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Every Court Everywhere All at Once

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ABSTRACT. Rulemaking agencies have always faced the risk of getting sued. But they have not traditionally faced the risk of getting sued for failing to discuss their risk of getting sued. They do now. In *Ohio v. EPA*, the Supreme Court found that an EPA rule was likely arbitrary and capricious because the rule's preamble did not explain why the conclusions underpinning its stringency would remain valid if courts blocked its implementation in some of the twenty-three states where it was originally meant to apply. Put another way: the Court faulted the agency for not adequately grappling, at the time of rulemaking, with at least some subset of the millions of alternate futures that judicial intervention could create. This Essay details the peculiar history of the *Ohio* decision and explores its troubling implications for the future of federal rulemaking.

INTRODUCTION

Imagine: An agency issues a rule with five requirements. A state attorney general promptly sues in federal district court, arguing that the rule exceeds the agency's statutory authority. The judge disagrees and grants summary judgment for the agency.

Rewind. Same rule, same judge, different argument. This time, rather than contend that the rule exceeds the agency's statutory authority, the attorney general argues that the rule is arbitrary and capricious. Why? Because the agency did not, in its preamble, discuss the possibility that a court would find that the rule exceeds the agency's statutory authority. Specifically, the attorney general claims that the agency impermissibly omitted a severability analysis — that is, an explanation of whether and why the remainder of the rule should be left in effect if one or more of its five requirements were struck down. The judge agrees and vacates the rule.

How to explain the different result? By reframing a substantive objection as a procedural one, the attorney general has significantly eased their persuasive burden. They no longer must convince this particular judge that a particular provision of the rule is unlawful. Instead, they need only persuade the court that *some* judge might plausibly find *some* portion of the rule unlawful. Given the

federal judiciary's diversity of opinions on administrative law,[1] that's hardly a difficult lift. A reasonable judge could be confident in the rule's lawfulness and just as confident that some of their colleagues would disagree. And while the case didn't, in this timeline, land on the docket of one of those colleagues, it is hard for the judge to deny that it could have—if the attorney general had filed in a different district, or if this district's clerk had just spun the civil-assignment wheel a little bit harder. By focusing on the agency's failure to plan for these alternate realities, the attorney general manages, in a sense, to transfer the case to all of the realities simultaneously.

This novel litigation strategy—call it multiversal forum shopping[2]—is arguably made possible by the Supreme Court's June 2024 decision in *Ohio v. EPA*.[3] In that case, the Court stayed the implementation of an Environmental Protection Agency (EPA) rule called the Good Neighbor Plan, which required reductions in border-crossing emissions of nitrogen oxides (NO_x) from twenty-three states.[4] Justice Gorsuch's majority opinion concluded that challengers were likely to succeed on the merits of a claim that EPA had arbitrarily "ignored an important aspect of the problem"[5]—namely, the possibility that some of the twenty-three covered states would "fall out" of the rule due to successful legal challenges.[6]

While circuit courts had, in fact, preliminarily blocked implementation of the Good Neighbor Plan in twelve states prior to the Supreme Court's decision,[7]

1. *See, e.g.*, Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 663 (2023) (surveying lower-court invocations of the major questions doctrine and finding that "[j]udges have taken vastly different approaches to defining and applying the doctrine both within and across circuits").

2. Merriam-Webster defines the multiverse as "a theoretical reality that includes a possibly infinite number of parallel universes." *Multiverse*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/multiverse [https://perma.cc/FG2Y-2DZ2]; *see also* Carolyn Y. Johnson, *How Physics Inspired Oscar Nominee 'Everything Everywhere All at Once,'* WASH. POST (Mar. 10, 2023), https://www.washingtonpost.com/science/2023/03/10/physics-multiverse-everything-everywhere-all-at-once [https://perma.cc/2A5J-T33W] ("[T]he concept of a multiverse is . . . linked to the famous but controversial 'many-worlds interpretation' of quantum mechanics, which proposes that each event that could have more than one outcome . . . causes reality to splinter and branch off to create new universes where alternate events happen.").

3. 603 U.S. 279 (2024).

4. *Id.* at 283-86, 300.

5. *Id.* at 293 (quoting Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

6. *Id.* at 293-94 (internal quotation marks omitted).

7. *Id.* at 289-90.

the Court's conclusion did not depend on the existence or validity of these stays.[8] Instead, the defect identified by the Court was congenital: it had existed from the moment the rule was finalized. EPA had set the twenty-three states' emission targets based, in part, on a "cost-effectiveness analysis."[9] Commenters on the proposed version of the rule had, according to Justice Gorsuch, questioned whether this analysis "would yield the same results and command the same emissions-control measures if conducted for" a smaller pool of states.[10] But in the final rule, rather than "address [this] concern," EPA "sidestep[ped] it."[11] That is, EPA "add[ed] a severability provision" asserting that the Good Neighbor Plan "would 'continue to be implemented' without regard to the number of States remaining."[12] But the provision did not explain whether and why the emissions targets for the remaining states would still "maximize cost-effectiveness" in such a scenario.[13]

In response—and without itself concluding (1) that litigation ultimately would or should lead to a reduction in the number of states covered by the Good Neighbor Plan[14] or (2) that such a reduction would in any way undermine EPA's original cost-effectiveness analysis[15]—the Court stayed the rule, finding that the Good Neighbor Plan's challengers were "likely to prevail on their argument that EPA's rule was not 'reasonably explained.'"[16] In so doing, the Justices raised the

8. As Ohio's Deputy Solicitor General explained at oral argument, the state's critique of EPA's failure "to consider in the first instance what happens when there is lesser participation" was not dependent on such lesser participation actually occurring. Transcript of Oral Argument at 23, *Ohio*, 603 U.S. 279 (No. 23A349), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23a349_iieo.pdf [https://perma.cc/PLR8-PPV3].

9. *Ohio*, 603 U.S. at 293.

10. *Id.* As discussed in Part II, the four dissenting Justices disagreed with the majority about whether this issue had been raised with the specificity required by the Clean Air Act. *See, e.g.*, *id.* at 309 (Barrett, J., dissenting).

11. *Id.* at 295.

12. *Id.* at 294 (quoting Response in Opposition to the Applications for a Stay at 27, *Ohio*, 603 U.S. 279 (Nos. 23A349, 23A350, 23A351), 2023 WL 7221236).

13. *Id.* at 295.

14. *Id.* at 290 n.8 (recognizing that the number of states subject to EPA's rule "could change again as litigation . . . progresses past preliminary stay litigation and toward final decisions on the merits").

15. *Id.* at 293 ("Perhaps there is some explanation why the number and identity of participating States does not affect what measures maximize cost-effective downwind air-quality improvements.").

16. *Id.* at 294 (quoting FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021)). To grant the challengers a stay of enforcement, the Court needed to find only a likelihood—not a certainty—of success on the merits of their arbitrary-and-capricious claim. *Id.* at 291. But the language of Justice Gorsuch's opinion evinces a more definitive judgment about the

specter of a novel analytic mandate not just for EPA, but for all federal agencies: the obligation to anticipate and account for the consequences of future litigation at the time of a rule's initial promulgation.

This Essay examines the history and reasoning of the *Ohio* decision and reaches two primary conclusions about its implications for future rulemaking. First, agencies should now assume that the risk of postpromulgation litigation is an important aspect of *every* regulatory problem. If a comment letter even arguably preserves the issue for judicial review, an agency should not ignore it. Second, declining to conduct a full severability analysis is *not* tantamount to ignoring litigation risk. Accordingly, even after *Ohio*, an agency's express, reasoned decision to forgo severability analysis should not, in and of itself, render a rule arbitrary and capricious. This latter point matters because, for rules with multiple, interdependent provisions, severability analysis can be a challenging and time-consuming exercise.[17] A blanket mandate for such analysis would be a significant disincentive to the issuance of complex but otherwise lawful and socially desirable regulatory protections.

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It is tempting to dismiss *Ohio* as a one-off—the *sui generis* result of an unusual rule with an unusual litigation history being reviewed in an unusual procedural posture.[18] But if history is any guide, what happens in esoteric Clean Air Act cases does not stay in esoteric Clean Air Act cases.[19] One can easily imagine regulatory opponents deploying *Ohio*'s basic reasoning in less arcane contexts.

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inadequacy of EPA's explanation for the rule. *See, e.g.*, *id.* at 293 ("Although commenters posed this concern to EPA during the notice and comment period . . . EPA offered no reasoned response."); *id.* at 296–97 ("By its own words and actions . . . the agency demonstrated that it was on notice of the applicants' concern. Yet . . . it failed to address the concern adequately.").

17. *See* Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2322 (2015) (noting the potentially "significant ex ante costs associated with investigating and reflecting on the various regimes that might result from an enforceable severability clause"); *id.* at 2323 (noting that, for a rule with multiple provisions, "it may be difficult to predict which combinations should result in severability").

18. The case reached the Supreme Court as a petition for emergency relief after the D.C. Circuit had denied a stay but before it had reached a decision on the merits. *See infra* note 60 and accompanying text. Traditionally, the Court decides such petitions without holding argument and without issuing an opinion, but here, as in a handful of other recent emergency-docket cases, the Court did both. Pamela King, *Supreme Court 'Shadow Docket' Halts Another EPA Rule*, E&E NEWS (July 9, 2024, 1:39 PM ET), https://www.eenews.net/articles/supreme-court-shadow-docket-halts-another-epa-rule [https://perma.cc/NR7C-ZLUQ].

19. *Chevron v. Natural Resources Defense Council*, for example, was a dispute about the meaning of "stationary source" for the purposes of a particular Clean Air Act program. 467 U.S. 837, 840 (1984). But in the course of deciding that issue, the Court articulated a deference doctrine that

Consider, for example, any multiprovision rule that relies—as federal regulations routinely do—on a finding that the policy's benefits justify its costs.[20] If commenters threaten suit, must the issuing agency discuss whether its cost-benefit conclusion holds for all possible subsets of the rule's provisions? (If there are ten provisions, that's over one thousand combinations.[21] If there are twenty, it's over one million.[22])

More generally, can a commenter, simply by raising the possibility of post-promulgation litigation, force an agency to engage in a detailed analysis of the extent to which such litigation might, if successful, undermine any findings that the agency relied upon in determining the rule's initial scope and stringency? Can an otherwise lawful rule become unlawful solely because the agency declines to explore entirely hypothetical realities in which a court strikes part of the rule down?

If the answer is yes, *Ohio* has turned the federal courts' standard approach to administrative severability on its head. Courts typically consider whether a rule's provisions are severable from one another only *after* determining that some piece of the regulation is unlawful.[23] At that point, the court must decide whether to

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eventually made the case "the most widely cited decision in administrative law." Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227, 229 (2024). In the more recent *West Virginia v. EPA*, the Court rejected EPA's interpretation of a different Clean Air Act term, "system of emission reduction," by expressly invoking, for the first time in a majority opinion, the major questions doctrine. 597 U.S. 697, 720-24 (2022). A little over a year later, the decision had already been cited in 114 lower-court decisions. Brunstein, *supra* note 1, at 662. Other examples of Clean Air Act decisions with transsubstantive impacts abound. *See*, *e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014) (cited in almost 600 judicial decisions, per Westlaw); Michigan v. EPA, 576 U.S. 743 (2015) (cited in over 400 judicial decisions, per Westlaw); Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) (cited in over 1,200 judicial decisions, per Westlaw).

20. Executive Order 12,866 instructs executive branch agencies to propose and finalize rules *only* after making such a finding, if statutorily permissible. Exec. Order No. 12,866 § 1(b)(6), 58 Fed. Reg. 51735, 51735 (Oct. 4, 1993). Courts, in turn, have subjected these findings to arbitrary-and-capricious review. *See, e.g.*, Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1039-40 (D.C. Cir. 2012).

21. 2^10 = 1,024.

22. 2^20 = 1,048,576.

23. Tyler & Elliott, *supra* note 17, at 2294 ("Questions of severability arise after a discontented stakeholder challenges a provision of a statute or regulation and the reviewing court invalidates the challenged provision as . . . unlawful.").

vacate[24] only the offending component or the entire rule.[25] In making this choice, the court itself takes responsibility for evaluating severability; an agency's inclusion of an express severability provision in the rule can inform the court's analysis but is not dispositive.[26]

The traditional model of severability analysis is an exercise in judicial modesty—an effort to do as little violence as possible to the work of a coequal branch of the federal government.[27] But a maximalist reading of *Ohio* could replace this "rule of judicial humility" with "a rule of judicial hubris."[28] Rather than perform

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24. "Vacatur" of a regulatory provision nullifies it, making it inapplicable not just to the parties seeking relief but to anyone. *See* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1122 (2020). Full or partial vacatur is the "ordinary result" in a successful regulatory challenge. *Id.* (quoting Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998)).

25. *See* Tyler & Elliott, *supra* note 17, at 2294 (describing "the severability decision" as "the remedial choice between invalidating the challenged provision alone, the challenged provision and some of the remainder, or the entire statute or rule"). In making this choice, courts consider (1) whether "the agency would have intended to promulgate the remaining portion" of the rule without the defective piece; and (2) whether "the remainder can function independently." Adelaide Duckett & Donald L.R. Goodson, *Administrative Severability: A Tool Federal Agencies Can Use to Address Legal Uncertainty*, INST. FOR POL'Y INTEGRITY 1 (Sept. 2023), https://policyintegrity.org/publications/detail/administrative-severability [https://perma.cc/BXB3-DK4H].

26. *See, e.g.*, Cmty. for Creative Non-Violence v. Turner, 893 F.2d 1387, 1394 (D.C. Cir. 1990) ("Our [severability] inquiry does not end simply because the Regulation contains no severability clause. The Supreme Court has held that 'the ultimate determination of severability will rarely turn on the presence or absence' of such a clause." (quoting United States v. Jackson, 390 U.S. 570, 585 n. 27 (1968)); Tyler & Elliott, *supra* note 17, at 2317–18 (reviewing relevant case law and concluding that "the doctrine on administrative severability clauses . . . recognize[s] only a weak presumption in favor of severability and does not require the court to defer to an administrative severability clause").

27. *See* Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1519–20 (2011) ("The Court has explained its approach to severability as a modest one, motivated by respect for the coequal branch of Congress or the sovereign authority of the individual states, as well as by its own institutional limitations on drafting laws." (citing Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 683–84 (1987))). Both Campbell's article and the *Alaska Airlines* case he cites focus on *statutory* severability. But the Supreme Court's "test for the severability of administrative regulations repurposes the *Alaska Airlines* statutory severability test," Tyler & Elliott, *supra* note 17, at 2296, and is presumably motivated by a similar desire to show respect for a coequal branch (in this case, the executive branch).

28. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 450 (2024) (Kagan, J., dissenting). The act of "hubris" Justice Kagan refers to here is the Court's disavowal of *Chevron* deference, but aggressive application of *Ohio* would similarly empower the judiciary at the expense of agencies. This result would be in keeping with what several scholars have characterized as an ongoing project of "judicial self-aggrandizement" by the Roberts Court in administrative-law cases. *See, e.g.*, Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 471 (2023)

severability analysis themselves, courts might mandate (and then evaluate) severability analysis by agencies, turning a tool for mitigating the harm of vacatur into an independent justification *for* vacatur. That is, an agency's refusal to indulge in judicial fortune telling could become an excuse to strike down rules in which a reviewing court has identified no other procedural or substantive flaw.

There is no need to interpret *Ohio* this broadly, however, and lower courts should decline invitations to do so. The better takeaway from the case is narrow: when commenters raise concerns about the consequences of postpromulgation litigation, an agency cannot respond *with an unsupported assertion of total severability*.

How *can* the agency respond? I argue that it has four nonarbitrary options. First, it can provide a justified assertion of total severability. Second, it can concede partial or total inseverability. Third, it can promulgate a contingency plan, pursuant to which the scope or stringency of some regulatory components will automatically adjust upon the stay or vacatur of other components. Finally, and perhaps most importantly, the agency can defer. That is, it can make a reasoned decision to delay taking a position on severability until one or more provisions of the rule are actually litigated.

For reasons discussed later, this final option may not always be strategically wise, but inadvisable is a far cry from arbitrary. In fact, a wait-and-see approach to severability has long been the standard operating procedure of agencies.[29] And in the absence of a much clearer signal than *Ohio*, this common practice should not suddenly be presumed unlawful. For now, at least, regulatory preambles may still reasonably decline to chart the litigation multiverse.

The remainder of the Essay proceeds as follows. Part I explains the Good Neighbor Plan, the unorthodox litigation strategy that led to the *Ohio* decision, and the sharply divergent narratives of the case presented by the majority and dissenting opinions. Part II explores why the decision is likely to be invoked in

(deeming it "increasingly evident that the Court is pursuing an anti-administrativist agenda with thinly reasoned rules of statutory interpretation"); Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 648 (2023) (arguing that the Justices have, in recent years, "used both anti-administrative and anti-Congress rhetoric in administrative law cases to aggrandize themselves at both of the other branches' expense"); Mark A. Lemley, *The Imperial Supreme Court* , 136 HARV. L. REV. F. 97, 101 (2022) (characterizing the Court as having "clearly embarked on a project to rein in the power of administrative agencies, at least when they do things the current Court majority doesn't like").

29. Tyler & Elliott, *supra* note 17, at 2319 ("[A]gencies tend to clarify their positions on severability only when required to do so in litigation . . . ."). *But see* Richard L. Revesz, *New Challenges for Federal Regulations: Executive Branch Responses*, 100 N.Y.U. L. REV. (forthcoming 2025) (manuscript at 26-27), https://ssrn.com/abstract=5328013 [https://perma.cc/N5E8-TEHS] (finding that, after over two decades with "relatively few references to severability in the regulatory materials," the number of severability references "ballooned in 2023 and 2024").

other regulatory contexts and how agencies can effectively respond to this new analytic challenge. I conclude with a word of caution for litigants tempted to adopt an aggressive reading of *Ohio* in challenges to deregulatory actions of the second Trump administration.

I. ALTERNATE PASTS: THE DUELING HISTORIES OF *OHIO V. EPA*

There are two versions of *Ohio v. EPA*. There are the facts of the case as recounted in Justice Gorsuch's majority opinion: an agency proposes a set of pollution limits, commenters presciently suggest that litigation might undermine the agency's rationale for those limits, and the agency ignores them.[30] Then there's Justice Barrett's telling, in which commenters who said nothing about litigation undermining the agency's conclusions later decide to pretend like they did and are aided in that effort by a Supreme Court majority that "goes out of its way" to help them retcon the record.[31] Because this is a Clean Air Act case, the details are complicated.[32] But they are also essential to an understanding of the decision's implications for future rulemaking, so, into the weeds we go.

A. The Good Neighbor Plan and Its Unusual Path to the High Court

Under the Clean Air Act, EPA periodically sets nationwide concentration limits, known as National Ambient Air Quality Standards (NAAQS), for six common air pollutants.[33] Individual states then develop State Implementation Plans (SIPs) to achieve the NAAQS within their borders.[34] If a state fails to submit a plan by the statutory deadline or submits an inadequate one, EPA must promulgate a Federal Implementation Plan (FIP).[35]

The trouble with this approach is that air pollution is "heedless of state boundaries."[36] Thus, "downwind" states that adopt strict limits on their own sources of pollution can nevertheless find themselves unable to attain the

30. Ohio v. EPA, 603 U.S. 279, 284-85, 287-89 (2024).

31. *Id.* at 320-21 (Barrett, J., dissenting).

32. *See* HUNTON ANDREWS KURTH LLP, CLEAN AIR ACT HANDBOOK, at xi (5th ed. 2023) ("The Clean Air Act is perhaps the most complex piece of environmental legislation ever enacted.").

33. *Criteria Air Pollutants*, ENV'T PROT. AGENCY (June 3, 2025), https://www.epa.gov/criteria-air-pollutants [https://perma.cc/UPL5-99YE].

34. EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 498 (2014).

35. *Id.*

36. *Id.* at 496.

NAAQS due to the exported emissions of laxly controlled sources in "upwind" states.[37]

Congress attempted to address this inequity by including a "Good Neighbor Provision" in the Clean Air Act.[38] As amended in 1990, the provision requires SIPs to prohibit sources in the state from "contribut[ing] significantly" to any other state's failure to comply with the NAAQS.[39]

But "the nonattainment of downwind States results from the collective and interwoven contributions of multiple upwind States."[40] That is, "many downwind States receive pollution from multiple upwind States."[41] Not all of these contributions need to be eliminated to bring downwind states into attainment, so how should the pollution-reduction burden be allocated? Or, in statutory terms, which contributions should be deemed significant?

In EPA's view, contributions are more appropriately treated as significant if they are (relatively) cheap to eliminate. Since 1998, the agency has required upwind states to achieve emissions reductions consistent with the use of "cost-effective" controls.[42] The Supreme Court affirmed this approach in 2014's *EPA v. EME Homer City*, calling it an "efficient and equitable solution to the allocation problem the Good Neighbor Provision requires the Agency to address."[43] Efficient because, by prioritizing emissions that are "easier, *i.e.*, less costly, to eradicate," EPA can reach "the same levels of attainment . . . at a much lower overall cost" than it would under a different allocation scheme.[44] Equitable because the agency's approach directs incremental reduction burdens to "[s]tates that have done relatively less in the past to control their pollution."[45]

How does EPA draw the line between controls that are and are not cost effective? In essence, EPA (1) surveys the "cost per ton of emissions prevented" using available reduction techniques (such as "installing scrubbers on

37. *Id.*

38. *Id.* at 498-99.

39. *Id.* at 499 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)).

40. *Id.* at 514.

41. *Id.* at 496. Adding to the complexity, "[m]ost upwind States propel pollutants to more than one downwind State," and "some States qualify as both upwind and downwind." *Id.*

42. *See* Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region, 63 Fed. Reg. 57356, 57369 (Oct. 27, 1998) (basing "the aggregate amounts to be prohibited on the availability of a subset of cost-effective controls"); *id.* at 57405 (using "the highly cost-effective measures . . . to calculate the amounts of emissions in each covered State that will contribute significantly to nonattainment").

43. *EME Homer City*, 572 U.S. at 519.

44. *Id.*

45. *Id.*

powerplant smokestacks");[46] (2) constructs a "cost curve" reflecting the total emissions reductions available at increasing levels of expenditure;[47] and (3) looks for a "knee," or a point of "rapidly diminishing returns," in that curve—that is, a point where a state would start to get much less pollution-reducing bang per additional buck.[48]

Almost every iteration of this cost-conscious policy has sparked litigation.[49] Prior to 2023, that litigation commenced in the D.C. Circuit.[50] This is because the Clean Air Act dictates that challenges to "nationally applicable regulations" and actions "based on a determination of nationwide scope or effect" must be filed in the D.C. court.[51] EPA has always maintained that its good-neighbor rulemakings fit both of these bills.[52] For a quarter century, challengers largely declined to dispute the point.[53]

Opponents of the 2023 Good Neighbor Plan took a different tack, however. Rather than wait to challenge the Plan (a FIP) directly, they challenged a necessary legal predicate to its implementation: EPA's disapproval of upwind states' SIPs.[54] Instead of litigating the SIP disapprovals en masse in the D.C. Circuit, they attacked them one by one, in the home circuit of each challenging state.[55]

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46. *Id.* at 501.

47. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48208, 48248 (Aug. 8, 2011).

48. *Id.* at 48256, 48258.

49. *See, e.g.*, Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000); North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008); EPA v. EME Homer City Generation, L.P., 696 F.3d 7 (D.C. Cir. 2012), *rev'd*, 572 U.S. 489 (2014).

50. For a sample of this litigation, see sources cited *supra* note 49.

51. 42 U.S.C. § 7607(b) (2024).

52. *See, e.g.*, Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36654, 36859-60 (June 5, 2023).

53. *See, e.g.*, Brief for States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, New Jersey, Pennsylvania, and Wisconsin, and the District of Columbia, the City of New York, and Harris County, Texas, Respondents in Opposition to Applications for Stay at 30, Ohio v. EPA, 603 U.S. 279 (2024) (No. 23A349, 23A350, 23A351), 2023 WL 7221237 [hereinafter State Opposition Brief] (explaining that, of twenty-seven states covered by EPA's 2011 good-neighbor rule, only one brought an (unsuccessful) challenge outside of the D.C. Circuit).

54. *See* Megan M. Herzog & Sean H. Donahue, *The Problems with the SCOTUS 'Good Neighbor' Arguments*, LEGALPLANET (Feb. 26, 2024), https://legal-planet.org/2024/02/26/the-problems-with-the-scotus-good-neighbor-arguments [https://perma.cc/3QJH-Z5H7].

55. *Id.*

Though EPA contested the circuit courts' authority to hear the disputes,[56] the challengers managed to secure preliminary stays of SIP disapproval in twelve of the twenty-three states covered by the Good Neighbor Plan.[57] In response, the agency suspended implementation of the Plan in those states but left it in effect for the remaining jurisdictions.[58]

Meanwhile, Ohio, which hadn't challenged its own SIP denial,[59] went to the D.C. Circuit and sought a stay of the Good Neighbor Plan itself, arguing that suspension of the Plan in some states had rendered it arbitrary and capricious in all states.[60] But this argument was doomed to fail, because the Clean Air Act limits judicial review of rulemaking to arguments "raised with reasonable specificity during the comment period."[61] To litigate an objection arising after the comment period—like concerns regarding the effects of postpromulgation stays—Ohio first needed to raise the issue with EPA in a request for reconsideration of the rule and then challenge the agency's denial of that request.[62]

And so, after the D.C. Circuit denied it a stay, Ohio reframed its argument. In petitioning the Supreme Court for emergency relief, it claimed not that the Good Neighbor Plan had been made retroactively arbitrary by the stays but that the rule had *always* been arbitrary. Why? Because the stays were "entirely

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56. EPA claimed that the SIP disapprovals were, like the Good Neighbor Plan itself, both "nationally applicable" and "based on a determination of nationwide scope or effect"—and thus subject to the Clean Air Act's D.C. Circuit venue provision. Oklahoma v. EPA, 145 S. Ct. 1720, 1729-30 (2025). This argument was ultimately rejected in a Supreme Court case decided almost a year after *Ohio*. *Id.* at 1734.

57. *Ohio*, 603 U.S. at 289-90.

58. *EPA Response to Judicial Stay Orders*, ENV'T PROT. AGENCY (Nov. 22, 2024), https://www.epa.gov/Cross-State-Air-Pollution/epa-response-judicial-stay-orders [https://perma.cc/HL32-JPSB].

59. *See* State Opposition Brief, *supra* note 53, at 10 (noting that Ohio "did not file any petition for review of the SIP Disapproval Rule"). For readability, this Essay refers only to Ohio when discussing the Good Neighbor Plan's challengers, but two other states, eight trade associations, and seven companies also challenged the rule in the D.C. Circuit and Supreme Court. *Id.* at 1. Ohio took the lead in arguing the arbitrary-and-capricious theory on which the Court granted a stay, and the Court didn't find it necessary to consider any of the other challengers' arguments in its opinion. *See Ohio*, 603 U.S. at 294 n.10.

60. Petitioners' Motion for Stay Pending Review and for an Administrative Stay at 13-14, Utah *ex rel.* Cox v. EPA, 2023 WL 6285159 (D.C. Cir. Sept. 25, 2023) (No. 23-1183) ("At this point, imposing the FIP on the remaining nonexempted States has no rational connection to the FIP's goals.").

61. 42 U.S.C. § 7607(d)(7)(B) (2024). EPA has historically had great success invoking this issue-exhaustion requirement to block challenges to its Clean Air Act rulemakings. *See* Gabriel H. Markoff, Note, *The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*, 90 TEX. L. REV. 1065, 1079 (2012).

62. *See* 42 U.S.C. § 7607(d)(7)(B) (2024).

foreseeable" at the time of the Good Neighbor Plan's promulgation,[63] but EPA had nevertheless failed to grapple with their potential consequences for the rule's analytic foundations. Specifically, EPA had "never seriously considered whether its plan would remain an effective, efficient, and equitable solution for dividing emission responsibilities among upwind States if the plan did not apply to all of the intended States."[64]

By the time the case reached oral argument, Ohio had refined its argument further, zeroing in on the "knee in the curve" analysis EPA used to set the cost-effectiveness threshold that determined upwind states' emission-reduction obligations. According to the state's Deputy Solicitor General,

> [W]hen states drop out and their particular technologies and industries drop out with them, those points of diminishing marginal returns shift, and they shift somewhat unpredictably, which means that the relevant cost threshold for a different mix of states could be cheaper . . . .[65]

In other words, if EPA had known all along that the Good Neighbor Plan would apply to eleven states rather than twenty-three states, it might have selected a lower cost-effectiveness threshold, which might, in turn, have yielded a smaller emission-reduction obligation for Ohio and the other remaining states.

To be sure, Ohio couldn't guarantee this was true. The cost-effectiveness threshold might remain the same under a new analysis, the state's Deputy Solicitor General conceded.[66] Or it might move higher![67] But in Ohio's view, this uncertainty was irrelevant, because "even if there ultimately [was] no change" in the appropriate threshold due to the stays, "what matter[ed was] that EPA failed to consider at all" this potential problem.[68]

By framing the case as "a failure to consider problem,"[69] Ohio relieved itself of the obligation to convince the Justices that the (possibly temporary) judicial excision of twelve states from the Good Neighbor Plan actually *had* undermined

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63. State Applicants' Emergency Application for a Stay of Administrative Action at 17, *Ohio*, 603 U.S. 279 (No. 23A349), 2023 WL 7042583.

64. Reply in Support of State Applicants' Emergency Application for a Stay of Administrative Action at 7-8, *Ohio*, 603 U.S. 279 (No. 23A349), 2023 WL 7300260.

65. Transcript of Oral Argument, *supra* note 8, at 6.

66. *Id.*

67. *Id.*

68. *Id.* at 9-10.

69. *Id.* at 9.

the validity of EPA's original cost-effectiveness determinations.[70] Instead, it needed to persuade the Court of two other things — first, that EPA hadn't, in the original rulemaking record, explained why judicial stays in some states wouldn't undermine its cost-effectiveness determinations, and second, that this potential undermining was "an important aspect of the problem" that EPA could not reasonably ignore.[71]

B. Justice Gorsuch's and Barrett's Competing Narratives

Ohio's gambit succeeded. A majority of the Supreme Court agreed that EPA had failed to explain "why the number and identity of participating States does not affect what measures maximize cost-effective downwind air-quality improvements."[72] The majority further agreed that this explanatory failure left the challengers "likely to prevail on their argument that EPA's final rule was not 'reasonably explained,' that the agency failed to supply a 'satisfactory explanation for its action,' and that it instead ignored 'an important aspect of the problem' before it."[73]

Justice Barrett was less taken with Ohio's theory of the case. In a vigorous dissent joined by the Court's three liberal Justices, Barrett argued that neither Ohio nor anyone else had brought this allegedly "important" aspect of the problem to EPA's attention in their comments on the proposed version of the Good Neighbor Plan.[74] The majority concluded otherwise, Barrett wrote, "only by putting in the commenters' mouths words they did not say."[75] Specifically, Barrett accused the majority of "dress[ing] up" a single "sentence that obliquely refers" to the potential need for "new assessment and modeling of contribution" as an expression of "concern that a 'different set of States might mean that the "knee in the curve" might shift' and change the cost-effective 'emissions-control measures.'"[76]

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70. *See* Ohio v. EPA, 603 U.S. 279, 306 n.1 (2024) (Barrett, J., dissenting) ("[T]he Court's basis for enjoining the [Good Neighbor Plan's] enforcement is not that the alleged problem [with the cost-effectiveness threshold] is real, but that the final rule did not address it.").

71. *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983).

72. *Ohio*, 603 U.S. at 293.

73. *Id.* at 294 (first quoting FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021); and then quoting *State Farm*, 463 U.S. at 43).

74. *Id.* at 306.

75. *Id.* at 307.

76. *Id.* at 308-09 (first quoting *Comments on Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, AIR STEWARDSHIP COAL. 13-14 (June 21, 2022), https://downloads.regulations.gov/EPA-HQ-OAR-2021-0668-0518/

Justice Gorsuch's majority opinion rejected this objection as "hair-splitting."[77] While no comment had explicitly mentioned the possibility of a shifting cost-effectiveness threshold, Gorsuch believed the issue was implicit in commenters' more general references to potential new modeling.[78] EPA was thus "[f]airly on notice of the concern" and "needed to" address it.[79]

Justice Barrett's dissent next argued that, to the extent that the cost-effectiveness issue had been raised, EPA had adequately addressed the problem because "the rule and its supporting documents arguably make clear that EPA's methodology for calculating cost-effectiveness thresholds and imposing emissions controls did not depend on the number of covered States."[80] In building its cost curves for the different types of sources covered by the Good Neighbor Plan, EPA used "national, industry-wide data" on the cost and emissions impact of available abatement technologies.[81] Because the data underlying the curves was not particular to the states covered by the rule, Barrett reasoned, a change in the number or identity of those covered states should have no impact on the location of the curves' knees and, in turn, no impact on any covered state's emissions budget.[82] "Confirming this interpretation," in Barrett's view, was EPA's express statement in the Good Neighbor Plan that the agency "view[ed] the plan as 'severable . . . along state and/or tribal jurisdictional lines.'"[83]

Again, Justice Gorsuch disagreed. While the severability provision "highlight[ed] . . . the agency's desire to apply its rule expeditiously and 'to the greatest extent possible,' no matter how many states it could cover," nothing the agency "said in support of [the] provision addresse[d] whether and how measures found to maximize cost effectiveness in achieving downwind ozone

attachment_1.pdf [https://perma.cc/WH8E-JW5N]; and then quoting *Ohio*, 603 U.S. at 288 (majority opinion)).

77. *Ohio*, 603 U.S. at 296 (quoting Appalachian Power Co. v. EPA, 135 F.3d 791, 817 (D.C. Cir. 1998)).

78. *Id.* at 297 n.12 ("And why would EPA need to perform a 'new assessment and modeling of contribution'? Because it may be that 'the math . . . wouldn't necessarily turn out the same' if some States were not covered." (first quoting *Comments on Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, AIR STEWARDSHIP COAL. 14 (June 21, 2022), https://downloads.regulations.gov/EPA-HQ-OAR-2021-0668-0518/attachment_1.pdf [https://perma.cc/WH8E-JW5N]; and then quoting Transcript of Oral Argument, *supra* note 8, at 59)).

79. *Id.*

80. *Id.* at 311 (Barrett, J., dissenting).

81. *Id.* at 313.

82. *Id.* at 313 n.7.

83. *Id.* at 316 (quoting Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36654, 36693 (June 5, 2023) (codified at 40 C.F.R. pts. 52, 75, 78 & 97)).

air-quality improvements with the participation of 23 States remain so when many fewer States . . . might be subject to the agency's plan."[84] In other words, "EPA's response did not address the . . . concern so much as sidestep it."[85] Thus, undeterred by the dissent's objections, the majority stayed the Good Neighbor Plan.[86]

C. Who Got It Right?

Which Justice's version of events is nearer to the truth? I'm persuaded by Justice Barrett that no commenter raised the alleged substantive problem on which Justice Gorsuch focused — "that the exclusion of some States from the [Good Neighbor Plan] would undermine EPA's cost-effectiveness analyses and resulting emissions controls" — with reasonable specificity.[87]

None of the letters that Justice Gorsuch cited mentioned the potential for a change in the cost-effectiveness threshold. The best approximation Gorsuch could find was this sentence in a forty-page submission from the Air Stewardship Coalition:

> The proposed [Good Neighbor Plan] essentially prejudges the outcome of [EPA's proposed-but-not-yet-finalized SIP disapprovals for the 23 covered states] and, in the event EPA takes a different action on those SIPs than contemplated in this proposal, it would be required to conduct a new assessment and modeling of contribution and subject those findings to public comment.[88]

Justice Gorsuch deemed this generic reference to "new assessment and modeling" sufficient to put EPA on notice of Ohio's argument. He cited a 1998 D.C. Circuit decision, *Appalachian Power Co. v. EPA*, for the proposition that "a party need not 'rehears[e]' the identical argument made before the agency" to avoid waiving it in subsequent litigation.[89] But as the D.C. Circuit explained in a much more recent case, 2015's *Center for Sustainable Economy v. Jewell*, this doesn't mean

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84. *Id.* at 295 (majority opinion) (quoting Response in Opposition to the Applications for a Stay at 27, *Ohio*, 603 U.S. 279 (Nos. 23A349, 23A350, 23A351), 2023 WL 7221236).

85. *Id.*

86. *Id.* at 300.

87. *Id.* at 307 (Barrett, J., dissenting).

88. *Id.* at 309 (quoting *Comments on Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard*, AIR STEWARDSHIP COAL. 14 (June 21, 2022), https://downloads.regulations.gov/EPA-HQ-OAR-2021-0668-0518/attachment_1.pdf [https://perma.cc/WH8E-JW5N]).

89. *Id.* at 296 (quoting Appalachian Power Co. v. EPA, 135 F.3d 791, 818 (D.C. Cir. 1998)).

that *any* gesture toward an issue, no matter how brief or oblique, is sufficient to preserve the issue for judicial review.[90] Instead, "[w]hether an objection is fairly raised depends on, among other things, the size of the record, the technical complexity of the subject, and the clarity of the objection."[91]

In *Center for Sustainable Economy*, the D.C. Circuit declined to find an argument preserved when "only two passages in [a] forty-page comment even obliquely refer[red]" to it, and the agency had received "280,189 comments on the [policy at issue], some of them dense and lengthy."[92] As in that case, "[w]ith the benefit of hindsight and guided . . . to the sentences on the specific pages" of the Air Stewardship Coalition's letter, it's possible to "see a connection between the comment" and Ohio's eventual argument regarding the risk of a shifting cost-effectiveness threshold.[93] But the coalition's letter was one of over 112,000 that EPA received on its proposed Good Neighbor Plan,[94] and it did not offer the agency "anything close to the kind of explanation" Ohio provided the Supreme Court at oral argument.[95] Thus, as in *Center for Sustainable Economy*, "the fact that, buried in hundreds of pages of technical comments . . . some mention [was] made of an argument related to a claim brought on judicial review," should have been deemed "insufficient to preserve the issue for review on appeal."[96]

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90. Ctr. for Sustainable Econ. v. Jewell, 779 F.3d 588, 602 (D.C. Cir. 2015).

91. *Id.* Importantly, *Center for Sustainable Economy* involved an issue-exhaustion requirement under the Outer Continental Shelf Lands Act (OCSLA) rather than the Clean Air Act. *Id.* at 592. But the text of OCSLA's exhaustion requirement is, if anything, more forgiving than the text of the Clean Air Act's similar requirement. The Clean Air Act requires the relevant objections themselves to have been "raised with reasonable specificity during the period for public comment." 42 U.S.C. § 7607(d)(7)(B) (2024). OCSLA, meanwhile, requires "the issues upon which . . . objections are based" to have been submitted "during the administrative proceedings related to the actions involved." 43 U.S.C. § 1349(c)(5) (2024). In reality, courts seem to treat exhaustion requirements as interchangeable, notwithstanding differences in wording. The D.C. Circuit in *Center for Sustainable Economy* characterized the OCSLA requirement as embodying a "general rule of administrative procedure" and cited non-OCSLA cases in support of its conclusions. 779 F.3d at 601. Similarly, the D.C. Circuit case that Justice Gorsuch cites, *Appalachian Power Co.*, invokes non-Clean Air Act exhaustion case law to support its assertions regarding the purpose and scope of the Clean Air Act's exhaustion provision. *See* 135 F.3d at 818.

92. *Ctr. for Sustainable Econ.*, 779 F.3d at 601-02.

93. *Id.* at 602.

94. *See* Federal Implementation Plan Addressing Regional Ozone Transport for the 2015 Ozone National Ambient Air Quality Standard, REGULATIONS.GOV (Apr. 6, 2022), https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-0007 [https://perma.cc/P83E-R9DH] (listing the total comments received at 112,159).

95. *Ctr. for Sustainable Econ.*, 779 F.3d at 602; Transcript of Oral Argument, *supra* note 8, at 4-6.

96. 779 F.3d at 602 (quoting Nat'l Ass'n of Mfrs. v. U.S. Dep't of the Interior, 134 F.3d 1095, 1111 (D.C. Cir. 1998)).

Why did Justice Gorsuch, as one scholar put it, "bend over backwards to extend grace to the objecting commenters"?[97] Perhaps because he disapproved of the *substance* of the Good Neighbor Plan. Consider that Gorsuch characterized EPA's adoption of a "uniform framework" for dealing with interstate air pollution as a break from its prior embrace of "'flexibility' and different state approaches."[98] He declined to mention that EPA has been using uniform cost thresholds in good-neighbor rulemaking for twenty-five years.[99] Nor did he acknowledge that the Court upheld one such rule in 2014.[100]

Why not mention the 2014 decision? Likely because Justice Gorsuch thought the 2014 Court got it wrong. *EME Homer City* was a *Chevron*-Step-2 case. The majority, in an opinion authored by Justice Ginsburg, viewed the Clean Air Act as silent on the question of what "amounts" of pollution in upwind states should be found to "contribute significantly" to downwind nonattainment of the NAAQS.[101] In accordance with the deference regime articulated in *Chevron v. Natural Resources Defense Council*, it read this "silence as a delegation of authority to EPA to select from among reasonable options."[102] And it concluded that EPA's approach was a "reasonable" way of filling the "gap left open by Congress."[103]

We know that two of the Justices in the *Ohio* majority think that EPA should have lost *EME Homer City* even with *Chevron* in place. Justice Thomas dissented from the decision,[104] and Justice Kavanaugh, then a D.C. Circuit judge, wrote

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97. Daniel Deacon, Ohio v. EPA *and the Future of APA Arbitrariness Review*, YALE J. ON REGUL.: NOTICE & COMMENT (June 27, 2024), https://www.yalejreg.com/nc/ohio-v-epa-and-the-future-of-apa-arbitrariness-review [https://perma.cc/XTH4-R4J9].

98. Ohio v. EPA, 603 U.S. 279, 286 (2024) (quoting Air Plan Disapproval; Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin; Air Plan Disapproval; Region 5 Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 9838, 9841 (Feb. 22, 2022) (codified at 40 C.F.R. pt. 52)).

99. *See, e.g.*, Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57356, 57377-78 (Oct. 27, 1998)(codified at 40 C.F.R. pts. 51, 72, 75 & 96) (explaining that EPA determined upwind states' NO_x budgets using a uniform cost-effectiveness threshold of $2,000 per ton).

100. EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 498 (2014).

101. *Id.* at 513-15.

102. *Id.* at 515.

103. *Id.* at 520 (quoting Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 866 (1984), *overruled in part by*, Loper Bright Enters. v. Raimondo, 603 U.S. 279 (2024)).

104. Justice Thomas joined Justice Scalia in arguing that EPA's cost-conscious construction of the Good Neighbor Provision "deserves no deference." *Id.* at 526 (Scalia, J., dissenting).

the lower-court opinion that *EME Homer City* reversed.[105] We also know that all five of the Justices in the *Ohio* majority think *Chevron* itself was bad law because they chose to overrule it in *Loper Bright Enterprises v. Raimondo*—a decision issued one day after *Ohio*.[106]

Does all of this add up to an *Ohio* majority that believes the last twenty-five-plus years of good-neighbor rulemaking under the Clean Air Act have been unlawful? Does a majority of the Court believe that EPA actually lacks statutory authority to take the cost of available emissions reductions into account when determining whether an upwind state "contributes significantly" to downwind nonattainment? I suspect so.[107] But we can't know for sure, because a substantive reevaluation of EPA's approach was not on the table in *Ohio v. EPA*. What *was* on offer to the Court was a "barely briefed failure-to-explain theory."[108] And whatever its motivation, the Gorsuch majority "seiz[ed]" that opportunity.[109]

II. ALTERNATE FUTURES: RULEMAKING AFTER *OHIO*

In lamenting the *Ohio* decision, Justice Barrett focused on its consequences for the downwind states that the Good Neighbor Plan sought to bring into attainment. She pointed out that a stay pending the completion of merits review in the D.C. Circuit and resolution of any subsequent petition for certiorari to the Supreme Court would "leave[] large swaths of upwind States free to keep contributing significantly to their downwind neighbors' ozone problems for the next several years," all so that EPA could "confirm what we already know"—namely, that the agency "would have promulgated the same plan even if fewer States were covered."[110]

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105. In that D.C. Circuit opinion, Judge Kavanaugh concluded that EPA's cost-conscious "reading of [the Good Neighbor Provision] reaches far beyond what the text will bear." EME Homer City Generation, L.P. v. EPA, 696 F.3d 7, 27-28 (D.C. Cir. 2012).

106. 603 U.S. at 412.

107. The fall of *Chevron* isn't necessarily fatal to the cost-conscious approach upheld in *EME Homer City*. *Loper Bright* made clear that, even absent deference to an agency's statutory interpretation, the "best reading of a statute" will sometimes be "that the agency is authorized to exercise a degree of discretion." 603 U.S. at 395. EPA would no doubt argue that the modifier "significantly" is the kind of "term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" *Id.* (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015)). This could explain why Justice Barrett approvingly cites *EME Homer City* in *Ohio*, even though she herself joined the *Loper Bright* majority in overruling *Chevron*. *See, e.g.*, Ohio v. EPA, 603 U.S. 279, 312 (Barrett, J., dissenting) (citing *EME Homer City*, 572 U.S. at 518, for the proposition that EPA may implement the cost-conscious approach).

108. *Ohio*, 603 U.S. at 322 (Barrett, J., dissenting).

109. *Id.*

110. *Id.*

The health and environmental costs of a Good Neighbor Plan delay are indeed substantial. According to EPA's regulatory-impact analysis for the rule, the policy would have prevented up to 1,300 premature deaths in 2026 alone if implemented on schedule.[111] But what of *Ohio*'s consequences beyond the Good Neighbor Plan? What of its doctrinal ramifications for other, not-yet-finalized rules and their beneficiaries? This Part explores the possibilities.

In concluding that the Good Neighbor Plan was likely arbitrary and capricious, the *Ohio* Court faulted EPA for violating what it has previously called "one of the basic procedural requirements of administrative rulemaking," an agency's obligation "to give adequate reasons for its decisions."[112] *Motor Vehicle Manufacturers Association v. State Farm* offers the seminal articulation of this requirement, which stems from the Administrative Procedure Act's mandate to "hold unlawful and set aside agency action" that is "arbitrary" or "capricious":[113]

> The agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made . . . . Normally, an 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.[114]

The Good Neighbor Plan ran afoul of this standard, the *Ohio* majority reasoned, by "ignor[ing] 'an important aspect of the problem'": whether a litigation-driven change in the states covered by the rule would undermine the analysis that EPA had relied on to calibrate the rule's stringency.[115] Thus, *Ohio*'s implications for future rulemaking depend on the answers to two questions. First, how often might the consequences of postpromulgation litigation be

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111. *EPA's Good Neighbor Plan Cuts Ozone Pollution—Overview Fact Sheet*, ENV'T PROT. AGENCY (Mar. 15, 2023), https://www.epa.gov/system/files/documents/2023-03/Final%20Good%20Neighbor%20Rule%20Fact%20Sheet_0.pdf [https://perma.cc/2EFS-V3GG].

112. Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221 (2016).

113. 5 U.S.C. § 706(2)(A) (2024). The parallel provision of the Clean Air Act at issue in *Ohio* authorizes courts to "reverse" any arbitrary or capricious action. 42 U.S.C. § 7607(d)(9) (2024). Courts have long applied the same standard of review to arbitrary-and-capricious claims under both statutes. *See, e.g.*, Allied Loc. & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61, 68 (D.C. Cir. 2000).

114. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S 29, 43 (1983).

115. *Ohio*, 603 U.S. at 294 (quoting *State Farm*, 463 U.S. at 43).

deemed an "important aspect of the problem"? And second, when the issue of litigation risk *is* important, what constitutes adequate consideration?

With respect to the first question, it is hard after *Ohio* to identify many regulatory scenarios in which an agency could confidently dismiss concerns regarding the consequences of litigation as unimportant and thus unnecessary to consider. Instead, *Ohio* opens the door to widespread deployment—against all sorts of federal agencies, issuing rules under all sorts of statutes—of the "multiversal forum shopping" I described at the start of this Essay.[116] Thus, so long as the issue of litigation risk has been raised in a comment (and thus preserved for judicial review), an agency should make some effort to consider it.

But this analytic obligation need not pose a significant new impediment to rulemaking. Instead, courts should recognize that adequate consideration of litigation risk can take several forms and, critically, that not all of these forms involve the preparation of a severability analysis. Instead, an agency should retain discretion to make an express, reasoned judgment to *defer* taking a position on a rule's severability until some component of the policy is actually litigated. At the same time, agencies should recognize that deferral, even if lawful, may not always be their best strategic choice.

A. The Presumptive Importance of Litigation Risk

In the four decades since it announced *State Farm*'s "important aspect of the problem" standard, the Supreme Court has treated some issues as presumptively important aspects of *every* regulatory problem, such as a regulation's costs[117] or its potential to disrupt reliance interests.[118] In the wake of *Ohio*, agencies are well-advised to treat litigation risk in a similar fashion. Why? Because most rules will satisfy the two conditions that seemed to render litigation risk important in

116. Again, I use "multiversal forum shopping" as a shorthand for challenges to agency rules that argue: (1) at the time of rulemaking, it was plausible that some part of the rule might eventually be declared substantively unlawful and vacated; and (2) the agency unreasonably failed to account for this plausible future in its regulatory preamble.

117. *See* Michigan v. EPA, 576 U.S. 743, 752-53, 759 (2015) (indicating the Court's view that agencies "have long treated cost as a centrally relevant factor when deciding whether to regulate" and that EPA "must consider cost . . . before deciding whether regulation is appropriate and necessary").

118. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1, 30 (2020) ("When an agency changes course . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (quoting Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016) (internal quotation marks omitted)).

Ohio: (1) plausibly interdependent components, and (2) a not-entirely-speculative chance that some of those components will be knocked out in court.[119]

First, consider the issue of interdependency. The *Ohio* majority suggested that severability was an important issue for the Good Neighbor Plan because the plan "rested on an assumption that all [23] upwind states" would comply with the rule's emissions-reduction requirements.[120] EPA's reliance on this assumption raised the question of whether the removal of some states from the rule's purview would undermine the appropriateness of the remaining states' obligations.[121] But many rules have multiple provisions, and agencies generally design and justify them on the assumption that all of those provisions will take effect. Thus, it will often be at least plausible that a rule's provisions are interdependent and that vacatur of some of those provisions would undermine a finding on which the remainder of the rule relies.[122] In fact, even a rule with a *single* provision is vulnerable to partial vacatur that could theoretically undermine some of its analytic foundations. As the D.C. Circuit explained in a 2020 decision, *Natural Resources Defense Council v. Wheeler*, "[i]t is a routine feature of severability doctrine that a court may invalidate only some applications even of indivisible text, so long as the valid applications can be separated from invalid ones."[123] Accordingly, requiring plausible interdependency does little work as a limiting principle for the importance of litigation risk.

In addition to the plausible interdependency of the Good Neighbor Plan's provisions, the *Ohio* majority emphasized how plausible it was, at the time of the rule's finalization, that at least some of those provisions would ultimately be

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119.. Importantly, the potential consequences of postpromulgation litigation could not have been an important aspect of the problem in *Ohio* solely because they were raised in a comment letter. After all, EPA was obligated to respond only to "*significant* comments . . . submitted . . . during the comment period." 42 U.S.C. § 7607(d)(6)(B) (2024) (emphasis added); *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 95-96 (2015) (finding that the Administrative Procedure Act contains an implicit obligation to respond to "significant comments received during the period for public comments" on a rule). Thus, while inclusion in a comment letter is often necessary to preserve an issue for judicial review, *see* Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109, 124-25 (2018), this inclusion does not in itself render the issue sufficiently significant to merit a response. And if a concern isn't significant enough to warrant a response, it's hard to see how it could be an "important" aspect of the problem before the agency.

120. *Ohio*, 603 U.S. at 280; *see also id.* at 287 (finding that the agency "had determined which emissions-control measures were cost effective at addressing downwind ozone levels based on an assumption that the FIP would apply to all covered States").

121. *Id.* at 293.

122. Tyler & Elliott, *supra* note 17, at 2301 ("Many regulatory schemes are very technical and complex, and they often involve highly interdependent provisions.").

123. Nat. Res. Def. Council v. Wheeler, 955 F.3d 68, 81 (2020).

blocked from taking effect.[124] But limiting an agency's obligation to consider litigation risk to proceedings in which litigation has "not an entirely speculative" chance of success also does little to shrink the pool of proceedings in which this burden could be successfully invoked.[125] An agency will rarely be able to dismiss a courtroom defeat as *entirely* implausible, because successful challenges to rules are far from rare. A recent study of all rules classified as "major" under the Congressional Review Act found that, since that statute's enactment in 1996, just over a fifth of such rules have been challenged, and almost half of the challenges have succeeded.[126] Additionally, both the challenge rate and the agency-loss rate have increased over time,[127] and it has become increasingly common for rules to be challenged in multiple courts at once (thereby increasing the challengers' odds of securing victory in at least one venue).[128] Furthermore, given *Chevron*'s recent demise, an agency cannot presume that a rule will withstand challenge simply because similar policies did in the past.[129]

In the absence of persuasive grounds for arguing that litigation risk was uniquely important to the Good Neighbor Plan, the safest course of action for an agency after *Ohio* is to assume that the consequences of postpromulgation litigation will be treated as a presumptively important aspect of every regulatory problem. Accordingly, if a commenter even arguably preserves the issue for judicial review, the agency should offer some sort of response.[130]

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124. *Ohio*, 603 U.S. at 287 (noting that many commenters "believed EPA's disapprovals of the [upwind states'] SIPs were legally flawed"); *id.* (explaining that, "[a]s the commenters portrayed the SIPs," it "was not an entirely speculative possibility" that the Good Neighbor Plan would not end up applying to all twenty-three states).

125. *Id.*

126. Libby Dimenstein, Donald L.R. Goodson & Tyler Szeto, *Major Rules in the Courts: An Empirical Study of Challenges to Federal Agencies' Major Rules*, TEX. A&M L. REV. (forthcoming 2025) (manuscript at 4), https://ssrn.com/abstract=4819477 [https://perma.cc/SX4B-QW32].

127. *Id.*

128. *Id.* at 5.

129. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024). While the *Loper Bright* majority cautioned that holdings in cases decided under *Chevron* are still entitled to "statutory *stare decisis*," *id.*, lower courts have since differed on the scope of this safe harbor, Elliot Setzer, *The Narrow View of* Chevron *Stare Decisis*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 24, 2025), https://www.yalejreg.com/nc/the-narrow-view-of-chevron-stare-decisis-by-elliot-setzer [https://perma.cc/J9JT-AJM6]. The Sixth Circuit, for example, has read the case to protect individual actions upheld under *Chevron* but not "subsequent agency actions that relied on the same statutory interpretation." *Id.*; *see In re* MCP No. 185, 124 F.4th 993, 1002 (6th Cir. 2025) (declining to extend statutory stare decisis to new agency action taken by the Federal Communications Commission).

130. *See supra* note 119.

B. Four Nonarbitrary Options for Considering Litigation Risk

If litigation risk is an important aspect of the regulatory problem, then an agency cannot "entirely fail[] to consider" it.[131] But what constitutes nonarbitrary consideration of litigation risk? This section identifies four options that should pass judicial muster.

First, an agency can make a *supported* assertion of total severability. As noted earlier, the preamble to the Good Neighbor Plan included a severability provision explaining that if "any jurisdiction-specific aspect" were "found invalid," the rule could "continue to be implemented as to any remaining jurisdictions."[132] But Gorsuch faulted EPA for not adequately explaining why the rule should continue to be implemented in such a situation.[133] Thus, *Ohio* makes clear that saying "litigation won't matter," without more, does not satisfy an agency's obligation to engage with comments on litigation risk. But rather than saying simply that litigation wouldn't matter, EPA could have said, "It won't matter, *and here's why.*" That is, it could have explained why any determinations necessary for the rule's initial issuance would remain valid in the event of partial vacatur. Indeed, this is the *only* acceptable response identified by the *Ohio* majority: "When faced with comments like the ones it received, EPA needed to explain why it believed its rule would continue to offer cost-effective improvements in downwind air quality with only a subset of the States it originally intended to cover."[134]

In the case of the Good Neighbor Plan, we know that EPA could indeed have offered such an explanation because the agency eventually did. In March 2024, a year after the Good Neighbor Plan's finalization but three months prior to *Ohio*'s release, EPA partially denied four petitions for reconsideration of the rule.[135] In those denials, the agency confirmed that the Good Neighbor Plan was "'modular' by nature"—meaning that each state's emission budget was calculated independently and "[n]one of the steps" in those calculations depended "in any way on the number of states included."[136] Accordingly, the rule's analytic framework

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131. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

132. Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36654, 36693 (June 5, 2023) (emphasis added).

133. Ohio v. EPA, 603 U.S. 279, 294-95 (2024).

134. *Id.* at 295 n.11.

135. *Response to Four Petitions for Reconsideration*, ENV'T PROT. AGENCY (Mar. 4, 2025), https://www.epa.gov/Cross-State-Air-Pollution/response-four-petitions-reconsideration [https://perma.cc/TS63-THUN].

136. *The EPA's Basis for Partially Denying Petitions for Reconsideration of the Good Neighbor Plan on Grounds Related to Judicial Stays of the SIP Disapproval Action as to 12 States*, ENV'T PROT. AGENCY 2, 31 (Mar. 27, 2024) [hereinafter Reconsideration Denial Letter], https://www.

"would yield the same obligations for included states" whether it "was applied to two . . . or twenty."[137]

But consider some alternate realities. What if the Good Neighbor Plan was not fully modular? What if, in at least some of the millions of possible scenarios for judicial intervention, the results of EPA's cost-effectiveness analysis would not hold? These hypotheticals matter because rules often do include "highly interdependent provisions."[138] For such rules, postpromulgation litigation could "undermine [their] rationale or render [them] ineffective."[139] What then?

The *Ohio* majority opinion doesn't offer any options, but that's likely because Gorsuch treats EPA's already-stated position on the severability of the Good Neighbor Plan as a given. That is, if EPA wanted to continue asserting that each upwind state's emissions budget was severable from the other states' requirements, then, yes, the agency's only option was to explain why the analysis underlying the state budgets wouldn't change if the group of states covered by the rule Good Neighbor Plan changed.

But agencies are certainly not *required* to issue severable rules.[140] Thus, a second nonarbitrary response to litigation risk is to concede partial or total *in*severability—the "litigation *will* sometimes matter" option. In EPA's 2015 Clean Power Plan, for example, the agency calculated greenhouse-gas-emission guidelines for fossil-fuel-fired power plants based on a set of three "building blocks": (1) "[i]mproving heat rate" at coal-fired plants; (2) "[s]ubstituting increased generation from lower-emitting existing natural gas" plants for generation from

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epa.gov/system/files/documents/2024-03/basis-for-partial-denial-of-petitions-for-reconsideration-of-good-neighbo.pdf [https://perma.cc/VM4W-G8EX].

137. *Id.* at 3. Although the *Ohio* majority was aware of the reconsideration denials, it declined to consider them, arguing that the Clean Air Act prohibits reviewing courts from "consulting explanations and information offered after the rule's promulgation." 603 U.S. at 295 n.11. The D.C. Circuit subsequently granted EPA a voluntary remand of the rule for the express purpose of supplementing the record on the issue of severability. Pamela King, *D.C. Circuit Allows EPA to Rework 'Good Neighbor' Rule Halted by Supreme Court*, E&E NEWS (Sept. 13, 2024, 1:25 PM ET), https://www.eenews.net/articles/dc-circuit-allows-epa-to-rework-good-neighbor-rule-halted-by-supreme-court [https://perma.cc/R67G-RE6R]. Ohio and other challengers asked the Supreme Court to block this remand, but the Court declined. *Supreme Court Denies Review of 'Good Neighbor' Air Rule Remand*, INSIDE EPA (Jan. 13, 2025), https://insideepa.com/daily-news/supreme-court-denies-review-good-neighbor-air-rule-remand [https://perma.cc/L8BW-YC3B].

138. Tyler & Elliott, *supra* note 17, at 2301.

139. *Ohio*, 603 U.S. at 305 (Barrett, J., dissenting).

140. Courts have read many demands into the words "arbitrary and capricious" over the decades. *See* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1299 (2012) (noting that the arbitrary-and-capricious standard as applied "represents a significant judicial elaboration of § 706(2)(A)'s text"). However, a requirement that all rulemaking be infinitely modular is not one of them.

coal plants; and (3) "[s]ubstituting increased generation from new zero-emitting renewable energy" for generation from both coal and gas plants.[141] In a severability section of the regulatory preamble, the agency explained that if *both* blocks two and three were vacated, block one should not be implemented alone due to the possibility of a "rebound effect" at the affected coal plants that would result in increased emissions, the opposite of the rule's intended outcome.[142]

A third possibility is for the agency to equip its rule with dynamic features that would automatically adjust in the event of partial vacatur—the "litigation will sometimes matter, but we have a plan" approach. EPA also did this in the Clean Power Plan's severability section—explaining that if "a court should deem building block 2 or 3 defective, but not both," the rule's standards could "be recomputed on the basis of the remaining building blocks," and providing "[a]ll of the data and procedures necessary" to complete this recalculation.[143]

Finally—and critically—an agency could punt. That is, the agency could (1) concede that it's possible that judicial intervention will undermine a rationale for its rule and (2) opt to wait until such an event actually occurs before making a decision on how to respond. This "litigation *might* matter, and we'll cross that bridge if we come to it" approach is not "sidestep[ping]" concerns about post-promulgation litigation in the manner deemed impermissible in *Ohio*.[144] Rather than ignoring a commenter's contention that litigation could undermine a rule's analytic foundations or dismissing the concern with a conclusory assertion of severability, the agency is acknowledging the issue of severability and making an express decision to defer judgment on it. This approach to severability is not unusual. A 2015 study by Charles Tyler and E. Donald Elliott found that, between 2000 and 2014, only twenty-one agencies included a severability provision in *any* regulation.[145] And "even the most active user[s]" of such provisions included them in less than ten percent of their rules.[146] Thus, waiting "to clarify [the

141. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64667 (Oct. 23, 2015).

142. *Id.* at 64758 n.443. Seven years after the rule's promulgation, the Supreme Court found the Clean Power Plan unlawful in *West Virginia v. EPA*, but not for any reason related to its severability provision. 597 U.S. 697, 734-35 (2022).

143. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64758; *see also* Yoon-Ho Alex Lee, *An Options Approach to Agency Rulemaking*, 65 ADMIN. L. REV. 881, 886-88 (2013) (advocating for the use of options in agency rulemaking).

144. *Ohio*, 603 U.S. at 295.

145. Tyler & Elliott, *supra* note 17, at 2318.

146. *Id.* at 2326.

agencies'] positions on severability" until "required to do so in litigation" was by far the most common practice.[147]

Of course, to survive arbitrary-and-capricious review, an agency's decision to delay taking a position on severability must be "reasonably explained."[148] But reasons for deferral are not hard to find. An agency could note that conducting a comprehensive severability analysis is costly, especially for a rule with numerous provisions. As Tyler and Elliott acknowledge, "investigating and reflecting on the various regimes that might result" from severability (i.e., identifying all possible subsets of a rule's provisions and assessing their desirability) could be quite time-consuming for an agency's staff.[149] Completing the analysis could thus delay finalization of the rule—or the finalization of other in-process rules from which staff resources must be diverted. These delays harm society at large by delaying realization of the delayed regulations' net benefits. The agency could further argue that those delay-related costs are not justified by any corresponding benefit, because the agency would proceed with the rule as currently designed *even if* a severability analysis revealed that one or more of its provisions was not properly severable from the others. And since it is certainly not arbitrary and capricious for an agency to proceed with an admittedly inseverable rule, it's hard to see how it could be arbitrary and capricious for an agency to proceed with an admittedly *potentially* inseverable rule.

All of that said, an agency will sometimes already know, at the time of rulemaking, that it would prefer for the remainder of the rule to be deemed severable if certain provisions are invalidated. In these circumstances, deferring severability analysis, while permissible, could be strategically unwise. The next Section explains why.

C. The Strategic Risk of Deferral

The fact that an agency *can* do something does not, of course, mean that it always *should*. While forgoing severability analysis in a rule should not provide independent grounds for declaring the rule arbitrary and capricious, it might

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147. *Id.* at 2319. A forthcoming study by Richard L. Revesz does find, however, that discussions of severability in regulatory materials "drastically increased" in 2023 and 2024. Revesz, *supra* note 29, at 33. Revesz notes that this spike began too early to be a response to the Court's discussion of severability in *Ohio*. *Id.* at 39. He speculates that it instead reflects agency awareness of the more generally "hostile judicial environment" that federal regulations currently face. *Id.* at 40.

148. FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) (explaining that a court reviewing a rule under the arbitrary-and-capricious standard "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision").

149. Tyler & Elliott, *supra* note 17, at 2322.

increase the probability that a finding of unlawfulness for some other reason will result in full rather than partial vacatur. Thus, if an agency is already reasonably confident that it will, if the issue arises in future litigation, argue for severability, declining to include a severability analysis in the rule itself may be strategically unwise, especially if the agency can complete the analysis without significantly delaying the rule's finalization.

This argument runs somewhat contrary to the traditional view that agencies "receive[] little payoff" for the labor of severability analysis because courts "tend not to give substantial deference to severability clauses, preferring instead to conduct the same severability analysis that they would perform in the absence of a severability clause."[150] However, even absent formal judicial deference to an in-rule severability analysis, there are several reasons that preparing such an analysis could nevertheless increase the odds that the rule will ultimately be deemed severable (and, thus, that a finding of unlawfulness with respect to one component of the rule will not result in vacatur of the entire policy).

For example, one factor that courts consider in evaluating severability is whether the agency intended for the rule to be severable.[151] As Richard L. Revesz observes in a forthcoming article, while courts sometimes find the necessary intent even absent an assertion of severability in the regulatory text or preamble, including such a clause "virtually guarantees" that this prong of the severability analysis will be satisfied.[152]

The other factor that courts consider is "workability"[153]—that is, "whether the remainder of the regulation could function sensibly without the stricken provision[s]."[154] As with intent, while an in-rule discussion is not strictly necessary for a finding of workability, addressing the issue in the regulatory text or preamble does appear to increase an agency's odds of successfully establishing severability.[155]

It's unsurprising that severability arguments made in litigation generally prove less persuasive than those made in regulatory preambles, because litigation materials, unlike preambles, are unlikely to be reviewed by "agency career staff, with whom a great deal of the government's scientific and economic expertise resides."[156] *Ohio* illustrates this very problem. The majority opinion notes that,

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150. *Id.*

151. Revesz, *supra* note 29, at 27.

152. *Id.* at 28.

153. *Id.* at 27.

154. Texas v. United States, 126 F.4th 392, 419 (5th Cir. 2025) (alteration in original) (quoting MD/DC/DE Broads. Ass'n v. FCC, 236 F.3d 13, 22 (D.C. Cir. 2001)).

155. Revesz, *supra* note 29, at 27, 29-30.

156. *Id.* at 23.

at oral argument, the U.S. Deputy Solicitor General representing EPA could not "say with certainty that [the agency] would have reached the same conclusions regardless of which States were included" in the Good Neighbor Plan.[157] But EPA staff certainly felt comfortable saying so with certainty in the partial denials of reconsideration that the agency issued several months later.[158]

A final reason for taking a position on severability during the rulemaking process is the risk that, before litigation over a rule concludes, the White House and, in turn, political leadership of the agency will change hands. In that scenario, the version of the agency that is asked to weigh in on severability by a reviewing court may be less enthusiastic about the rule and thus more willing to concede inseverability than the version of the agency that issued the rule in the first place.[159] Including a persuasive case for severability in the rule itself could make such a change of position at least marginally more difficult. Because the agency's original position on the issue would be part of the administrative record and thus available to the court, the new administration would be forced to acknowledge and justify its change of heart.

In sum, if an agency believes that, faced with a future judicial finding of partial unlawfulness, it would argue for the lawful provisions of its rule to remain in effect, there are good reasons to go ahead and make a preemptive case for severability as part of the rulemaking record, even though the agency is not legally obligated to do so. But if an agency simply isn't sure whether a rule's legal and economic rationale could withstand vacatur of some subset of its components—and if the opportunity cost of resolving that uncertainty prior to finalization would be substantial—declining to take an in-rule position on severability may be not just lawful but sensible.

CONCLUSION

Forty years ago, in *State Farm*, the Supreme Court deemed it arbitrary and capricious for an agency to "entirely fail[] to consider an important aspect of the problem" when issuing a rule.[160] Now, with *Ohio*, the Court has effectively

157. Ohio v. EPA, 603 U.S. 279, 299 (2024).

158. Reconsideration Denial Letter, *supra* note 136, at 2-3.

159. Again, *Ohio* illustrates this risk. After the Trump Administration took office, it announced plans to repeal the Good Neighbor Plan and secured an abeyance from the D.C. Circuit of merits litigation regarding the rule. *See EPA Launches Biggest Deregulatory Action in U.S. History*, ENV'T PROT. AGENCY (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history [https://perma.cc/2GNA-EWRG] (listing among the agency's planned actions "[e]nding [the] so-called 'Good Neighbor Plan'"); Utah *ex rel.* Cox v. EPA, No. 23-1157, 2025 WL 1354371, at *1 (D.C. Cir. May 2, 2025).

160. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

declared *itself*—or, at least, the federal judiciary as a whole—a presumptively important aspect of every regulatory problem.

And one might think, well, of course it is. In interviews with "dozens of agency officials across the administrative state," Anya Bernstein and Cristina Rodríguez found that "[n]early all" officials view "calculating 'litigation risk' [as] integral to policymaking."[161] Administrators deciding whether, when, and how to regulate "ask[] 'what's the probability of litigation, and what's the probability that the federal government would prevail?'"[162]

But agencies don't normally ask (or answer) these questions *out loud*. As Timothy G. Duncheon explains, "overt references to litigation risk" in regulatory materials have traditionally been "rare"—likely because agencies fear that to acknowledge such risk is to concede that a rule "is on shaky legal ground."[163]

Ohio, even under the narrow reading I've offered here, requires that concession. Because even deferral—the "it might matter, and we'll cross the bridge if we come to it" option for responding to litigation risk—is still, at its core, an admission that the agency might be wrong about its authority to issue the rule in question. In this sense, *Ohio* is a further entrenchment of what Nicholas Bagley calls "defensive crouch administrative law."[164]

Here, one might think, well, putting agencies in a defensive crouch doesn't sound so bad right now. As I write this, Donald Trump has returned to the White House with an even more aggressive deregulatory agenda than he offered in his first term.[165] And as they did last time around, proregulatory advocacy groups are looking to arbitrary-and-capricious review as a bulwark against rollbacks.[166] In this context, an aggressive application of *Ohio* might have some appeal even to those who initially decried EPA's loss in the case. Indeed, even though *Ohio* was a loss for the Biden Administration, Christopher J. Walker characterizes it

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161. Anya Bernstein & Cristina Rodríguez, *Working with Statutes*, 103 TEX. L. REV. 921, 921, 974 (2025).

162. *Id.* at 975.

163. Timothy G. Duncheon, *Litigation Risk as a Justification for Agency Action*, 95 N.Y.U. L. REV. 193, 216 (2020); *see also* Tyler & Elliott, *supra* note 17, at 2319 ("[A]gency general counsel staffs were often reluctant to imply that there was even a possibility that portions of their rule might be set aside.").

164. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 351 (2019).

165. *Compare* Exec. Order No. 13,771, 90 Fed. Reg. 9339, 9339 (Jan. 30, 2017) (requiring any agency proposing a new rule to "identify at least two existing regulations to be repealed"), *with* Exec. Order 14,192, 90 Fed. Reg. 9065, 9065 (Feb. 6, 2025) (requiring ten identified repeals with each proposal).

166. *See* Lawrence Hurley, *This Obscure Law Is One Reason Trump's Agenda Keeps Losing in Court*, NBC NEWS (Feb. 12, 2025, 5:00 AM ET), https://www.nbcnews.com/politics/donald-trump/trump-losing-court-boring-reason-adminitrative-procedure-act-rcna191113 [https://perma.cc/JN7U-F2F7].

as continuing a trend of "'harder' look review" that began in Trump's first term, with Supreme Court decisions blocking the administration's efforts to "insert a question on citizenship into the 2020 decennial census" and "unwind the . . . Deferred Action for Childhood Arrivals . . . immigration relief program."[167]

It's true that *Ohio*, in theory, poses the same analytic impediment to efforts to repeal regulatory protections as it does to efforts to strengthen such protections.[168] But as Bagley explains, even when procedural obligations are not exclusively one-way ratchets, they "[o]n net and over time" favor the interests of those who seek to weaken or dismantle the administrative state over those who wish to buttress or expand it.[169] Among other reasons for this asymmetry, a deregulatory administration often has more room to skirt procedural constraints by pursuing its goals through initiatives other than rulemaking, such as widespread nonenforcement.[170] Thus, just as opponents of progressive regulation reap more benefits from traditional forms of forum shopping,[171] they will also have an advantage in the sort of multiversal forum shopping made possible by *Ohio*.

Litigants who ultimately want a federal government with the flexibility to address "thorny" problems like cross-state air pollution should think twice before embracing *Ohio* maximalism.[172] The short-term benefits likely are not worth the long-term costs.

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167. Christopher J. Walker, *Congress and the Shifting Sands in Administrative Law*, 34 WIDENER COMMONWEALTH L. REV. 187, 193-96 (2024).

168. To see why, consider this variation on a hypothetical from the Introduction: Say an agency proposes to repeal a multiprovision rule and relies on a finding that the repeal's benefits justify its costs. If commenters raise the threat of lawsuits, must the agency discuss whether its cost-benefit conclusion holds for all possible subsets of the repealed rule's provisions?

169. Bagley, *supra* note 164, at 364.

170. *Id.* at 365-66. Even when using rulemaking to achieve its policy aims, the Trump Administration has sought to evade standard procedural constraints. A recent presidential memorandum, for instance, argues that repeals of "facially unlawful regulations" can be finalized without notice and comment under the Administrative Procedure Act's "good cause" exception. *Directing the Repeal of Unlawful Regulations*, WHITE HOUSE (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations [https://perma.cc/6SMM-NWR3].

171. Alice Clapman, *Judge Shopping, Explained*, BRENNAN CTR. FOR JUST. (Feb. 27, 2025), https://www.brennancenter.org/our-work/research-reports/judge-shopping-explained [https://perma.cc/LSF3-8YRY] (arguing that litigants' ability to file in single-judge divisions of district courts "push[es] the law rightward, both because single-judge divisions are more common in rural and conservative areas and because the most conservative districts have resisted calls to randomize across divisions").

172. EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 514 (2014).

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