Oral Argument Not Yet Scheduled

No. 21-1159

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

STATES OF ARIZONA, LOUISIANA, OHIO, OKLAHOMA, AND TEXAS,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.,

Respondents.

On Petition for Review of a Final Order of the Environmental Protection Agency

BRIEF OF PETITIONERS

Mark Brnovich
Attorney General
Drew C. Ensign
Deputy Solicitor General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
acl@azag.gov

Counsel for Petitioner State of Arizona
(additional counsel listed in signature block)

January 6, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and Amici Curiae

Petitioners are the States of Arizona, Louisiana, Ohio, Oklahoma, and Texas.

Respondents are the U.S. Environmental Protection Agency and Michael S. Regan, Administrator.

B. Rulings Under Review

The decision under review is the EPA action "National Primary Drinking Water Regulations: Lead and Copper Rule Revisions; Delay of Effective and Compliance Dates." 86 Fed. Reg. 31,939 (June 16, 2021).

C. Related Cases

There are no other cases involving the same underlying agency order pending review in this Court or any other.

/s/ Drew C. Ensign
Drew C. Ensign

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LCR	Lead and Copper Rule, 56 Fed. Reg. 26,460 (June 7, 1991)
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INTRODUCTION

This is a challenge to EPA's latest attempt to kill an unwanted rule not through repeal, as required by law, but through serial delays to achieve the same result. This Court emphatically rejected EPA's previous attempt at this same gambit: "EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule." *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1065 (D.C. Cir. 2018). It should do so again since EPA has committed the very same legal violation.

The substantive rule at issue is the Lead and Copper Rule Revisions ("LCRR"), and the delay challenged here (hereafter, the "Delay Rule") is EPA's second delay of the LCRR's effective date. 86 Fed. Reg. 14,003 (Mar. 12, 2021). The Delay Rule pushed the date from June 17 to December 16, 2021. 86 Fed. Reg. 31,939 (June 16, 2021). It also delayed the deadline for complying with the LCRR nine months, from January 16, 2024 to October 16, 2024. *Id.* at 31,940.

It is undisputed that the LCRR would have tightened standards for lead and copper levels in drinking water under the Safe Drinking Water Act ("SDWA") and the effect of the Delay Rule is to leave the prior, less-

stringent standards in place. EPA also acknowledges that, had the LCRR gone into effect as originally scheduled, there would have been material health benefits: in particular, reductions in the pernicious brain damage in children caused by lead in drinking water, and further that the Delay Rule will prevent those health benefits from being realized.

The Delay Rule is not just bad policy creating permanent harms largely borne by children. It is also profoundly unlawful. It directly violates this Court's holding in *Air Alliance* and does precisely what this Court prohibited: delay a rule premised only on a desire to reconsider it. *See Air Alliance*, 906 F.3d at 1067 ("'[A] decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration.'" (citation omitted)).

But it suffers from two other patent legal violations that require invalidation, both concerning EPA's analysis of costs and benefits, which the SDWA's text explicitly mandates. 42 U.S.C. § 300g-1(b)(3)(C)(i)-(ii).

First, under *EPA*'s *own estimates* the costs of the Delay Rule actually appear to exceed its benefits. Specifically, at a 3% discount rate, the value of health benefits foregone ($10-29 million) *exceed* the economic costs avoided by delay ($8-15 million) by as much as $14 million—thus

violating both the SDWA's cost-benefit analysis requirement and engaging in quintessential arbitrary-and-capricious decision-making by doing more harm than good (even under the agency's own rose-colored analysis).

In contrast, at a 7% discount rate, the cost-benefit calculus is slightly positive. EPA thus hangs its fortune on this more forgiving discount rate, for both SDWA and APA compliance. But EPA does not expend *even a single word* explaining why a 7% discount rate is superior to a 3% rate here, thus failing entirely to offer a reasoned explanation for its actions.

Indeed, EPA outright admitted that it "did not—could not—favor one discount rate over the other," EPA Opp. at 24, as if the subject were one's own children and not discount rates for mandatory cost-benefit analysis. But this Court has previously held that an agency's failure to "fix the [discount] rate carefully and explain its decision intelligibly" violates the APA. *NRDC v. Herrington*, 768 F.2d 1355, 1414 (D.C. Cir. 1985). EPA's complete failure—indeed admitted refusal—to explain the proper discount rate *at all* should fare no better.

Moreover, given the nature of the harms—*i.e.*, permanent injury to the brains of children causing life-long developmental issues—there are strong reasons to believe that application of the lower 3% discount rate is warranted, thus rendering the Delay Rule arbitrary and capricious. And while EPA has abstracted these benefits, they are very real to those affected: those millions in foregone benefits represent the monetized value of "estimated IQ point decrements"—*i.e.*, permanent brain damage—that would otherwise occur. *See* LCRR, 86 Fed. Reg. 4,198, 4,269 (Jan. 15, 2021).

To comply with the APA, an agency must do more than simply beg the question of whether a rule does more harm than good: it must at least offer a reasonably convincing answer that it does not. *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA has explicitly refused to do so.

Second, the Delay Rule's putative *raison d'être* is to avoid the LCRR imposing compliance costs on operators of drinking water systems (typically States and their subdivisions). But EPA admits that the effect of the Delay Rule will be to replace the prior certainty of the LCRR with uncertainty, requiring operators to prepare for multiple contingencies. In

the Delay Rule itself, "EPA recommends that states consider each of these possibilities [total repeal, no changes, and modifications to the LCRR] in their planning and resource allocation decision-making." 86 Fed. Reg. at 31,941. And it is axiomatic that it is more expensive to prepare for *multiple* contingencies than it is to prepare for one certain outcome, particularly where the former admittedly includes the possibility of the latter. Thus, while the Delay Rule's putative purpose is to *reduce* compliance costs, EPA itself acknowledges that it is likely to *increase* them. That self-contradictory rationale also violates the APA.

After initiating this action, the Petitioner States filed a motion for a stay pending appeal and/or summary vacatur. This Court denied that relief on October 27, 2021, holding that "Petitioners have not satisfied the stringent requirements for a stay pending court review" or "the merits of the parties' positions [we]re not so clear as to warrant summary action." Oct. 27, 2021 Order (Document #1919821).

As a likely result of this suit, however, EPA did not promulgate any third delay of the effective date of the LCRR. That rule thus went into effect on December 16, 2021, which moots the States' challenge to that particular aspect of the Delay Rule. Because the delayed compliance

dates remain well in the future in 2024, however, there remains a live controversy as to the validity of the Delay Rule—particularly as the delay of those compliance dates rests on the same legally deficient rationales.

Because the Delay Rule violates both the SDWA and the APA, this Court should vacate that rule.

STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28(a)(5), pertinent statutes and regulations are set forth in the separately bound Addendum of Statutes and Regulations.

JURISDICTIONAL STATEMENT

EPA has authority to revise standards under the SDWA under 42 U.S.C. § 300g-1(b)(9).

The Delay Rule was published in the Federal Register on June 16, 2021. 86 Fed. Reg. at 31,939. The States filed a petition for review with this Court on July 29, 2021, which is timely under 42 U.S.C. § 300j-7(a)(1).

STATEMENT OF ISSUES

The issues presented are:

1. Whether the Delay Rule exceeded EPA's authority or was arbitrary and capricious where it delayed the LCRR for the explicit purpose of reconsidering it, in violation of this Court's *Air Alliance* decision.

2. Whether EPA's analysis of costs and benefits in the Delay Rule violates the SDWA's explicit cost-benefit mandate or the APA where it:

a. Concluded that costs may exceed benefits depending on whether a 3% or 7% discount rate is used, and then explicitly refused to analyze which discount rate was proper.

b. Was premised on the proposition that the Delay Rule will *decrease* compliance costs to replace the regulatory certainty of the LCRR standards with the possibility of multiple alternative standards (including the possibility of no changes).

STATEMENT OF THE CASE

A. Safe Drinking Water Act

The SDWA is a comprehensive statute designed to address one of the most enduring and pernicious issues that has plagued humanity for millennia: the presence of contaminants and infectious agents in

drinking water. The SDWA "requires the EPA to promulgate drinking water regulations designed to prevent contamination of public water systems." *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1269 (D.C. Cir. 1994).

Under the SDWA, EPA is required "to establish maximum contaminant level goals [] and national primary drinking water regulations [] for contaminants that, in the judgment of the Administrator, may have any adverse effect on the health of persons and that are known or anticipated to occur in public water systems." 56 Fed. Reg. 26,460, 26,462 (June 7, 1991).

Goals under the SDWA are just that: not specifically enforceable requirements. Instead, they are "health goals which are based solely upon considerations of protecting the public from adverse health effects of drinking water contamination." 56 Fed. Reg. at 26,462.

Regulations, however, impose binding requirements that should seek to attain, "to the extent feasible," the goals set by the EPA. *Id.* Regulations can either set specific maximum levels for particular contaminants or require treatment techniques to address them. 42 U.S.C. § 300g-1(b)(7)(A).

In establishing regulations, EPA is required to conduct cost-benefit analysis. *See* 42 U.S.C. § 300g-1(b)(3)(C)(i)-(ii). For treatment techniques, EPA must consider *inter alia* "health risk reduction benefits and costs likely to be experienced as the result of compliance with the treatment technique." *Id.* § 300g-1(b)(3)(C)(ii).

The SDWA also imposes a six-year periodic review mandate. *Id.* § 300g-1(b)(9). EPA is thus required to "not less often than every 6 years, review and revise, as appropriate, each national primary drinking water regulation." *Id.* "[E]ach revision shall maintain, or provide for greater, protection of the health of persons." *Id.*

B. The Lead And Copper Rule

Lead and copper are two prominent contaminants in drinking water. 56 Fed. Reg. at 26,463. EPA "has set the maximum contaminant level goal for lead in drinking water at zero because lead is a toxic metal that can be harmful to human health even at low exposure levels."[1] "[T]he best available science … shows there is no safe level of exposure to lead."[2]

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[1] EPA, Basic Information About Lead In Drinking Water, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#regs.

[2] *Id.*

EPA recognizes that "exposure to lead in the environment continues to be a concern, especially for vulnerable populations such as children and pregnant women." LCRR, 86 Fed. Reg. 4198, 4199 (Jan. 15, 2021).

Lead exposure causes severe health consequences, especially in children. Lead exposure:

- "[I]s known to present serious health risks to the brain and nervous system of children";
- "[C]auses damage to the brain and kidneys and can interfere with the production of red blood cells that carry oxygen to all parts of the body"; and
- "[H]as acute and chronic impacts on the body."

84 Fed. Reg. 61,684, 61,690 (Nov. 13, 2019); *accord* Delay Rule, 86 Fed. Reg. at 31,939, 31,941.

Notably, "[t]he most robustly studied and most susceptible subpopulations are the developing fetus, infants, and young children." 86 Fed. Reg. at 31941. "Even low level lead exposure is of particular concern to children because their growing bodies absorb more lead than adults do, and their brains and nervous systems are more sensitive to the damaging effects of lead." *Id.* at 31,941-42.

To address these severe potential harms, EPA published the Lead and Copper Rule (the "LCR") on June 7, 1991. 56 Fed. Reg. 26,460 (June 7, 1991); *see also* 86 Fed. Reg. at 4207. "The rule established a [SDWA regulation] for lead and copper consisting of treatment technique requirements that include [corrosion control treatment], source water treatment, lead service line replacement [], and [public education]." 86 Fed. Reg. at 4,207. Since its initial promulgation, the LCR has undergone revisions in 2000, 2004, and 2007. *See id.*

C. The 2021 Lead And Copper Rule Revision

On November 13, 2019, EPA published a notice of proposed rulemaking, detailing proposed revisions to the LCR. 84 Fed. Reg. at 61,684. In the proposed rule, EPA noted that it had "sought input over an extended period on ways in which the Agency could address the challenges to achieving the goals for the LCR" and described the engagements it has had with various "small water systems, state and local officials, the Science Advisory Board and the National Drinking Water Advisory Council (NDWAC)." 84 Fed. Reg. at 61,686.

EPA initially provided 60 days for comment, and later extended that by an additional thirty days. *See* 84 Fed. Reg. 69,695 (Dec. 19, 2019). Almost 700 comments were submitted.

On January 15, 2021, EPA issued the LCRR, which "includes a suite of actions to address lead contamination in drinking water that, taken together, will improve the LCR and further reduce lead exposure…, resulting in an enduring positive public health impact." 86 Fed. Reg. at 4,200.

The LCRR focuses on six key areas: (1) identifying areas most impacted, (2) strengthening treatment requirements, (3) systematically replacing lead service lines, (4) increasing sampling reliability, (5) improving risk communication, and (6) protecting children in schools. *Id.* at 4200-01.

The revised requirements "provide greater and more effective protection of public health by reducing exposure to lead and copper in drinking water," and "will better identify high levels of lead, improve the reliability of lead tap sampling results, strengthen corrosion control treatment requirements, expand consumer awareness and improve risk communication." *Id.* at 4198. Additionally, the LCRR "requires, for the

first time, community water systems to conduct lead-in-drinking-water testing and public education in schools and child care facilities" and "will accelerate lead service line replacements by closing existing regulatory loopholes, propelling early action, and strengthening replacement requirements." *Id.* at 4198.

The LCRR provided an effective date of March 16, 2021 and a compliance date of January 16, 2024. *Id.*

D. The Delay Rules

On his first day in office, President Biden issued an Executive Order directing agency heads to review certain regulations. Exec. Order 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021). The same day, the White House identified the LCRR as one such action to review. *See* 86 Fed. Reg. at 31,940. The White House also issued a memo to agency heads entitled, "Regulatory Freeze Pending Review," which "direct[ed] agencies to consider postponing the effective date of regulations, like the LCRR, that ha[d] been published in the Federal Register, but ha[d] not taken effect, for the purpose of reviewing any questions of fact, law, and policy the rules may raise." 86 Fed. Reg. 14,003 (Mar. 12, 2021).

On March 12, 2021, and just four days before the LCRR was set to take effect, the EPA issued a final rule delaying the effective date of the LCRR from March 16, 2021 until June 17, 2021. *Id.* The final rule stated that the "[s]ole purpose" of the delay was "to enable EPA to take public comment on a longer extension of the effective date for EPA to undertake its review of the rule in a deliberate and thorough manner." *Id.* Notably, this rule was issued without providing an opportunity for comment.

On the same day that the EPA published its first delay rule, it also published a "proposed rule," which would delay the LCRR's effective date even further—from June 17 to December 16, 2021. 86 Fed. Reg. 14,063 (Mar. 12, 2021). At that time, EPA proposed to delay the January 16, 2024 LCRR compliance date to September 16, 2024. *Id.* Ultimately, EPA pushed back the compliance date even further to October 16, 2024. *Id.* at 31940.

The proposed rule allowed for a thirty-day comment period, during which several commenters expressed concerns regarding delaying the benefits of the LCRR. *See, e.g.*, *id.* at 31,943 (noting "concerns that EPA's proposal to delay the effective date … would postpone the significant

public health improvements that will be achieved by implementing the rule as finalized").

The EPA finalized the Delay Rule on June 16, 2021, claiming that the "delay will allow sufficient time for EPA to complete its review of the rule in accordance with [presidential] directives and conduct important consultations with affected parties." *Id.* at 31,939-40.

E. Procedural History

On July 29, 2021, Petitioners, the States of Arizona, Louisiana, Ohio, Oklahoma, and Texas, filed a timely petition for review in this Court challenging the Delay Rule.

Petitioners sought a stay pending review and/or summary vacatur from this Court. EPA filed a cross-motion to dismiss for lack of standing.

This Court denied the State's motion in an October 27, 2021 order. That order reasoned that "Petitioners have not satisfied the stringent requirements for a stay pending court review" or "the merits of the parties' positions [we]re not so clear as to warrant summary action." Oct. 27, 2021 Order (Document #1919821). In addition, this Court directed that EPA's "motion to dismiss be referred to the merits panel to which this petition for review is assigned."

Following this Court's October 27 order, EPA did not release any further delays to the effective and compliance dates for the LCRR. The LCRR thus become effective on December 16, 2021, and the date for compliance with its requirements is currently set at October 16, 2024 (which the Delay Rule had extended from January 16, 2024). 86 Fed. Reg. at 31,490.

SUMMARY OF ARGUMENT

The Delay Rule is unlawful at a foundational level. Its only rationale is precisely what this Court has held is unlawful: "delay [of an] existing rule pending … reconsideration" of it. *Air Alliance*, 906 F.3d at 1067. But "the mere fact of *reconsideration, alone, is not a sufficient basis* to delay promulgated effective dates specifically chosen by EPA on the basis of public input and reasoned explanation." *Id.* (emphasis added).

EPA has been perfectly clear that reconsideration of the LCRR was the entire purpose of the Delay Rule. And this Court has been equally clear that taking such action violates the APA. Vacatur is thus required under *Air Alliance* alone. Moreover, EPA has never provided an adequate explanation of why it changed course from the original dates of the LCRR, thus failing to supply "a reasoned explanation … for disregarding facts

and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations*, 556 U.S. 502, 516 (2009).

But even if EPA generally had authority to delay the LCRR merely to reconsider it, the cost-benefit analysis of the Delay Rule violates both the APA and the SDWA for two reasons.

First, EPA has *admitted* that the Delay Rule's estimated costs may exceed its benefits, depending on whether a 3% or 7% discount rate is used. EPA Opp. at 23. Indeed, its own analysis demonstrates that at 3% discount rate, monetized costs exceed benefits by $2-14 million. 86 Fed. Reg. at 31,944-45); *infra* at 29-31.

But even though the applicable discount rate is dispositive of whether EPA's calculated net benefits are positive or negative, EPA further admitted that it did not even attempt *at all* to answer that controlling question. EPA Opp. at 23. Instead, it claimed that it "did not—could not—favor one discount rate over the other." *Id.*

This Court, however, has held that a failure to set "the [discount] rate carefully and explain its decision intelligibly" violates the APA. *Herrington,* 768 F.2d at 1414. It therefore vacated agency action where the Department of Energy's adoption of a 10% discount rate that was

"simply too conclusory to qualify as reasoned decisionmaking." *Id.* at 1413.

Here, however, EPA has not even offered a "conclusory" explanation of why a 7% discount rate is more appropriate than a 3% one. Nor has it "explain[ed] its decision intelligibly," *id.*—or even unintelligently. Instead, EPA has not only disavowed supplying an explanation for its choice, but outright denied that it had any power to make a selection at all. But there is no such limitation on EPA's authority (and the agency certainly cites none). And the SDWA affirmatively *mandates* cost-benefit analysis. Neither the APA nor SDWA allow EPA to leave its cost-benefit analysis half-finished before promulgating it.

Second, a core irrationality underlies the Delay Rule: while it putatively is motivated by *saving* the States and other drinking water system operators from compliance costs, it actually *exacerbates* them. While EPA claims that the Delay Rule will save compliance costs, it admits the States and other operators now must plan for *multiple contingencies*, rather than a single one. *See* 86 Fed. Reg. at 31,941. ("EPA recommends that *states consider each of these possibilities* [total repeal,

no changes, and modifications to the LCRR] in their planning and resource allocation decision-making." (emphasis added)).

EPA's apparent logic is that it is somehow *cheaper* to plan for options X, Y, and Z (and all intermediate possibilities) than simply option X alone. That is simply irrational, and is quintessential arbitrary-and-capricious decision-making.

For all of these reasons, this Court should vacate the Delay Rule.

STANDING

The Petitioner States have standing on three independent bases.

First, the States are direct objects of the LCRR and the Delay Rule, as they are some of the principal regulated entities. The States' standing is thus "self-evident" under this Court's precedents: "In many if not most cases" a petitioner's standing is self-evident, especially "if the complainant is 'an object of the action (or forgone action) at issue[.]'" *Sierra Club v. EPA*, 292 F.3d 895, 899–900 (D.C. Cir. 2002) (citation omitted). That is just so here.

The Petitioning States are plainly the direct objects of the Delay Rule. That Delay Rule repeatedly acknowledged that "systems and states" are the objects of the regulatory action. *See, e.g.*, 86 Fed. Reg.

31,939, -42, -43, -44. Similarly, acknowledging that the States are principal objects of the action at issue, the Delay Rule issues recommendations directly to the States. *See*, *e.g.*, *id.* at 31,941 ("EPA recommends *that states* consider each of these possibilities in their planning and resource allocation decision-making[.]" (emphasis added)).

Second, the States' standing is also established through the proprietary injury. *See Air Alliance*, 906 F.3d at 1059 ("'[T]here is no difficulty in recognizing [a state's] standing to protect proprietary interests[.]'") (citation omitted)). The States' residents will directly experience negative health consequences, including permanent brain damage SEADD-1-184. The States will further suffer economic injury in the form of increased Medicaid and special education spending to address the adverse health consequences that EPA explicitly acknowledges will occur as a result of the Delay Rule—which it estimated at as high as $29 million. *Id.*; SE-ADD-25 (calculating reduction in social welfare spending for each person with reduced lead exposure in childhood to be $691 per year)]]; *infra* at 29-31.

Third, the States will suffer increased compliance costs as a result of the regulatory uncertainty that the Delay Rule will occasion and EPA

acknowledges. The States and their subdivisions operate numerous drinking water systems. Indeed, EPA's own analysis acknowledges that the compliance costs will fall on states, and EPA has explicitly admitted that "*states* [should] consider *each of these possibilities* [total repeal, no changes, and modifications to the LCRR] in their planning and resource allocation decision-making[.]" 86 Fed. Reg. at 31,941 (emphasis added). Such costs support standing. *See*, *e.g.*, *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998); *Texas v. EEOC*, 933 F.3d 433, 446-47 (5th Cir. 2019); *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001).

In challenging standing previously, EPA relied on recasting the Delay Rule as "simply giv[ing] [Petitioners] a choice" of whether to adopt the LCRR now, or wait and see what EPA decides to do. EPA Opp. at 13. Under EPA's theory, because Petitioners could always adopt the LCRR standards themselves, they lack standing to challenge EPA's Delay Rule.

EPA, however, never contended that it would be costless for the States to adopt the LCRR standards themselves while waiting for EPA to act. The process of promulgating, implementing, and enforcing independent state mandates that diverge from the federal standard

would impose at least some costs that themselves establish cognizable injuries-in-fact directly resulting from the Delay Rule.

Remarkably, EPA made a virtually identical argument in *Air Alliance*, contending that the petitioning states there "ha[d] *the option* to administer the Risk Management Program through delegation from EPA[,]" 2017 WL 6270691 at *25 (emphasis added)—just like the Petitioning States here theoretically have the "option" (though also not costless here) to impose parallel LCRR standards themselves. But this Court held that the petitioner states' proprietary injuries were cognizable even though, under EPA's instant theory, they would not be. *Air Alliance*, 906 F.3d at 1059. The same result should obtain here.

STANDARDS OF REVIEW

"The Administrative Procedure Act instructs courts to set aside agency action 'found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) (quoting 5 U.S.C. § 706(2)(A)). "Agency action is arbitrary and capricious if the agency has failed to meet statutory, procedural, or constitutional requirements, or if its action is not supported by substantial evidence." *Motor Vehicle Mfrs. Ass'n of*

U.S., Inc. v. Ruckelshaus, 719 F.2d 1159, 1164 (D.C. Cir. 1983) (internal citations omitted).

"[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

An order may not stand if the agency has misconceived the law." *Teva Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006) (quotations omitted).

ARGUMENT

I. EPA LACKED AUTHORITY TO PROMULGATE THE DELAY RULE

EPA has admitted that it promulgated the Delay Rule for the purpose of reconsidering the LCRR. But that is not a legally sufficient basis for delaying the LCRR's effective and compliance dates.

In any event, EPA has failed to provide an adequate explanation for why it deviated from the dates chosen in the LCRR. EPA thus violated the APA by failing to provide "a reasoned explanation … for disregarding

facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 516.

A. Agencies Lack Authority To Delay Rules Merely To Reconsider Them

Orders, like the Delay Rule, that substantially "delay[] [a] rule's effective date" or "compliance deadlines" are "tantamount to amending or revoking a rule," *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017); *accord Envt'l Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) ("[S]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553."). For that reason, delay rules are reviewed with the same "rigor" as any other rule. *See State v. BLM*, 286 F. Supp. 3d 1054, 1064 (N.D. Cal. 2018) (citing *Fox Television Stations*, 556 U.S. at 515). That principle is important to prevent agencies from "employ[ing] delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits." *Air Alliance*, 906 F.3d at 1065.

Moreover, this Court has squarely held that "a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." *Id.* at 1067 (quoting

NRDC v. NHTSA, 894 F.3d 95, 111-12 (2d Cir. 2018)); *see also BLM*, 286 F. Supp. 3d at 1064 (agency "cannot use the purported proposed future revision, which has yet to be passed, as a justification for the Suspension Rule."). Thus, "the mere fact of *reconsideration, alone, is not a sufficient basis* to delay promulgated effective dates specifically chosen by EPA on the basis of public input and reasoned explanation." *Air Alliance*, 906 F.3d at 1067 (emphasis added); *accord NRDC v. NHTSA*, 894 F.3d at 111-12 ("As the D.C. Circuit recently held, a decision to reconsider a rule does not simultaneously convey authority to indefinitely delay the existing rule pending that reconsideration." (citing *Clean Air Council*, 862 F.3d at 9)).

B. The Delay Rule's Explicit Purpose Is Precisely What *Air Alliance* Forbids: A Delay For The Purpose Of Reconsideration

Here, there can be little doubt that EPA is engaged in *precisely* what *Air Alliance* forbids: delaying a rule based on the "mere fact of reconsideration, alone," and relying on "a decision to reconsider a rule … [as] convey[ing] authority to … delay the existing rule pending that reconsideration." *Air Alliance*, 906 F.3d at 1067.

The Delay Rule is clear on this point: in it, EPA referred to itself as being engaged in a "reconsideration of other aspects of the LCRR" and explained that it will use the delay period so that it can "decide[] to withdraw the LCRR" or "decide[] it is appropriate to modify the LCRR." 86 Fed. Reg. at 31,946. That is precisely what *Air Alliance* and the APA deny EPA authority to do.

Indeed, in opposing the States' request for a stay/summary vacatur, EPA itself forthrightly admitted (EPA Opp. at 1) that the purpose of the Delay Rule was to facilitate reconsideration of the LCRR: *i.e.*, it was using the time created by the delay for the purpose of "reviewing the revisions to decide whether to withdraw, modify, or keep them."

To be sure, EPA at times has dressed up its reconsideration as being more about "consult[ing] with stakeholders." *See, e.g.*, 86 Fed. Reg. at 31,941. But the Delay Rule never identifies any deficiencies with the previous stakeholder consultations. Nor is there any conceivable basis to delay the LCRR's effective and compliance dates pending those stakeholder consultations *except for reconsideration/revision* of the LCRR.

C. In Any Event, EPA's Failure To Provide A Convincing Rationale For the Delay Rule Violates The APA.

Even assuming EPA had authority to delay the LCRR's effective and compliance dates pending reconsideration, EPA violated the APA by failing to explain its actions adequately.

The LCRR set forth reasons for why it had selected the dates that it had. *See*, *e.g.*, 86 Fed. Reg. 4,200 at 4,210, 4,212, 4,214. It was therefore incumbent upon EPA, in the Delay Rule, to provide an adequate explanation for the change: When there is a change in policy, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox Television Stations*, 556 U.S. at 515-16.

That has not occurred here. EPA did not even begin to examine or explain its departure from the myriad findings in the LCRR surrounding its technical aspects. EPA reiterated stakeholder concerns with some of the findings, but nowhere did EPA explain why those findings were no longer true or relevant. This is insufficient. *See Air Alliance*, 906 F.3d at 1065. As in *Air Alliance*, "nothing in the Delay Rule explains EPA's

departure from its stated reasoning in setting the original effective date and compliance dates." *Id.* at 1067.

In regard to why the delay is necessary, EPA's primary reason appears to be its reconsideration of the LCRR and associated stakeholder engagement. *See supra* at 26. But the Delay Rule does not offer any convincing reason for why it cannot continue its review/stakeholder engagement while the LCRR is in effect. As this Court has recognized, "Agencies regularly reconsider rules that are already in effect." *Air Alliance*, 906 F.3d at 1067. EPA has not provided any convincing rationale why it could not conduct the shareholder engagement it desires while the Delay Rule is in effect and with the original compliance deadlines in effect. *See Council of Parent Att'ys & Advocs., Inc. v. DeVos*, 365 F. Supp. 3d 28, 53 (D.D.C. 2019) ("Here too, the government has not shown that delay is necessary to permit reconsideration of the 2016 Regulations.").

The only possible reason provided is EPA's desire to "avoid imposing unnecessary costs on water systems and states." 86 Fed. Reg. at 31,943. But, as explained below, the Delay Rule actually imposed

additional compliance costs by injecting new legal uncertainty and the need for contingency planning into the mix. *See infra* Section II.E.

II. EPA'S ANALYSIS OF COSTS AND BENEFITS VIOLATES THE SDWA AND THE APA

A. EPA's Own Analysis Revealed That The Costs Of The Delay Rule Potentially Exceeded Its Benefits

EPA's own cost-benefit analysis demonstrates that costs of the Delay Rule potentially exceed its benefits, and the agency offers no persuasive explanation of why that is not the case. By begging—but not answering—the question of whether the Delay Rule imposes costs exceeding its benefits, EPA has violated both the APA and the SDWA's explicit cost-benefit requirement. *See* 42 U.S.C. § 300g-1(b)(3)(C)(i)-(ii).

Because of the nature of delay, the costs and benefits are flipped from a typical regulatory analysis: here the "costs" of delay are the foregone health benefits that the LCRR would have otherwise been realized absent the delay, while the "benefits" are the compliance costs thereby avoided. EPA analyzed those costs and benefits using both 3% and 7% discount rates. *See* 86 Fed. Reg. at 31,944-45.[3]

[3] The use of a discount rate "reduces the value of future benefits and costs because the right to receive a dollar in the future is not as valuable as a dollar today." *Herrington*, 768 F.2d at 1412.

EPA's analysis of costs/benefits at 3% and 7% discount rates are as follows:

Table 1: EPA's Cost-Benefit Analysis For Delay (86 Fed. Reg. at 31,944-45)			
	Without Delay	**With Delay**	**Change**
Discount Rate			
3%	Costs: $161-$335 M Benefits: $223-$645 M	Costs: $153-$320M Benefits: $213-$616M	Costs: **Decrease $8-$15 million** Benefits: **Decrease $10-$29 million**
7%	Costs: $167-$372M Benefits: $39-$119M	Costs: $155-$346M Benefits: $37-$111M	Costs: **Decrease $12-$26 million** Benefits: **Decrease $2-$8 million**

As Table 1 indicates, under EPA's *own analysis*, the decrease in benefits ($10-29 million) from the Delay Rule actually *exceeds* the resulting decrease in costs ($8-15 million) at a 3% discount rate at both the lower and upper bounds (by $2 million and $14 million, respectively). At a 3% discount rate, the Delay Rule thus imposes costs anticipated to exceed benefits, which violates both (1) the SDWA's mandate to consider costs and benefits before setting regulations and (2) the APA, as failure

to address this critical issue—which EPA itself identified as such and the SDWA *makes* a mandatory consideration/requirement—constitutes "fail[ure] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. In contrast, at a 7% discount rate, the numbers are positive: the foregone compliance costs ($12-$26 million) exceed the foregone health benefits ($2-$8 million).

B. EPA's Failure To Analyze The Proper Discount Rate Violates The APA

The upshot is that EPA's own cost-benefit analysis reveals that whether the Delay Rule's benefits exceed its costs depends entirely on the proper discount rate: at 3% they don't, at 7% they do. *Supra* at 29-31. EPA admitted as much previously, confessing that "whether cost savings outweigh reductions in quantified benefits depends on which discount rate applies." EPA Opp. at 23. The amounts involved are substantial: at a 3% discount rate, costs exceed benefits by 2-14 million dollars.

The bare rationality of EPA's Delay Rule necessarily hinges on the proper discount rate to be used, which is dispositive of the relationship between costs and benefits even if *all* of EPA's other reasoning is accepted.

But despite this issue being *dispositive* of the Delay Rule's validity, EPA remarkably does not offer *any* reasoning why a 7% discount rate is superior to a 3% one. In doing so, EPA has "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

This Court has previously explained that agencies must "fix the [discount] rate carefully and explain its decision intelligibly." *Herrington*, 768 F.2d at 1414. It is particularly important that agencies do so given the "major consequences" that attach to that decision, which may "substantially increase[] … [the] benefits" of a policy. *Id.* This Court therefore invalidated a Department of Energy policy because its explanation of why it selected a 10% discount rate was "simply too conclusory to qualify as reasoned decisionmaking." *Id.* at 1413.

But the Department of Energy in *Herrington* has something that EPA lacks here: its explanation actually existed (even if in conclusory form). Because EPA has offered *no* explanation of the proper discount rate whatsoever, judicial invalidation is warranted here *a fortiorari* under *Herrington*.

EPA must rationally explain its decision with respect to the discount rate. Otherwise, this court "might as well be deferring to a coin

flip." *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011).

Similarly, this Court has held "when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable." unreasonable. *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (Courts will not "tolerate rules based on arbitrary and capricious cost-benefit analyses"). And failing to resolve whether benefits actually exceed costs is essentially the most "serious flaw" one can imagine within the field of cost-benefit analysis.

Even if EPA had attempted to explain why a 7% discount rate were appropriate, there are strong reasons to doubt that it could be sustained. The nature of the harms at issue (permanent brain damage) strongly suggests a lower discount rate may be appropriate. Moreover, the Biden Administration has specifically endorsed 3% (or lower) discount rates for their social cost of carbon regulations.[4] It is doubtful that EPA could

[4] February 2021 Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990, available at https://www.whitehouse.gov/wp-

coherently take the position that the harms at issue here are less important. But they have not even tried.

C. EPA's Cost-Benefit Analysis Similarly Violates The SDWA

EPA's refusal to analyze the dispositive rate issue also violates the SDWA's express cost-benefit analysis mandate. *See* 42 U.S.C. § 300g-1(b)(3)(C). For treatment techniques, EPA was required to consider *inter alia* "health risk reduction benefits and costs likely to be experienced as the result of compliance with the treatment technique." *Id.* § 300g-1(b)(3)(C)(ii).

By expressly mandating consideration of costs and benefits, Congress required that EPA conclude that anticipated benefits exceeded costs. *See*, *e.g.*, *City of Portland v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007) ("Section 300g–1(b)(3)(C) requires EPA to conduct a cost-benefit analysis…. If, based on this cost-benefit analysis, EPA concludes that the *costs of a [standard] outweigh its benefits*, the Agency may set a less stringent [standard]." (emphasis added)). Indeed, it would be absurd for Congress to mandate such consideration/quantification but then permit

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content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.

EPA to adopt rules with negative net benefits—*i.e.*, a quintessential example of arbitrary and capricious decision-making.

Because EPA effectively *admits* that it cannot say with any certainty that estimated benefits actually exceed costs, EPA has violated that mandate of the SDWA. Indeed, EPA cites no case in which an agency "complied" with an explicit cost-benefit mandate merely by calculating that benefits might—*or might not*—exceed costs. There is no reason for this case to be the first.

D. EPA's Post-Hoc Rationales Do Not Suffice

In opposing the States' request for a stay pending review/summary vacatur, EPA finally attempted to offer some explanation for why it believed costs exceeded benefits. *See* EPA Opp. at 22-26.

Those explanations are categorically insufficient as a matter of law: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *accord EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 36 (D.C. Cir. 2006) ("[W]e must rely only upon the reasons given by the agency, not 'counsel's *post hoc* rationalizations for agency action.'" (quoting *State Farm,* 463 U.S. at 50)).

EPA's failure to provide those explanations in the Delay Rule itself is thus fatal. But even if those arguments were timely raised in the Delay Rule, they each fail.

1. Purported Inability To Select A Proper Discount Rate

EPA previously told this Court (EPA Opp.24)—without citation—that it "could not—favor one discount rate over the other." But it never explains why that is the case. Such a contention without any apparent basis is arbitrary and capricious in itself.

Perhaps EPA believes that OMB guidance—which merely require it to perform cost-benefit analyses under the 3% and 7% rates—preclude it from further analyzing what rate is more appropriate to the issue at hand. But nothing in those regulations actually preclude it from doing so. *See* OMB Circular A-4 at 34 ("For regulatory analysis, you should provide estimates of net benefits using both 3 percent and 7 percent.").[5]

In any event, even if OMB guidance did recommend that EPA not select a proper discount rate, EPA's Delay Rule would still be invalid. In

[5] *Available at available at* https://www.transportation.gov/sites/dot.gov/files/docs/OMB%20Circular%20No.%20A-4_0.pdf.

rejecting the Department of Energy's attempt to rely on OMB guidance to avoid analyzing the proper discount rate, this Court explained that agencies "may not rely without further explanation on an unelaborated order from another agency." *Herrington*, 768 F.2d at 1413. But here EPA has neither identified the "[]other agency" nor even pointed to its relevant order, let alone sufficient explanation in that unidentified order from the unidentified agency (or supplied any of its own).

2. Reliance On Qualitative Benefits

EPA also previously advanced the overwhelmingly post-hoc contention that it "did not ignore costs and benefits" because it "considered them qualitatively." EPA Opp. at 24 (citing 86 Fed. Reg. at 31,945/1). But EPA's response identified only a *single* such "qualitative" factor: "stakeholder engagement." Opp. at 24 n.14. And the single column of the Delay Rule that EPA cited only says this about such engagement: "EPA has determined not to do so [*i.e.*, allow the LCRR to become effective] at this time because it would pre-determine the outcome of the public stakeholder process." 86 Fed. Reg. at 31,945.

That is flatly wrong as legal matter: even if EPA allows the LCRR to become effective, that would not preclude reconsideration following

stakeholder engagement. After all, "Agencies regularly reconsider rules that are already in effect." *Air Alliance*, 906 F.3d at 1067.

There is thus no actual "pre-determin[ation]." That alone requires invalidation, as "[a]n order may not stand if the agency has misconceived the law." *Teva Pharmaceuticals USA, Inc.*, 441 F.3d at 5 (citation omitted). And because the only value that EPA assigned to delaying the LCRR effective/compliance dates vis-à-vis "stakeholder engagement" was premised on the need to avoid "pre-determination," there is no cognizable "qualitative benefit" that EPA has placed on the scales at all.

But even if "stakeholder engagement" could conceivably have significant value mooting the issue of the proper discount rate, EPA actually makes no effort to value it—which is particularly problematic as there was already *extensive* stakeholder engagement that led to the LCRR. Indeed, the *only* apparent issue EPA took with the prior stakeholder engagement—and only *post hoc* in a filing in this Court—is the lack of "public meetings" and "targeted meetings." EPA Opp. at 8. But there is no reason to believe those meetings are worth the health risks and other adverse impacts that delaying the LCCR may impose, as quantified by the $2-14 million that costs would otherwise exceed

benefits at a 3% discount rate. Those would have to be some meetings to have that sort of value.

There is no reason to believe EPA's apparent desire to press the flesh is worth anywhere near those millions of dollars. But that is academic, since EPA's failure to offer any reason to believe those meetings could have anywhere near that value is fatal. *See*, *e.g.*, *Michigan v. EPA*, 576 U.S. 743, 750 (2015) ("'Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.'" (citation omitted)).

Moreover, EPA's qualitative/quantitative distinction is highly artificial. Those $2-14 million in foregone benefits exceeding costs represents the monetized value of "estimated IQ point decrements." *See* 86 Fed. Reg. 4,198 at 4,269. If EPA can monetize permanent brain damage, it surely can ballpark the value of some meetings.

More fundamentally, EPA cannot simply invoke "qualitative benefits" as some magic talisman that renders all quantification irrelevant. That would render all cost-benefit mandates toothless. Federal courts have thus warned that "unquantified benefits never were

intended as a trump card allowing the EPA to justify any cost calculus, no matter how high." *Corrosion Proof Fittings v. EPA.*, 947 F.2d 1201, 1219 (5th Cir. 1991).

Moreover, EPA's qualitative analysis here is questionable at best: in essence, EPA has apparently determined that the value of stakeholder *meetings* has greater qualitative value than preventing *permanent brain injuries in children*. Or at least that is what EPA's current arguments are necessarily premised upon. But EPA unsurprisingly will not offer any reasoning to that effect expressly—either in the Delay Rule or even in its post hoc briefing—rendering its Delay Rule indefensible.

For all of these reasons, EPA's refusal to analyze the appropriate discount rate violates both the SDWA and APA, and EPA's attempt to invoke "qualitative" benefits as a get-out-of-jail-free card fails on multiple independent levels. *See National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency [relies] on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

E. EPA's Analysis Of Compliance Costs Is Arbitrary And Capricious

Similarly, EPA's analysis of the savings in compliance costs more generally contradicts itself and is thus arbitrary and capricious. In particular, EPA states: "the expected first year (post rule effective date) expenditures by systems and states would be between $57-60 million, in 2016 dollars. These first-year expenditures to prepare for regulatory compliance with the LCRR *could be unnecessary if EPA determines to initiate a rulemaking to withdraw or significantly revise the LCRR*[.]" 86 Fed. Reg. at 31,945 (emphasis added).

By replacing regulatory certainty (*i.e.*, having the LCRR rule in effect) with regulatory uncertainty (*i.e.*, potential replacement (or not) of the LCRR rule with any number of new possibilities), EPA's actions will *increase* compliance costs, rather than decrease them. Notably, EPA itself acknowledges this elsewhere: "EPA recommends that *states consider each of these possibilities* [total repeal, no changes, and modifications to the LCRR] in their planning and resource allocation decision-making." *Id.* at 31,941.

The Delay Rule replaces the certainty of the LCRR with the uncertainty of multiple possibilities—which EPA acknowledges must *all*

be prepared for—rendering EPA's conclusion that the Delay Rule will decrease year-one compliance costs arbitrary and capricious. EPA's explicit contention that the planning costs of preparing for a single known standard is *higher* than having to plan for that same standard *plus* myriad *additional* possible standards falls well below the minimum rationality that the APA demands.

In responding to this point previously, EPA confined its response to a single unpersuasive footnote. EPA Opp. at 24 n.15. There EPA contended that "the uncertainty comes from review of the Revision Rule, not the Delay Rule." *Id.*

But there was no proposed rule revising the LCRR when EPA promogulated the Delay Rule—or even now. EPA's contention as to the source of the uncertainty is *post hoc*, evidence-free speculation. EPA cannot rely on a proposed rule not yet then (or now) in existence as the source of the costs it had calculated.

In any event, the Delay Rule specifically identifies *itself* as the source of the uncertainty, declaring that, as a result of its enactment—and not some external consideration—States would incur costs. EPA explained that "[a]ccordingly"—*i.e.*, as a result of the action taken by the

Delay Rule itself—"EPA recommends that states consider each of these possibilities [total repeal, no changes, and modifications to the LCRR] in their planning and resource allocation decision-making[.]" 86 Fed. Reg. at 31,941.

III. THIS CASE CONTINUES TO PRESENT A LIVE CONTROVERSY

When this action was initiated and the States sought a stay pending review/summary vacatur, the delayed LCRR effective date of December 16, 2021 was still looming. That date has now passed, so the States' challenge to the Delay Rule insofar as it delayed the LCRR's effective date is now moot.[6]

At the same time, both the original and delayed LCRR compliance dates (January 16, 2024 and October 16, 2024, respectively) remain reasonably far into the future. And EPA's delay of the compliance date rests on the *very same* legally deficient rationales in the Delay Rule as

[6] The LCRR becoming effective also moots the States' claim that EPA violated 42 U.S.C. § 300g-1(b)(9), which requires that EPA "shall, not less often than every 6 years, review and revise, as appropriate, each national primary drinking water regulation." Because the LCRR has now gone into effect, EPA has revised relevant standards in the prior six years. The States therefore are no longer pressing an argument that the Delay Rule itself violates subsection (b)(9).

the delayed effective date. As a result, vacating the Delay Rule would thus provide "effective relief" that prevents this action from being moot. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (holding that a case is moot "only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party." (cleaned up) (emphasis added)).

Moreover, this case provides no basis to depart from "the ordinary practice [which] is to vacate unlawful agency action." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019). Indeed, "vacatur is the default remedy to correct defective agency action." *Nat'l Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 501 (D.C. Cir. 2019). Given EPA's clear errors, vacatur is particularly warranted here.

CONCLUSION

EPA's Delay Rule should be vacated and this cause remanded to the agency.

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Respectfully submitted,

FOR THE STATE OF ARIZONA

MARK BRNOVICH
ATTORNEY GENERAL

/s/ Drew C. Ensign
Drew C. Ensign
Deputy Solicitor General
Counsel of Record
2005 N. Central Ave.
Phoenix, AZ 85004
Tel: (602) 542-5025
Drew.Ensign@azag.gov
Counsel for the State of Arizona

FOR THE STATE OF LOUISIANA

JEFF LANDRY
ATTORNEY GENERAL

/s/Elizabeth Baker Murrill
Elizabeth Baker Murrill
Solicitor General
1885 N. Third Street
Baton Rouge, LA 70802
Tel: (225) 326-6766
MurrillE@ag.louisiana.gov

Counsel for the State of Louisiana

FOR THE STATE OF OKLAHOMA

JOHN M. O'CONNOR
ATTORNEY GENERAL

/s/Mithun Mansinghani
Mithun Mansinghani
Solicitor General
313 NE 21st Street
Oklahoma City, OK 73105
Tel: (405) 521-3921
mithun.mansinghani@oag.ok.gov

Counsel for the State of Oklahoma

FOR THE STATE OF OHIO

DAVE YOST
ATTORNEY GENERAL

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General
30 East Broad Street
17th Floor
Columbus, OH 43215
Tel: (614) 466-8980
Benjamin.Flowers@OhioAGO.gov

Counsel for the State of Ohio

FOR THE STATE OF TEXAS

KEN PAXTON
ATTORNEY GENERAL

/s/ Judd E. Stone II
Judd E. Stone II
Solicitor General
P.O. Box 12548 (MC-059)
Austin, TX 78701
Tel: (512) 936-17
Judd.Stone@oag.texas.gov

Counsel for the State of Texas

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of D.C. Cir. R. 32(e)(2).

1. This brief is 8,288 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook type, which complies with Fed. R. App. P. 32(a)(5) and (6).

s/ Drew C. Ensign
Drew C. Ensign
Counsel for the State of Arizona

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Drew C. Ensign
Drew C. Ensign
Counsel for the State of Arizona