IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1145

CLEAN AIR COUNCIL, EARTHWORKS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL INTEGRITY PROJECT, NATURAL RESOURCES DEFENSE COUNCIL, AND SIERRA CLUB,

Petitioners,

v.

SCOTT PRUITT, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

PETITIONERS' AND PETITIONER-INTERVENORS' RESPONSE IN OPPOSITION TO PETITIONS FOR REHEARING EN BANC

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INTRODUCTION

This case does not come close to satisfying the demanding standards for granting en banc rehearing. The Panel correctly decided that Administrator Pruitt's stay of a duly promulgated regulation was reviewable and was arbitrary, capricious, and in excess of his authority. Respondent EPA has not even sought rehearing. The Industry and State Respondent-Intervenor petitions do not raise any serious argument that casts doubt on the decision, much less show that this case presents a question worthy of en banc review.

The petitions assert that review is necessary to secure or maintain uniformity with decisions of this Court and the Supreme Court, but neither delivers the promised conflicts. Respondent-Intervenors argue that this Court's decision somehow transformed non-final agency action into reviewable final agency action. Respondent-Intervenors have it exactly backwards. As this Court correctly recognized, reviewable final agency action—here, EPA's stay—is not made unreviewable simply because the Court, in order to determine the lawfulness of EPA's action in imposing the stay, had to inquire into whether the statutory predicate to the stay as established by Congress in the Clean Air Act, was satisfied. Indeed, they cite no case in which any court, let alone the Supreme Court or this Court, has held that an agency's stay of an operative rule is not reviewable "final agency action." And for the proposition that EPA's stay is not reviewable because

opening a Clean Air Act reconsideration proceeding is not reviewable, they cite wildly inapposite cases: an Eastern District of Pennsylvania decision regarding class certification and an attorney's argument in an 1866 Supreme Court decision regarding bills of attainder and ex post facto laws. Industry Pet'n for Rehearing En Banc 10, ECF 1686243 (July 27, 2017) ("Indus. Pet'n"). The Court should deny the petitions.

BACKGROUND

On June 3, 2016, EPA promulgated a rule—developed over many years with extensive stakeholder input—requiring oil and gas companies to take common sense and cost-effective steps to curb emissions of methane, volatile organic compounds, and other air pollutants from new and modified wells and associated equipment. 81 Fed. Reg. 35,824 (June 3, 2016) ("2016 Rule"). The cornerstone of the Rule is its requirements for leak detection and repair, which direct oil and gas companies to monitor equipment at well sites and compressor stations at regular intervals to detect leaks (also called fugitive emissions) of air pollutants and to repair those leaks within specified periods. *See* 40 C.F.R. § 60.5397a. The rule became effective on August 2, 2016, 81 Fed. Reg. at 35,824, requiring compliance with many of its provisions within several months. *See, e.g.*, 81 Fed. Reg. 35,851 (November 30, 2016 deadline for compliance with pneumatic pumps standards).

The Rule provided operators up to a year to complete initial inspections for leaks, with that deadline passing on June 3, 2017. *Id.* at 35,859.

But on June 5, 2017, two days *after* the June 3, 2017 deadline, EPA Administrator Scott Pruitt published a "stay" that purported to stay (retroactively) the entire leak detection and repair program (as well as other requirements whose compliance deadlines had long passed) for a 90-day period beginning on June 2, 2017. 82 Fed. Reg. 25,730, 25,732-33 (June 5, 2017) ("Stay Notice"). Petitioners immediately challenged the administrative stay because it would significantly increase oil and gas operations' emissions of dangerous air pollution—ozone-forming volatile organic compounds, carcinogenic hazardous air pollutants like benzene, and climate-disrupting methane—in their members' communities during the height of ozone season. Petitioners sought a judicial stay or, in the alternative, summary vacatur of EPA's administrative stay. Petitioner-Intervenor States and Cities intervened to protect their millions of citizens from this dangerous pollution. *See* Mass. *et al*. Mot. to Intervene 9-13, ECF 1680516 (June 20, 2017); Colo. Mot. to Intervene 12 ¶ 19, ECF 1682343 (June 30, 2017).[1]

[1] Shortly after Petitioners filed their emergency motion, EPA proposed two new rules to further stay the 2016 Rule for an additional three months and two years, respectively. *See* 82 Fed. Reg. 27,641, 27,643 (June 16, 2017); 82 Fed. Reg. 27,645, 27,645 (June 16, 2017).

The Panel granted the motion for summary vacatur on July 3, 2017, determining that the stay was reviewable final action, and was "unauthorized," "unreasonable," and "arbitrary, capricious, [and] in excess of statutory … authority." Opinion 11, 15, ECF 1682465 (July 3, 2017) ("Slip Op.").

As to jurisdiction, the Panel explained that while "[i]t is true that an agency's decision to grant a petition to reconsider a regulation is not reviewable final agency action," "[t]he imposition of a stay . . . is an entirely different matter." *Id*. at 6. The reason is that the stay lifted otherwise applicable regulatory compliance obligations: "Absent the stay, regulated entities would have had to complete their initial round of monitoring surveys by June 3 and repair any leaks within thirty days," and "[f]ailure to comply with these requirements could have subjected oil and gas companies to civil penalties, citizens' suits, fines, and imprisonment." *Id*. at 7. The Panel concluded that, like the many instances in which this Court has reviewed agency actions to suspend compliance deadlines, the Stay Notice was a final agency action subject to review. *Id.* at 6-7. Judge Brown dissented, arguing that the stay was not final action and thus was not reviewable. Slip Op. 1-8 (Brown, J., dissenting).

The Panel issued the mandate simultaneously with the July 3 decision. On July 7, 2017, Administrator Pruitt moved for recall of the mandate, asking for more than seven weeks to determine whether to pursue further review. Mot. to Recall

Mandate 1, ECF 1683079 (July 7, 2017). The Panel recalled the mandate for a 14-day period to allow the Administrator to consider seeking further review, stating that to delay the mandate for any longer period "would hand the agency, in all practical effect, the very delay in implementation this panel determined to be arbitrary, capricious, [and] … in excess of [EPA's] statutory … authority." Order, ECF 1683944 (July 13, 2017).

EPA filed no petition for rehearing, but Industry and State Respondent-Intervenors did file petitions, with one petition for rehearing en banc filed at the eleventh hour of the fourteenth day, and the other filed after that period had lapsed. The petitions sought further delay of the mandate "until after disposition of [their] petition[s]." Indus. Pet'n 1.

On July 31, the en banc Court ordered the mandate to issue forthwith, and requested this response. Order of En Banc Court, ECF 1686663 (July 31, 2017).

ARGUMENT

I. The Panel's Decision that the Stay Is a Reviewable, Final Agency Action Is Correct.

The Panel's decision was manifestly correct. Industry and State Respondent-Intervenors do not quarrel with the Panel's conclusion that EPA gave adequate notice on all the pertinent issues in the prior rulemaking, that industry actually filed comments on those issues, and that therefore the threshold requirements of section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), were not met.

Rather, they peg their petitions on the contention that the Stay Notice is not reviewable final agency action. Indus. Pet'n 11.

As the Panel correctly concluded, Administrator Pruitt's stay was unquestionably a final, reviewable agency action. The stay lifted regulated entities' legal obligation to comply with key provisions of the 2016 Rule, and thus was an agency action "from which legal consequences flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation omitted). The stay was not "of a merely tentative or interlocutory nature," but rather reflected a "settled agency position" purporting to irrevocably eliminate those entities' obligations during the stay period. *Appalachian Power Co. v. EPA,* 208 F.3d 1015, 1022-23 (D.C. Cir. 2000). *See also U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016) (concluding that an agency action that prevents the agency from bringing enforcement proceedings is a final agency action); *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) (concluding that an agency's guidance document that "create[d] a safe harbor," thereby "withdraw[ing] some of the discretion . . . Division offices and states previously had" was a reviewable final agency action).

The Panel correctly determined that although the Court could not review the decision to grant reconsideration absent a stay, that does not render EPA's final action staying the rule unreviewable. Slip Op. at 10. As the Supreme Court made

clear in *Bennett*, there are no *inherently* unreviewable agency actions; rather, the courts must carefully analyze whether legal consequences flow from the action. 520 U.S. at 177-78. *Bennett* contrasted three different government actions, concluding that two were not final agency actions because they "were purely advisory and in no way affected the legal rights of the relevant actors," while a third was final agency action because it "ha[d] direct and appreciable legal consequences." *Id*. at 78. Similarly, while opening a reconsideration proceeding by itself "in no way affect[s] the legal rights of the relevant actors," EPA's stay has "direct and appreciable legal consequences." The former is not a final reviewable action, but the latter unquestionably is.

II. The Petitions Do Not Present Any Valid Basis for En Banc Rehearing.

The petitions do not come close to meeting the standard for en banc review. En banc rehearing "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a) (requiring petitions to include a statement explaining which of these circumstances is met); *see Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1340-41 (D.C. Cir. 1981) (citation omitted) ("En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances

exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.”).[2]

Industry Respondent-Intervenors do not even claim that this is a case of exceptional importance or otherwise presents extraordinary circumstances. And they fail to identify any conflicting decision of this Court or the Supreme Court that cries out for reconciliation.

A. Industry Respondent-Intervenors identify no pertinent cases conflicting with the Panel’s determination that, although the grant of reconsideration is not reviewable, the stay is reviewable.

Industry Respondent-Intervenors spend the bulk of their petition on a red herring: that the decision to commence a proceeding for administrative reconsideration is not reviewable. Indus. Pet’n 6-10. Neither the Panel nor Petitioners disagree. Industry Respondent-Intervenors then attempt to convert that proposition into a second one: a bar on reviewing issuance of a stay during that reconsideration. The Panel’s proper rejection of that legal sleight of hand does not conflict with any governing case law. Indeed, to accept that proposition would *create* conflict with prior decisions of this Court, which have never before

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[2] *See also Air Line Pilots Ass’n v. Eastern Air Lines*, 863 F.2d 891, 925 (D.C. Cir. 1988) (Ginsburg, Ruth B., J., concurring in denial of rehearing en banc) (“Only in the rarest of circumstances … should we countenance the drain on judicial resources, the expense and delay for the litigants, and the high risk of a multiplicity of opinions offering no authoritative guidance, that full circuit rehearing of a freshly-decided case entails.”) (internal quotations omitted).

concluded that a stay pursuant to the Clean Air Act is not reviewable.

In support of their novel argument, the only cases Industry Respondent-Intervenors cite are *O'Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 283 (E.D. Pa. 2003) and *Cummings v. Missouri*, 71 U.S. 277, 288 (1866). They cite both cases for the very general maxim that "what cannot be done directly cannot be done indirectly." Indus. Pet'n 10.

Neither case, however, bears any resemblance to this one, and neither addresses finality of agency action, or conflicts with the Panel's decision. In *O'Keefe*, a judge in the Eastern District of Pennsylvania concluded that once a class action had been removed to federal court, plaintiffs could not expand the class to include members and claims that would not have met the requirements for federal jurisdiction at the time of removal. 214 F.R.D. at 280-84. The court was concerned that if so allowed, plaintiffs might intentionally file suit in state court, wait for defendants to remove the case to federal court, and then expand the class, thus "creating a loophole that plaintiffs lawyers could drive a truck through." *Id*. at 284. In *Cummings*, Industry Respondent-Intervenors cite an attorney argument that Civil War-era amendments to the Missouri constitution were unlawful ex post facto laws and bills of attainder because they required priests to take an oath that they had not committed acts made criminal only later, and that presumed guilt in the absence of such an oath. 71 U.S. at 288.

Neither case has anything to do with the rules regarding finality and reviewability presented by a stay under section 307(d)(7)(B) of the Clean Air Act. Instead, both involve attempt to circumvent Constitutional limits irrelevant to this case: in one, limits on diversity jurisdiction, and in the other, limits on the power to punish ex post facto. They do not establish that an otherwise final agency action staying a rule is unreviewable if that review would require the Court to assess the underlying rulemaking to determine whether the stay was issued in accordance with defined statutory requirements.

Absent the stay, the Court would not have jurisdiction to review that question before the conclusion of the reconsideration proceeding. But that is because the rule would have been unchanged during that proceeding. Here, the stay changed the Rule—with direct and appreciable consequences—and that is why the Court had authority to consider whether the requirements for mandatory reconsideration were met.

Moreover, the "doing indirectly" maxim does not fit this case. Petitioners did not seek to—and the Panel did not—stop the reconsideration proceeding. Indeed, the Panel emphasized that the Administrator is free to consider revisions to the 2016 Rule, so long as his actions are consistent with the substantive and procedural limits of the Clean Air Act. Slip Op. 11-12, 23. But what he cannot do is avoid both judicial review of the stay and the Clean Air Act's requirements for

revising a rule. Notably, in the proposals to extend the stay for additional periods of three months and two years, the Administrator has explicitly refused to entertain public comment on any *substantive change* to the 2016 Rule, including the reconsideration issues for which he purportedly issued the stay. 82 Fed. Reg. at 27,643; 82 Fed. Reg. at 27,645.[3] All that must await a *subsequent* proposal at some indefinite point in the future.

B. Industry Respondent-Intervenors identify no cases conflicting with the Panel's determination that the stay is final agency action.

Industry Respondent-Intervenors contend that the Panel's determination that the stay was final agency action presents a second conflict with Supreme Court and D.C. Circuit caselaw, Indus. Pet'n 11, but do not identify a single case in which this Court or any other has concluded that a stay or delay of a rule is not final agency action. As discussed above, *supra* 6-7, the Panel's decision is thoroughly consistent with the Supreme Court's holding in *Bennett.* Beyond that, Industry Respondent-Intervenors cite only Judge Brown's dissent in this case.

[3] Industry Respondent-Intervenors oddly suggest that the Panel has "robb[ed] EPA of the opportunity to evaluate whether the reconsideration issues were adequately noticed and of central relevance" through notice and comment. Indus. Pet'n 9-10. But the agency assesses those issues *when it decides whether or not to convene a proceeding*, and it did so here. 82 Fed. Reg. at 25,731-32. The reconsideration proceeding itself addresses the substantive issues raised by the reconsideration petitions, *not* whether the statutory threshold is met.

Indeed, it is Industry Intervenors' view—not the Panel's—that conflicts with this Court's case law. This Court has long held that agency actions suspending duly promulgated regulations pending reconsideration or further rulemaking are reviewable. *See, e.g.*, *Nat'l Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36 (D.C. Cir. 1992) (reviewing, and invalidating, EPA's extension of a section 307(d)(7)(B) stay issued during an ongoing a reconsideration proceeding); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981) (reviewing Department of Labor's action to defer implementation of regulations by six months); *see also Safety-Kleen Corp. v. EPA*, 1996 U.S. App. LEXIS 2324, Slip Op. at *2-3 (D.C. Cir. 1996) (granting motion "to vacate [EPA's] administrative stay" of a promulgated rule for failing to satisfy the prerequisites of the Administrative Procedure Act's stay provision).

Industry Respondent-Intervenors' claim that "this Court lacks jurisdiction" any time an agency "hits the pause button" as "part of a broader rulemaking." Indus. Pet'n 11;[4] *id. at* 12 (contending that where agency "preserv[es] the status quo" while it reconsiders an action, such preservation is unreviewable). But Administrator Pruitt here did not "hit the pause button" in the midst of an ongoing

[4] Industry Respondent-Intervenors attempt to add gravitas to their argument by asserting that this Court "lacks jurisdiction." While nothing turns on this characterization in this case, the Supreme Court recently held that section 307 is a "mandatory, yet *not* jurisdictional" rule. *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1602-03 (2014).

rulemaking before reaching a final decision. Rather, Administrator Pruitt sought to halt implementation of a final Rule a year *after* its promulgation, while he considers amendments to the Rule through a *new* rulemaking.

Moreover, the Stay Notice in this case did *not* preserve the status quo—it *changed* the status quo. The status quo was the regulated industry's obligation to comply with the leak detection and repair requirements, with monitoring occurring no later than June 3, 2017—a deadline that incorporated (at industry's request) a year's preparatory lead time, and for which industry was readying itself. *See* Pet'rs' Mot. for Stay, ECF 1678141, Attach. 240-41 (American Petroleum Institute request for "an initial compliance period of 1 year"). Further, Administrator Pruitt also stayed other provisions of the 2016 Rule long after their compliance deadlines had passed, including requirements for certification by a professional engineer and requirements related to pneumatic pumps. *See* 40 C.F.R. 60.5393a ("For each pneumatic pump affected facility, you must comply with the GHG and VOC standards . . . on or after November 30, 2016"); 81 Fed. Reg. 35,851 (providing a November 30, 2016 deadline for compliance with pneumatic pumps requirements, including any technical infeasibility certifications by a professional engineer).

If one were to accept that "hitting the pause button" in order to retain the status quo is unreviewable, the result would be a sweeping agency power that would greatly undermine the interests in regulatory stability and certainty. And

Industry Respondent-Intervenors would never agree that an administrative stay of a *deregulatory* rule would be unreviewable—for example, a stay of an exemption or safe harbor that would result in putting obligations back in force pending a reconsideration proceeding.[5]

C. Industry Respondent-Intervenors' other arguments, which do not involve claims of precedential conflicts, are simply wrong.

Industry Respondent-Intervenors' other arguments similarly lack merit. Neither EPA nor Intervenors argued to the Panel that the stay is unreviewable because there is no law to apply and that the statute commits stay decisions to agency discretion. Indus. Pet'n. 13. In any event, this case does not present one of those "very narrow exception[s]" to the general rule of reviewability, which applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Cook v. Food & Drug Admin.*, 733 F.3d 1, 6 (D.C. Cir. 2013) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Far from providing "no manageable

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[5] Industry Respondent-Intervenors attempt to cabin their assertion of sweeping agency authority by emphasizing that a stay under section 307(d)(7)(B) is limited to three months. Indus. Pet'n 12-13. But there is nothing about their view of final agency action that would not logically apply to longer stays as well and, indeed, preclude judicial review even if EPA were to issue a longer stay under section 307(d)(7)(B) contrary to the plain language of that provision. Moreover, the stay sought here is not so limited; rather it is just the first step in a planned stay of at least 27 more months. *See* 82 Fed. Reg. 27,641, 27,643 (June 16, 2017); 82 Fed. Reg. 27,645, 27,645 (June 16, 2017).

standard[s]," Section 307(d)(7)(B) lays out precisely the factors that must be present for issuance of a stay, namely that there must have been a notice failure on an issue of central relevance.[6]

Industry Respondent-Intervenors also contend that the Court must defer to Administrator Pruitt's post hoc rationalization—not made in the Federal Register notice—that section 307(d)(7)(B), a provision that specifically mandates that promulgated rules should go into effect and strictly limits stays, permits EPA to stay a duly promulgated rule when no notice failure occurred in the prior rulemaking. Indus. Pet'n 15. The Panel rightly held that this post-hoc rationalization cannot be considered, *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943), much less given deference. *See* Slip Op. 13 (noting that "when EPA granted reconsideration and imposed the stay . . . it did not rely on its so-called inherent authority"). Moreover, *no* member of the panel agreed with the Administrator's counter-textual reading of the statute. *See* Slip Op. 1 (Brown, J., dissenting) (agreeing that "the Clean Air Act provision at issue here 'expressly

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[6] Industry Respondent-Intervenors also fail to contend with the "strong presumption that Congress intends judicial review of administrative action," which can only be overcome by "'clear and convincing evidence'" that Congress intended to preclude the suit. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). Industry Respondent-Intervenors point to no evidence whatsoever that Congress intended to preclude review here, let alone clear and convincing evidence.

links EPA's power to stay a final rule to the two requirements for mandatory reconsideration.'") (internal citation omitted).

CONCLUSION

The Court should deny the petitions for rehearing en banc.

Respectfully submitted,

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DATED: August 2, 2017

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Response in Opposition to Respondent Intervenors' Petitions for Rehearing En Banc was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 3,673 words.

/s/ *Susannah L. Weaver*
Susannah L. Weaver

DATED: August 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2017, I have served the foregoing Response in Opposition to Respondent Intervenors' Petitions for Rehearing En Banc on all parties through the Court's electronic filing (ECF) system.

DATED: August 2, 2017

/s/ *Susannah L. Weaver*
Susannah L. Weaver