Clean air advocates outside the Supreme Court ahead of the EPA 'Good Neighbor' arguments on February 21 (Photo by Paul Morigi/Getty Images for SKDK)

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Last Wednesday, the Supreme Court did something it has done only three times in the last half-century—it heard oral argument in a case without merits briefing. The argument concerned four applications from industrial polluters and allied States (consolidated under *Ohio v. EPA*) seeking to stop the Environmental Protection Agency from implementing its Good Neighbor Rule to limit cross-state emissions of smog-forming pollution.

We have explained on Yale's *Notice & Comment* blog how abnormal—and contrary to basic legal principles—it would be for the Court to stay this Rule on the basis of applicants' claim that EPA failed to explain adequately its rationale. Here, we take a step back and examine what Wednesday's argument revealed about the perils of the Court's expanded use of its emergency or "shadow" docket.

## First, What Is the Good Neighbor Rule?

The Clean Air Act's Good Neighbor Provision requires "upwind" States to prevent significant amounts of pollution from flowing across their borders and interfering with "downwind" States' ability to meet national air quality standards. Recognizing States' structural incentives to reap the benefits of industrial activity while exporting its health and environmental costs, Congress mandated that EPA step in with a federal plan to control cross-border pollution where States fail to do so in the first instance. EPA has been implementing the Good Neighbor Provision since the 1990s to successfully reduce significant contributions from power plants (and sometimes other types of big industrial sources) to ozone pollution (also called smog) in downwind States.

When EPA strengthened the national ozone standard in 2015 based upon updated scientific understanding of ozone's health harms, it triggered States' obligation to develop Good Neighbor plans. Some States failed to submit plans by the deadline, and many others submitted plans that failed to take any further action to reduce pollution—despite the tighter standard. The Act thus required EPA to issue federal plans, and to do so promptly so as to provide downwind states the necessary help in meeting their own statutory air quality attainment deadlines.

EPA's latest Rule finalizes federal plan requirements for 23 upwind States. This Rule continues to use the same time-tested, court-affirmed methodology EPA has long used to identify cost-effective pollution controls and equitably allocate reductions among upwind States. The Rule's flexible, phased requirements are based on proven measures used in regions across the country.

The Rule is already working to reduce dangerous smog. It will save thousands of lives and make it easier for millions of Americans (especially children and older people) to breathe, with benefits far exceeding costs every year. If allowed to continue to operate, it will help abate pollution levels this year during the hot-weather "ozone season" that runs from May to September.

## How Did a Rule Promulgated Under Clear Statutory Authority Wind Up in the Supreme Court's Crosshairs?

In short, well-resourced industry litigants and their State allies kicked up dust by challenging EPA's state plan disapprovals in regional courts of appeals, then used those cases as leverage for Supreme Court stay applications.

The Clean Air Act directs lawsuits challenging EPA's disapprovals of the inadequate state plans to the D.C. Circuit; but some industry groups and States instead filed suit in regional courts of appeals on disputed (we think wrong) venue theories. Courts hearing those cases have granted provisional stays of disapproval actions for 12 States while litigation proceeds. Notably, no court has yet ruled on the merits (and one—the Tenth Circuit—has already found that the cases filed there belong in the D.C. Circuit). In the meantime, EPA is not enforcing the Good Neighbor Rule as to those 12 States with state plan disapproval stays. The Rule remains in effect for 11 other States and continues to provide important health and economic benefits.

Meanwhile, the D.C. Circuit is considering direct challenges to the Good Neighbor Rule (*Utah v. EPA*, 23-1157). Merits briefs have not yet been filed. Over the summer, multiple petitioners moved to stay the Rule pending litigation, which the court of appeals denied. In October, those parties then applied to the Supreme Court for a stay. The crux of their argument is, strikingly, a procedural objection: that EPA did not sufficiently explain that the Rule remains valid and workable even if 1 or more of the 23 originally covered States drops out (as has at least temporarily happened here to 12 states because of the regional circuits' stay orders).

Set aside that the Rule is *designed*, per Clean Air Act requirements, for States to enter and exit its requirements (as has routinely occurred under EPA's prior rules under the Good Neighbor provision); that the lower court stays are provisional; and that the 11-State Rule is working just fine. Despite all that, one normally would think sophisticated litigants would not have the chutzpah to seek a nationwide stay of a federal rule from the Supreme Court on the basis of an alleged procedural violation. After all, even serious substantive infirmities wouldn't warrant vacatur of this important public health rule after merits briefing, so how could procedural harms possibly warrant an interim stay?

Applicants' claims of irreparable harm and the public interest are equally boldfaced. The Rule's near-term requirements apply only to power plants and reflect plants *turning on controls they have already installed* and modest upgrades. And the Rule's longer-term requirements for power plants are based on common controls already installed at two-thirds of U.S. coal plants. There are *no* emissions-reduction requirements for other types of industrial emitters until May 2026 or later, and those future requirements, too, reflect proven controls already in use in many regions across the country. But still, as will come as no surprise to anyone familiar with Clean Air Act emissions standards, applicants' declarations catastrophize about threats to power and heating reliability, national security, consumer pocketbooks, and so on. In response, the Public Interest Respondents provided declarations from independent experts who soundly refuted the sky-is-falling narrative and

explained the Rule's enormous public health and economic benefits *right now*.

## The Mismatch Between Record Review and the Emergency Stay Procedures

As every law student learns, agency actions are judged only on the grounds upon which the agency relied when it acted. Stay motions disrupt the usual, methodical course of these record-review cases, however, as parties submit declarations in expedited briefing that allege facts without discovery or cross-examination. In the ordinary course—i.e., when an appeals court motions panel decides a stay motion behind closed doors—the tensions between record-based review and stay litigation are mediated by the neutral criteria of the stay standard, by an appreciation of all the "stuff" (to use Justice Kagan's term) that accompanies record-based review in the first instance, and by a practical understanding that stay movants may be overstating the likely harms from a rule (*see, e.g.*, the stay of EPA's Clean Power Plan). So, the burden is on the movants to show (1) that they really are likely to get the relief in the end that they're seeking in the interim, and (2) that they really are likely to suffer seriously and gratuitously if the court indulges the fiction that the case might come out their way.

But oral argument is no motions panel, and thus the Good Neighbor Rule argument went astray in entirely predictable ways. Once robed and seated at the bench, the Justices largely acted as if it were an ordinary merits argument arising from their tiny docket with the benefit of robust briefing, a joint appendix, and discrete legal questions of cross-cutting relevance on which they can render superior (or at least definitive) conclusions. Instead of probing counsel who are ostensibly presenting "oral argument" and sifting the relevant "facts" with appropriate skepticism, some of the Justices got lost in the complexities and merits-ness of it all. Without any express findings from a lower court, the Court was presented with undistilled evidentiary declarations expressing claims of harm from, on the one hand, regulation of pollution sources, or on the other, allowing that pollution to continue—and the Court showed no interest (unsurprisingly, given that only two of its members have spent any time as "factfinders") in sifting and weighing the evidence.

This is perhaps typified by the expressed concern from the bench, based on no apparent methodology other than comparing stacks of pages, that the harms to regulated industry from denying a stay and to the downwind public and States from granting one were "a wash," and all that's left to the Court is to decide the "merits" of the alleged procedural violations. It appeared that the mere *assertion* of harm by industry declarants was deemed sufficient to offset the harms from blocking the Rule's pollution abatements. There was a

sense that the Court's task did not include assessing the strength of the evidence—or evaluating rebuttal evidence.

Other questions did key on the right issues, attempting to interrogate industry counsel about whether industry has in fact experienced the "crushing costs" they predicted while the Rule has been in effect; but counsel is no fact witness, and unsurprisingly fell back on the prognostications in declarations signed seven months earlier. The Court could have, but did not, ask the parties to answer those questions by updated or supplemental briefing. Rather, there seemed to be a brooding sense that EPA itself had failed to make things clear—even though the stays arose after the Rule was finalized.

Some of the Justices demonstrated that they did not yet understand how this Rule actually operates or what exactly applicants are arguing is wrong with it. In particular, the Justices seemed to think the Rule's cost thresholds, which express the degree of emissions-control effort expected of sources in the contributing upwind States, were based upon cost data drawn from the particular set of States subject to the Rule when it was finalized—and so presumably would shift as the set of covered States changes; but in fact, those thresholds were based upon nationwide surveys of costs that did not change regardless of how many States' sources were covered by the Rule. Again, such misapprehensions were not altogether surprising given the lack of full briefing.

The combination of these factors made for a highly unusual argument. It had the vibe of a merits inquiry, but without the normal foundation of full briefing and facility with the record. Much of the Justices' attention was devoted to EPA's alleged failure to explain and other procedural issues that are far from the Court's usual diet of important questions of federal law. There was some sense that a showing of "certworthiness" should be a prerequisite to emergency relief from the High Court—but very little effort to identify any question of law (or fact!) that might present such an issue here, unsurprisingly, since the case hasn't even been briefed in the lower court and involves the reapplication of a legal framework the D.C. Circuit and the Supreme Court itself have previously blessed. And the Justices seemed altogether unsure of what to do with the other stay factors.

## The Essential Bulwark: Preliminary Injunctive Relief Must Truly Be Extraordinary

The Court's usual way of acknowledging the limits of its institutional competence is to deny cert, e.g., in cases that entail review of a massive administrative record or factual skirmishes between an agency and regulated industry, save for announcing high-level

principles to guide lower-court business. But emergency applications demand the Court's attention. As Justice Jackson pointed out, "if we are going to entertain every motion that someone has about being harmed or whatnot in the lower courts before any of the lower courts even get the opportunity to talk about it … we have to have something that guides our consideration of when to do that."

We agree. The relevant check, embodied in the stay caselaw, is that provisional injunctive remedies must be truly *extraordinary*, because the court is affording coercive relief before it has decided that the movant has won the case. Sometimes, justice requires such relief, of course; but a court should always be very reluctant to grant it and should hold the movant to a high bar.

The alternative standard suggested by applicants' counsel last Wednesday—that applicants need merely check the boxes of unrecoverable costs and success on any merits claim, without heed to the likely remedy or the statutory context—would be disastrous for important public health, safety, and consumer protection rules, and would invite even more emergency applications. That outcome, one would think, would not be good for the Court in an era of hyper-partisanship and public distrust.

One might argue that offering the opportunity for oral argument, if it becomes normalized, might provide something of a check against profligate uses of the Court's emergency super-powers. And, to be sure, a public courtroom session like Wednesday's does help to bring stay motions out of the shadows. But Wednesday's exercise also seemed to demonstrate fundamental and inherent difficulties with an institution schooled in cases involving well-defined, well-"percolated" legal questions instead of replicating, de novo, the work of a D.C. Circuit motions panel.

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