in original). In addition, "[f]urther necessary or proper relief based on a declaratory judgment or decree may [also] be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." *Id.* § 2202. With jurisdiction now established, Williams should have the opportunity to seek declaratory relief.

C. The nonjurisdictional nature of the 60-day provision allows consideration of issues such as prudential ripeness.

Before finding a challenge to EPA's initial denial untimely for not being filed within 60 days of the Federal Register notice on April 5, 2022, a court could find that—when Williams filed his petition for administrative reconsideration—a challenge was not *ripe*. A lack of constitutional or prudential ripeness would stall the 60-day clock until the claim ripened:

> We have held in other cases involving the confrontation between a statutory bar and a

> claim not yet prudentially ripe that a time limitation on petitions for judicial review can run only against challenges ripe for review. Our reading of 42 U.S.C. § 7607(b) does not contradict this precedent.

Louisiana Envtl. Action Network v. Browner, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (internal quotations and alterations omitted). The factual elements of EPA's denial of Williams' application require not only the factual development that his administrative petition provided, but potentially also EPA's application of its unique new-entrant rule to those facts.

D. The APA and § 307(d) apply different timing criteria to EPA's action—and inaction—on administrative petitions.

Perhaps because most Clean Air Act litigation has involved the major programs listed in § 307(d)(1), there is not much law on how the APA applies to EPA action outside § 307(d). While § 307(d)'s procedures are a form of "APA-lite," the two standards obviously differ in some ways, or Congress would not have taken the time to draft § 307(d)'s abbreviated procedures. For action outside § 307(d), the APA applied before Congress enacted § 307(d), *Amoco Oil Co. v. EPA*, 501 F.2d 722, 731 (D.C. Cir. 1974) (quoting 5 U.S.C. § 706(2)(A)), and § 307(d)'s enactment did nothing to change that. 5 U.S.C. § 559 (APA applies to post-APA statutes unless expressly exempted); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999).

The APA requires a response to Williams' petition for administrative reconsideration and provides judicial review to "compel agency action unlawfully withheld." 5 U.S.C. §§ 555(b), 706(1). The action reviewed when EPA acts (or fails to act) on a petition

for administrative reconsideration under the APA is the latter act (or failure to act) of withholding or denying reconsideration, not the original action that a petitioner asks an agency to reconsider. *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 284-85 (1987); *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.,* 834 F.2d 191, 195-196 (D.C. Cir. 1987). That future action is the final agency action that the APA reviews when an agency denies an administrative petition, and that final agency action had not occurred by June 6, 2022 (*i.e.*, EPA's claimed cut-off for Williams to have sought review).

It is important for the D.C. Circuit to resolve how the claims-processing rule applies to APA actions outside § 307(d), even if Williams were to have claim barred under the Clean Air Act's claims-processing rule and to have APA and declaratory relief denied.

CONCLUSION

The Court should grant the petition for rehearing and issue a GVR for reconsideration of the dismissal under *Harrow*.

June 24, 2024

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CERTIFICATE OF COUNSEL

Pursuant to this Court's Rule 44.2, petitioner's counsel certifies that the Petition for Rehearing is restricted to the grounds specified in the rule with substantial grounds not previously presented. Counsel certifies that this Petition is presented in good faith and not for delay.

June 24, 2024 Respectfully submitted,

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