

GIBSON DUNN



Appellate & Constitutional Law Update

June 27, 2024

Supreme Court Grants Stay Suspending EPA's "Good Neighbor" Emissions-Regulation Plan

Ohio v. EPA, Nos. 23A349, 23A350, 23A351, and 23A384 – Decided June 27, 2024

Today, in a case that further highlights the significance of the Court's emergency docket for challenging agency rules, the Supreme Court (5-4) granted Ohio and several other applicants a stay that suspends the EPA's "Good Neighbor" plan regulating some states' emissions.

"Perhaps there is some explanation why the number and identity of participating States does not affect what measures maximize cost-effective downwind air-quality improvements. But if there is an explanation, it does not appear in the final rule. As a result, the applicants are likely to prevail on their argument...."

JUSTICE GORSUCH, WRITING FOR THE COURT

Background:

The Clean Air Act directs each state to develop plans to implement air-quality standards. If a state's plan fails to meet the relevant requirements, the EPA can reject that plan and impose a federal plan instead. One requirement in the Act is a "Good Neighbor" provision, which requires upwind states to reduce emissions to account for pollution exported to downwind states. In 2022, the EPA proposed to reject the plans of 23 upwind states whose emissions it said would have an effect on downwind states. The EPA proposed a single, coordinated federal plan for all 23 states. The EPA ultimately disapproved 21 states' plans. Before the federal plan was final, several courts of appeals held that the EPA had likely violated the Act in disapproving certain states' plans and granted stays of the disapprovals pending review. In June 2023, the EPA nonetheless finalized the proposed federal plan—the "Good Neighbor" plan. Since then, several other states have obtained stays of the EPA's state-plan disapprovals. The Good Neighbor plan now applies to only 11 states, regulating far less emissions than the plan's stated intent.

Ohio and several other states still subject to the federal plan, as well as several industry participants, challenged the plan in the D.C. Circuit and sought a stay pending that court's review. After the D.C. Circuit declined to stay the federal plan, several of the states and industry participants applied to the Supreme Court for a stay, arguing that the Good Neighbor plan violates the Administrative Procedure Act because the EPA failed to consider how the federal plan would work if it applied to fewer than 23 states.

Issue:

Are applicants entitled to a stay of the Good Neighbor plan?

Court's Holding:

Yes. The applicants are likely to succeed on the merits because the Good Neighbor plan does not comply with the APA's requirement that the agency provide a reasoned explanation, and applicants have demonstrated that they face irreparable harm justifying a stay of the plan pending final judicial review.

What It Means:

- The Court concluded that the applicants were likely to succeed on the merits. The Court emphasized that the "long-settled standards" of federal rulemaking require the agency to explain its response to all material comments raised during the notice and comment period. While the Court recognized that EPA was aware of the concern that the Good Neighbor plan might not apply to all 23 States, the Court faulted EPA for failing "to explain why it believed its rule would continue to offer cost-effective improvements in downwind air quality with only a subset of the States it originally intended to cover."
- Because the Court concluded that the "harms and equities" relevant to a stay of the enforcement of a federal regulation were "very weighty on both sides," it held that the propriety of the stay turned on the likelihood of success on the merits. The Court did credit—and the dissent did not dispute—the applicants' argument that the unrecoverable costs of compliance with the rule during the pendency of the litigation would constitute irreparable harm. This argument would likely extend more broadly to challenges of other agency actions.

- Justice Barrett dissented, joined by Justices Sotomayor, Kagan, and Jackson. She did not object to the Court’s analysis of the equities but concluded that the States were unlikely to succeed on the merits. She closed by noting that the Court “should proceed all the more cautiously” when addressing emergency applications “with voluminous, technical records and thorny legal questions.”
- The Court’s decision indicates a willingness to grant stays while an agency rule is being challenged in lower courts and even before any lower court has expressed its views on the merits of the rule. This further highlights the importance of the Court’s emergency docket, particularly for challenges to broad federal rules.
- Notably, the Court defused criticism over the so-called “shadow docket” by holding oral argument, rather than deciding the stay merely on the briefs.

Gibson Dunn Appellate Honors



The Court’s opinion is available [here](#).

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding developments at the U.S. Supreme Court. Please feel free to contact the following practice group leaders:

Appellate and Constitutional Law

Thomas H. Dupree Jr.
+1 202.955.8547
tdupree@gibsondunn.com

Allyson N. Ho
+1 214.698.3233
aho@gibsondunn.com

Julian W. Poon
+1 213.229.7758
jpoon@gibsondunn.com

Lucas C. Townsend
+1 202.887.3731
ltownsend@gibsondunn.com

Bradley J. Hamburger
+1 213.229.7658
bhamburger@gibsondunn.com

Brad G. Hubbard
+1 214.698.3326
bhubbard@gibsondunn.com

Related Practice: Environmental Litigation and Mass Tort

Stacie B. Fletcher
+1 202.887.3627
sfletcher@gibsondunn.com

Daniel W. Nelson
+1 202.887.3687
dnelson@gibsondunn.com

This alert was prepared by associates Zachary Tyree, Aly Cox, and Aaron Gyde.

Attorney Advertising: These materials were prepared for general informational purposes only based on information available at the time of publication and are not intended as, do not constitute, and should not be relied upon as, legal advice or a legal opinion on any specific facts or circumstances. Gibson Dunn (and its affiliates, attorneys, and employees) shall not have any liability in connection with any use of these materials. The sharing of these materials does not establish an attorney-client relationship with the recipient and should not be relied upon as an alternative for advice from qualified counsel. Please note that facts and circumstances may vary, and prior results do not guarantee a similar outcome.

If you would prefer NOT to receive future emailings such as this from the firm,
please reply to this email with "Unsubscribe" in the subject line.

If you would prefer to be removed from ALL of our email lists,
please reply to this email with "Unsubscribe All" in the subject line. Thank you.

© 2024 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at gibsondunn.com