No. 18-1190(L), consolidated with No.18-1192

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ENVIRONMENTAL DEFENSE FUND, CENTER FOR BIOLOGICAL DIVERSITY, and SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION AND RESPONSE IN OPPOSITION TO MOTION TO DISMISS

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SUPPLEMENTAL BACKGROUND

Last month, two sets of petitioners—three national environmental organizations, and seventeen States plus the District of Columbia—moved this Court to determine the legality of the "Glider Decision," EPA's nationwide decision not to enforce an existing air-pollution-control regulation that limits production of super-polluting heavy-duty diesel freight trucks. The agency's only stated reason for that decision was "to avoid profound disruption" to firms desiring to manufacture additional super-polluting trucks, in violation of EPA's existing regulations but "in reliance on" the agency's pending proposal to repeal those regulations. A3.

Environmental Petitioners moved this Court to "either summarily declare EPA's decision unlawful and vacate it, or else stay its effect pending review on the merits," Envtl. Pet. Mot. 3; and State Petitioners followed with a similar request two days later. In between, this Court granted the request of Environmental Petitioners to administratively stay the Glider Decision pending disposition of the motion. The Court initially gave EPA eight days after service of Environmental Petitioners' motion to respond, but it later granted EPA's unopposed request for five additional days and double the usual word allocation to defend the Glider Decision.

Shortly before EPA was due to respond, Acting Administrator Andrew R. Wheeler issued a memorandum (Wheeler Memo) that *prospectively* withdrew the Glider Decision, not on the ground that it was unlawful at the time it issued, but

because its issuance on "these particular facts" ran afoul of "agency guidance." Memo at 2. The Wheeler Memo stated that "EPA will not offer any other no action assurance to any party with respect to the currently applicable requirements for glider manufacturers and their suppliers." *Id.* at 3. And, it ended by reiterating the agency's plan "to move as expeditiously as possible on a regulatory revision." *Ibid.*

EPA's ensuing response to petitioners' motions does not defend the Glider Decision. The agency argues only that the Wheeler Memo moots this litigation. Environmental Petitioners disagree and ask this Court to declare the Glider Decision unlawful and void *ab initio*.[1] *See* Envtl. Pet. Mot. 3, 13, 19 (requesting relief).

ARGUMENT

Apart from raising the specter of mootness, EPA's response to petitioners' motions amounts to a default. The agency does not and cannot dispute that the Glider Decision is a final action that this Court has jurisdiction to review under the Clean Air Act. Nor does EPA defend against petitioners' claims that the Glider Decision violated both the Clean Air Act and core principles of administrative law, or that it threatened massive harm to human health. The agency does not even hint that a defense is in the offing if this case proceeds to regular briefing on the merits. EPA's unwillingness to defend the Glider Decision, despite having received extra

[1] In light of the Wheeler Memo, Environmental Petitioners withdraw their request in the alternative for a stay of the Glider Decision pending judicial review.

time and words to do so, confirms that the flaws in that decision are "so clear as to justify expedited action" declaring it unlawful and setting it aside as void *ab initio*. *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980).

EPA contends that its withdrawal of the Glider Decision in response to litigation renders the petitions nonjusticiable because it is now "impossible for a court to grant any effectual relief whatever to [petitioners]." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (internal quotation marks and citation omitted). *See* Opp. 6–8. But this sort of "maneuver[] designed to insulate a decision from review … must be viewed with a critical eye." *Knox v. Serv. Emp. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). On close inspection, the Wheeler Memo does not moot this litigation because it does not "completely eradicate[] the effects" of the Glider Decision. *Nat. Res. Def. Council, Inc. v. U.S. Nuclear Reg'y Comm'n*, 680 F.2d 810, 814 n.8 (D.C. Cir. 1982).

1. As Environmental Petitioners have observed (Mot. 14–15), "[t]he purpose and intended effect of the Glider Decision is to blunt the effectiveness of the mandatory production limit of 300 noncompliant glider vehicles per manufacturer per year by inviting manufacturers to disregard it while EPA takes 'more time' to finalize a relaxation or elimination of that limit." The Wheeler Memo stops short of "completely and irrevocably eradicat[ing]" that effect. *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631 (1979). The memo reaffirms that EPA "continue[s] to move as

expeditiously as possible on a regulatory revision," Memo at 3, yet it fastidiously avoids statements respecting compliance with existing law in the interim. Nor does the Wheeler Memo recant one of the cardinal errors of the Glider Decision—the assertion that regulated firms may structure their conduct "in reliance on" EPA's ongoing glider rulemaking rather than the agency's duly promulgated regulations.

A mere statement that the agency will not reissue a formal No Action Assurance is not commensurate with a commitment by EPA to enforce the very law that it plans to amend "as expeditiously as possible." Memo at 3. Under normal circumstances, an agency's commitment to enforce the law might reasonably be implied. But these are not normal circumstances—EPA bears a "heavy burden" here to show that *all* the harmful effects of its open and notorious decision not to enforce the Clean Air Act have been eradicated. *True the Vote, Inc. v. I.R.S.*, 831 F.3d 551, 555–56 (D.C. Cir. 2016). The Wheeler Memo does not carry that burden.

Only weeks ago, EPA chose to go on record stating that it *would not* enforce existing regulations, with the goal of prompting businesses to violate the law rather than cease production of noncompliant gliders. Pulling back the Glider Decision is a transparent ploy to avoid an adverse ruling by this Court, without acknowledging that the decision was illegal when issued, and without committing to enforce existing law or take any steps to assure compliance with it. The Wheeler Memo sends, at best, a mixed message to firms that already "have reached" their annual

production limit for noncompliant glider trucks. A3. A mere "promise" not to announce to the public, once again, that EPA will not enforce the law "is insufficient" to show that the agency *will* enforce it. *Kifafi v. Hilton Hotels Retirement Plan*, 701 F.3d 718, 725 (D.C. Cir. 2012). *See also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). In this context—where the agency action under review was a categorical decision *not to act*—only an affirmative commitment *to act* where appropriate to enforce the law could "completely and irrevocably eradicate[]" the effects of EPA's initial decision. *Davis*, 440 U.S. at 631.

2. The petitions are not moot for the further reason that there is a "continuing legal and practical" difference between, on the one hand, the Wheeler Memo's *prospective* rescission of the Glider Decision and, on the other hand, a declaration by this Court that the Glider Decision was unlawful and void *ab initio*. *Pub. Media Ctr. v. F.C.C.*, 587 F.2d 1322, 1328 (D.C. Cir. 1978). Because the Glider Decision did not actually change the law, any exceedance of the regulatory limit on noncompliant-glider production that occurred before the decision was withdrawn was unlawful. And that unlawful activity subjects the violator to Clean Air Act enforcement actions, not only from EPA (which abdicated its enforcement power in the Glider Decision), but also from "any person" alleging that a glider company is "in violation of" the regulatory cap. 42 U.S.C. § 7604(a). *See also* 28 U.S.C. § 2462 (five-year statute of limitations).

The Glider Decision would not save the violator from liability in a citizen suit, but if the violation occurred between the date the Glider Decision issued and the date this Court entered an administrative stay—*i.e.*, if companies hastened to produce more noncompliant gliders as soon as the decision issued—the purported legality of the Glider Decision during that period could impact at least the reviewing court's assessment of civil penalties and costs.[2] *See* 42 U.S.C. § 7413(a)(1) (requiring court to consider all "factors as justice may require" in assessing civil penalties); *id.* § 7604(d) (granting court discretion to award costs and fees to prevailing party "whenever the court determines such award is appropriate"). Thus, an order declaring the Glider Decision illegal and void *ab initio* has meaningful consequences for future litigation. *Cf. Nader v. Volpe*, 475 F.2d 916, 918 (D.C. Cir. 1973) (holding that a challenge to the validity of an agency action was not moot, whether or not Congress later had authorized such action by statute, because "there is no indication that the authorization [was] to have retroactive effect"). Such an order could issue only from this Court, in this case. *See* 42 U.S.C. § 7607(b)(2) (prohibition on collateral review of EPA final actions in enforcement proceedings).

[2] EPA does not dispute Environmental Petitioners' analysis that the Glider Decision was expected to lead to, on average, "30 additional [noncompliant] glider sales per day," A123, to say nothing of the "risk of massive pre-buys" of noncompliant gliders in the days following the decision. A436. *See* Envtl. Pet. Mot. 21–23.

3. At the very least, the petitions will not be moot until the time expires to contest the Wheeler Memo in this Court. That memo is itself a "final action" because it withdrew another final action, the Glider Decision. 42 U.S.C. § 7607(b)(1). *Cf. U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814 (2016) (observing that, if a decision in one direction has legal consequences, "[i]t follows" that a decision in the opposite direction also has legal consequences). Thus, a glider company may challenge the Wheeler Memo "within 60 days from the date [it received] notice" of the memo. 42 U.S.C. § 7607(b)(1). Whatever the merit of such a suit, EPA's avowed intent to undo or ease limits on production of noncompliant gliders as expeditiously as possible and the agency's demonstrated solicitude for glider companies, *see* Envtl. Pet. Mot. 6–10, might well lead EPA to stay or revoke the Wheeler Memo in light of new "particular facts." Wheeler Memo at 2. The Glider Decision then could be reinstated by the agency if this Court does not award the relief prayed for by petitioners. *Cf. Am. Iron & Steel Inst. v. E.P.A.*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (finding a rescinded action not moot where "[t]he agency's subsequent statement … could be stricken down by a reviewing court").

* * *

"[U]nder all the circumstances," there remains here "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of [at least] a declaratory judgment" finding the

Glider Decision unlawful. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). It would be a most "powerful weapon against public law enforcement," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), if an administrative agency charged with that enforcement could publish a blanket decision not to enforce a law, and then, solely to avert judicial review, withdraw that decision "with a wave of its hand" and without conceding its unlawfulness or confirming that the agency would enforce the law going forward. *Kifafi*, 701 F.3d at 724. The Wheeler Memo is, in this respect, of a piece with the Glider Decision itself—a shortcut by which EPA has tried to avoid judicial scrutiny of a fatally flawed agency action.

CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioners' motions, this Court should declare the Glider Decision unlawful and void *ab initio* and enter judgment in favor of petitioners.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion is printed in Times New Roman, a proportionally spaced 14-point font, and that, according to the word-count function in Microsoft Word 365, the motion contains 1,927 words, in compliance with Circuit Rule 8(b) and this Court's order of July 20, 2018.

/s/ *Matthew Littleton*
Matthew Littleton

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of August, 2018, I served a copy of the foregoing document on respondent United States Environmental Protection Agency through this Court's CM/ECF System.

/s/ *Matthew Littleton*
Matthew Littleton