OHIO V. EPA ORAL ARGUMENT AND STANDARDS OF REVIEW ON THE EMERGENCY DOCKET

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The Supreme Court held oral argument this morning in *Ohio v. EPA*. The oral argument offers some insights on the potential for the Court to clarify its standard of review for assessing attempts to temporarily halt administrative action.

In the case, a number of States and private industry are asking the Court to "stay" the EPA's implementation of its new "Good Neighbor" rule for ozone. The rule requires certain upwind states to reduce their ozone emissions so as to not interfere with downwind states' ability to meet national air quality standards for ozone. A fuller overview of the Environmental Law issues in the case is available here.

The Court made the unusual move of holding oral argument on this application for emergency relief. It did the same thing in the vaccine-or-test *NFIB v. OSHA* case a few terms back. Today's oral argument offered a window into how some of the Justices are conceiving of attempts to temporarily halt administrative action.

Normally, when a litigant asks the Supreme Court to stop an actor (like an executive branch actor) from doing something, they ask the Court for an "injunction." But emergency challenges to agency action are routinely framed as "stays." Whether that is the case because some of the foundational caselaw on this front arose in a world in which agencies were more apt to act like courts (by doing adjudications) than legislatures (by issuing rules), such that conceiving of the relief along the lines of a stay of a lower court order was more natural, or because more recent caselaw has at times conceived of this sort of relief in specific statutory contexts (like immigration removal orders) as a stay, is a question for another day.

The more pressing question is what standards ought to guide the Court in issuing such relief. This is especially relevant in a situation like *Ohio v. EPA*, wherein the lower court (the D.C. Circuit) concluded that the new Good Neighbor Plan should *not* be halted as the plaintiffs' merits challenge plods its way through the federal courts. In this sort of scenario, litigants have begun sparring in their briefs over what exactly they are asking the Supreme Court to do.

Petitioners (like the private industry and States in *Ohio v. EPA*) regularly fashion their requests as a "stay" that should be governed by the Supreme Court's standards for issuing "stays." In recent years, however, the Solicitor General's Office has begun combatting this characterization of the relief. Including in *Ohio v. EPA*, the SG's briefing contends that in fact what petitioners are seeking when they aim to halt administrative action at the Supreme Court is

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an "injunction." What's more, argues the SG, is that the Supreme Court's traditional standard for issuing such preliminary injunctive relief is much higher than its standard for issuing stays. That is, the petitioners' right to injunctive relief, unlike stays, must be "indisputably clear," to use the phrasing of in-chambers opinions authored by Chief Justice Rehnquist and Justice Scalia.

The Court has not yet resolved this brewing dispute between petitioners and the SG. It could use *Ohio v. EPA* as a vehicle to do so. Did oral argument shed light on how the Court might come out?

Yes and no.

Surprisingly, the SG's Office did not spend any time during oral argument hammering home its brief's argument that petitioners were in fact seeking injunctive relief. The SG's Office seemed to accept the framing of the relief as a stay.

Similarly surprising was Justice Kagan's invocation of the *Nken* framework — a framework for lower courts' issuances of stays — given that she seems partial to the EPA's position in the case and has publicly dissented from alleged overuse of the Court's "shadow docket." That is surprising because accepting the SG's brief's framing of the sought after relief as an "injunction" — and then applying the proffered Rehnquist/Scalia heightened standard to that relief — cuts in EPA's favor in this specific case and cuts against the Court issuing consequential rulings in the preliminary stages of litigation by way of emergency orders.

Another interesting piece of oral argument was that Justice Barrett seems to have reupped her *Does 1–3 v. Mills* concurring opinion's framework for assessing motions for preliminary injunctive relief. In that separate opinion, Justice Barrett argued in favor of considering certworthiness as part of the likelihood of success on the merits prong for preliminary injunctive relief. During oral argument today, Justice Barrett voiced some skepticism with respect to just applying *Nken* (which, again, articulated the standard for lower courts to apply when issuing stays, and thus does not include any certworthiness considerations).

This move by Justice Barrett raises some interesting questions. If Justice Barrett wants to include a consideration of certworthiness when assessing motions for emergency relief against agency action but conceives of the requested relief against the EPA as a stay, then she could easily invoke the Supreme Court's own standard for issuing stays, which *does* include consideration of certworthiness. *See* Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam).

But the way in which she framed her question during oral argument — and the way in which Justice Kavanaugh built off it (note, too, that he had joined her *Does 1–3 v. Mills* concurrence) — indicates that Justice Barrett is not necessarily conceiving of the relief here as a stay. Surely she would have rebutted the application of *Nken* with reference to *Hollingsworth* if so. Instead, Justice Barrett said that likelihood of success on the merits entails a certworthiness consideration. That is, she seems to be baking a certworthiness consideration into the injunctive relief inquiry. Just like she did in her *Does 1–3 v. Mills* concurrence. In short, one could read this line of questioning to indicate that Justice Barrett is conceiving of the relief against the EPA as injunctive relief.

If that's the case, then an even more interesting question arises: how can certworthiness necessarily be a consideration in the preliminary injunctive relief context when that relief, traditionally speaking, requires that the petitioner's rights be "indisputably clear"? The tension here is acute when a split in lower court authority provides the grounds for certworthiness. In

an in-chambers opinion assessing an application for preliminary injunctive relief a few years back, Chief Justice Roberts reasoned that the existence of a circuit split cuts *against* granting the relief. Why? Because if the lower courts are divided on the question of petitioner's right to relief, then the petitioner's right to relief is probably not "indisputably clear." In short, there's a potential tension between Justice Barrett's approach and the Rehnquist/Scalia/SG briefing approach.

Finally, that brings me to Justice Jackson's questions at oral argument today. Reminiscent of those Rehnquist and Scalia opinions, Justice Jackson evinced discomfort with respect to applying a traditional stay analysis in this posture. She worried that without a sufficiently heightened standard, the Supreme Court risks supplanting the role of the lower federal courts during the preliminary stages of litigation. Based on her questioning, her solution to that concern seems to be to require a particularly high level of irreparable harm, something "extraordinarily harmful." If one shares Justice Jackson's concerns about the Supreme Court stepping in too early and too often, though, then it would seem that the "indisputably clear" standard (which goes to the likelihood of success on the merits prong as opposed to irreparable harm) has a stronger foothold in the doctrine.

Time will tell whether the Supreme Court gives a clear answer in *Ohio v. EPA* to the question of what standard it is applying when it decides whether to temporarily halt agency action. I have a working draft of a forthcoming student Note available here with my own suggestions on the proper standard, but hopefully those suggestions will be preempted.

In the meantime, today's oral argument leaves us with a lot of interesting questions — though no answers, yet.