(Slip Opinion)

OCTOBER TERM, 2023

Syllabus

1

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is

being done in connection with this case, at the time the opinion is issued.

The syllabus constitutes no part of the opinion of the Court but has been

prepared by the Reporter of Decisions for the convenience of the reader.

See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

OHIO ET AL v. ENVIRONMENTAL PROTECTION

AGENCY ET AL

ON APPLICATIONS FOR STAY

No. 23A349. Argued February 21, 2024—Decided June 27, 2024\*

The Clean Air Act envisions a collaborative effort between States and the

federal government to regulate air quality. When the Environmental

Protection Agency sets standards for common air pollutants, States

must submit a State Implementation Plan, or SIP, providing for the

“implementation, maintenance, and enforcement” of those standards

in their jurisdictions. See 42 U. S. C. §7410(a)(1). Because air currents

can carry pollution across state borders, States must also design their

plans with neighboring States in mind. Under the Act’s “Good Neigh-

bor Provision,” state plans must prohibit emissions “in amounts which

will . . . contribute significantly to nonattainment in, or interfere with

maintenance by, any other State” of the relevant air-quality standard.

§7410(a)(2)(D)(i)(I). Only if a SIP fails to satisfy the “applicable re-

quirements” of the Act may EPA issue a Federal Implementation Plan,

or FIP, for the noncompliant State that fails to correct the deficiencies

in its SIP. §§7410(k)(3), (c)(1).

In 2015, EPA revised its air-quality standards for ozone, thus trig-

gering a requirement for States to submit new SIPs. Years later, EPA

announced its intention to disapprove over 20 SIPs because the agency

believed they had failed to address adequately obligations under the

Good Neighbor Provision. During the public-comment period for the

proposed SIP disapprovals, EPA issued a single proposed FIP to bind

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\*Together with No. 23A350, Kinder Morgan, Inc., et al. v. Environ-

mental Protection Agency et al.; No. 23A351, American Forest & Paper

Assn. et al. v. Environmental Protection Agency, No. 23A384, United

States Steel Corp. v. Environmental Protection Agency et al., also on ap-

plications for stay.

2

OHIO v. EPA

Syllabus

all those States. EPA designed its proposed FIP based on which emis-

sions-control measures would maximize cost-effectiveness in improv-

ing ozone levels downwind and on the assumption the FIP would apply

to all covered States. Commenters warned that the proposed SIP dis-

approvals were flawed and that a failure to achieve all the SIP disap-

provals as EPA envisioned would mean that EPA would need to reas-

sess the measures necessary to maximize cost-effective ozone-level

improvements in light of a different set of States. EPA proceeded to

issue its final FIP without addressing this concern. Instead, EPA an-

nounced that its plan was severable: Should any jurisdiction drop out,

the plan would continue to apply unchanged to the remaining jurisdic-

tions. Ongoing litigation over the SIP disapprovals soon vindicated at

least some of the commenters’ concerns. Courts stayed 12 of the SIP

disapprovals, which meant EPA could not apply its FIP to those States.

A number of the remaining States and industry groups challenged

the FIP in the D. C. Circuit. They argued that EPA’s decision to apply

the FIP after so many other States had dropped out was “arbitrary” or

“capricious,” and they asked the court to stay any effort to enforce the

FIP against them while their appeal unfolded. The D. C. Circuit de-

nied relief, and the parties renewed their request in this Court.

Held: The applications for a stay are granted; enforcement of EPA’s rule

against the applicants shall be stayed pending the disposition of the

applicants’ petition for review in the D. C. Circuit and any petition for

writ of certiorari, timely sought. Pp. 9–20.

(a) When deciding an application for a stay, the Court asks (1)

whether the applicant is likely to succeed on the merits, (2) whether it

will suffer irreparable injury without a stay, (3) whether the stay will

substantially injure the other parties interested in the proceedings,

and (4) where the public interest lies. Nken v. Holder, 556 U. S. 418,

434. When States and other parties seek to stay the enforcement of a

federal regulation against them, often “the harms and equities [will

be] very weighty on both sides.” Labrador v. Poe, 601 U. S. \_\_\_, \_\_\_

(KAVANAUGH, J., concurring in grant of stay). Because that is true

here, resolution of applicants’ stay request ultimately turns on the first

question: Who is likely to prevail at the end. See Nken, 556 U. S., at

434. Pp. 9–11.

(b) Applicants are likely to prevail on their arbitrary-or-capricious

claim. An agency action qualifies as “arbitrary” or “capricious” if it is

not “reasonable and reasonably explained.” FCC v. Prometheus Radio

Project, 592 U. S. 414, 423. Thus, the agency must offer “a satisfactory

explanation for its action[,] including a rational connection between

the facts found and the choice made” and cannot simply ignore “an im-

portant aspect of the problem.” Motor Vehicle Mfrs. Assn. of United

States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U. S. 29, 43.

Cite as: 603 U. S. \_\_\_\_ (2024)

Syllabus

3

EPA’s plan rested on an assumption that all the upwind States would

adopt emissions-reduction measures up to a uniform level of costs to

the point of diminishing returns. Commenters posed their concerns

that if upwind States fell out of the planned FIP, the point at which

emissions-control measures maximize cost-effective downwind air-

quality improvements might shift. To this question, EPA offered no

reasoned response. As a result, the applicants are likely to prevail on

their argument that EPA’s final rule was not “reasonably explained,”

Prometheus Radio Project, 592 U. S., at 423, and that it instead ig-

nored “an important aspect of the problem” before it, State Farm Mut.

Automobile Ins. Co., 463 U. S., at 43. Pp. 11–13.

(c) EPA’s alternative arguments are unavailing. First, EPA argues

that adding a “severability” provision to its final rule—i.e., providing

the FIP would “continue to be implemented” without regard to the

number of States remaining—responded to commenters’ concerns.

But EPA’s response did not address those concerns so much as it side-

stepped them. Nothing in the final rule’s severability provision actu-

ally addressed whether and how measures found to maximize cost-ef-

fectiveness in achieving downwind ozone air-quality improvements

with the participation of all the upwind States remain so when many

fewer States might be subject to the agency’s plan. Second, EPA in-

sists that no one raised that concern during the public comment period.

The Act’s “reasonable specificity” requirement, however, does not

mean a party must rehearse the identical argument made before the

agency. Here, EPA had notice of the objection, and its own statements

and actions confirm the agency appreciated the concern. Third, EPA

argues that applicants must return to EPA and file a motion asking it

to reconsider its final rule before presenting their objection in court

because the “grounds for [their] objection arose after the period for

public comment.” §7607(d)(7)(B). Nothing requires the applicants to

return to EPA to raise (again) a concern EPA already had a chance to

address. Pp. 13–17.

Applications for stay granted.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS,

C. J., and THOMAS, ALITO, and KAVANAUGH, JJ., joined. BARRETT, J., filed

a dissenting opinion, in which SOTOMAYOR, KAGAN, and JACKSON, JJ.,

joined.

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

1

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United States Reports. Readers are requested to notify the Reporter of

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SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Nos. 23A349, 23A350, 23A351 and 23A384

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

OHIO, ET AL.

23A349

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

KINDER MORGAN, INC., ET AL.

23A350

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN FOREST & PAPER ASSOCIATION, ET AL.

23A351

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UNITED STATES STEEL CORPORATION

23A384

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON APPLICATIONS FOR STAY

[June 27, 2024]

JUSTICE GORSUCH delivered the opinion of the Court.

The Clean Air Act envisions States and the federal gov-

ernment working together to improve air quality. Under

that law’s terms, States bear “primary responsibility” for

developing plans to achieve air-quality goals. 42 U. S. C.

§7401(a)(3). Should a State fail to prepare a legally compli-

ant plan, however, the federal government may sometimes

step in and assume that authority for itself. §7410(c)(1).

2

OHIO v. EPA

Opinion of the Court

Here, the federal government announced its intention to re-

ject over 20 States’ plans for controlling ozone pollution. In

their place, the government sought to impose a single, uni-

form federal plan. This litigation concerns whether, in

adopting that plan, the federal government complied with

the terms of the Act.

I

A

“The Clean Air Act regulates air quality through a

federal-state collaboration.” EME Homer City Generation,

L.P. v. EPA, 795 F. 3d 118, 124 (CADC 2015). Periodically,

the Environmental Protection Agency (EPA) sets standards

for common air pollutants, as necessary to “protect the pub-

lic health.” §§7409(a)(1), (b)(1). Once EPA sets a new

standard, the clock starts ticking: States have three years

to design and submit a plan—called a State Implementa-

tion Plan, or SIP—providing for the “implementation,

maintenance, and enforcement” of that standard in their ju-

risdictions. §7410(a)(1); see EPA v. EME Homer City Gen-

eration, L. P., 572 U. S. 489, 498 (2014). Under the Act,

States decide how to measure ambient air quality.

§7410(a)(2)(B). States pick “emission limitations and other

control measures.” §7410(a)(2)(A). And States provide for

the enforcement of their prescribed measures.

§7410(a)(2)(C).

At the same time, States must design these plans with

their neighbors in mind. Because air currents can carry

pollution across state borders, emissions in upwind States

sometimes affect air quality in downwind States. See EME

Homer, 572 U. S., at 496. To address that externality prob-

lem, under the Act’s “Good Neighbor Provision,” state plans

must prohibit emissions “in amounts which will . . . contrib-

ute significantly to nonattainment in, or interfere with

maintenance by, any other State” of the relevant air-quality

standard. §7410(a)(2)(D)(i)(I).

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

3

Because the States bear “primary responsibility” for de-

veloping compliance plans, §7401(a)(3), EPA has “no au-

thority to question the wisdom of a State’s choices of emis-

sion limitations.” Train v. Natural Resources Defense

Council, Inc., 421 U. S. 60, 79 (1975). So long as a SIP sat-

isfies the “applicable requirements” of the Act, including

the Good Neighbor Provision, EPA “shall approve” it within

18 months of its submission.

§7410(k)(3); see

§§7410(k)(1)(B), (k)(2). If, however, a SIP falls short, EPA

“shall” issue a Federal Implementation Plan, or FIP, for the

noncompliant State—that is, “unless” the State corrects the

deficiencies in its SIP first. §7410(c)(1); EME Homer, 572

U. S., at 498. EPA must also ensure States meet the new

air-quality standard by a statutory deadline. See §7511.

B

A layer of ozone in the atmosphere shields the world from

the sun’s radiation. See National Resources Defense Coun-

cil v. EPA, 464 F. 3d 1, 3 (CADC 2006). But closer to earth,

ozone can hurt more than it helps. Forming when sunlight

interacts with a wide range of precursor pollutants, ground-

level ozone can trigger and exacerbate health problems and

damage vegetation. 80 Fed. Reg. 65299, 65302, 65370

(2015).

To mitigate those and other problems, in 2015 EPA re-

vised its air-quality standards for ozone from 75 to 70 parts

per billion. Id., at 65293–65294. That change triggered a

requirement for States to submit new SIPs. Id., at 65437.

Along the way, EPA issued a guidance document advising

States that they had “flexibility” in choosing how to address

their Good Neighbor obligations. See EPA, Memorandum,

Information on the Interstate Transport State Implemen-

tation Plan Submissions for the 2015 Ozone National Am-

bient Air Quality Standards 3 (Mar. 27, 2018). With that

and other guidance in hand, many (though not all) States

submitted SIPs. See 84 Fed. Reg. 66612 (2019). And many

4

OHIO v. EPA

Opinion of the Court

of the States that did submit SIPs said that they need not

adopt emissions-control measures to comply with the Good

Neighbor Provision because, among other things, they were

not linked to downwind air-quality problems or they could

identify no additional cost-effective methods of controlling

the emissions beyond those they were currently employing.

See, e.g., 87 Fed. Reg. 9798, 9810 (2022); 87 Fed. Reg. 9545,

9552 (2022); see generally 88 Fed. Reg. 9336, 9354–9361

(2023).

For over two years, EPA did not act on the SIPs it re-

ceived. See, e.g., 87 Fed. Reg. 9838, 9845–9851 (2022).

Then, in February 2022, the agency announced its intention

to disapprove 19 of them on the ground that the States sub-

mitting them had failed to address adequately their obliga-

tions under the Good Neighbor Provision.1 A few months

later, the agency proposed disapproving four more SIPs.2

Pursuant to the Act, the agency issued its proposed SIP dis-

approvals for public comment before finalizing them. See

§7607(d)(3).

C

During that public comment period, the agency proposed

a single FIP to bind all 23 States.3 87 Fed. Reg. 20036,

20038 (2022). Rather than continue to encourage “‘flexi-

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1 See 87 Fed. Reg. 9463 (2022) (Maryland); 87 Fed. Reg. 9484 (2022)

(New York, New Jersey); 87 Fed. Reg. 9498 (2022) (Kentucky); 87 Fed.

Reg. 9516 (2022) (West Virginia); 87 Fed. Reg. 9533 (2022) (Missouri); 87

Fed. Reg. 9545 (2022) (Alabama, Mississippi, Tennessee); 87 Fed. Reg.

9838 (2022) (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin); 87

Fed. Reg. 9878 (2022) (Arkansas, Louisiana, Oklahoma, Texas).

2 See 87 Fed. Reg. 31443 (California); 87 Fed. Reg. 31470 (2022) (Utah);

87 Fed. Reg. 31485 (2022) (Nevada); 87 Fed. Reg. 31495 (2022) (Wyo-

ming).

3 EPA also added three more States: Pennsylvania and Virginia, which

had not submitted SIPs, and Delaware, whose SIP, EPA said, it had ap-

proved in “error.” 87 Fed. Reg. 20036, 20038 (2022).

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

5

bilit[y]’” and different state approaches, EPA now appar-

ently took the view that “[e]ffective policy solutions to the

problem of interstate ozone transport” demanded that kind

of “uniform framework” and “[n]ationwide consistency.” 87

Fed. Reg. 9841; see 87 Fed. Reg. 20073. The FIP the agency

proposed set as its target the reduction of the emissions of

one ozone precursor in particular: nitrous oxide. See id., at

20038. And it sought to impose nitrous oxide emissions-

control measures that “maximized cost-effectiveness” in

achieving “downwind ozone air quality improvements.” Id.,

at 20055; see also id., at 20043.

In broad strokes, here is how EPA’s proposed rule worked

to eliminate a State’s “significant contribution” to down-

wind ozone problems. First, the agency identified various

emissions-control measures and, using nationwide data,

calculated how much each typically costs to reduce a ton of

nitrous-oxide emissions. Id., at 20076; see, e.g., id., at

20077–20081. Next, the agency sought to predict how much

each upwind State’s nitrous-oxide emissions would fall if

emissions-producing facilities in the State adopted each

measure. Id., at 20076; see, e.g., id., at 20088–20089; EPA,

Ozone Transport Policy Analysis Proposed Rule TSD 22–23

(EPA–HQ–OAR–2021–0668, 2022) (Proposed Ozone Analy-

sis). In making those predictions, EPA often considered

data specific to the emissions-producing facilities in the

State, and fed “unit-level and state-level” values into its cal-

culations. See id., at 9–10, 13. Then, the agency estimated

how much, on average, ozone levels would fall in downwind

States with the adoption of each measure. 87 Fed. Reg.

20076; see, e.g., id., at 20092–20093, 20096–20097; Pro-

posed Ozone Analysis 51–52. In making those estimations,

too, EPA calibrated its modeling to each State’s features,

“determin[ing] the relationship between changes in emis-

sions and changes in ozone contributions on a state-by-state

. . . basis.” Id., at 33; see also id., at 40, 42.

To pick which measures would “maximiz[e] cost-

6

OHIO v. EPA

Opinion of the Court

effectiveness” in achieving “downwind ozone air quality im-

provements,” 87 Fed. Reg. 20055, EPA focused on what it

called the “ ‘knee in the curve,’” or the point at which more

expenditures in the upwind States were likely to produce

“very little” in the way of “additional emissions reductions

and air quality improvement” downwind, id., at 20095 (hy-

phenation omitted). EPA used this point to select a “uni-

form level” of cost, and so a uniform package of emissions-

reduction tools, for upwind States to adopt. Id., at 20076.

And EPA performed this analysis on two “parallel tracks”—

one for power plants, one for other industries. Ibid. Pursu-

ant to the Clean Air Act, §§7607(d)(1)(B), (d)(3)–(6), the

agency published its proposed FIP for notice and comment

in April 2022, 87 Fed. Reg. 20036.

Immediately, commenters warned of a potential pitfall in

the agency’s approach.

EPA had determined which

emissions-control measures were cost effective at address-

ing downwind ozone levels based on an assumption that the

FIP would apply to all covered States. But what happens if

some or many of those States are not covered? As the com-

menters portrayed the SIPs, this was not an entirely spec-

ulative possibility. Many believed EPA’s disapprovals of

the SIPs were legally flawed. See, e.g., Comments of Mis-

souri Dept. of Natural Resources 3 (June 17, 2022) (refer-

encing “all the technical, legal, and procedural issues” with

the proposed SIP disapproval); see also, e.g., Comments of

Louisiana Dept. of Environmental Quality 1–3 (June 21,

2022); Comments of Texas Comm’n on Environmental

Quality 2–4 (June 21, 2022); EPA, Response to Public Com-

ments on Proposed Rule 9–11 (EPA–HQ–OAR–2021–0668).

They added that EPA’s FIP was “inextricably linked” to the

SIP disapprovals. E.g., Comments of Missouri Dept. of Nat-

ural Resources, at 4. Without a SIP disapproval or missing

SIP, after all, EPA could not include a State in its FIP. See,

e.g., id., at 3; supra, at 3.

Commenters added that failing to include a State could

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

7

have consequences for the proposed FIP. If the FIP did not

wind up applying to all 23 States as EPA envisioned, com-

menters argued, the agency would need “to conduct a new

assessment and modeling of contribution and subject those

findings to public comment.” E.g., Comments of Air Stew-

ardship Coalition 13–14 (June 21, 2022); Comments of Port-

land Cement Association 7 (June 21, 2022). Why? As noted

above, EPA assessed “significant contribution” by deter-

mining what measures in upwind States would maximize

cost-effective ozone-level improvements in the States down-

wind of them. Supra, at 5–6. And a different set of States

might mean that the “knee in the curve” would shift. After

all, each State differs in its mix of industries, in its pre-

existing emissions-control measures, and in the impact

those measures may have on emissions and downwind air

quality. See 87 Fed. Reg. 20052, 20060, 20071–20073; EPA,

Technical Memorandum, Screening Assessment of Poten-

tial Emissions Reductions, Air Quality Impacts, and Costs

from Non-EGU Emissions Units for 2026, pp. 12–13

(2022).4

As it happened, ongoing litigation over the SIP disap-

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4 Commenters pointed out the variance among emissions-producing fa-

cilities too. See, e.g., Comments of Indiana Municipal Power Agency 9

(June 20, 2022) (the “cost effectiveness” of one tool “will be highly varia-

ble” across different power plants); Comments of Lower Colorado River

Authority 21 (June 21, 2022) (power plants that “have already invested”

in one emissions-control tool “have already undertaken significant costs

to achieve [nitrous oxide] reductions and have less to gain from addi-

tional control installation”); Comments of Air Stewardship Coalition 27

(June 21, 2022) (noting that the knee in the curve appeared to be at a

different cost depending on which mix of industries were considered);

Comments of Wisconsin Paper Council 2 (June 21, 2022) (the air-quality

benefits from controlling one industry—pulp and paper mills—had a

“maximum estimated improvement” in ozone levels in downwind States

of just 0.0117 parts per billion).

8

OHIO v. EPA

Opinion of the Court

provals soon seemed to vindicate at least some of the com-

menters’ concerns. Two circuits issued stays of EPA’s SIP

denials for four States. See Order in No. 23–60069 (CA5,

May 1, 2023) (Texas and Louisiana); Order in No. 23–1320

(CA8, May 25, 2023) (Arkansas); Order in No. 23–1719

(CA8, May 26, 2023) (Missouri).

Despite those comments and developments, the agency

proceeded to issue its final FIP. 88 Fed. Reg. 36654 (2023).5

In response to the problem commenters raised, EPA

adopted a severability provision stating that, should any ju-

risdiction drop out, its rule would “continue to be imple-

mented as to any remaining jurisdictions.” Id., at 36693.

But in doing so, EPA did not address whether or why the

same emissions-control measures it mandated would con-

tinue to further the FIP’s stated purpose of maximizing

cost-effective air-quality improvement if fewer States re-

mained in the plan.

D

After EPA issued its final FIP, litigation over the agency’s

SIP disapprovals continued. One court after another issued

one stay after another.6 Each new stay meant another

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5 The final FIP covered 23 States. 88 Fed. Reg. 36654, 36656 (2023).

That plan included Pennsylvania and Virginia, but EPA declined to cover

Tennessee or Wyoming at the time, even though it had announced its

intention to disapprove those States’ SIPs. Ibid.; see also supra, at 4,

and nn. 1–2. EPA has since proposed a plan for Tennessee and several

other States. 89 Fed. Reg. 12666 (2024).

6 See, e.g., Order in No. 23–60069 (CA5, June 8, 2023) (Mississippi);

Order in No. 23–682 (CA9, July 3, 2023) (Nevada); Order in

No. 23–1776 (CA8, July 5, 2023) (Minnesota); Order in No. 23–3216

(CA6, July 25, 2023) (Kentucky); Order in No. 23–9520 etc. (CA10, July

27, 2023) (Utah and Oklahoma); Order in No. 23–11173 (CA11, Aug. 17,

2023) (Alabama); see also Order in No. 23–1418 (CA4, Aug. 10, 2023)

(West Virginia, pending oral argument on preliminary motions to stay

and to transfer); Order in No. 23–1418 (CA4, Jan. 10, 2024) (West Vir-

ginia, after oral argument and pending merits review of petition).

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

9

State to which EPA could not apply its FIP. See §7410(c)(1).

Ultimately, EPA recognized that it could not apply its FIP

to 12 of the 23 original States.7 Together, these 12 States

accounted for over 70 percent of the emissions EPA had

planned to address through its FIP. See Application for

Ohio et al. in No. 23A349, p. 1 (States’ Application); see also

88 Fed. Reg. 36738–36739.8

A number of the remaining States and industry groups

challenged the remnants of the FIP in the D. C. Circuit.

They pointed to the Act’s provisions authorizing a court to

“reverse any . . . action” taken in connection with a FIP that

is “arbitrary” or “capricious.” §7607(d)(9)(A). And they ar-

gued that EPA’s decision to apply the FIP to them even af-

ter so many other States had dropped out met that stand-

ard. As part of their challenge, they asked that court to stay

any effort to enforce the FIP against them while their ap-

peal unfolded. After that court denied relief, the applicants

renewed their request here. The Court has received and

reviewed over 400 pages of briefing and a voluminous rec-

ord, held over an hour of oral argument on the applications,

and engaged in months of postargument deliberations as

we often do for the cases we hear.

II

A

Stay applications are nothing new. They seek a form of

interim relief perhaps “as old as the judicial system of the

nation.” Scripps-Howard Radio, Inc. v. FCC, 316 U. S. 4,

17 (1942). Like any other federal court faced with a stay

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7 See 88 Fed. Reg. 49295 (2023) (Arkansas, Kentucky, Louisiana, Mis-

sissippi, Missouri, and Texas); 88 Fed. Reg. 67102 (2023) (Alabama, Min-

nesota, Nevada, Oklahoma, Utah, and West Virginia). EPA has since

proposed settling the litigation over the Nevada SIP disapproval. 89 Fed.

Reg. 35091 (2024).

8 Of course, this could change again as litigation over the SIP denials

progresses past preliminary stay litigation and toward final decisions on

the merits.

10

OHIO v. EPA

Opinion of the Court

request, we must provide the applicants with an answer—

“grant or deny.” Labrador v. Poe, 601 U. S. \_\_\_, \_\_\_ (2024)

(KAVANAUGH, J., concurring in grant of stay) (slip op., at 2).

In deciding whether to issue a stay, we apply the same

“sound . . . principles” as other federal courts. Nken v.

Holder, 556 U. S. 418, 434 (2009) (internal quotation marks

omitted). Specifically, in this litigation, we ask (1) whether

the applicant is likely to succeed on the merits, (2) whether

it will suffer irreparable injury without a stay, (3) whether

the stay will substantially injure the other parties inter-

ested in the proceedings, and (4) where the public interest

lies. Ibid.; States’ Application 13; Response in Opposition

for Respondent EPA in No. 23A349 etc., p. 16 (EPA Re-

sponse).9

When States and other parties seek to stay the enforce-

ment of a federal regulation against them, often “the harms

and equities [will be] very weighty on both sides.” Labra-

dor, 601 U. S., at \_\_\_ (opinion of KAVANAUGH, J.) (slip op.,

at 3). That is certainly the case here, for both sides have

strong arguments with respect to the latter three Nken fac-

tors. On one side of the ledger, the federal government

points to the air-quality benefits its FIP offers downwind

States. EPA Response 48–50. On the other side, the States

observe that a FIP issued unlawfully (as they contend this

one was) necessarily impairs their sovereign interests in

regulating their own industries and citizens—interests the

Act expressly recognizes. See Part I–A, supra; States’ Ap-

plication 24–26; Maryland v. King, 567 U. S. 1301, 1303

(2012) (ROBERTS, C. J., in chambers). The States observe,

too, that having to comply with the FIP during the pen-

dency of this litigation risks placing them at a “competitive

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9 Approaching the applications before us like any other stay request

both accords with the Clean Air Act’s text, see 42 U. S. C. §7607(d), and

usual practice in this field, see, e.g., Texas v. EPA, 829 F. 3d 405, 424

(CA5 2016); West Virginia v. EPA, 90 F. 4th 323, 331 (CA4 2024); In re

Murray Energy Corp., 788 F. 3d 330, 335 (CADC 2015).

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

11

disadvantage” to their exempt peers. States’ Application

21. The States and the private applicants also stress that

complying with the FIP during the pendency of this litiga-

tion would require them to incur “hundreds of millions[,] if

not billions of dollars.” Tr. of Oral Arg. 96. Those costs, the

applicants note, are “nonrecoverable.” Thunder Basin Coal

Co. v. Reich, 510 U. S. 200, 220–221 (1994) (Scalia, J., con-

curring in part and concurring in judgment); see, e.g.,

States’ Application 24; Application for American Forest &

Paper Association et al. 25; see also Alabama Assn. of Real-

tors v. Department of Health and Human Servs., 594 U. S.

758, 765 (2021) (per curiam).

Because each side has strong arguments about the harms

they face and equities involved, our resolution of these stay

requests ultimately turns on the merits and the question

who is likely to prevail at the end of this litigation. See

Nken, 556 U. S., at 434; Labrador, 601 U. S., at \_\_\_ (opinion

of KAVANAUGH, J.) (slip op., at 4).

B

When it comes to that question, the parties agree on the

rules that guide our analysis. The applicants argue that a

court is likely to hold EPA’s final FIP “arbitrary” or “capri-

cious” within the meaning of the Act and thus enjoin its en-

forcement against them. 42 U. S. C. §7607(d)(9)(A); see,

e.g., States’ Application 15–16; Application for American

Forest & Paper Association et al. 14; see also 5 U. S. C.

§706(2)(A). An agency action qualifies as “arbitrary” or “ca-

pricious” if it is not “reasonable and reasonably explained.”

FCC v. Prometheus Radio Project, 592 U. S. 414, 423 (2021).

In reviewing an agency’s action under that standard, a

court may not “‘substitute its judgment for that of the

agency.’” FCC v. Fox Television Stations, Inc., 556 U. S.

502, 513 (2009). But it must ensure, among other things,

that the agency has offered “a satisfactory explanation for

its action[,] including a rational connection between the

12

OHIO v. EPA

Opinion of the Court

facts found and the choice made.” Motor Vehicle Mfrs. Assn.

of United States, Inc. v. State Farm Mut. Automobile Ins.

Co., 463 U. S. 29, 43 (1983) (internal quotation marks omit-

ted). Accordingly, an agency cannot simply ignore “an im-

portant aspect of the problem.” Ibid.

We agree with the applicants that EPA’s final FIP likely

runs afoul of these long-settled standards. The problem

stems from the way EPA chose to determine which emis-

sions “contribute[d] significantly” to downwind States’ dif-

ficulty meeting national ozone standards. 42 U. S. C.

§7410(a)(2)(D)(i)(I). Recall that EPA’s plan rested on an as-

sumption that all 23 upwind States would adopt emissions-

reduction tools up to a “uniform” level of “costs” to the point

of diminishing returns. 87 Fed. Reg. 20076, 20095; 88 Fed.

Reg. 36661, 36683–36684, 36719; see Part I–C, supra. But

as the applicants ask: What happens—as in fact did hap-

pen—when many of the upwind States fall out of the

planned FIP and it may now cover only a fraction of the

States and emissions EPA anticipated? See, e.g., States’

Application 16–21; Application for American Forest & Pa-

per Association et al. 14–15, 19–20. Does that affect the

“knee in the curve,” or the point at which the remaining

States might still “maximiz[e] cost-effectiv[e]” downwind

ozone-level improvements? 87 Fed. Reg. 20055. As “the

mix of states changes, . . . and their particular technologies

and industries drop out with them,” might the point at

which emissions-control measures maximize cost-effective

downwind air-quality improvements also shift? Tr. of Oral

Arg. 6.

Although commenters posed this concern to EPA during

the notice and comment period, see Part I–C, supra, EPA

offered no reasoned response. Indeed, at argument the gov-

ernment acknowledged that it could not represent with cer-

tainty whether the cost-effectiveness analysis it performed

collectively for 23 States would yield the same results and

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

13

command the same emissions-control measures if con-

ducted for, say, just one State. Tr. of Oral Arg. 58–59. Per-

haps there is some explanation why the number and iden-

tity of participating States does not affect what measures

maximize cost-effective downwind air-quality improve-

ments. But if there is an explanation, it does not appear in

the final rule. As a result, the applicants are likely to pre-

vail on their argument that EPA’s final rule was not “rea-

sonably explained,” Prometheus Radio Project, 592 U. S., at

423, that the agency failed to supply “a satisfactory expla-

nation for its action[,]” State Farm Mut. Automobile Ins.

Co., 463 U. S., at 43, and that it instead ignored “an im-

portant aspect of the problem” before it, ibid. The appli-

cants are therefore likely to be entitled to “revers[al]” of the

FIP’s mandates on them. §7607(d)(9).10

III

A

Resisting this conclusion, EPA advances three alterna-

tive arguments.

First, the government insists, the agency did offer a rea-

soned response to the applicants’ concern, just not the one

they hoped. When finalizing its rule in response to public

comments, the government represents, “the agency did con-

sider whether the [FIP] could cogently be applied to a sub-

set of the 23 covered States.” EPA Response 27; see also

post, at 17–18 (BARRETT, J., dissenting). And that consid-

eration, the government stresses, led EPA to add a “sever-

ability” provision to its final rule in which the agency an-

nounced that the FIP would “‘continue to be implemented’”

without regard to the number of States remaining, even if

just one State remained subject to its terms. EPA Response

——————

10 Various applicants offer various other reasons why they believe they

are likely to succeed in challenging EPA’s FIP. Having found that they

are likely to succeed on the basis discussed above, however, we have no

occasion to address those other arguments.

14

OHIO v. EPA

Opinion of the Court

27 (quoting 88 Fed. Reg. 36693). In support of its severa-

bility provision, EPA cited, among other things, its intent

to address “‘important public health and environmental

benefits” and encourage reliance by others “on th[e] final

rule in their planning.’” Ibid.

None of this, however, solves the agency’s problem. True,

the severability provision highlights that EPA was aware

of the applicants’ concern. But awareness is not itself an

explanation. The severability provision highlights, too, the

agency’s desire to apply its rule expeditiously and “ ‘to the

greatest extent possible,’” no matter how many States it

could cover. Ibid. But none of that, nor anything else EPA

said in support of its severability provision, addresses

whether and how measures found to maximize cost effec-

tiveness in achieving downwind ozone air-quality improve-

ments with the participation of 23 States remain so when

many fewer States, responsible for a much smaller amount

of the originally targeted emissions, might be subject to the

agency’s plan. Put simply, EPA’s response did not address

the applicants’ concern so much as sidestep it.11

——————

11 As the applicants conceded at oral argument, see Tr. of Oral Arg. 25–

26, EPA did not need to address every possible permutation when it

sought to adopt a multi-State FIP. Our conclusion is narrower: When

faced with comments like the ones it received, EPA needed to explain

why it believed its rule would continue to offer cost-effective improve-

ments in downwind air quality with only a subset of the States it origi-

nally intended to cover. To be sure, after this Court heard argument,

EPA issued a document in which it sought to provide further explana-

tions for the course it pursued. See 89 Fed. Reg. 23526 (2024). But the

government has not suggested that we should consult this analysis in

assessing the validity of the final rule. See Letter from E. Prelogar, So-

licitor General, to S. Harris, Clerk of Court 1 (Mar. 28, 2024). Nor could

it, since the Clean Air Act prevents us (and courts that may in the future

assess the FIP’s merits) from consulting explanations and information

offered after the rule’s promulgation. See 42 U. S. C. §§7607(d)(6)(C)

(“The promulgated rule may not be based (in part or whole) on any infor-

mation or data which has not been placed in the docket as of the date of

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

15

Second, the government pivots in nearly the opposite di-

rection. Now, it says, if its final rule lacks a reasoned re-

sponse to the applicants’ concern, it is because no one raised

that concern during the public comment period. And, the

agency stresses, a litigant may pursue in court only claims

premised on objections first “‘raised with reasonable speci-

ficity’” before the agency during the public comment period.

Id., at 19–20 (quoting §7607(d)(7)(B)); see also post, at 8–

11.

We cannot agree. The Act’s “reasonable specificity” re-

quirement does not call for “a hair-splitting approach.” Ap-

palachian Power Co. v. EPA, 135 F. 3d 791, 817 (CADC

1998). A party need not “rehears[e]” the identical argument

made before the agency; it need only confirm that the gov-

ernment had “notice of [the] challenge” during the public

comment period and a chance to consider “in substance, if

not in form, the same objection now raised” in court. Id., at

818; see also, e.g., Bahr v. Regan, 6 F. 4th 1059, 1070 (CA9

2021).

Here, EPA had notice of the objection the applicants seek

to press in court. Commenters alerted the agency that,

should some States no longer participate in the plan, the

agency would need to return to the drawing board and “con-

duct a new assessment and modeling of contribution” to de-

termine what emissions-control measures maximized cost

effectiveness in securing downwind ozone air-quality im-

provements. Comments of Air Stewardship Coalition, at

13–14; see also Part I–C, supra (noting examples of other

——————

such promulgation”), 7607(d)(7)(A) (restricting the “record for judicial re-

view”). We therefore look to only “the grounds that the agency invoked

when it” promulgated the FIP. Michigan v. EPA, 576 U. S. 743, 758

(2015). Should the applicants show the FIP was arbitrary or capricious

on the existing record, as we have concluded is likely, the Clean Air Act

entitles them to “revers[al]” of that rule’s mandates on them.

§7607(d)(9)(A).

16

OHIO v. EPA

Opinion of the Court

comments). And, as we have just seen, EPA’s own state-

ments and actions confirm the agency appreciated that con-

cern. In preparing the final rule in response to public com-

ments, the agency emphatically insists, it “did consider

whether the [r]ule could cogently be applied to a subset of

the 23 covered States.” EPA Response 27. And as a result

of that consideration, the agency observes, it opted to add a

severability provision to its final rule. Ibid. By its own

words and actions, then, the agency demonstrated that it

was on notice of the applicants’ concern. Yet, as we have

seen, it failed to address the concern adequately.12

Third, the government pursues one more argument in the

alternative. As the agency sees it, the applicants must re-

turn to EPA and file a motion asking it to reconsider its fi-

nal rule before presenting their objection in court. They

must, the agency says, because the “grounds for [their] ob-

jection arose after the period for public comment.”

§7607(d)(7)(B); see EPA Response 20–21. As just discussed,

——————

12 The dissent resorts to a “hair-splitting approach” to the public com-

ments. Post, at 8–11. It stresses, for example, that some comments high-

lighted variances among specific emissions-producing facilities and in-

dustries, “not States.” Post, at 8 (emphasis deleted). But the dissent fails

to acknowledge that, for purposes of the FIP, States are a sum of their

emissions-producing facilities. See, e.g., Ozone Transport Policy Analy-

sis Final Rule TSD 12 (EPA–HQ–OAR–2021–0668, 2023) (Final Ozone

Analysis). Similarly, the dissent characterizes the comment indicating

EPA would need to “conduct a new assessment and modeling” if States

dropped out of the FIP as a complaint about the “sequencing” of the pro-

posed SIP disapprovals and the FIP. Post, at 10. But why would the

sequencing matter? Because the FIP cannot apply to a State if its SIP is

not disapproved. See Part I–A, supra. And why would EPA need to per-

form 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 by the FIP. Tr. of Oral Arg. 59. Fairly on notice

of the concern, EPA needed to, and by its own admission sought to, “con-

sider” whether its FIP could apply to a subset of States. EPA Response

27.

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

17

however, EPA had the basis of the applicants’ objection be-

fore it during the comment period. It chose to respond with

a severability provision that in no way grappled with their

concern. Nothing requires the applicants to return to EPA

to raise (again) a concern EPA already had a chance to ad-

dress.

Taking the government’s argument (much) further, the

dissent posits that every “objection that [a] final rule was

not reasonably explained” must be raised in a motion for

reconsideration. Post, at 7 (internal quotation marks omit-

ted; emphasis deleted). But there is a reason why the gov-

ernment does not go so far. The Clean Air Act opens the

courthouse doors to those with objections the agency al-

ready ignored. If an “objection [is] raised with reasonable

specificity during the period for public comment” but not

reasonably addressed in the final rule, the Act permits an

immediate challenge. §7607(d)(7)(B). A person need not go

back to the agency and insist on an explanation a second

time. Tellingly, the case on which the dissent relies in-

volves an entirely different situation: a “‘logical outgrowth’

challeng[e].” Post, at 7. There, the objection was that EPA

had supposedly “‘significantly amend[ed] the [r]ule be-

tween the proposed and final versions,’” making it impossi-

ble for people to comment on the rule during the comment

period. Ibid. (quoting EME Homer, 795 F. 3d, at 137). That

is nothing like the challenge here, where EPA failed to ad-

dress an important problem the public could and did raise

during the comment period.

B

With the government’s theories unavailing, the dissent

advances others of its own. It begins by suggesting that the

problem the applicants raise was not “‘important’” enough

to warrant a reasoned reply from the agency because the

methodology EPA employed in its FIP “appear[s] not to de-

pend on the number of covered States.” Post, at 12–17, 18–

18

OHIO v. EPA

Opinion of the Court

19. Then, coming at the same point from another direction,

the dissent seeks to excuse the agency’s lack of a reasoned

reply as “harmless” given, again, “the apparent lack of con-

nection between the number of States covered and the FIP’s

methodology.” Post, at 20.

The trouble is, if the government had arguments along

these lines, it did not make them. It did not despite its am-

ple resources and voluminous briefing. See supra, at 9.

This Court “normally decline[s] to entertain” arguments

“forfeited” by the parties. Kingdomware Technologies, Inc.

v. United States, 579 U. S. 162, 173 (2016). And we see no

persuasive reason to depart from that rule here.

If anything, we see one reason for caution after another.

Start with the fact the dissent itself expresses little confi-

dence in its own theories, contending no more than it “ap-

pear[s]” EPA’s methodology did not depend on the number

of covered States. Post, at 14 (emphasis added). Add to that

the fact that, at oral argument, even the government re-

fused to say with certainty that EPA would have reached

the same conclusions regardless of which States were in-

cluded in the FIP. See Tr. of Oral Arg. 59. Combine all that

with the further fact that, in developing the FIP, EPA said

it used the “same regulatory framework” this Court de-

scribed in EME Homer City Generation, L. P. v. EPA, 572

U. S. 489. E.g., EPA Response 7–8. And, at least as the

Court described that framework, state-level analyses play

a significant role in EPA’s work.13 Finally, observe that,

while the Act seems to anticipate, as the dissent suggests,

——————

13 The agency, we said, “first calculated, for each upwind State, the

quantity of emissions the State could eliminate at each of several cost

[levels]”; next, it “conducted complex modeling to establish the combined

effect of the upwind reductions projected at each cost [level] would have

on air quality in downwind States”; and only after all that did the agency

“then identif[y] significant cost [levels]” to use in setting its emissions

budgets. EME Homer City, 572 U. S., at 501–502.

Cite as: 603 U. S. \_\_\_\_ (2024)

Opinion of the Court

19

that the agency’s “procedural determinations” may be sub-

ject to harmless-error review, §7607(d)(8), the Act also

seems to treat separately challenges to agency “actions” like

the FIP before us, authorizing courts to “reverse any . . . ac-

tion,” found to be “arbitrary” or “capricious,” §7607(d)(9)(A)

(emphasis added). With so many reasons for caution, we

think sticking to our normal course of declining to consider

forfeited arguments the right course here.14

\*

The applications for a stay in Nos. 23A349, 23A350,

23A351, and 23A384 are granted. Enforcement of EPA’s

rule against the applicants shall be stayed pending the dis-

position of the applicants’ petitions for review in the United

States Court of Appeals for the D. C. Circuit and any peti-

tion for writ of certiorari, if such writ is timely sought.

Should the petition for certiorari be denied, this order will

terminate automatically. If the petition is granted, this or-

der shall terminate upon the sending down of the judgment

of this Court.

It is so ordered.

——————

14 Admittedly, the dissent points to some statements in the FIP sug-

gesting EPA considered nationwide data in parts of its analysis. See,

e.g., post, at 14; see also, e.g., 88 Fed. Reg. 36721, 36727. But other state-

ments in that rule and supporting documents also seem to suggest EPA

considered state-specific information. See Part I–C, supra. If, as the

dissent posits, only nationwide data informed EPA’s analysis, why would

EPA say that, “for purposes of identifying the appropriate level of con-

trol,” it focused on “the 23 upwind states that were linked” to the down-

wind States, rather than, say, “all states in the contiguous U.S.”? Final

Ozone Analysis 3 (footnote omitted). Why would EPA explain that its

“findings regarding air quality improvement” downwind were a “central

component” of picking the appropriate cost levels and so defining a

State’s significant contribution? 88 Fed. Reg. 36741. And why would

EPA bother to “determine the relationship between changes in emissions

and changes in ozone contributions on a state-by-state . . . basis” and

“calibrat[e]” that relationship “based on state-specific source apportion-

ment”? Final Ozone Analysis 43. In asking these questions, we do not

profess answers; we simply highlight further reasons for caution.

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

1

SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Nos. 23A349, 23A350, 23A351 and 23A384

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

OHIO, ET AL.

23A349

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

KINDER MORGAN, INC., ET AL.

23A350

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN FOREST & PAPER ASSOCIATION, ET AL.

23A351

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

UNITED STATES STEEL CORPORATION

23A384

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON APPLICATIONS FOR STAY

[June 27, 2024]

JUSTICE BARRETT, with whom JUSTICE SOTOMAYOR,

JUSTICE KAGAN, and JUSTICE JACKSON join, dissenting.

The Court today enjoins the enforcement of a major En-

vironmental Protection Agency rule based on an underde-

veloped theory that is unlikely to succeed on the merits. In

so doing, the Court grants emergency relief in a fact-

intensive and highly technical case without fully engaging

with both the relevant law and the voluminous record.

While the Court suggests that the EPA failed to explain it-

self sufficiently in response to comments, this theory must

surmount sizable procedural obstacles and contrary record

2

OHIO v. EPA

BARRETT, J., dissenting

evidence. Applicants therefore cannot satisfy the stringent

conditions for relief in this posture.

I

I will start by setting the record straight with respect to

some important background.

First, the Court downplays EPA’s statutory role in ensur-

ing that States meet air-quality standards. Ante, at 2–3.

The Clean Air Act directs EPA to “establish national ambi-

ent air quality standards (NAAQS) for pollutants at levels

that will protect public health.” EPA v. EME Homer City

Generation, L. P., 572 U. S. 489, 498 (2014); see 42 U. S. C.

§§7408, 7409. States must create State Implementation

Plans (SIPs) to ensure that their air meets these standards.

§7410(a)(1). But States also face an externality problem:

“Pollutants generated by upwind sources are often trans-

ported by air currents . . . to downwind States,” relieving

upwind States “of the associated costs” and making it diffi-

cult for downwind States to “maintain satisfactory air qual-

ity.” EME, 572 U. S., at 496. So the Act’s Good Neighbor

Provision requires SIPs to “prohibi[t]” the State’s emissions

sources from “emitting any air pollutant in amounts which

will . . . contribute significantly to nonattainment in, or in-

terfere with maintenance by, any other State with respect

to any [NAAQS].” §7410(a)(2)(D)(i)(I).

Given the incentives of upwind States to underregulate

the pollution they send downwind, the Act requires EPA to

determine whether a State “has failed to submit an ade-

quate SIP.” EME, 572 U. S., at 498; see §7410(c)(1). If a

SIP does not prevent the State’s polluters from significantly

contributing to nonattainment in downwind States, EPA

“shall” promulgate a Federal Implementation Plan (FIP)

that does. §7410(c)(1). And EPA must stop the State’s sig-

nificant contributions by the statutory deadline for the af-

fected downwind States to achieve compliance. See Wiscon-

sin v. EPA, 938 F. 3d 303, 313–314 (CADC 2019)

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

3

(per curiam); §7511.

Second, the Court fails to recognize that EPA’s SIP dis-

approvals may, in fact, be valid. EPA justified its findings

that 23 States had failed to submit adequate SIPs. It found

that these States all significantly contributed to ozone pol-

lution in downwind States. See 88 Fed. Reg. 36656 (2023).

But 21 of these States, including applicants, proposed to

do nothing to reduce their ozone-precursor (i.e., NOx)

emissions—arguing that they did not actually contribute to

downwind nonattainment or that there were no other cost-

effective emissions-reduction measures they could impose.

See 88 Fed. Reg. 9354–9361 (2023). The other two States

failed to submit a SIP at all. See 84 Fed. Reg. 66614 (2019).

While 12 of EPA’s SIP disapprovals have been temporarily

stayed, no court yet has invalidated one. So EPA’s replace-

ment FIP—the Good Neighbor Plan—may yet apply to all

23 original States. Indeed, EPA and the plaintiffs who chal-

lenged Nevada’s SIP disapproval have proposed a settle-

ment that would lift that stay. 89 Fed. Reg. 35091 (2024).

Third, the Court claims that commenters on the proposed

FIP warned that its emissions limits might change if it cov-

ered fewer States, but EPA failed to respond. Ante, at 6–8.

Not exactly. As I will elaborate below, commenters merely

criticized EPA’s decision to propose a FIP before its SIP dis-

approvals were final. EPA responded that this sequencing

was “consistent with [its] past practice in [its] efforts to

timely address good neighbor obligations”: Given the Au-

gust 2024 deadline for certain States to comply with the

2015 ozone NAAQS, EPA was “obligated” to start the years-

long process of promulgating a FIP so that one could be ef-

fective in time. EPA, Response to Public Comments on Pro-

posed Rule 149–150, (EPA–HQ–OAR–2021–0668–1127,

June 2023) (Response to Comments); see Wisconsin, 938

F. 3d, at 313–314.

Finally, the Court repeatedly characterizes the FIP as re-

lying on an “assumption that [it] would apply to all covered

4

OHIO v. EPA

BARRETT, J., dissenting

States.” Ante, at 6; see ante, at 12. But try as it might, the

Court identifies no evidence that the FIP’s emissions limits

would have been different for a different set of States or

that EPA’s consideration of state-specific inputs was any-

thing but confirmatory of the limits it calculated based on

nationwide data. See ante, at 5–6, 19, n. 14. The Court

leans on the fact that EPA “considered data specific to the

emissions-producing facilities in [each] State” to calculate

“how much each upwind State’s [NOx] emissions would fall”

if the State’s emitters “adopted each [emissions-control]

measure.” Ante, at 5 (citing EPA, Ozone Transport Policy

Analysis Proposed Rule TSD 9–10, 13, 22–23, (EPA–HQ–

OAR–2021–0668–0133, Feb. 2022) (Proposed Ozone Analy-

sis)). But the Proposed Ozone Analysis makes clear that

EPA did these state-specific calculations to determine each

State’s “emissions budget.” Proposed Ozone Analysis 7–13.

A State’s budget consists of the “emissions that would re-

main” after the State’s power plants meet the emissions

limits that EPA independently calculated. 88 Fed. Reg.

36762; see Proposed Ozone Analysis 13 (“adjust[ed]” “unit-

level emissions are summed up to the state level”); n. 6, in-

fra. Of course each State’s emissions budget will depend on

the emitters in that State. What matters is whether the

limits the FIP imposes on each emitter depend on the num-

ber of States the FIP covers. Tellingly, the Court does not

identify any NOx limit for any industry that relied on state-

specific data.

On the contrary, as I will explain in Part II–B, the final

rule and its supporting documents suggest that EPA’s

methodology for setting emissions limits did not depend on

the number of States in the plan, but on nationwide data

for the relevant industries—and the FIP contains many ex-

amples of emissions limits that EPA created using nation-

wide inputs. Moreover, EPA has now confirmed this inter-

pretation. During this litigation, EPA received petitions

seeking reconsideration of the FIP on the ground that it

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

5

should not be implemented in just a subset of the original

States. EPA denied these petitions on April 4, 2024. 89

Fed. Reg. 23526. It thoroughly explained how its “method-

ology for defining” each State’s emissions obligations is “in-

dependent of the number of states included in the Plan” be-

cause it “relies on a determination regarding what

emissions reductions each type of regulated source can cost-

effectively achieve.” EPA, Basis for Partial Denial of Peti-

tions for Reconsideration on Scope 1, (EPA–HQ–OAR–

2021–0668–1255, Apr. 2024) (Denial). The “control technol-

ogies and cost-effectiveness figures the EPA consider[ed]

. . . do not depend in any way on the number of states in-

cluded.” Id., at 2. So “[s]ources in the remaining upwind

states currently regulated by the Plan . . . would bear the

same actual emission reduction obligations” regardless of

the number of covered States. Id., at 3–4.

II

To obtain emergency relief, applicants must, at a mini-

mum, show that they are likely to succeed on the merits,

that they will be irreparably injured absent a stay, and that

the balance of the equities favors them. Nken v. Holder,

556 U. S. 418, 425–426 (2009). Moreover, we should grant

relief only if we would be likely to grant certiorari were the

applicants’ case to come to us in the usual course. See Does

1–3 v. Mills, 595 U. S. \_\_\_, \_\_\_ (2021) (BARRETT, J., concur-

ring in denial of application for injunctive relief ); Hol-

lingsworth v. Perry, 558 U. S. 183, 190 (2010) (per curiam).

In my view, the applicants cannot satisfy the stay factors.

Most significantly, they have not shown a likelihood of suc-

cess on the merits.

The Court holds that applicants are likely to succeed on

a claim that the Good Neighbor Plan is “arbitrary” or “ca-

pricious.” 42 U. S. C. §7607(d)(9). The “arbitrary-and-

capricious standard requires that agency action” be both

6

OHIO v. EPA

BARRETT, J., dissenting

“[1] reasonable and [2] reasonably explained.” FCC v. Pro-

metheus Radio Project, 592 U. S. 414, 423 (2021). The

Court’s theory is that EPA did not “‘reasonably explai[n]’”

“why the number and identity of participating States does

not affect what measures maximize cost-effective down-

wind air-quality improvement.” Ante, at 13 (quoting only

the second part of Prometheus Radio’s formulation (empha-

sis added)). So to be clear, the Court does not conclude that

EPA’s actions were substantively unreasonable—e.g., that

the FIP cannot rationally be applied to fewer States be-

cause a change in the number of participants would under-

mine its rationale or render it ineffective. Nor could it,

given the significant evidence in the record (not to mention

EPA’s denial of reconsideration) that the covered States did

not, in fact, affect the plan’s emissions-reduction obliga-

tions. See Part II–B, infra. Thus, the only basis for the

Court’s decision is the argument that EPA failed to provide

“‘a satisfactory explanation for its action’” and a “reasoned

response” to comments. Ante, at 12–13 (quoting Motor Ve-

hicle Mfrs. Assn. of United States, Inc. v. State Farm Mut.

Automobile Ins. Co., 463 U. S. 29, 43 (1983)). There are at

least three major barriers to success on such a claim.

A

The Clean Air Act imposes a procedural bar on the chal-

lenges that a plaintiff can bring in court: Only objections

that were “raised with reasonable specificity during the pe-

riod for public comment . . . may be raised during judicial

review.” §7607(d)(7)(B). If it was “impracticable to raise

such objection within such time or if the grounds for such

objection arose after the period for public comment,” the

challenger may petition for reconsideration of the rule and

can obtain judicial review only if EPA refuses. Ibid. While

EPA has now separately denied petitions for reconsidera-

tion of the Good Neighbor Plan, this case came to us di-

rectly; we are assessing applicants’ likelihood of success in

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

7

challenging the plan itself, not the denial of reconsidera-

tion. So the procedural bar on objections not raised in the

comments presents a significant obstacle—in two ways.

First, consider the Court’s basic theory: that EPA offered

“no reasoned response” to comments allegedly questioning

whether the plan’s emissions limits depend on the States

covered. Ante, at 12. That EPA failed to adequately explain

its final rule in response to comments is “an objection to the

notice and comment process itself,” which applicants “obvi-

ously did not and could not have raised . . . during the pe-

riod for public comment.” EME Homer City Generation,

L. P. v. EPA, 795 F. 3d 118, 137 (CADC 2015) (Kavanaugh,

J.). No one could have raised during the proposal’s com-

ment period the objection that the “final rule was not ‘rea-

sonably explained.’” Ante, at 13 (emphasis added).

The D. C. Circuit, on remand in EME Homer, considered

a similar objection that EPA had “violated the Clean Air

Act’s notice and comment requirements”: EPA had “signifi-

cantly amend[ed] the Rule between the proposed and final

versions without providing additional opportunity for no-

tice and comment.” 795 F. 3d, at 137. But because this pro-

cedural objection could not have been raised during the

comment period, “the only appropriate path for petitioners”

under §7607(d)(7)(B) was to raise it “through an initial pe-

tition for reconsideration to EPA.” Ibid. So the D. C. Cir-

cuit lacked “authority at th[at] time to reach this question.”

Ibid. While such “logical outgrowth” challenges typically

are cognizable under the Administrative Procedure Act, see

Shell Oil Co. v. EPA, 950 F. 2d 741, 747 (CADC 1991), the

Clean Air Act channels these challenges through reconsid-

eration proceedings. This Court’s failure-to-explain objec-

tion may face the same problem: It is not judicially review-

able in its current posture.1

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1 The Court offers

a feeble response to this application of

8

OHIO v. EPA

BARRETT, J., dissenting

Second, even putting aside this aspect of §7607(d)(7)(B),

it is not clear that any commenter raised with “reasonable

specificity” the underlying substantive issue: that the ex-

clusion of some States from the FIP would undermine

EPA’s cost-effectiveness analyses and resulting emissions

controls. §7607(d)(7)(B); see ante, at 13. The Court con-

cludes otherwise only by putting in the commenters’

mouths words they did not say. It first cites a bevy of com-

ments arguing that EPA’s “disapprovals of the SIPs were

legally flawed” and noting the obvious point that EPA can-

not “include a State in its FIP” unless it validly disapproves

the State’s SIP. Ante, at 6. These comments do not address

the continued efficacy of a FIP that applies to a subset of

the originally covered States.

Another collection of the Court’s inapposite comments re-

lates to the inclusion of specific sources, emissions controls,

and industries in the proposed plan—not States. See ante,

at 7, n. 4. For example, one commenter argued that the

“cost effectiveness of the requirement to employ SNCR will

be highly variable, and is unlikely to meet EPA expecta-

——————

§7607(d)(7)(B)’s procedural bar.

Ante, at 17.

It simply quotes

§7607(d)(7)(B) and asserts without support that it means that a plaintiff

“need not go back to the agency and insist on an explanation a second

time.” Ibid. The Court fails to engage with the logic of this argument:

The objection that the final rule did not contain sufficient explanation

was not and could not have been raised during the comment period, so it

must be raised in a petition for reconsideration. EME Homer, 795 F. 3d,

at 137. The Court claims that its theory is different from the logical-

outgrowth challenge the D. C. Circuit considered in EME Homer. Ante,

at 17. But the Court ignores the fact that its failure-to-explain challenge

and logical-outgrowth challenges are both “objection[s] to the notice and

comment process itself ” that depend on the content of the final rule.

EME Homer, 795 F. 3d, at 137. Even if the public raised an “important

problem . . . during the comment period,” ante, at 17, the Court’s basis

for enjoining the FIP’s enforcement is not that the alleged problem is

real, but that the final rule did not address it.

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

9

tions in even the most optimistic case.” Comments of Indi-

ana Municipal Power Agency 9 (June 20, 2022). That is a

challenge to EPA’s endorsement of a particular emissions-

control technology; it says nothing about the FIP’s depend-

ence on a particular number of States. See also, e.g., Com-

ments of Lower Colorado River Authority 21–22 (June 21,

2022). Similarly, another commenter argued that pulp and

paper mills should not be included because the “maximum

estimated improvement” in ozone levels from controlling

their emissions would be “too small to even measure.” Com-

ments of Wisconsin Paper Council 2 (June 21, 2022).2 An

argument that the maximum benefits from regulating an

industry are too small is not an argument that those bene-

fits would become too small if fewer States were covered.3

The closest comment that the Court can find—which it

quotes repeatedly—is one sentence that obliquely refers to

some “new assessment and modeling of contribution” that

EPA might need to perform. Comments of Air Stewardship

Coalition 13–14 (June 21, 2022). The Court dresses up this

——————

2 The Court claims that in distinguishing comments about particular

industries from comments that question whether the plan depends on a

number of States, I “fai[l] to acknowledge” that the FIP treats States as

the “sum of their emissions-producing facilities.” Ante, at 16, n. 12. But

in reality, it is the Court that ignores how the FIP works. The FIP de-

termines emissions limits for particular sources based on their indus-

tries; the total NOx emissions limit for each State is simply the sum of

the limits the plan imposes on each of the State’s sources. See, e.g., 88

Fed. Reg. 36678, 36762; Part II–B, infra. So comments critiquing a par-

ticular industry-specific emissions limit or technology assumption say

nothing about the FIP’s dependence on a certain number of States.

3 Nor did the Air Stewardship Coalition’s comment about the “knee in

the curve” raise concerns about which States are included. See ante, at

7, n. 4. Rather, this comment questioned EPA’s proposed average cost-

effectiveness threshold of $7,500 per ton for non-power-plant sources; it

argued that EPA should use different thresholds for different industries.

Comments of Air Stewardship Coalition 27 (June 21, 2022) (Air Steward-

ship Comments). It did not link its concern about cost thresholds to the

States covered by the plan.

10

OHIO v. EPA

BARRETT, J., dissenting

comment by characterizing it as a warning about what

might happen “[i]f the FIP did not wind up applying to all

23 States” and responding to the 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.” Ante, at 7. But those words are the Court’s, not

the commenter’s.

The commenter’s actual objection was to EPA’s sequenc-

ing of its actions—proposing a FIP before it finalized its SIP

disapprovals. The commenter titled this section “EPA Step

Two Screening is Premised on the Premature Disapproval

of 19 Upwind States[’] Good Neighbor SIPs.” Air Steward-

ship Comments 13 (boldface omitted). And the relevant

sentence reads in full:

“The proposed FIP essentially prejudges the outcome of

those pending SIP actions 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 as-

sessment and modeling of contribution and subject

those findings to public comment.” Id., at 14.

This sentence says nothing about what would be required if

after EPA finalizes its SIP disapprovals and issues a final

FIP, some States drop out of the plan. Nor does it suggest

that the plan’s cost-effectiveness thresholds or emissions

controls would change with a different number of States.

Nor is it clear what the comment means by its bare refer-

ence to a “new assessment and modeling of contribution”:

Would EPA be required to perform a new evaluation of

which upwind States cause pollution in downwind States?

A new analysis of how much pollution each source must

eliminate? A new assessment of the plan’s impact on down-

wind States?

It is therefore difficult to see how this comment raised

with “reasonable specificity” the objection that the removal

of some States from the final plan would invalidate EPA’s

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

11

cost-effectiveness thresholds and chosen emissions-control

measures.4 That is not how EPA understood it. EPA char-

acterized this comment as arguing that “by taking action

before considering comments on the proposed disapprovals,

the EPA is presupposing the outcome of its proposed rule-

makings on the SIPs.” Response to Comments 147 (noting

this comment’s ID number, 0518). And EPA explained that

it “disagree[d]” with the argument that the “sequence” of its

actions was “improper, unreasonable, or bad policy”; EPA

had a statutory obligation to promulgate a FIP by the Au-

gust 2024 NAAQS attainment deadline. Id., at 150. If a

commenter had said with reasonable specificity what the

Court says today—that “a different set of States might

mean that the ‘knee in the curve’ might shift,” ante, at 7—

EPA could have responded with more explanation of why

its methodology did not depend on the number of covered

States—as it has recently explained. But EPA cannot be

penalized if it did not have reasonable notice of this objec-

tion.5

——————

4 So too with Portland Cement’s comment. See ante, at 7. That com-

ment simply echoes the quoted sentence from the Air Stewardship Coa-

lition almost word for word, also in the context of objecting to EPA’s de-

cision to propose a FIP before finalizing its SIP disapprovals. Comments

of Portland Cement Association 7 (June 21, 2022).

5 The Court concludes to the contrary only by building out the com-

ment’s bare reference to a “new assessment and modeling” with its own

inferences about the possible effect of different numbers of States on “the

math.” Ante, at 16, n. 12 (internal quotation marks omitted). But as

explained above, the comment itself said nothing about States dropping

out of the final plan or the possible impact of different numbers of States

on the FIP’s cost thresholds or emissions limits. It is hard to believe that

a single sentence with no elaboration or explanation of the potential is-

sue—in a sea of thousands of pages of comments—gave EPA reasonable

notice that it should have included in its final rule a detailed explanation

of why the FIP’s emissions limits did not depend on the number of States.

Cf. Public Citizen, Inc. v. FAA, 988 F. 2d 186, 197 (CADC 1993) (An

“agency need not respond at all to comments that are ‘purely speculative

and do not disclose the factual or policy basis on which they rest’ ”).

12

OHIO v. EPA

BARRETT, J., dissenting

In sum, §7607(d)(7)(B)’s procedural bar likely forecloses

both the failure-to-explain objection that the Court credits

and any substantive challenge to the reasonableness of ap-

plying the FIP to a subset of the originally covered States.

B

Even if applicants clear §7607(d)(7)(B)’s procedural bar,

they face an uphill battle on the merits. To prevail on the

Court’s theory, applicants must show that EPA’s actions

were “arbitrary” or “capricious.” §§7607(d)(9)(A), (D). “The

scope of review under the ‘arbitrary and capricious’ stand-

ard is narrow and a court is not to substitute its judgment

for that of the agency.” State Farm, 463 U. S., at 43. A rule

is arbitrary and capricious if the agency “entirely failed to

consider an important aspect of the problem.” Ibid. (em-

phasis added). But we will “ ‘uphold a decision of less than

ideal clarity if the agency’s path may reasonably be dis-

cerned.’” Ibid. (quoting Bowman Transp., Inc. v. Arkansas-

Best Freight System, Inc., 419 U. S. 281, 286 (1974)). Given

the explanations and state-agnostic methodology apparent

in the final rule and its supporting documentation—and the

paucity of comments specifically raising the issue—EPA

may well have done enough to justify its plan’s severability.

To begin, 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. The rule

applied EPA’s longstanding “4-step interstate transport

framework” to create emissions limits that will prevent NOx

sources in upwind States from significantly contributing to

ozone pollution in downwind States. 88 Fed. Reg. 36659;

see 42 U. S. C. §7410(a)(2)(D). Under that framework, EPA

(1) identifies “downwind receptors that are expected to have

problems attaining or maintaining the NAAQS”; (2) identi-

fies which upwind States are “ ‘link[ed]’ ” to those downwind

receptors because they contribute at least 1% of a receptor’s

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

13

ozone; (3) determines which NOx sources in the linked up-

wind States “significantly contribute” to downwind nonat-

tainment or interference; and (4) implements emissions

limits to stop those sources’ significant contributions. 88

Fed. Reg. 36659; see EME, 572 U. S., at 500–501 (describ-

ing similar approach used in earlier FIP). The first two

steps determine which States the FIP must cover. The rub-

ber meets the road at steps 3 and 4: How much do sources

in those States “significantly contribute” to downwind pol-

lution, and what must they do about it?

Here is how EPA explains that methodology. A source

“significantly contributes” to downwind pollution if there

are cost-effective measures it could implement to reduce its

emissions: It must halt those emissions that can be elimi-

nated at a cost “under the cost threshold set by the Agency”

for sources in that industry. EME, 572 U. S., at 518 (up-

holding this approach). So the “‘amount’ of pollution” that

sources must eliminate is “that amount . . . in excess of the

emissions control strategies the EPA has deemed cost effec-

tive.” 88 Fed. Reg. 36676. EPA calculates for each type of

source a “uniform level of NOx emissions control stringency”

expressed as a “cost per ton of emissions reduction.” Id., at

36719. This cost-effectiveness threshold is based on the

point “at which further emissions mitigation strategies be-

come excessively costly on a per-ton basis while also deliv-

ering far fewer additional emissions reductions.” Id., at

36683 (describing this “ ‘knee in the curve’” analysis). The

plan requires sources in each covered State to reduce their

emissions accordingly.6

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6 For power plants, EPA implements these requirements by allocating

each State an “‘emissions budget’ . . . representing the EPA’s quantifica-

tion of the emissions that would remain” if plants in that State elimi-

nated all the emissions that EPA determines can be eliminated for less

than the cost threshold. 88 Fed. Reg. 36762. EPA then allocates trade-

able “‘allowances’” proportionally among the State’s sources, creating a

14

OHIO v. EPA

BARRETT, J., dissenting

Crucially, the final rule suggests that EPA calculated

cost-effectiveness thresholds based on the likely cost and

impact of available emissions-reduction technology given

national, industry-wide data. Contrary to the Court’s spec-

ulations, ante, at 12, these thresholds and the FIP’s result-

ing emissions limits appear not to depend on the number of

covered States. Consider the plan’s approach to power

plants (“electric generating units,” or EGUs). EPA assessed

the cost and impact of different NOx mitigation strategies

that EGUs could implement. One strategy was to fully op-

erate “selective catalytic reduction” (SCR) technology. 88

Fed. Reg. 36655; see id., at 36720. EPA estimated that a

“representative marginal cost” for this strategy would be

$1,600 per ton, and a “reasonable level of performance”

would be 0.08 lb/mmBtu—based on “nationwide” power

plant “emissions data.” Id., at 36720–36721. EPA thus de-

termined that SCR optimization was a “viable mitigation

strategy for the 2023 ozone season” and built this assump-

tion into the plan’s emissions limits. Id., at 36720. In other

words, EPA relied on nationwide industry data to select

cost thresholds that corresponded to how much it would cost

to use particular emissions-reduction technologies, and it

applied that “uniform control stringency to EGUs within

the covered upwind states.” Id., at 36680.7

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marketplace for emissions. Ibid. With respect to other sources, EPA

determined that nine industries in the covered States produced the most

significant emissions. Id., at 36817. The rule requires sources in each of

those industries to meet specific emissions limits that were calculated

based on the reductions that they can cost-effectively achieve. Ibid.

7 EPA ultimately selected (based on nationwide data) a cost threshold

of $1,800 per ton of NOx reduction that would apply in earlier years, and

a cost threshold of $11,000 per ton that would apply in later years. 88

Fed. Reg. 36749, 36846. These cost thresholds corresponded to the cost

of different emissions-control measures: For example, EGUs can “ret-

rofi[t] state-of-the-art combustion controls” and “[o]ptimiz[e] idled SCRs”

for less than $1,800 per ton, and they can “instal[l new] SCRs” for less

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

15

In fact, some commenters criticized EPA’s reliance on a

“nationwide data set” to calculate emissions limits, arguing

that EPA should “limit the dataset to . . . just the covered

states”—an approach that would have made the cost-

effectiveness thresholds depend on which States were cov-

ered. Id., at 36723. But EPA expressly defended its ap-

proach based on its “intention to identify a technology-specific

representative emissions rate” and its interest in “the per-

formance potential of a technology”—which were best

served by the “largest dataset possible (i.e., nationwide).”

Id., at 36723–36724 (emphasis added). EPA explained that

it used the same approach it had successfully applied in

previous rulemakings: It “derive[d] technology performance

averages” based on nationwide data. Id., at 36724. Then it

applied the relevant industry standard “on a uniform basis”

to each emitter across the covered States. Id., at 36817.8

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than $11,000 per ton. Ozone Transport Policy Analysis Final Rule TSD

5 (EPA–HQ–OAR–2021–0668–1080, Mar. 2023) (Final Ozone Analysis).

EPA then calculated each State’s emissions budget based on the assump-

tion that the State’s EGUs would implement the emissions-reductions

strategies that cost less than the chosen thresholds. See n. 6, supra; 88

Fed. Reg. 36762; Final Ozone Analysis 6, 9. Given the likelihood that

EPA selected cost thresholds based on nationwide data, each State’s

budget would be the same even if the FIP covered different States.

8 While EPA’s methodology with respect to other industrial sources

(non-EGUs) was more complicated, it also seems to have relied on na-

tionwide data. EPA chose a “$7,500 marginal cost-per-ton threshold,” 88

Fed. Reg. 36740, which corresponded to the point of diminishing returns

(the “knee in the curve”) when EPA assessed the impact of emissions

controls in the highest impact industries and in “all industries” on the

total “ozone season NOx reduction potential,” Technical Memorandum,

Screening Assessment of Potential Emissions Reductions, Air Quality

Impacts, and Costs From Non-EGU Emissions Units for 2026, p. 4,

(EPA–HQ–OAR–2021–0668–150, Feb. 2022) (boldface omitted). This

figure thus appears to have been determined based on industry-wide cost

and emissions data rather than state-specific calculations. So too with

the specific emissions limits EPA decided could be implemented for less

than that cost. See, e.g., 88 Fed. Reg. 36825 (“EPA based the proposed

16

OHIO v. EPA

BARRETT, J., dissenting

The Court, perhaps recognizing the problem that the

FIP’s seemingly state-agnostic methodology poses for its

theory, throws at the wall a cherry-picked assortment of

EPA statements mentioning state data. See ante, at 5–6,

19, n. 14. None stick. The fundamental problem with the

Court’s citations is that they discuss analyses that EPA per-

formed after it chose cost thresholds and emissions limits

based on nationwide industry data. EPA did assess the im-

pact on downwind States if particular upwind States met

the proposed emissions limits, and that impact depended on

the States included in the modeling. Ante, at 5, 19, n. 14.

But EPA said that these “‘findings regarding air quality im-

provement,’” ante, at 19, n. 14 (quoting 88 Fed. Reg. 36741),

served only to “cement EPA’s identification of the selected

. . . mitigation measures as the appropriate control strin-

gency,” 88 Fed. Reg. 36741 (emphasis added); see Denial 18.

EPA explained that the statutory requirement to “eliminate

significant contribution” depends on the implementation of

cost-effective emissions controls at individual “industrial

sources,” not some overall impact on “downwind areas’ non-

attainment and maintenance problems.” 88 Fed. Reg.

36741. EPA assessed the FIP’s impact assuming the par-

ticipation of particular States primarily to ensure that its

emissions limits did not result in “overcontrol”—i.e., more

reductions than necessary to help downwind States comply

with the NAAQS. Ibid.; see EME Homer City, 572 U. S., at

521. The technical document that the Court cites, ante, at

5, makes this point clear: “The downwind air quality im-

pacts are used to inform EPA’s assessment of potential

overcontrol.” Proposed Ozone Analysis 31.

EPA’s analysis confirmed that its chosen emissions limits

would not result in overcontrol if they were implemented in

the States originally covered by the FIP. 88 Fed. Reg.

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emissions limits for cement kilns on the types of limits being met across

the nation”).

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

17

36741. Importantly, implementing the FIP “in fewer up-

wind states does not (and cannot possibly) result in overcon-

trol” given that “there was no overcontrol even when more

states, making more emission reductions, were included.”

Denial 22. So the fact that EPA used state-specific data in

its overcontrol analysis does not mean that the FIP’s emis-

sions limits depended on the number of States it covered.

And the inclusion of fewer States in that analysis logically

could not have affected the results.

Thus, EPA generally characterized the FIP’s emissions

limits as dependent on nationwide data, not on any partic-

ular set of States.9 Confirming this interpretation, the final

rule contemplates its application to a different number of

States. It recognizes that “states may replace FIPs with

SIPs if EPA approves them,” and several sections explain

how States may exit this FIP. 88 Fed. Reg. 36753, 36838–

36843. And the rule’s severability provision explains that

EPA views the plan as “severable along . . . state and/or

tribal jurisdictional lines.” Id., at 36693.

Moreover, EPA justified the FIP’s severability: EPA

“must address good neighbor obligations as expeditiously as

practicable and by no later than the next applicable attain-

ment date”; severability serves “important public health

and environmental benefits” and ensures that stakeholders

can “rely on this final rule in their planning.” Ibid. These

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9 The Court argues that EPA equated the framework it used here with

the one that we described in EME Homer City. Ante, at 18, and n. 13.

But even if EME described an approach that selected cost thresholds

“only after” conducting downwind air-quality assessments, ibid., it is not

clear that the Good Neighbor Plan adopted this aspect of the EME frame-

work. In fact, there are other key similarities between this FIP and

EME’s approach. For example, the final FIP refers to EME in order to

note that EPA’s “uniform framework of policy judgments”—i.e., applying

the same cost thresholds with “[n]ationwide consistency”—was upheld in

that case. 88 Fed. Reg. 36673. And the final FIP identifies cost thresh-

olds that EPA chose based on nationwide data—like $1,800 based on the

cost of EGUs “optimiz[ing] . . . existing SCRs and SNCRs.” Id., at 36749.

18

OHIO v. EPA

BARRETT, J., dissenting

rationales align with EPA’s response to critics of its decision

to propose a FIP before finalizing its SIP disapprovals:

Quickly proposing a FIP—just like keeping the FIP in place

even if some States drop out—“is a reasonable and prudent

means of assuring that [EPA’s] statutory obligation to re-

duce air pollution affecting the health and welfare of people

in downwind states is implemented without delay.” Re-

sponse to Comments 151.

Given these justifications and the state-agnostic method-

ology apparent in the final rule, EPA’s “‘path may reasona-

bly be discerned.’” State Farm, 463 U. S., at 43. The FIP’s

cost thresholds and emissions limits did not depend in any

significant way on the number of States included, so the

drawbacks of severability were minimal. On the other

hand, severability was necessary so that EPA could fulfill,

to the greatest extent possible, its statutory obligation to

eliminate the significant ozone contributions of upwind

States and reduce harmful pollution in downwind States in

time to meet the attainment deadlines. See Response to

Comments 150 (noting the August 2024 ozone-NAAQS at-

tainment deadline). If the FIP were not severable, EPA

would have to go back to the drawing board for all States

whenever a single State is removed—thwarting its mission

for little reason.10

Finally, it is unlikely that EPA’s response to comments

evinces a “fail[ure] to consider an important aspect of the

problem.” State Farm, 463 U. S., at 43 (emphasis added).

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10 The Court claims that the severability clause is evidence that EPA

“had notice of the objection the applicants seek to press in court,” yet

EPA’s justifications for it did not address (alleged) concerns about how

the cost-effectiveness thresholds would change with fewer States. Ante,

at 15–16. But as explained above, commenters did not raise that issue

with specificity; they simply pointed out that some SIP disapprovals

might be invalid. The severability clause is evidence that EPA was

aware of that possibility, and the clause was EPA’s response to it.

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

19

An agency must respond to “‘relevant’ and ‘significant’ pub-

lic comments,” and that requirement is not “particularly de-

manding”; the “agency need not respond at all to comments

that are ‘purely speculative and do not disclose the factual

or policy basis on which they rest.’ ” Public Citizen, Inc. v.

FAA, 988 F. 2d 186, 197 (CADC 1993) (quoting Home Box

Office, Inc. v. FCC, 567 F. 2d 9, 35, and n. 58 (CADC 1977);

emphasis added); see §7607(d)(6)(B) (EPA must respond to

“significant” comments). EPA received hundreds of com-

ments, and its response numbered nearly 1,100 pages.

Given the likelihood that the FIP’s emissions limits did not

depend on the covered States, the risk of it applying to

fewer States may not be “important,” and comments pur-

portedly raising that possibility might not be “relevant” and

“significant.” Moreover, the one comment that vaguely re-

ferred to a need for a “new assessment and modeling,” Air

Stewardship Comments 14, was “purely speculative” and

“disclose[d]” no “factual or policy basis”; it likely merited no

response, Home Box Office, 567 F. 2d, at 35, n. 58. Requir-

ing more from EPA risks the “sort of unwarranted judicial

examination of perceived procedural shortcomings” that

might “seriously interfere with that process prescribed by

Congress.” Vermont Yankee Nuclear Power Corp. v. Natu-

ral Resources Defense Council, Inc., 435 U. S. 519, 548

(1978).11

C

Applicants face one more impediment: the Clean Air Act’s

stringent harmless-error rule. A court “reviewing alleged

procedural errors . . . may invalidate [an EPA] rule only if

——————

11 Despite the Court’s suggestion of forfeiture, ante, at 17, EPA could

not have forfeited the argument that the comments the Court cites were

too insubstantial to merit a response. The Court relies on comments that

were not raised until the applicants’ reply briefs or that were uncovered

later by the Court itself. See, e.g., Reply Brief in No. 23A351, p. 11 (rais-

ing the Air Stewardship Coalition “modeling” comment for the first time).

20

OHIO v. EPA

BARRETT, J., dissenting

the errors were so serious and related to matters of such

central relevance to the rule that there is a substantial like-

lihood that the rule would have been significantly changed

if such errors had not been made.” §7607(d)(8) (emphasis

added). This provision appears “tailor-made to undo” any

“rigid presumption of vacatur” that might apply in other

contexts. N. Bagley, Remedial Restraint in Administrative

Law, 117 Colum. L. Rev. 253, 291 (2017).

The alleged error here plausibly is subject to §7607(d)(8)’s

harmless-error rule. As explained above, the Court does not

suggest that it is substantively “[un]reasonable” to apply

the FIP to fewer States, only that EPA did not “reasonably

explai[n]” the FIP’s severability in response to comments.

Prometheus, 592 U. S., at 423. That is arguably an “alleged

procedural error” within the meaning of §7607(d)(8). In

fact, the Act contemplates that at least some “arbitrary or

capricious” challenges allege failures to “observ[e] . . . pro-

cedure required by law,” and such challenges may only suc-

ceed if §7607(d)(8)’s “condition is . . . met.” §7607(d)(9)(D).

If the Act’s harmless-error rule applies, applicants are

unlikely to prevail. Given the apparent lack of connection

between the number of States covered and the FIP’s meth-

odology for determining cost thresholds and emissions lim-

its, it is difficult to imagine a “substantial” likelihood that

the rule would have been “significantly” different had EPA

just responded more thoroughly. In fact, applicants seem

to have conceded as much. See Tr. of Oral Arg. 6 (“[W]ith

full candor to the Court, [the cost threshold] could be the

same or even be more expensive”); id., at 9 (“I can’t tell you

what that looks like, whether there is a difference in the

obligations or not”). And EPA, the Court says, had “notice”

of the alleged concern that the cost thresholds might change

with different States. Ante, at 15. Yet EPA still chose to

make the FIP severable because of its statutory obligation

to reduce downwind pollution—an obligation it repeatedly

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

21

referenced. See, e.g., 88 Fed. Reg. 36693; Response to Com-

ments 149–151. Would that same EPA have “significantly

changed” the FIP had it just explained more thoroughly

why the plan did not depend on the States covered?12 And

on top of all this, EPA has in fact refused to reconsider the

FIP now that it applies to fewer States, explaining in detail

why its methodology was unaffected by the States it cov-

ered.13

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With little to say in response to the FIP’s apparent state-

agnostic methodology for setting emissions limits and the

Clean Air Act’s stringent harmless-error rule, the Court re-

sorts to raising forfeiture. Ante, at 17–19. But it is the

Court that goes out of its way to develop a failure-to-explain

——————

12 The Court faults EPA for “refus[ing] to say with certainty” at oral

argument that it would have reached the same conclusions if different

States were included in the FIP. Ante, at 18. But §7607(d)(8) does not

require the Government to show that the rule would be the same; it is

most naturally read to require the challenger to demonstrate a “substan-

tial likelihood that the rule would have been significantly changed if such

errors had not been made.”

(Emphasis added.)

And though

§7607(d)(9)(A) appears to allow reversal of “ ‘any’ ” arbitrary or capricious

“ ‘action,’ ” ante, at 19, §7607(d)(8)’s more specific harmless-error rule and

§7607(d)(9)(D)’s more specific requirements for reversal based on arbi-

trary or capricious procedural errors would seem to control.

13 The Court claims that the Clean Air Act prevents us from consider-

ing EPA’s denial of reconsideration. Ante, at 14–15, n. 11. But it is not

obvious that the relevant provision of the Act—§7607(d)(7)(A)’s defini-

tion of the “record for judicial review”—bars consideration of later devel-

opments for purposes of the Act’s stringent harmless-error rule,

§7607(d)(8). Even assuming that the denial of reconsideration itself can-

not count as evidence of harmlessness, we are judging applicants’ likeli-

hood of success on the merits. On the merits, we can expect EPA to make

just the sort of arguments it made in its denial: EPA likely will explain

why the covered States did not matter by citing and interpreting mate-

rial in the record. See, e.g., Denial 11 (“Record Basis Establishing Why

the Plan Functions Independently by State”); id., at 15, and nn. 16–18

(citing the final rule and technical support documents on the rulemaking

docket).

22

OHIO v. EPA

BARRETT, J., dissenting

theory largely absent from applicants’ briefs. One can

search diligently in the hundreds of pages of applicants’

opening briefs for the Court’s theory—that EPA failed to

explain in its final rule why the FIP’s cost-effectiveness

thresholds for imposing emissions limits do not shift with a

different mix of States—and be left wondering where the

Court found it. That theory appears not to have crystallized

until oral argument, during which counsel for the state ap-

plicants struggled to locate it in the States’ brief. Tr. of Oral

Arg. 11–12. Consider just one illustrative example. Given

the importance to the Court’s theory of how the “knee in the

curve” might change with different States, see ante, at 6, 7,

and n. 4, 12, one might expect to find some mention of that

idea in applicants’ briefs. One would be wrong.

Given that applicants’ theory has evolved throughout the

course of this litigation, we can hardly fault EPA for failing

to raise every potentially meritorious defense in its re-

sponse brief. That is particularly true given the compressed

briefing schedule in this litigation’s emergency posture: The

Court gave EPA less than two weeks to respond to multiple

applications raising a host of general and industry-specific

technical challenges, filed less than a week earlier. Even

still, EPA raised §7607(d)(7)(B)’s procedural bar. Brief for

Respondents 19. And on the merits, EPA expressly argued

that the FIP’s “viability and validity do not depend on the

number of jurisdictions it covers”; the “Rule need not apply

to any minimum number of States in order to operate co-

herently.” Id., at 24. EPA could also have demonstrated

how the FIP’s state-agnostic methodology for selecting cost

thresholds was apparent in the final rule. But EPA cannot

have forfeited that more specific point because applicants

did not raise it to begin with.

Because EPA did not forfeit these responses to the merits

of applicants’ arbitrary-or-capricious challenge, there is no

need to consider whether a departure from our typical ap-

proach to forfeited arguments is justified. See ante, at 18.

Cite as: 603 U. S. \_\_\_\_ (2024)

BARRETT, J., dissenting

23

It remains applicants’ burden to show that the FIP’s alleged

dependence on the covered States likely was an “important”

problem that EPA “entirely failed to consider.” State Farm,

463 U. S., at 43. And that is on top of their burden to over-

come §7607(d)(7)(B)’s procedural bar and the lack of “signif-

icant,” specific comments raising this issue. §7607(d)(6)(B).

Finally, I would exercise our discretion to consider

§7607(d)(8)’s harmless-error rule. Even putting aside the

expedited briefing schedule and the limited discussion of

the Court’s theory in applicants’ briefs, applicants bear the

burden in seeking emergency relief to show a likelihood of

success on the merits. In other words, we must predict

whether applicants will overcome every barrier to relief at

the end of the day, after full merits briefing and argument

in the lower courts and, potentially, again in this Court.

Section 7607(d)(8)’s harmless-error rule is one such im-

portant obstacle, and EPA has already signaled that it will

raise it as litigation progresses. See Denial 35, n. 38 (argu-

ing that any failure to more fully explain “how the Rule is

not interdependent” is harmless error under §7607(d)(8)). I

see no reason not to consider it now.

III

Given the emergency posture of this litigation, my views

on the merits of the failure-to-explain objection and the

application of the Clean Air Act’s procedural bar and

harmless-error rule are tentative. But even a tentative ad-

verse conclusion can undermine applicants’ likelihood of

success. And applicants, to prevail, must run the table;

they face the daunting task of surmounting all of these sig-

nificant obstacles. They are unlikely to succeed.

The Court, seizing on a barely briefed failure-to-explain

theory, grants relief anyway. It enjoins the Good Neighbor

Plan’s enforcement against any state or industry applicant

pending review in the D. C. Circuit and any petition for cer-

24

OHIO v. EPA

BARRETT, J., dissenting

tiorari. Ante, at 19. Given the number of companies in-

cluded and the timelines for review, the Court’s injunction

leaves large swaths of upwind States free to keep contrib-

uting significantly to their downwind neighbors’ ozone

problems for the next several years—even though the tem-

porarily stayed SIP disapprovals may all be upheld and the

FIP may yet cover all the original States. The Court justi-

fies this decision based on an alleged procedural error that

likely had no impact on the plan. So its theory would re-

quire EPA only to confirm what we already know: EPA

would have promulgated the same plan even if fewer States

were covered. Rather than require this years-long exercise

in futility, the equities counsel restraint.

Our emergency docket requires us to evaluate quickly the

merits of applications without the benefit of full briefing

and reasoned lower court opinions. See Does 1–3, 595 U. S.,

at \_\_\_ (opinion of BARRETT, J.). Given those limitations, we

should proceed all the more cautiously in cases like this one

with voluminous, technical records and thorny legal ques-

tions. I respectfully dissent.