No. __-_____

In the Supreme Court of the United States

PETER WILLIAMS,

***PETITIONER*,**

v.

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

***RESPONDENTS*.**

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

PETITION FOR WRIT OF *CERTIORARI*

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
202-899-2987
ljoseph@larryjoseph.com

Counsel for Petitioner

QUESTIONS PRESENTED

Clean Air Act §307(b)(1)'s typical claims-process rule requires petitioning for review within 60 days of final action of the Administrator. Since 1990, unique among such forms of review, administrative petitions to reconsider do not stay an action's finality. In 2022, EPA staff erred factually and legally by denying an informal Administrative Procedure Act ("APA") adjudication to enter a new program with annual distributions, which petitioner immediately met with staff to correct, following up by administratively petitioning to correct within the 60-day window. When EPA issued the next year's distribution without deciding the administrative petition, he sued for constructive denial, which the D.C. Circuit found *jurisdictionally* barred by the 60-day window and §304(a)(2), another 1990 Clean Air Act provision, which expanded district court jurisdiction for failure to take nondiscretionary action. The present petition for review challenged not only the 2022 staff action but also EPA's 2024 denial of two of four then-pending administrative petitions.

In both petitions for review, the Court of Appeals granted EPA's motions to dismiss without the administrative record, over petitioners' objection. A record would have shown that subordinate staff without the Administrator's delegated authority took the 2022 action and that nothing hinged on the partial 2024 denial in isolation (*i.e.*, EPA could grant the two pending petitions before the next annual distribution).

The questions presented *for summary decision* are:

1. Whether this Court's supervening decision on nonjurisdictional 60-day windows bars *res judicata*?

2. Whether review of action *unlawfully withheld* remains under §307(b)(1) or moved to §304(a)(2)?

PARTIES TO THE PROCEEDING

Petitioner here and in the court of appeals is Peter Williams, who used the trade name New Era Group in his application at issue here.

The respondents here and in the court of appeals are the federal Environmental Protection Agency and its Administrator—Lee M. Zeldin—in his official capacity.

RULE 29.6 STATEMENT

Petitioner is a natural persons with no parent companies and no outstanding stock.

STATEMENT OF RELATED CASES

For purposes of this Court's Rule 14.1(b)(iii), this case arises from and is related to the following proceedings in the U.S. Court of Appeals for the District of Columbia Circuit and this Court:

- *Williams v. Envtl. Prot. Agency,* No. 22-1314 (D.C. Cir.). Dismissed July 7, 2023.
- *In re Williams,* No. 23-1269 (D.C. Cir.). Dismissed December 21, 2023.
- *Williams v. Envtl. Prot. Agency,* No. 23-1340 (D.C. Cir.). Dismissed April 2, 2025.
- *Williams v. Envtl. Prot. Agency,* No. 24-1386 (D.C. Cir.). Dismissed June 25, 2025 (*i.e.*, this case).
- *Williams v. Envtl. Prot. Agency,* No. 26-1021 (D.C. Cir.). Docketed December 21, 2023; pending.
- *Williams v. Newberg*, No. 1:24-cv-3471-RBW (D.D.C.). Filed December 12, 2024; pending.
- *In re Williams,* No. 25A757 (U.S.). Application granted January 5, 2026.

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PETITION FOR WRIT OF *CERTIORARI*

Peter Williams respectfully petitions this Court for a writ of *certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit to review dismissal of his Clean Air Act petition for review under 42 U.S.C. §7607(b)(1) and—to the extent that statutory subject-matter jurisdiction under that section was lacking—the court's failure to consider transfer to the district court under 28 U.S.C. §1631. This petition for review is the fourth appellate effort to compel respondent Environmental Protection Agency and its Administrator ("EPA") to correct an obvious error by EPA staff in 2022 on Williams' application as a new-market entrant in an EPA cap-and-trade program. In the D.C. Circuit, EPA argued that he must sue in district court. In district court, EPA argues that he must sue under a petition for review. This ping pong must stop.

OPINIONS BELOW

The District of Columbia Circuit's unreported order is reprinted in the Appendix ("App") at 1a.

JURISDICTION

On June 25, 2025, the District of Columbia Circuit issued its Order dismissing the petition for review. By orders dated October 10, 2025, App:22a, 23a, the panel and *en banc* court denied petitioners' timely petition for rehearing. By order dated January 5, 2026, the Circuit Justice extended the time within which to petition for a writ of *certiorari* to March 9, 2026. *In re Williams*, No. 25A757 (U.S. 2026). The Court of Appeals had jurisdiction under 42 U.S.C. §7607(b)(1). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix sets out the relevant constitutional, statutory, and regulatory provisions. App:24a-41a.

STATEMENT OF THE CASE

At best for EPA, this is a case of mistaken identity in which Williams applied as an individual, but EPA interpreted his application to be on behalf of a defunct corporation. Through counsel, Williams quickly petitioned EPA administratively to reconsider EPA's error, but EPA has evaded answering administrative petitions forthrightly and—in appellate review and in the district court—EPA has steadfastly avoided filing the administrative record and sought dismissal based on untimeliness under the 60-day window for review under 42 U.S.C. §7607(b)(1), If filed, the record would show that the EPA staffers who initially acted to deny his application lacked the Administrator's delegated authority to act in 2022 and that no subsequent action

constituted final action of the Administrator on his underlying application.[1]

This action ("*Williams IV*") challenges the 2024 denial by EPA's Assistant Administrator for Air and Radiation in the "Goffman Letter," App:14a, of two of four then-pending administrative petitions. Williams seeks to challenge the 2022 action by EPA staff as the type of "preliminary, procedural, or intermediate agency action[s] or ruling[s]" that the APA reviews as part of "the review of the final agency action." 5 U.S.C. §704. The Court of Appeals dismissed all but Wiliams' challenge to the Assistant Administrator's Goffman Letter.[2]

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[1] EPA staff took three discrete actions related to Williams' application in 2022: (a) a letter from Cynthia Newberg denying the application, App:3a ("Newberg Letter"), (b) a memorandum to file by Newberg, App:6a ("Newberg Memorandum"), and (c) a Federal Register noticed signed by another EPA staffer, Hans Christopher Grundler, App:12a.

[2] The five appellate matters were not carbon copies. *Williams v. EPA*, No. 22-1314 (D.C. Cir.) ("*Williams I*"), petitioned to review the 2023 HFC allocation as constructively denying his administrative petition for reconsideration dated April 20, 2022. *See Friedman v. FAA*, 841 F.3d 537, 541-42 (D.C. Cir. 2016) ("practical effect" of inaction constitutes a "constructive denial"). *In re Williams*, No. 23-1269 (D.C. Cir.) ("*Williams II*"), petitioned for a writ of mandamus to compel EPA to grant his new-market-entrant application under 5 U.S.C. §706(1) (addressing both action "unlawfully withheld" and action "unreasonably delayed") because the "unlawfully withheld" clause is synonymous with mandamus. *Williams v. EPA*, No. 23-1340 (D.C. Cir.) ("*Williams III*"), petitioned under 5 U.S.C. §705 (*i.e.*, not §706) when EPA's Federal Register notice for the 2024 allocations also announced administrative-consequence policies that—apart from the 2024 allocation—threatened to deplete a common fund that EPA could use to make Williams whole without encroaching on the other participants core HFC allocations. *See In re Estate of Reilly*, 933

Although the Assistant Administrator's had authority to act for EPA, his action was neither "final" under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), nor ripe because EPA already had issued the 2025 distributions and could have granted his still-pending application and still pending administrative petitions before EPA issues the 2026 allocations in November of 2025 (*i.e.*, nothing hinged on the 2024 denial of two of the four then-pending petitions). EPA now has issued the 2026 allocations without either granting or denying the still-ending administrative petitions or Williams' underlying application, and he has protectively petitioned the D.C. Circuit for review for constructive denial of his application, seeking—in the alternative—transfer to the district court. *See Williams v. EPA*, No. 26-1021 (D.C. Cir.) ("*Williams V*"). EPA has once again moved to withhold the record and to dismiss for lack of jurisdiction. Williams seeks summary reversal here so that this challenge can join *Williams V* in the Court of

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A.2d 830, 834 (D.C. 2007) (affirming preliminary injunction against further dissipation of trust funds); *Deckert v. Independence Shares Corporation*, 311 U.S. 282, 290 (1940) (same). *Williams v. EPA*, No. 24-1386 (D.C. Cir.) ("*Williams IV*"), petitioned to review not only the Goffman Letter's belated, partial response to the then-pending administrative petitions for reconsideration but also the Goffman Letter's ripening of Williams' challenge to EPA staff's underlying denial of his application. *See Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 646 (D.C. Cir. 2019) (distinguishing between review for failing to revise and for after-arising ripening). *Williams v. EPA*, No. 26-1021 (D.C. Cir.) ("*Wiliams V*"), protectively petitioned for review of the 2026 allocation as constructive denial of Williams' application based on the lack—to date—of a final action of the Administrator on his application, while alternatively seeking transfer if there was no final action on his application for subject-matter jurisdiction under 42 U.S.C. §7607(b)(1).

Appeals, while removing any issues of res judicata and giving the Court of Appeals guidance on the jurisdictional issues to consider.

Because Williams seeks summary reversal on the basis of purely legal issues (*i.e.*, whether the Clean Air Act's 60-day window for review is jurisdictional, whether a court should dismiss APA claims without an administrative record, whether the Clean Air Act's 1990 citizen-suit amendments displaced appellate APA merits review), the facts are not particularly relevant.[3] Williams recounts them here only as they relate to the issues presented here.

EPA staff's processing of Williams' application involved four entities: (A) the applicant, Peter Williams, a natural person; (B) his trade name, "New Era Group;" (C) a Georgia corporation named "New ERA Group, Inc.;" and (D) RMS of Georgia, LLC (an existing market participant with Kenneth Ponder as its President and owner). There are three ways to analyze the four entities' relevance to Plaintiff's application:

- ***Plaintiff's Interpretation***: A and B are legal synonyms: "the identity of [a sole proprietorship] was the same as that of its owner." *Pritchett v. Stillwell*, 604 A.2d 886, 889 (D.C. 1992); *York Grp., Inc. v. Wuxi Taihu Tractor Co.*, 632 F.3d 399, 403 (7th Cir. 2011) (person and his trade name "are two names for the same person. Either will do; both are better"). Thus, the applicant was A:B, with both C and D as irrelevant third parties.

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[3] A verified Second Amended Complaint that Williams seeks leave to file in district court sets out the facts in detail. Second Am. Compl. (ECF #52-1), *Williams v. Newberg*, No. 1:24-cv-3471-RBW (D.D.C.).

- ***Newberg Letter***: As noticed to Williams on April 1, 2022, the Newberg Letter appears to treat B and C as synonymous, so the applicant was A dba B:C, where C and D are affiliated because they share a common officer. This analysis is clearly erroneous: "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); *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"); *cf. Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000) (distinguishing corporation from its officer and sole shareholder). 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 law equates individuals with similarly named corporations.
- ***Newberg Memorandum***: As belatedly noticed to Williams on May 12, 2025, the Newberg Memorandum finds affiliation based on the purported fact that A and an officer of D served together on the board of C—wholly apart not only from the similarity of B's and C's names but also from whether A's application mentioned B—so A is affiliated with D. This analysis is clearly erroneous because a corporate "affiliate" means "[a] corporation that is related to another corporation *by shareholdings or other means of control*; a *subsidiary, parent, or sibling*

> corporation." BLACK'S LAW DICTIONARY 72 (11th ed. 2019) (emphasis added); BLACK'S LAW DICTIONARY 72 (12th ed. 2024) (same); *Yellow Pages Photos, Inc. v. YP, LLC*, 856 F.App'x 846, 856 n.3 (11th Cir. 2021) (same), which reflects "the usual corporate understanding of affiliation as a relationship involving ownership or control" that applies in the absence of a contrary definition. *United States v. Western Elec. Co.*, 12 F.3d 225, 230 (D.C. Cir. 1993); O.C.G.A. §14-2-1110(1) ("affiliate" means "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with a specified person").

These distinctions are relevant here for two reasons. First, the fact that EPA did not disclose the Newberg Memorandum in the 2022 Federal Register notice or provide it to Williams until 2025 violated 5 U.S.C. §555(e) (requiring prompt notice of basis for denial), which could be relevant to the timeliness (*i.e.*, when the 60-day window began to run). *See* Section I.B, *infra*. Second, the absurdity of EPA's interpretation of the unmodified phrase "corporate affiliation" means, *see* 40 C.F.R. §84.15(c)(2), could convince the Court of the equites of the parties' respective positions if the Court considers such issues in determining whether to grant review.[4]

Upon receiving the Newberg Letter on April 1, 2022, Williams contacted EPA staff to correct the

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[4] The Paperwork Reduction Act, 44 U.S.C. §§3501-3521, requires agencies to certify, *inter alia*, that information collection activities like EPA's application form are "written using plain, coherent, and unambiguous terminology and [are] understandable to those who are to respond." 44 U.S.C. §3506(c)(3)(D).

conflation of his trade name ("New Era Group") with a similarly named corporation ("New ERA Group, Inc."). Through counsel, on April 20, 2022, Williams petitioned EPA administratively to correct EPA's error, but EPA has never acted on his petition. Williams supplemented his administrative petition through counsel by letter dated December 12, 2022, and RMS—the company with which EPA believed Williams or New ERA Group, Inc. had corporate relations—administratively petitioned EPA to correct its error by letter dated December 29, 2022. EPA did not act on the pending administrative petition in time to include Williams in the 2023 allocation. On April 30, 2024, Williams notified EPA of his intent to sue to bring a citizen suit to compel a response to not only his two administrative petitions but also to the RMS administrative petition and again petitioned EPA to grant his underlying application. Significantly, both the RMS petition and Wiliams' petition dated April 30, 2024, included new evidence for reversing EPA's denial within the meaning of *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 284-85 (1987) ("*BLE*"). In denying the petitions dated April 20, 2022, and December 12, 2022, the Goffman Letter cited the lack of new evidence under *Sendra Corp. v. Magaw*, 111 F.3d 162, 166 (D.C. Cir. 1997), App:16a, while ignoring two administrative petitions that contained new evidence.

REASONS TO GRANT THE WRIT

The Clean Air Act's control over so many facets of the national economy and even daily life make it critical that federal courts provide the judicial review that Congress intended, consistent with constitutional and prudential guidelines. Given that so much of the litigation in the Act funnels through

the District of Columbia Circuit as "nationally applicable," *see* 42 U.S.C. §7607(b)(1); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283-84 (1978) (centrality of D.C. Circuit to Clean Air Act review), this Court should not wait for circuit splits to arise when the District of Columbia Circuit errs. The Court should grant the writ to address several aspects of judicial review under the Clean Air Act.

1. This Court should clarify that the 60-day window for review is non-jurisdictional under *Harrow v. Dep't of Def.*, 601 U.S. 480, 484 (2024).

2. The court of appeals applied cases under the Clean Air Act generally, without distinguishing 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)) *vis-à-vis* EPA actions like this matter that remain subject to pure APA review.

3. That "APA versus §307(d)" distinction bears on the timing, adequacy, and exclusivity of judicial review of EPA action, especially in informal adjudications that involve administrative petitions for reconsideration.

4. Whether via summary reversal and remand or full merits briefing, this Court should clarify that the 1990 Clean Air Act's expansion of citizen-suit review of EPA inaction did not displace APA merits review on petitions for review.

5. This Court should reiterate that APA review requires an administrative record.

These important reasons justify this Court's resolving these crucial issues expeditiously.

I. THE COURT OF APPEALS LACKED A VALID BASIS TO FIND A CHALLENGE TO EPA STAFF'S 2022 ACTIONS UNTIMELY.

The motions panel dismissed Williams' challenge to EPA staff's 2022 actions as untimely, App:19a, refused to reinstate it, App:1a-2a, and held that the record Williams sought would not bear on the court's ruling. App:22a. Without the record, however, the motions panel had no basis to find untimeliness under blackletter administrative law.

A. The Clean Air Act's 60-window is a non-jurisdictional claims-processing rule.

Prior to the U.S. Supreme Court's decision in *Harrow* 601 U.S. at 484, precedent in this Circuit deemed provisions like the Clean Air Act's 60-day window for judicial review as jurisdictional. *See*, *e.g.*, .*Growth Energy v. EPA*, 5 F.4th 1, 12-13 (D.C. Cir. 2021); App:19a (citing *Growth Energy* 5 F.4th at 12-13). Under *Harrow*, courts "treat a procedural requirement as jurisdictional only if Congress clearly states that it is, *Harrow*, 601 U.S. at 484, and nothing in 42 U.S.C. §7607(b)(1) makes the 60-day window jurisdictional. The only requirement for subject-matter jurisdiction in 42 U.S.C. §7607(b)(1) is final action of the Administrator. *See* 42 U.S.C. §7607(b)(1); *Harrison v. PPG Indus.*, 446 U.S. 578, 605 & n.7 (1980) (Stevens, dissenting) (timeliness not an issue where EPA had not yet published action in the Federal Register). In sum, §307(b)(1)'s 60-day window is non-jurisdictional.

B. *Williams I* cannot control on timeliness.

Williams I cannot control on the timeliness of Williams' challenge to EPA staff's 2022 actions on his application for at least five reasons:

- *Harrow* changed the legal context.
- EPA did not disclose its full basis the 2022 action on the underlying application until after Williams filed *Williams IV*.
- EPA staff who acted in 2022 on the application lacked the Administrator's delegated authority.
- If authorized EPA officials ratified EPA staff's 2022 action, the 60-day window begins to run when EPA notices the ratification in the Federal Register, which has not happened yet.[5]
- Any issue preclusion on timeliness is curable by alleging that EPA staff lacked authority to take final action for EPA in 2022.

Williams says *at least* five reasons because tolling the 60-day window and barring use of *res judicata* would be available on equitable grounds, beyond the reasons listed above.

Res judicata is an equitable doctrine that encompasses two distinct doctrines: (a) claim preclusion, and (b) issue preclusion or collateral estoppel. *Brownback v. King*, 592 U.S. 209, 215 n.3 (2021). Claim preclusion requires a merits judgement, *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 646 (2016), which *Williams I* was not. Collateral estoppel—or issue preclusion—can arise "once a court has decided an issue of fact or law necessary to its judgment" and "*may* preclude relitigation of the issue in a suit on a different cause of action involving a

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[5] Ratification requires dealing with "full knowledge" of the issues underlying the ratified act and a "independent evaluation of the merits." *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (ratification requires "independent evaluation of the merits"); *United States v. Beebe*, 180 U.S. 343, 354 (1901) (ratification requires "full knowledge of all the facts").

party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added). But even where collateral estoppel otherwise might apply, an exception applies for an intervening "change in [the] applicable legal context." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (cleaned up); *Montana v. United States*, 440 U.S. 147, 157-58 (1979) (prior judgment was conclusive "[a]bsent significant changes in controlling facts or legal principles" since the judgment). *Harrow* changed otherwise-controlling Circuit precedent on timeliness of challenges to past action.

Second, EPA did not release the basis for EPA staff's March 2022 denial until August 12, 2025, when EPA disclosed the Goffman Letter's administrative record. The belated disclosure violated the duty under 5 U.S.C. 555(e) to disclose the basis for the denial. A 60-day window to petition for review begins to run only when the agency publishes its full action. *Indus. Union Dep't v. Bingham*, 570 F.2d 965, 969 (D.C. Cir. 1977) (citing *Microwave Communications, Inc. v. FCC*, 515 F.2d 385 (D.C. Cir. 1974)) ("the period for seeking review of an [agency] order began only when its full text was made available"); Office of Air Quality Planning and Standards, *EPA Process Manual for Responding to Requests Concerning Applicability and Compliance Requirements of Certain Clean Air Act Stationary Source Programs*, at 47 (July 2020).

Third, the "phrase 'final action' … bears the same meaning in [42 U.S.C. §7607(b)(1)] that it does under… 5 U.S.C. §704," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001), and "preliminary… or intermediate agency action[s] or ruling[s]" are reviewable only after an agency takes final agency action. 5 U.S.C. §704. Neither agency action taken by merely subordinate officials nor "tentative" agency

action is "final" agency action. *NRDC v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). EPA staff's 2022 actions were not final action *of the Administrator* needed for the Court of Appeals to have had subject-matter jurisdiction in 2022 under 42 U.S.C. §7607(b)(1).

Fourth, the effective date of ratified agency action is the date of ratification, not the date of the original act. *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994). Further, the 60-day window for review *begins* when EPA notices it in the Federal Register, 42 U.S.C. §7607(b)(1), which has not happened yet, even if EPA has ratified EPA staff's 2022 action.

Fifth, jurisdictional issue preclusion is curable by citing in a new action based on new agency action the defect in the prior subject to a curable-defect exception, *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41-42 (D.C. Cir. 2015) (citing *GAF Corp. v. United States*, 818 F.2d 901, 912-13 (D.C. Cir. 1987), and *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983)). Here, EPA took a new 2024 action, and Williams alleged that the underlying 2022 actions were merely the acts of subordinate EPA staff.

C. Neither this Court nor the Court of Appeals should hold petitioner's action untimely without the record.

Without the benefit of the administrative record, the motions panel found a challenge to the 2022 action on Williams' application both final, App:19a, and ripe. App:1a-2a. Significantly, subject-matter jurisdiction under §307(b)(1) requires finality. *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 404-05 (D.C. Cir. 2020) ("finality is jurisdictional under the Clean Air Act") (cleaned up); *cf. John Doe, Inc. v. DEA*, 484 F.3d 561,

565 (D.C. Cir. 2007) ("under the APA … the requirement of 'final agency action' is not jurisdictional"). Agency action can be final, without being ripe: "a final agency action nonetheless can be unripe for judicial review." *Pfizer Inc. v. Shalala*, 182 F.3d 975, 979-80 (D.C. Cir. 1999); *cf. Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (60-day window does not run on unripe claims). The motions panel's error, however, was far more basic.

> [The] administrative record is not, however, before us. The lower courts based their review on the litigation affidavits that were presented. These affidavits were merely "post hoc" rationalizations, which have traditionally been found to be an inadequate basis for review. And they clearly do not constitute the "whole record" compiled by the agency: the basis for review required by § 706 of the Administrative Procedure Act. [¶] Thus it is necessary to remand this case … for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971) (cleaned up); *accord Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (remanding to district court to reconsider based on whole record); *accord Rodway v. Dep't of Agriculture*, 514 F.2d 809, 816-17 (D.C. Cir. 1975); *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001). The need for the record is basic "Administrative Law 101," and the motion panel erred in deciding the case based on unsworn statements in

EPA's motion papers (i.e., not even affidavits). That is clear error.

II. THE 1990 AMENDMENTS TO §304 DID NOT REMOVE THE COURTS OF APPEALS' §307 JURISDICTION OVER APA UNLAWFULLY-WITHHELD CLAIMS.

Notwithstanding the 1990 amendment expanding citizen-suit authority and jurisdiction in the district courts, merits review under the Clean Air Act remains an appellate process via petitions for review. Even if Congress did not make that jurisdiction exclusive, the longstanding rationale for confining merits review in the appellate process is efficiency and uniformity. *See*, *e.g.*, 28 U.S.C. §1651(a); *Whitney Nat'l Bank v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 421-22 (1965); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984); *accord Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75-77 (D.C. Cir. 1984) ("*TRAC*"); *Sierra Club v. Thomas*, 828 F.2d 783, 787 (D.C. Cir. 1987) (applying *TRAC* to Clean Air Act), *abrogated in part on other grounds*, PUB. L. NO. 101-549, §707(f), 104 Stat. 2399, 2683 (1990). The question is the *extent* to which the 1990 amendments abrogated *Sierra Club v. Thomas* to bring forward disfavored bifurcation of merits review via disfavored repeal by implication.

By way of background, as originally enacted, the Clean Air Act was subject to judicial review under the terms of the APA. *See*, *e.g.*, *Amoco Oil Co. v. EPA*, 501 F.2d 722, 731 (D.C. Cir. 1974); *Ethyl Corp. v. EPA*, 541 F.2d 1, 33-35 (D.C. Cir. 1976); *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 786 (D.C. Cir. 1976). The APA provides for compelling agency action unlawfully withheld and agency action unreasonably delayed. 5 U.S.C. §706(1). The former is synonymous with mandamus, *Arizona v. Inter Tribal Council of*

Arizona, Inc., 570 U.S. 1, 19 n.10 (2013), and is available under the APA. *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988); *Am. Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1262 (D.C. Cir. 1980). Together, EPA's regulations and 5 U.S.C. §555(b) gave EPA a clear duty to act on and to grant Williams' application 40 C.F.R. §84.15(e)(3), which is enforceable as action unlawfully withheld under the APA. *See* 5 U.S.C. §706(1).[6]

A. Repeals by implications are disfavored, *especially* when they repeal causes of action as *especially, especially* for APA claims.

Repeals by implication require "clear and manifest" legislative intent, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 662 (2007) ("*NAHB*"), and "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975). For post-APA legislation like the Clean Air Act, the canon is even more adamant: "Subsequent statute may not be held to supersede or modify [the APA and related provisions] except to the extent that it does so expressly." 5 U.S.C. §559; *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999). There is no "clear and manifest," much less express, legislative intent to repeal APA

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[6] The motions panel considered a purportedly "unchallenged regulation tying a new market entrant's receipt of 2025 allowances to that entity's receipt of 2023 allowances," App:20a (citing 40 C.F.R. §84.11(b)(1)), but Williams disputes EPA's interpretation of the regulation and, in any event, petitioned EPA to repeal that provision. *See* 5 U.S.C. §553(e).

review of action unlawfully withheld or to consign that review to district courts.

1. This Court's *Bennett* holding could guide this Court to find APA merits review under §307(b)(1).

This Court already has held that citizen-suit provisions do not displace or preclude otherwise-applicable APA review:

> No one contends (and it would not be maintainable) that the causes of action against the Secretary set forth in the ESA's citizen-suit provision are exclusive, supplanting those provided by the APA.

Bennett, 520 U.S. at 175. At least for merits review for unlawfully withheld EPA action, the 1990 amendments to §304(a) should not displace APA review under §307(b)(1).

2. Then-Judge Kavanaugh's *Mexichem* dissent could guide this Court to find APA merits review under §307(b)(1) for actions outside §307(d).

In a case involving an EPA action to which §307(d) did apply—which therefore expressly exempted a few listed parts of the APA, 42 U.S.C. §7607(d)(1)[7]—then-Judge Kavanaugh explained in dissent that the other, unexcepted parts of the APA (namely, 5 U.S.C. §705) should continue to apply the Clean Air Act. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part). When §307(d) does not apply, the Clean Air Act's plain terms

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[7] " The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." *Id.*

show that *none* of the APA is excepted. *See* 42 U.S.C. §7607(d)(1). For an action covered by §307(d), then-Judge Kavanaugh was willing to disregard an express provision, 42 U.S.C. §7607(d)(7)(B), to honor an APA provision that §307(d) did not except. For EPA action *outside* §307(d), none of the APA is excepted.[8]

B. The motions panel abused its discretion by not deciding the jurisdictional issue.

Appellate courts review lower courts' decisions not to transfer an action pursuant to 28 U.S.C. §1631 under an abuse-of-discretion standard. *See*, *e.g.*, *Paul v. INS*, 348 F.3d 43, 46 (2d Cir. 2003) (Sotomayor, J.); *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 129 (3d Cir. 2020) (same); 17 MOORE'S FEDERAL PRACTICE - CIVIL §111.63 (same, collecting cases). This Court has reversed lower courts' failure to transfer, albeit for dismissal under 28 U.S.C. §1406(a). *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-66 (1962). A federal "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), and federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976).

The motions panel denied transfer to the district court on the rationales that jurisdiction was "at best questionable" and Williams already had filed a suit there. App:2a. Both rationales abused the motion

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[8] Indeed, the issue of unanswered administrative petitions would not arise because §307(d) allows treating EPA's failure to answer them or convene a proceeding as a denial and also provides 30 days after EPA acts to supplement the record. *See* 42 U.S.C. §7607(d)(5)(iv), (d)(7)(B).

panel's discretion—and shirked its obligation—by failing even to consider transfer to the district court.

First, *Williams II* held that the district court has jurisdiction. *See* Section II.C.2, *infra*. To deny transfer based on questioning *Williams II* now is precisely the type of jurisdictional ping pong that litigants should not have to endure. There is a right answer, and this Court should ask the Court of Appeals to pick one—not both or neither—in a reasoned manner.

Second, although Williams has a case pending in district court, the operative complaint there does not include citizen-suit claims, and EPA has opposed—on jurisdictional grounds—Williams' motion for leave to amend the complaint to add citizen-suit claims. Transfer would avoid this jurisdictional ping pong.

C. The 1990 expansion of citizen suits for unreasonable-delay claims did not displace merits review under §307(b)(1).

This Court need not decide now whether the 1990 amendments actually gave district courts authority and jurisdiction to issue mandamus-style merits relief for "a failure … to perform any act or duty under … *which is not discretionary* with the Administrator." *See* 42 U.S.C. §7604(a)(2) (emphasis added). It would be enough for the Court to decide that—under the canon against repeals by implication and *Bennett*—the 1990 citizen-suit expansion did not clearly and manifestly erase the Courts of Appeals' pre-1990 authority and jurisdiction to resolve mandamus-style issues under the APA and §307(b)(1), at least where §307(d)'s APA carveout does not apply.

1. District courts likely lack authority or jurisdiction to issue merits relief.

Although the 1990 amendments transferred to the district courts actions to compel EPA to take certain nondiscretionary actions, 42 U.S.C. §7604(a)(2), that transfer does not apply to compelling final EPA action that alters existing EPA final agency action reviewable under 42 U.S.C. §7607(b)(1). *Env't Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989); *Sierra Club v. Browner*, 130 F.Supp.2d 78, 90 (D.D.C. 2001). Nor could it. Transferring ultimate relief over granting a nondiscretionary change to an existing final EPA action would transfer the Court of Appeals' exclusive §307(b)(1) jurisdiction to district courts. That does not follow from the 1990 amendments to §304(a)(2) for at least two reasons.

First, the district courts' authority does not extend to review that would affect EPA action reviewable in the courts of appeal. *Mexichem*, 787 F.3d at 553 n.6 (citing S. REP. NO. 101-228, at 374 (1989) for proposition that the 1990 amendments to §304 abrogated *Sierra Club v. Thomas* only "partly"). As the Senate Report makes clear, inaction that refuses to modify a prior final EPA action or that itself constitutes a final refusal to act is reviewable in the courts of appeals:

> [W]here adjudication of a challenge to EPA inaction would effectively require a court to overturn final action previously taken by the EPA, jurisdiction over the challenge would [lie] in the court of appeals under section 307(b)(l). See *Indiana & Michigan Electric Co. v US. EPA*, 733 F. 2d 489, 490 (7th Cir. 1984) (courts of appeals have jurisdiction over cases where a complaint about agency inaction is

> "embedded" in a challenge to agency action). In addition, where the EPA inaction culminates in a formal decision not to take action, such a situation would constitute a "denial" within the meaning of APA section 551(13) and would likewise be reviewable in the courts of appeal under section 307(b)(1).

S. REP. NO. 101-228, at 374. Granting Williams' application is not a simple binary yes-no decision that affects only Williams, as the Eleventh Circuit held in requiring RMS to sue in the District of Columbia Circuit because RMS's claim about *its allocation* necessarily affected *all other allocations*: "Rather, the Allocation Notice is better understood as one EPA action, and RMS's allocation an inseparable component of it." *RMS of Ga., LLC v. United States EPA*, 64 F.4th 1368, 1374 (11th Cir. 2023). Under the circumstances, Williams' petition here falls within the exception to the 1990 amendment recognized in *Mexichem*.

Second, prodding EPA to act is not the "same genre" as the merits relief that Williams seeks. *El Rio Santa Cruz Neighborhood Health Ctr. v. United States HHS*, 396 F.3d 1265, 1271 (D.C. Cir. 2005) (quoting *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) ("*WEAL*")). In *WEAL*, suing schools to stop discrimination was deemed the same genre as suing the Department of Education to enforce its anti-discrimination rules. *WEAL*, 906 F.2d at 751. Prodding EPA to act is not the same genre as merits relief (*i.e.*, the former is procedural, the latter substantive). As indicated, APA review includes both agency action "unlawfully withheld" and agency action "unreasonably delayed," 5 U.S.C. §706(1), but the 1990 amendments transferred only the latter to

the citizen-suit provision, 42 U.S.C. §7604(a), not the former. As such, the courts of appeals retain their exclusive jurisdiction over claims of EPA action unlawfully withheld. That answers the *jurisdictional* question, even if a court of appeals elects—in its *discretion*—to order a timely agency response in lieu of reaching the merits. *See*, *e.g.*, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 52 (D.C. Cir. 1977) (courts *sua sponte* may order agency to clarify facts); *cf. Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971) (precedent "favor[s] remand, in the interest of a just result, where there has been a change in [core] circumstances, subsequent to administrative decision and prior to court decision"); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983) (remand appropriate for "a serious impropriety in the administrative process" or issues that could not have been raised before agency). These APA tools remain available in merits challenges, outside the citizen-suit process for pure unreasonable-delay claims.

2. While likely wrong and unintended, *Williams II* held that §304 empowers district courts to issue merits relief.

Williams II indisputably sought mandamus relief (*i.e.*, "grant my application" relief, not "hurry up" relief), and the D.C. Circuit dismissed for lack of jurisdiction, citing 42 U.S.C. §7604(a):

> Because petitioner seeks to compel respondent to act on his pending reconsideration petition, jurisdiction over this case lies in the district court. *See* 42 U.S.C. §§7604(a), 7675(k)(1)(C); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 553 n.6 (D.C. Cir. 2015).

In re Williams, 2023 U.S. App. LEXIS 33969, at *1 (D.C. Cir. Dec. 21, 2023) (No. 23-1269) (cleaned up). To be sure, the *Williams II* merits panel focused on administrative petitions, not on the mandamus sought for Williams' underlying application. But "judgments, not opinions," are what counts. *Harvey v. District of Columbia*, 798 F.3d 1042, 1056 (D.C. Cir. 2015) (cleaned up); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), *overruled in part on other grounds*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). And the *judgment* in *Williams II* was that the district court was where Williams must seek mandamus relief to compel EPA to grant his application. While likely wrong and almost certainly unintended, that is what *Williams II* held. That holding binds on the parties if asserted as a basis for *res judicata*. Williams asserts res judicata on this point in district court but is happy to waive it here if this Court remands for the D.C. Circuit to reassess the issue. Williams is amenable to *either court* having mandamus power and jurisdiction, but not amenable to *neither court* having mandamus power and jurisdiction. Neither EPA nor the lower courts can point in opposite directions and say "go sue there."

D. Summary reversal and remand to consider the jurisdictional question is appropriate.

Because this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005), and the nettlesome issue of parsing the lower courts' mandamus authority and jurisdiction would benefit from a non-summary review of the issue from the Court of Appeals, Williams asks this Court merely to reverse the Court of Appeals' dismissal for the clear

error of ignoring Williams II, refusing to transfer for the potentially illusory rationale that Williams has already sued in district court, and for deciding the timeliness issue about challenging EPA staff's 2022 actions without the record. Indeed, even is the district court allows Williams to add his citizen-suit claims to the district court complaint, EPA is likely to move to dismiss those new counts on jurisdictional grounds, and the non-prevailing party is likely to appeal. After all that, the issue would return to the Court of Appeals for resolution. The "interests of justice" under 28 U.S.C. §1631 and judicial economy warrant the Court of Appeals' answering the issue now, not later. *Cf. Goldlawr*, 369 U.S. at 465-66. Williams implores this Court to send the issue back to the Court of Appeals to resolve this jurisdictional ping pong.

Summary action would allow this action to join *Williams V* in the Court of Appeals and is warranted for at least three reasons.

- First, summary reversal based on the still-recent *Harrow* decision—including its effect under *Bobby* and *Montana* on *res judicata*—is warranted. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996). This Court does not need full merits briefing to dispatch the Court of Appeals' clearly erroneous precedent on jurisdictional 60-day windows. *See* Section I.A, *supra*.
- Second, the clear error of deciding an APA case without the record warrants summary action. *See*, *e.g.*, *Jefferson v. Upton*, 560 U.S. 284, 293 (2010) (reversing where lower courts failed to consider controlling standards). Again, full merits briefing is not needed to decide that the Court of Appeals' divinations about what the record may or may not show cannot suffice. *See* Section I.C, *supra*.

- This Court plainly erred both in ruling without a record, *see* Section I.C, *supra*, and in finding that citizen suits displace pre-existing APA review. *See* Section II.A, *supra*. Summary reversal on these "narrow" and well-understood grounds is the only action that the Court need take now. *See Tolan v. Cotton*, 572 U.S. 650, 655 n.3 (2014). A reasoned Court of Appeals decision after remand may make it necessary for this Court finally to resolve the tradeoff between citizen suits and §307(b)(1), but for now, summary reversal would advance those issues.

Far from a *fact-bound* inquiry, this case presents a *fact-free* inquiry of purely legal issues on which the motions panel clearly erred. Summary reversal is not only warranted but the most efficient way to resolve the important issues presented here. *See* Section III, *infra*.

III. THE ISSUES HERE ARE IMPORTANT, RECURRING, AND SQUARELY SET FOR SUMMARY DECISION.

The Clean Air Act's wide scope covers not only key national industries—such as electrical power, fuel, and transportation—that indirectly affect everyone but also has numerous direct effects such as land-use planning, consumer products, and appliances. The Act's implementation is thus vitally important and worthy of this Court's review on the following recurring issues presented here.

- The APA's ongoing application to reviewing EPA actions outside the Clean Air Act's abbreviated review procedures in §307(d).

- The non-jurisdictional nature of trigger—namely, notice or publication—for the 60-day window for review under §307(b)(1).
- The trigger for commencing the running of the 60-day claims-processing rule when EPA conceals the basis for its initial action or when the Administrator (or the Administrator's delegee) later ratifies EPA staff's preliminary analysis.
- The need for—and a petitioner's right to—EPA's record under 5 U.S.C. §706, 28 U.S.C. §2112(b), and FED. R. APP. P. 17(b)(3).
- The division of jurisdiction—for EPA inaction—between the courts of appeals under §307(b)(1) and the district courts under §304(a)(2).

All these purely legal and recurring issues are important and squarely presented here.

The D.C. Circuit's exclusive jurisdiction to review nationally applicable Clean Air Act rules, 42 U.S.C. §7607(b)(1), and that court's abdication of that role here warrant this Court's intervention. Specifically, it falls to this Court to ensure that review under this far-reaching statute takes place in that "single court intimately familiar with administrative procedures" to "insur[e] that [the Clean Air Act's] substantive provisions … would be uniformly applied" nationwide. *Adamo Wrecking*, 434 U.S. at 283-84.

CONCLUSION

The petition for the writ of *certiorari* should be granted, the Court of Appeals' judgment should be summarily reversed, and this action should be remanded to the Court of Appeals to determine in the first instance whether the Court of Appeals should hear the merits or should transfer the action to the district court.

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Respectfully submitted,

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 700-1A
Washington, DC 20036
202-899-2987
ljoseph@larryjoseph.com

Counsel for Petitioner