No. 21-16958 (lead), 21-16960, 21-16961

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

IN RE: CLEAN WATER ACT RULEMAKING

AMERICAN RIVERS; AMERICAN WHITEWATER; CALIFORNIA TROUT; IDAHO RIVERS UNITED; COLUMBIA RIVERKEEPER; SIERRA CLUB; SUQUAMISH TRIBE; PYRAMID LAKE PAIUTE TRIBE; ORUTSARARMIUT NATIVE COUNCIL; STATE OF CALIFORNIA; STATE WATER RESOURCES CONTROL BOARD; STATE OF OREGON; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF MARYLAND; STATE OF RHODE ISLAND; STATE OF COLORADO; DISTRICT OF COLUMBIA; STATE OF NORTH CAROLINA; COMMONWEALTH OF VIRGINIA; STATE OF NEW MEXICO; STATE OF VERMONT; STATE OF MINNESOTA; STATE OF CONNECTICUT; STATE OF WASHINGTON; STATE OF MICHIGAN; COMMONWEALTH OF MASSACHUSETTS; STATE OF NEVADA; STATE OF WISCONSIN; STATE OF MAINE; *and* STATE OF ILLINOIS,
PLAINTIFFS-APPELLEES,
v.
MICHAEL S. REGAN* *and* U.S. ENVIRONMENTAL PROTECTION AGENCY,
DEFENDANTS,
and
AMERICAN PETROLEUM INSTITUTE, INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *and* NATIONAL HYDROPOWER ASSOCIATION,
INTERVENORS-DEFENDANTS-APPELLANTS
AND
STATE OF ARKANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF WEST VIRGINIA; STATE OF WYOMING; *and* STATE OF TEXAS,
INTERVENORS-APPELLANTS.

On Appeals from the U.S. District Court
for the Northern District of California
Case Nos. 3:20-cv-04636-WHA, -04869-WHA, -06137-WHA
The Honorable William H. Alsup, Judge

INTERVENOR-DEFENDANTS-APPELLANTS' AND INTERVENORS-APPELLANTS' REPLY BRIEF

* EPA Administrator Regan was automatically substituted for his predecessor, Andrew R. Wheeler, under Fed. R. App. P. 43(c)(2).

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1(a), American Petroleum Institute states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

Dated: July 27, 2022

/s/ George P. Sibley, III
GEORGE P. SIBLEY, III

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Interstate Natural Gas Association of America states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

Dated: July 27, 2022

/s/ George P. Sibley, III
GEORGE P. SIBLEY, III

Pursuant to Federal Rule of Appellate Procedure 26.1(a), National Hydropower Association states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

Dated: July 27, 2022

/s/ Misha Tseytlin
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INTRODUCTION

In the Administrative Procedure Act (APA), Congress authorized agencies to revise major regulatory programs only through notice-and-comment rulemaking. And it allows federal courts to set aside such actions only after concluding, based on review of the administrative record, that the agency's action was arbitrary, capricious, or contrary to law. Plaintiffs ask this Court to create an unprecedented loophole, giving any single district judge unreviewable authority to nullify nationwide any rule adopted by a prior Administration without even cracking open the administrative record, let alone adjudicating the lawfulness of the agency's action. EPA does not even attempt to defend that loophole on the merits, so it argues that district courts taking advantage of it should not be subject to appellate review, which would—of course—amount to the same result. But the Supreme Court has strongly signaled, in issuing a stay in this very case, that neither position is tenable. After all, EPA and Plaintiffs raised these jurisdictional and merits arguments before the Supreme Court, which concluded that both were likely to fail.

Plaintiffs in three federal district courts around the country challenged the Section 401 Rule ("Rule"). Only the district court below

vacated the Rule, and it did so without holding that the Rule was actually unlawful or even attempting the mandatory severability analysis. That conclusion was plainly erroneous. But because the new Administration does not like the Rule, it did not appeal, which left the parties that the Rule benefits—several sovereign States and three major industry organizations ("Intervenor-Appellants")—to appeal the district court's decision and obtain a stay from the Supreme Court.

Before the Supreme Court and now before this Court, EPA finally concedes that the district court lacked authority to vacate the Rule. Nevertheless, EPA claims that such a plainly erroneous, consequential, and final decision cannot be appealed. The nonsensical construction of finality EPA advocates contravenes precedent from this Court and the Supreme Court, and would leave the very error that EPA concedes the district committed here—vacatur of a rule without adjudicating that rule unlawful—unreviewable in a case where the Administration would prefer to avoid the strictures of notice-and-comment rulemaking to withdraw a rule. Plaintiffs, for their part, continue to defend the district court's unlawful decision on the merits. The district court, however, did not even attempt to grapple with the APA's plain text limiting its

authority to "set aside" agency action "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Plaintiffs' attempts to salvage that decision by resorting to the district court's equitable authority plainly fail in light of the clear statutory text. And, even were it proper for the district court to apply the *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), test for vacatur of a rule without first finding the rule unlawful, the district court erred in applying that test by ignoring the substantial disruption vacatur would cause.

ARGUMENT

I. This Court Has Appellate Jurisdiction.

A. The district court's order is final and appealable. Dkt. 47 ("Opening Br.") at 4–7. That order "is a full adjudication of the issues," *Patel v. Del Taco, Inc.*, 446 F.3d 996, 1000 (9th Cir. 2006), as the court gave Plaintiffs the only relief they sought by "vacating the Final Rule," 4-ER-560; 1-ER-21. The order also clearly evidences the district court's intention that it be the court's final judgment to "ensure appealability," 1-ER-4, and removed any doubt about finality, *Montes v. United States*, 37 F.3d 1347, 1350 (9th Cir. 1994). This Court gives finality "a practical

construction," *Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384 (9th Cir. 1996), meaning that it exercises jurisdiction over remand orders where "nonappealability would effectively deprive the litigants of an opportunity to obtain review," *Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1184–85 (9th Cir. 2004) (internal quotation marks and citation omitted). The only issue on appeal is whether the district court properly vacated the Rule without finding all aspects of it unlawful and/or inseverable. That question will not "be considered during the agency proceedings on remand." *Crow Indian Tribe v. United States*, 965 F.3d 662, 675 (9th Cir. 2020). Thus, if that question is not reviewed here, it will not be reviewed at all. Under *Alsea Valley*, that makes the order final and appealable. 358 F.3d at 1184–85.

B. EPA says *Alsea Valley* mandates a different result, but EPA's reasoning requires this Court to attach talismanic significance to the district court's use of the word "remand" in its final order, a position that neither *Alsea Valley* nor any other decision supports. To the contrary, this Court has expressly rejected such rigid formalism when evaluating finality. The fact central to the analysis here is that the agency will not, on remand, evaluate whether a district court has authority to vacate

agency action without first finding it unlawful based on review of the administrative record. *See Alsea Valley*, 358 F.3d at 1184–85. Indeed, as if to highlight the point, EPA has now published its proposed revision to the 401 Rule, and that proposed revision says nothing about a district court's authority under the APA to vacate the Rule at issue here, and invites no comment on the question. *See* EPA, *Clean Water Act Section 401 Water Quality Certification Improvement Rule; Proposed Rule*, 87 Fed. Reg. 35,318 (June 9, 2022). So Intervenor-Appellants will have no opportunity before the agency to vindicate the position they advance on appeal. Each of EPA's arguments ignores this indisputable reality.

EPA starts first by noting that the district court's characterization of its order as "final" is not dispositive. *See* Dkt. 59 ("EPA Br.") at 21 (citing *Alsea Valley*, 358 F.3d at 1184–87). True enough, because this Court must look to the practical effect of the district court's order. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 409 (2015), just as Intervenor-Appellants have argued, Opening Br. at 4–5. That is the reason that mere use of a label like "remand" does not alter the fundamental character of the district court's order, which vacates the Rule without first finding it unlawful. Evaluating the legality of that

exercise of judicial power is plainly beyond EPA's remit. So whereas the appellants in *Alsea Valley* at least had a chance to obtain relief first from the agency, Intervenor-Appellants here have no opportunity to reverse the plainly unlawful exercise of judicial power by the Court below.

EPA's position, on the other hand, asks the Court to treat *Alsea Valley* as establishing a hard-and-fast rule that any district court "remand" of agency action can only be appealed by the agency. But *Alsea Valley* itself expressly disclaimed such rigidity, acknowledging that "there may be circumstances that would afford a non-agency litigant the ability to appeal a remand order, but we need not reach that question." 358 F.3d at 1185. And for good measure, the Court expressly rejected EPA's formalistic approach a few years later. *See Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1069 (9th Cir. 2010).

EPA whistles past this key feature of this Court's precedent to focus on the outcomes in *Alsea Valley* and *Pit River Tribe*, where this Court found that orders the issuing district courts considered final were not sufficiently "final" to trigger appellate jurisdiction. EPA Br. at 20–21. But in both cases, the deciding factor was not that the district court granted "remand" in a purportedly final order but that the appellant

could vindicate its rights before the agency on remand. *See Alsea Valley*, 358 F.3d at 1184; *Pit River Tribe*, 615 F.3d at 1076. That is not the case here because the issue is whether the district court could vacate the Rule without finding all aspects of it unlawful and/or inseverable. The agency cannot and will not consider that question at all on remand.

EPA next contends that Intervenors improperly try to separate the remand and vacatur portions of the district court's order, as the appellant did in *Alsea Valley*. EPA Br. at 17–18. But that, too, is false. The would-be appellants in *Alsea Valley* argued "that setting aside the [rule] is a separately appealable district court decision, distinct from declaring the [rule] unlawful." 358 F.3d at 1185. Here, the court did not find the Rule unlawful, but nonetheless vacated it. That final decision to vacate the Rule is what Intervenors appeal. Thus, the district court's failure to receive merits briefing, 1-ER-12–15, only underscores that the district court did not make a merits determination, which is the very illegality that Intervenors challenge. *See infra* Parts II & III. This point also rebuts EPA's claim that Intervenors' positions will be considered on remand, EPA Br. at 15–17, even if it were not already rebutted by the complete lack of discussion of the issues on appeal in EPA's proposed

rulemaking, *supra* p. 5. Intervenors are entitled to the benefit of the Rule now because the district court did not lawfully vacate that Rule. That is the position Intervenors seek to vindicate on appeal, and it is entirely independent of what decision, if any, EPA makes during the remand process in terms of adopting a new rule.

EPA then argues the district court did not issue a separable "definitive[]" ruling because it did not instruct EPA to take any particular actions on remand. EPA Br. at 16. But, again, the court unquestionably "issued a definitive ruling" on a "separable legal issue," adverse to Intervenors by vacating the Rule without finding all aspects of it unlawful and/or inseverable. *See Crow Indian Tribe*, 965 F.3d at 676.

EPA's related argument that the order is non-final because it does not force EPA to adopt a potentially erroneous rule similarly fails. *See* EPA Br. at 16. This Court has found appellate jurisdiction appropriate where, even though "the district court's order would not 'force[ ] the agency to apply a potentially erroneous rule,'" the "relief sought [on appeal] could not be achieved" on remand. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1175–76 (9th Cir. 2011) (per curiam) (citation omitted). That makes the case for finality even stronger here. In *Sierra*

Forest, the Court found finality even though relief on remand was "theoretically possible" because "the final judgment rule deals in practice, not theory." *Id.* at 1175. Relief on remand is not even theoretically possible here.

That makes this case much more like *Crow Indian Tribe*, which EPA and Plaintiffs make no effort to distinguish. There, the district court held the agency's failure to include a recalibration commitment arbitrary and capricious. 965 F.3d at 676. The Intervenors sought to appeal the district court's order requiring the Fish and Wildlife Service to recalibrate any new grizzly bear population estimator to the current estimator. *Id.* at 670. This Court took a practical approach, finding the order final not because the district court "preordained" the outcome of the rulemaking, EPA Br. at 16, but because, as here, "[a]n appeal is the only way the Intervenors' objections can be considered," *Crow Indian Tribe*, 965 F.3d at 676. That approach is what the Supreme Court's binding caselaw mandates, given that the Court takes a "practical rather than a technical construction," while noting that "the statute's core application

is to rulings that terminate an action." *Gelboim*, 574 U.S. at 409 (quoting *Mohawk Indus., Inc. v. Carpenter*, 588 U.S. 100, 106 (2009)).[1]

The sheer audacity of EPA's position here illustrates the wisdom of precedent's focus on the practical effect of the district court's order. EPA now admits what the district court did below was unlawful, *see supra* p. 2, and yet EPA refused to appeal precisely because it wanted to retain the results of the district court's illegal actions. Only a "technical" construction of finality could tolerate such an unjust result, which would create a trivially easy-to-replicate receipt for any agency wanting to evade the APA's strictures: litigants friendly to a new Administration seek vacatur of the prior Administration's rule in as many courts around the country as needed, and once a single district court grants a nationwide vacatur as part of the remand, the new Administration declines to take an appeal, putting an unreviewable end to the rule. The practical construction of finality that the Supreme Court's and this Court's precedent mandate empowers stakeholders like Intervenor-

[1] Indeed, if this Court now concludes that *Alsea Valley* requires a contrary result—notwithstanding *Alsea Valley*'s limiting language, *Pit River Tribe*, and *Crow Indian Tribe* —then this Court should *sua sponte* reverse that aspect of *Alsea Valley* en banc, in order to avoid conflict with the Supreme Court's caselaw and its stay decision in this very case.

Appellants here to appeal so that higher courts can prevent agencies from "circumvent[ing] the usual and important requirement, under the [APA], that a regulation originally promulgated using notice and comment . . . may only be repealed through notice and comment." *See Ariz. v. City and County of San Francisco*, 142 S. Ct. 1926 (2022) (Roberts, C.J., concurring).

II. The APA Precludes The District Court From Vacating A Rule Without Finding It Unlawful Based on Review of the Full Administrative Record and Briefing on the Merits.

A. Under the APA's plain text, federal courts may only set aside federal agencies' actions "found" to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," after a "review [of] the whole record." 5 U.S.C. § 706(2). This specific statutory authorization satisfies the requirement that courts can only vacate agency action "for substantial procedural or substantive reasons as mandated by statute." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) (citation omitted); Opening Br. at 17–20. Violating these clear statutory limitations and controlling caselaw, the district court below vacated the landmark Section 401 Rule nationwide, without finding any aspect of the Rule unlawful, based upon

its own mere doubts about the Rule's propriety. Opening Br. at 22–24. That violates the APA, and the court's justification for its ultra vires order is badly flawed. *Id.* at 24–31; *see also N. Alaska Envtl. Ctr. v. Haaland*, No. 3:20-cv-00187-SLG, 2022 WL 1556028, at *6 (D. Alaska May 17, 2022) ("granting vacatur without a merits determination would run contrary to the APA's goals because it would in some cases 'allow the [government] to do what [it] cannot do under the APA, repeal a rule without public notice and comment without judicial consideration of the merits.'").

B. EPA "agrees with Intervenors that when an agency seeks a voluntary remand without confessing error, the district court cannot vacate the challenged agency action unless the court first determines that the action is unlawful and carefully considers the appropriate scope of relief." EPA Br. at 22–23. Only Plaintiffs persist in the argument that district courts can vacate agency actions without even a confession of error by the agency.

C. In support of their claim that vacatur is proper without a merits ruling or confession of error—thus, again, asking this Court to prompt reversal by the Supreme Court that just stayed the district court's

unlawful order—Plaintiffs rely on cases that hold no such thing. Plaintiffs cite *Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520 (9th Cir. 2015), for the proposition that remand orders with vacatur may only be avoided in "limited circumstances," Dkt. 60 ("Plaintiffs' Br.") at 23. But that opinion explained that this general guidance only applied to "an *invalid* rule," *Pollinator*, 806 F.3d at 532 (emphasis added). No better is their citation (at 18) of *Chlorine Chemistry Council v. EPA*, where EPA confessed error and the Court found the rule "arbitrary and capricious" before vacating it. *Chlorine Chem. Council*, 206 F.3d 1286, 1288, 1291 (D.C. Cir. 2000).

Plaintiffs also err in contending that district courts have on-statutory equitable authority to vacate rules outside of the APA's strictures. Plaintiffs' Br. at 18–23. A federal court can only vacate agency action where "*mandated by statute*, not simply because the court is unhappy with the result reached." *Vt. Yankee*, 435 U.S. at 558 (emphasis added; citation omitted); *see also In re Powerine Oil Co.*, 59 F.3d 969, 973 (9th Cir. 1995) ("Equity may not be invoked to defeat clear statutory language, nor to reach results inconsistent with the statutory scheme.").

Plaintiffs' pre-APA precedent only reinforces that principle, thereby refuting their argument. *See* Plaintiffs' Br. at 19–20. In each case, the Supreme Court recognized that a district court could vacate after an actual finding of procedural or substantive unlawfulness, not before such a finding. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 372–73 (1939) (no need for court "to examine other grounds of attack" on the "merits" of agency decision, where board's adoption of "decision proposed by its subordinates" without its own consideration and findings or "opportunity [for petitioner] to be heard thereon" was sufficient grounds to remand and set aside); *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946) (in exercising equitable authority over agency, district court may "upon a proper showing" order preliminary relief, or after "decid[ing] all relevant matters in dispute . . . award complete relief"); *see also United States v. Morgan*, 307 U.S. 183, 185, 198 (1939) (after this Court "set aside" agency action "without consideration of the merits, for failure of the Secretary to follow the procedure prescribed by the statute" in *Morgan v. United States*, 304 U.S. 1 (1938), "the full record of the Secretary's proceedings" on remand, "including findings supported by evidence," would give

district court "the appropriate basis" to exercise its equitable discretion over impounded funds).

In any event, the "inescapable inference" of the APA is that this statute "restricts the court's jurisdiction in equity" to set aside or vacate a rule, *Porter*, 328 U.S. at 398, to only circumstances where the court finds a specific statutory ground to do so, 5 U.S.C. § 706(2). Thus, Congress was "clear," *Webster v. Doe*, 486 U.S. 592, 603 (1988), that it intended to foreclose equitable remedies beyond those bases to set aside agency action that the APA explicitly provides. 5 U.S.C. § 706(2). Plaintiffs' citations to legislative history cannot overcome this clear statutory text. *See United States v. Lopez*, 998 F.3d 431, 442 (9th Cir. 2021) ("'[L]egislative history can never defeat unambiguous statutory text.'" (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020)). And because "the APA is, foremost, a waiver of sovereign immunity," *Washington v. U.S. Dep't of State*, 996 F.3d 552, 565 (9th Cir. 2021), the district court's freewheeling equity approach is particularly inappropriate.

Similarly unhelpful to Plaintiffs is their suggestion that a court's decision to remand a rulemaking back to the agency operates outside of

the confines of the APA's judicial-review procedures. Plaintiffs' Br. at 21. Plaintiffs claim that any court "considering an agency's request for remand, however, is not engaging in judicial review of the challenged rule" and so the APA's judicial-review provisions, *see* 5 U.S.C. §§ 701–06, do not apply, Plaintiffs' Br. at 21. But, of course, the APA's judicial review provisions apply to "any applicable form of legal action" concerning an agency action reviewable under the APA, 5 U.S.C. § 703, unless review by the courts is precluded by statute or the agency's decision "is committed to agency discretion by law," *id.* § 701(a). That is why Plaintiffs invoked the judicial-review provisions of the APA in filing this lawsuit, 4-ER-540, 546, and the district court purported to base its erroneous decision on these APA provisions, 1-ER-010–011.

Plaintiffs oddly claim that nothing in 5 U.S.C. § 702 limits a district court's authority to order vacatur *before* a finding of unlawfulness. Plaintiffs' Br. at 22. But the issue is what the statute *empowers* a court to do, because the APA is a waiver of sovereign immunity and the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981); *see also Lane*

v. Pena, 518 U.S. 187, 192 (1996) ("a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.").

No more relevant are Plaintiffs' concerns that without vacatur before a finding of unlawfulness, agencies will be able to "withdraw dubious actions from judicial review" and leave plaintiffs without a remedy. Plaintiffs' Br. at 24. Permitting an agency to reconsider a rulemaking without vacatur when doing so is not "'frivolous or in bad faith,'" *id.* at 24 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)), is consistent with a court's obligation under the APA to "deny relief on any other appropriate legal or equitable ground," 5 U.S.C. § 702. Of course, a court may decline an agency's request for remand if it believes the request is "frivolous or in bad faith," *SKF USA Inc.*, 254 F.3d at 1029, or "issue all necessary and appropriate process to . . . preserve status or rights," 5 U.S.C. § 705, if faced with a sufficiently "dubious" agency action, Plaintiffs' Br. at 24. But under no circumstances may a court simply vacate a rulemaking without any adjudication of lawfulness. *See Vt. Yankee*, 435 U.S. at 558. The district court's own actions below—vacating an agency rule nationwide after two other courts

declined to do so, 1-ER-021–022; Opening Br. at 13, unilaterally undoing EPA's rulemaking work of "more than 125,000 comments on the proposed rule from a broad spectrum of interested parties," EPA, *Clean Water Act Section 401 Certification Rule; Final Rule*, 85 Fed. Reg. 42,210, 42,213 (July 13, 2020), without following the APA's mandatory process for invalidating rules, 5 U.S.C. § 706(2)—shows starkly why that must be so.

Plaintiffs have no answer to the Intervenor-Appellants' argument that the district court's action exceeds the APA's limited waiver of sovereign immunity. They merely point to the fact that EPA has not itself raised that immunity. Plaintiffs' Br. at 22. But EPA now agrees with Intervenors that the district court lacked authority to vacate the 2020 Rule without first finding the Rule invalid. EPA Br. at 22–23. In any event, "Congress alone has power to waive or qualify" sovereign immunity. *United States v. Chem. Found.*, 272 U.S. 1, 20 (1926). A federal agency cannot consent to a waiver of sovereign immunity. *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011) (agency "regulation[s] and . . . letter[s] are not acts of Congress, so they cannot effect a waiver of sovereign immunity"). Plaintiffs are also wrong in their suggestion that sovereign immunity is a question of jurisdiction over the

federal government, not the type of relief sought. *See United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (to sustain a claim for monetary damages, the waiver of sovereign immunity must extend to such monetary claims); *Blue v. Widnall*, 162 F.3d 541, 545 (9th Cir. 1998) ("The APA waives sovereign immunity for actions against the United States and its agencies . . . *to the extent that nonmonetary relief is sought*" (emphasis added)).

D. Finally, neither EPA nor Plaintiffs address Intervenors' argument that the nationwide scope of the vacatur order was inappropriate. Thus, EPA and Plaintiffs have "waive[d] any argument" on this point by "fail[ing] to raise [it] in [their] answering brief." *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015); *see also Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

III. The District Court's Application Of The *Allied-Signal* Factors Was Erroneous, Even If It Were Proper To Apply That Test Here.

The *Allied-Signal* test has no bearing on this case because the district court had no authority to vacate the Rule without finding it statutorily unlawful. *See supra* Part II; Opening Br. at pp. 17–31. In any event, the way in which the district court applied that test was erroneous.

See Opening Br. at pp. 32–41. Plaintiffs relied almost entirely on their erroneous contention that EPA admitted the Rule's illegality in various statements. *See* 3-ER-281–82; 2-ER-239–45. When Plaintiffs did attempt substantive arguments, they failed to support the broad remedy of vacatur, discussing at most a fraction of the Rule's provisions. 3-ER-268, 281–82. The district court's complete vacatur of the Rule was without justification as the district court did not even conduct a severability analysis with respect to the portions of the Rule on which it expressed doubts. The district court also erred in its consideration of the second *Allied-Signal* factor by ignoring the substantial and predictable disruptions caused by vacatur.

While Plaintiffs argue that the court properly applied the *Allied-Signal* factors, Plaintiffs' Br. at 24–30, they ignore entirely that the district court never found any "deficiencies," "serious[ ]" or otherwise, with the Rule. *See Allied-Signal*, 988 F.2d at 150. Instead, it expressed mere "doubt" about the Rule because it did not track exactly the Supreme Court's *PUD No. 1* decision. 1-ER-17–18. But, as Plaintiffs concede, *PUD No. 1* identified only what the Court then considered to be "the most reasonable interpretation," Plaintiffs' Br. at 26–27, not the *only*

reasonable interpretation, leaving open the possibility that EPA could adopt another reading as part of its delegated authority, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

Further, that the new administration's EPA has expressed "doubts" about the Rule is legally irrelevant. Plaintiffs' Br. at 28–29. EPA quite pointedly has not conceded error in this case. But even if that were enough, mere expression of "doubts" does not amount to legal deficiency and thus cannot meet *Allied-Signal*'s first factor. *California Communities Against Toxics* is not to the contrary because there no party defended the rule's reasoning and EPA sought to salvage the rule based solely on new reasoning, which it cannot do. *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 993 (9th Cir. 2012) (per curiam) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

Plaintiffs argue the district court correctly vacated the Rule because it did not track exactly the Supreme Court's decision in *PUD No. 1*. Not so. *Brand X* provides that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no

room for agency discretion." 545 U.S. at 982 (emphasis added). In *PUD No. 1*, the Supreme Court never found that its reading is required by the unambiguous text of Section 401, such that there is no room for agency discretion. In fact, quite the opposite, the Supreme Court found that "EPA's conclusion that activities—not merely discharges—must comply with state water quality standards is a reasonable interpretation of § 401, and is *entitled to deference*." 511 U.S. at 712 (emphasis added); *see also id.* at 728–29 (Thomas, J., dissenting) (criticizing the majority for resorting to *Chevron* deference even though the Government did not seek deference). Thus, EPA could adopt a different reading of Section 401 under *Brand X* so long as that reading is reasonable, and the district court never tried to assess whether EPA's reading was reasonable.

Further, this one merits argument only addresses one aspect of the Rule. Like the district court, Plaintiffs do not even try to conduct a severability analysis of this complex rule that has many different aspects and provisions. *See* 3 EOR 268, 281–82; *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 351–52 (D.C. Cir. 2019). Plaintiffs claim that the district court did not have to conduct such analysis "[g]iven the pervasive and fundamental flaws the court identified, it would have been futile to

consider severability." Plaintiffs' Br. at 28. But the district court never found that any alleged flaw in the Rule was so "fundamental" or "pervasive" that they could not be severed. That failure alone is sufficient for this Court to reverse. In any event, Plaintiffs never explain which alleged flaws were so "fundamental" or "pervasive" or why those flaws made non-severability a foregone conclusion.

Finally, Plaintiffs can only arm-wave at the clear disruptiveness of the district court's nationwide vacatur. Plaintiffs' Br. at 29–30. As Intervenors have shown, the district court ignored outright the substantial disruptions immediate vacatur caused to pending Section 401 reviews and to States' sovereignty by giving other States outsized control over economic activities within their borders. Opening Br. at 36–41. And Plaintiffs make no serious effort to refute those points.

IV. The Ninth Circuit Lacks Authority to Vacate the Non-Appealed Remand.

Plaintiffs alternatively ask this Court to vacate the district court's entire October 21 Order—including the aspect of the Order remanding the Rule to EPA—and to send the case back to the district court, Plaintiffs' Br. at 30–31, but this Court lacks jurisdiction to take this action because Plaintiffs failed to file timely an appeal (or cross-appeal).

Under Federal Rule of Appellate Procedure 4(a), Plaintiffs had 60 days to appeal from the district court's October 21 Order, 1-ER-005–022, and subsequent entry of judgment, 1-ER-004, meaning they had until no later than Monday, January 17, 2022, to file their notices of appeal. 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B); *see also* Fed. R. App. P. 26(a)(1)(C). Plaintiffs did not appeal from the district court's October 21 Order within the jurisdictional time period, meaning they have forfeited any challenge to any aspect of that Order, including the district court's decision to remand the case to EPA under *SKF USA, Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001). *See Bowles v. Russell*, 551 U.S. 205, 212–13 (2007).

That Plaintiffs now regret the consequences of their own voluntary litigation choices is, of course, irrelevant to the above-described jurisdictional defects, but it is also worth emphasizing that the situation in which Plaintiffs now find themselves is of their own doing. The developments that have prompted Plaintiffs' 11th hour request—that an appellate court would ultimately stay or reverse the vacatur portion of the district court's unprecedented, unlawful ruling, *see Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1347 (2022)—was foreseeable when Plaintiffs made the "voluntary, conscious election not to appeal" any aspect of the

October 21 Order, as would have been necessary for them to challenge any aspect of that Order. *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982).

CONCLUSION

The decision below should be reversed and the district court instructed to either grant the Federal Defendants' motion to remand without vacatur or deny the motion and proceed to merits briefing.

Dated: July 27, 2022

Respectfully submitted,

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* Pursuant to Circuit Rule 25-5(e), I hereby attest that concurrence in the filing of the document has been obtained from each of the other Signatories. /s/ George P. Sibley, III

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 5,116 words. This Brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Century Schoolbook typeface.

Dated: July 27, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 27, 2022. Service will be accomplished by the appellate CM/ECF system on registered CM/ECF users.

The following case participants are not registered CM/ECF users, and so I caused the foregoing to be served upon them via overnight third-party commercial carrier for delivery at the following addresses:

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