No. 09-495

IN THE

Supreme Court of the United States

AMERICAN CHEMISTRY COUNCIL, AMERICAN FOREST AND PAPER ASSOCIATION INC., AMERICAN PETROLEUM INSTITUTE, NATIONAL PETROCHEMICAL & REFINERS ASSOCIATION,

Petitioners,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

Petitioner American Forest & Paper Association ("AF&PA") is the national trade association of the forest, paper and wood products industry.

Petitioner American Petroleum Institute ("API") is a nationwide, not-for-profit association.

National Petrochemical & Refiners Association ("NPRA") is a national trade association.

The AF&PA, API, and NPRA have no parent companies, and no publicly-held company has a 10% or greater ownership interest in either the AF&PA, API, or NPRA.

The American Chemistry Council ("ACC") is a not-for-profit trade association. ACC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a ten percent (10%) or greater ownership interest in ACC.

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REPLY BRIEF FOR PETITIONERS

The D.C. Circuit's holding is that a regulation adopted in 1994 can be reviewed more than a decade later, notwithstanding the unequivocal language of 42 U.S.C. §7607(b)(1), that such a challenge is barred if not brought within the 60 days after the regulation is published. Every other circuit (and many panels of the D.C. Circuit) would hold that such a challenge is time-barred and that the challengers must seek rescission of the rule by the agency first and then proceed with judicial review if the agency chooses not to withdraw the rule. That approach is textually required and it promotes an orderly administrative process. Indeed, the Solicitor General agrees that the decision below is clearly wrong. That is an understatement. The D.C. Circuit's holding is lawless, tramples important reliance interests, and in this particular case wreaks havoc on a wide array of industries. Those are reasons enough to warrant certiorari and nothing that respondents offer detracts from that conclusion.

Respondents make four principal arguments. First, Sierra Club asserts that the Petitioners' claim was not made below. Second, both Respondents allege that, regardless of the court's error, there is no circuit split on the question presented. Third, they assert that the D.C. Circuit's jurisdiction over cases outside the statutory period for review has minimal practical importance. Finally, they suggest that the vacatur of the SSM provision itself has little practical importance. On each question, the United States and Sierra Club are mistaken. Petitioners presented their claim to the D.C. Circuit, which clearly decided it; there is a square conflict among the circuits; the decision below will introduce increasing uncertainty

into judicial challenges to agency decisions; and the decision below threatens regulated industries with substantial, unavoidable liability.

I. PETITIONERS RAISED THE QUESTION PRESENTED IN THE D.C. CIRCUIT.

The question presented here was both presented and decided below. In their brief before the D.C. Circuit, Petitioners stated:

> The appropriate way to challenge a long-standing regulation believed to violate a statute is to file a petition to amend or rescind the rule and then challenge if denied. Petitioners' claim that the petition process would be a "waste of time and resources" cannot stand. With a petition, all interested parties, including industry intervenors, may fully participate in the proceedings. If Petitioners followed this required path, this Court would have a complete record on which to base its review, hardly a waste of time or resources.

Int. Br. at 18 n.13 (internal citations omitted). Thus, the question presented in this case was presented below. Furthermore, it was actually decided below. *Va. Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991). Indeed, the question presented was one of the subjects of the dissent. Pet. App. at 20a.

The court of appeals held that "[a] constructive reopening occurs if the revision of accompanying regulations 'significantly alters the stakes of judicial review.'" Pet. App. at 9a. That holding is what Petitioners are challenging; they believe there is no basis in the statute to allow that result. That issue is clearly fair game for this Court. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

II. THE CIRCUITS ARE DIVIDED ON THE QUESTION WHETHER A PETITIONER SEEKING TO CHALLENGE A LONG-STANDING RULE MUST FIRST FILE A PETITION TO RESCIND.

Both the United States and Sierra Club analyze the issue as if the term "constructive reopening" has some talismanic meaning. It does not; it is the flip side of the coin that insists that the proper approach is for the challenging party to file a petition to rescind the rule and seek judicial review of that order, if appropriate. Thus, the repeated assertion that other circuits do not specifically reject "constructive reopening" is irrelevant. *See, e.g.*, US Br. at 12; Sierra Club Br. at 21–22. On the relevant question—whether a party seeking to challenge a longstanding rule must first file a petition to rescind—the circuits are squarely divided.

The government accurately summarizes the situation when it states "the courts of appeals have held that a party may obtain judicial review of even a long-established rule by petitioning the agency to amend or rescind it and then seeking judicial review if that petition is denied." US Br. at 12. The government also notes, accurately, that the other circuits do not mention, or invoke and then reject, the D.C. Circuit's "constructive reopening" terminology. *Id.* at 13. But there is no magic in that terminology. Given the clarity of the statute, hardly anyone would assume that any kind of "reopening" is available, constructive or otherwise. Thus, that the other courts reject the D.C. Circuit's doctrine in fact, if not by name, is more than enough reason to warrant this Court's review.

The government suggests that the other circuits have not "held that seeking review of the denial of a

petition to rescind is the exclusive means of securing review of an old rule." *Id.* That is not a fair reading of the decisions of the other circuits. Of course, there may be other means to review an "old rule," if the text of the relevant statute allows challenges whenever the rule is applied or whenever new circumstances require. But when a rule is "old" in the sense that the text of the statute dictates that review is no longer available, the other courts of appeals' opinions, fairly read, indicate that seeking review of the denial of a petition to rescind is the only appropriate means of securing review.[1]

For instance, when the Fifth Circuit held that the petitioner's challenge was time-barred in *Dunn-McCampbell Royalty Interest, Inc.* v. *National Park Service*, 112 F.3d 1283 (5th Cir. 1997), it noted: "If Dunn-McCampbell were able to point to . . . an application of the regulations [to Dunn-McCampbell] here, or if they had petitioned the National Park Service to change the . . . regulations and been denied, this court might have jurisdiction to hear that case." *Id.* at 1287–88. Thus, the Fifth Circuit identified only two ways to avoid the time bar. First, the petitioner could identify an application of the statute to itself—this exception does not apply in Clean Air Act cases. *Compare id.* at 1288, *with* 42 U.S.C. § 7607(b)(2). Second, the petitioner can

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[1] Of course, the rule then reviewed is the denial of the petition to rescind, not the "old rule," because the old rule is still shielded from *direct* review. *See Legal Envtl. Assistance Found., Inc.* v. *EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997).

There are other ways to direct an agency to reexamine an old rule. For instance, a court could vacate a *new* rule because that new rule drastically changed the regulatory context of an old rule, and instruct the agency that if it wishes to avoid vacatur of the new rule, it must reconsider the old rule.

petition to rescind the regulation in question. It is impossible to read the Fifth Circuit's opinion as countenancing any other way around the time bar. After all, the Circuit was relying explicitly on a decision holding that one may bring an action outside the statutory time period "*only* by petitioning the agency to review the application of the regulation to that particular challenger." 112 F.3d at 1287 (citing *Wind River Mining Corp.* v. *United States*, 946 F.2d 710, 715 (9th Cir. 1991)) (emphasis added).[2]

Similarly, in *Union Electric Co.* v. *EPA*, 515 F.2d 206 (8th Cir. 1975), *aff'd*, 427 U.S. 246 (1976), the court concluded that "[i]t is *only* when the Administrator fails to act upon the basis of the new information presented to him that a petition for review is proper." *Id.* at 220 (emphasis added). And this position was adopted by the D.C. Circuit in *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 666 (D.C. Cir. 1975), and embraced by the Fifth Circuit in *Save the Bay, Inc.* v. *EPA*, 556 F.2d 1282 (5th Cir. 1977).

Sierra Club, for its part, suggests that the decisions of the other circuits would not require filing a petition for review in this case because those cases merely concern situations in which there is "new information." Sierra Club Br. at 21. But if this is a distinction, it cuts the other way. After all, the statutory text of the CAA expressly provides an exception to the 60-day bar for petitions raised on the basis of new information: "if such petition is based

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[2] The Fifth Circuit accurately characterized *Wind River*, which clearly implied that the petition to rescind process was the exclusive means of avoiding the statutory time bar. *Wind River*, 946 F.2d at 715. *Wind River* emphasized that "the narrow scope of challenges to agency decisions that" it allowed would not undercut the statutory time bar. *Id.* at 716.

solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1). If a party must file a petition to rescind when there *is* "new information," surely it must file such a petition when there is not. Thus, the decisions of the other circuits are in direct conflict with the decision below on the question presented.

III. THE DECISION BELOW WILL INTRODUCE SUBSTANTIAL UNCERTAINTY INTO THE AGENCY REVIEW PROCESS.

The government predicts that the D.C. Circuit's practice of asserting jurisdiction outside the statutory time period for review will be infrequently employed, and thus will have little effect. US Br. at 10–12. This prediction is unsupportable.

First, the government argues that, in the past, "plaintiffs have rarely invoked the 'constructive reopening' doctrine." US Br. at 18. That is hard to determine, given the lag between filing petitions for review and published decisions resulting from that petition. Sierra Club filed this case in April 2002, relatively soon after the first spate of "constructive reopening" decisions appeared. *See, e.g.*, *PanAmSat Corp.* v. *FCC*, 198 F.3d 890, 894 (D.C. Cir. 1999); *Nat'l Ass'n of Mfrs.* v. *Dep't of the Interior*, 134 F.3d 1095, 1104 (D.C. Cir. 1998); *Kennecott Utah Copper Corp.* v. *Dep't of the Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996). Indeed, that generation of cases seems to have spawned another generation. *See, e.g.*, Pet. App. at 1a–21a; *NRDC* v. *EPA*, 571 F.3d 1245 (D.C. Cir. 2009); *Envtl. Def.* v. *EPA*, 467 F.3d 1329, 1333–34 (D.C. Cir. 2006). In any event, two published decisions issued within months of each other is hardly evidence that the "constructive reopening" line of cases is going away.

Second, there is reason to think that the volume of these cases may soon increase dramatically. This is because of the D.C. Circuit's recent decision in *American Road & Transportation Builders Association* v. *EPA*, 588 F.3d 1109, 1112 (D.C. Cir. 2009), which held that the petition for review procedure may not be used to bring a challenge that could have been brought when the rule was first promulgated, even if the challenge is substantive. *Id.* at 1113. This rule, which also appears inconsistent with those of the other circuits, will push more and more D.C. Circuit plaintiffs to the "constructive reopening" argument.

IV. THE VACATUR OF THE SSM RULE WILL HAVE SERIOUS AND UNAVOIDABLE ADVERSE IMPACTS.

The government argues that the decision below "only" applies directly to 35 source categories, and that EPA is fixing the rest.[3] US Br. at 14–16. As noted below, changing 35 rules is a massive task. And, as the government has acknowledged, seventy-four more categories have now been "called into question." Kushner Letter at 2 n.1; *see also* Chamber of Commerce Br. at 12 n.3. And some of these categories use language that closely mirrors the SSM provision at issue below. Kushner Letter at 2 n.1.

Furthermore, the government's recent actions show that the decision may have even broader consequences. EPA summarily removed an exemption for

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[3] A letter from the government and its brief in opposition also state, without precision or support, that "most" source categories do not need to rely on the SSM provision referenced in their rules, for "various reasons." US Br. at 14–15 (citing Letter from Adam M. Kushner, Director, Office of Civil Enforcement 2-3 (Kushner Letter), *available at* http://www.epa.gov/compliance/civil/caa/ssm-memo080409.pdf).

SSM that had been in place since 1997 for hospital, medical, and infectious waste incinerators, finding that the D.C. Circuit's ruling applies to waste incinerators regulated by another section of the Clean Air Act, 74 Fed. Reg. 51,368, 51,375 (Oct. 6, 2009) (to be codified at 40 C.F.R. pt. 60).

Regardless, even thirty-five rules, standing alone, would take many years to promulgate. The most recent Government Accountability Office (GAO) report on the topic notes that "[D]eveloping MACT [Maximum Achievable Control Technology] standards for hazardous air pollutants can take up to 3 years." GAO, *Mercury Control Technologies at Coal-Fired Power Plants Have Achieved Substantial Emissions Reductions* 2 (Oct. 2009).

Historically, these standards are notoriously difficult to promulgate, and require years to adopt. The 1990 Clean Air Act Amendments charged EPA with issuing MACT rules for all major sources of 189 toxic pollutants under a phased schedule. 42 U.S.C. § 7412(e). But within the first year of that effort, the GAO determined that EPA could not meet the prescribed schedule "because some data take years to acquire." GAO, *EPA's Strategy and Resources May Be Inadequate to Control Air Toxics* 3 (June 1991). In April 2000, GAO found that EPA missed its deadline for *102 of 117* hazardous air pollutant requirements. GAO, GAO/RCED-00-72, *Status of Implementation and Issues of the Clean Air Act Amendments of 1990*, at 11 (Apr. 2000). The government's assertion that it can "quickly" solve the problems created by the decision below is a triumph of wishful thinking over the documented reality of EPA's MACT regulation history.

Finally, the government suggests that the practical impact of the decision below may be minimized

because it could use "enforcement discretion." US Br. at 16. But this is not a binding commitment to forswear civil or criminal enforcement actions against sources that have done everything possible to comply with now unattainable standards. Instead, it merely notes that it will consider "among other things, the good faith efforts of the source to minimize emissions during SSM events." *Id.* (quoting Kushner letter at 3). A close read of this statement reveals that EPA has promised *very* little. Most importantly, neither the government nor Sierra Club suggests how sources faced with unattainable standards will be protected from the substantial penalties that citizens' enforcement suits could impose. 42 U.S.C. § 7604(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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