No. 15A773

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF WEST VIRGINIA,
STATE OF TEXAS, *et al.*,

*Applicants,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and
REGINA A. MCCARTHY, Administrator,
United States Environmental Protection Agency

*Respondents.*

ON APPLICATION FOR
IMMEDIATE STAY OF FINAL AGENCY ACTION

# REPLY OF 29 STATES AND STATE AGENCIES IN SUPPORT OF APPLICATION FOR IMMEDIATE STAY


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## GLOSSARY

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| Act (or CAA) | Clean Air Act |
| EPA | United States Environmental Protection Agency |
| EPA Opp. | Memorandum For The Federal Respondents In Opposition, Nos. 15A773, *et al.* (U.S. Feb. 4, 2016) |
| FERC | Federal Energy Regulatory Commission |
| NAAQS | National Ambient Air Quality Standards |
| Non-State Int. Opp. | Non-State Respondent-Intervenors' Opposition to Applications for Stay of Final Agency Action Pending Appellate Review, No. 15A773 (U.S. Feb. 4, 2016) |
| Power Plan or Plan | Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) |
| State Int. Opp. | Opposition of States of New York, *et al.*, No. 15A773, *et al.* (U.S. Feb. 4, 2016) |

## INTRODUCTION

EPA's opposition tellingly avoids the two cases of this Court that most clearly demonstrate the need for a stay in this case: *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) ("*UARG*"), and *Michigan v. EPA*, 135 S. Ct. 2699 (2015). The *UARG* case is given all of one paragraph on pages 41 and 42 of EPA's 73-page filing, and the *Michigan* decision is not squarely addressed until page 68. The reason for this spare treatment is obvious: EPA has no answer to either case.

As the States explained in their Application, the Power Plan is clearly unlawful for a number of reasons, but most obviously it cannot be reconciled with *UARG*. In that case, this Court told EPA that it cannot make "decisions of vast 'economic and political significance'" under a long-extant statute, like the Clean Air Act, without "clear congressional authorization." *UARG*, 134 S. Ct. at 2444. And yet that is precisely what EPA has done in employing the "generation shifting" measures at the heart of the Power Plan. Buried on page 41 of its opposition, EPA *concedes* the point, admitting that Section 111(d) of the Clean Air Act "does not expressly address such measures." EPA Opp. 41.

EPA also has no answer to the fact that in *Michigan*, the agency unlawfully extracted billions of dollars in compliance from power plants before this Court could even review the rule, and is attempting to do so here again but on a much larger scale. Left unstayed, the Power Plan will force massive and irreversible changes in terms of state policies and resources, power plant shutdowns, and investments in wind and solar power. The Plan will require States to spend thousands of hours and

millions of dollars in the next year designing State Plans, while forcing them to change their laws and regulatory approaches. Indeed, absent a stay, the States will need to approve new sources of energy and other capital investments, which approvals will necessarily include hikes in energy rates for consumers, to defray the cost of Power Plan-driven projects. Simply put, if a stay is denied, the Power Plan "will immediately and significantly impact *nearly every regulatory decision affecting the energy industry in*" the States. Nowak Reply Decl. ¶¶ 3 (emphasis added).

Considerations of the equities similarly favor a stay. If this Court agrees with the States that the Power Plan is unlawful—including as entirely contrary to *UARG*—then the massive, immediate consequences that both sides of this case have explained to this Court, are entirely contrary to the public interest as a matter of law. This includes the "billions" of dollars that industry supporting EPA represent will be driven to their projects, and the additional international agreements the Administration is attempting to secure based upon the incorrect representation that EPA has the authority to enact the Power Plan. If this Court does not grant the stay, EPA will succeed in "bak[ing] into the system" its generation-shifting goals, regardless of the legality of the agency's rule, just as in *Michigan*.

The States do not ask for this Court's intervention lightly. But this case is truly extraordinary, given that the Power Plan imposes the largest burden the States have ever been asked by EPA to carry, on the basis of a rule that is flatly contrary to this Court's recent caselaw when dealing with the same agency, and the

same pollutants. And EPA is doing this in the shadow of its own brazen abuse of its authority, where it bragged on its public blog that it had rendered this Court's decision in the States' favor an effective nullity. EPA should not be permitted to impose its generation-shifting agenda on the sovereign States before the courts have had the opportunity to rule on the lawfulness of EPA's approach.

## ARGUMENT

### I. If The D.C. Circuit Upholds The Power Plan, There Is A Reasonable Probability That Four Justices Would Vote To Grant Review And A Fair Prospect That A Majority Would Declare The Plan Unlawful.

#### A. Section 111(d) Does Not Authorize EPA To "Generation-Shift."

In the Power Plan, EPA asserted that is has the authority to restructure the States' energy grids because, in the agency's view, Section 111(d) permits it to require the "owners or operators" of an industry to "shift[]"to a competitor industry, deemed by EPA to be "cleaner." 80 Fed. Reg. at 64,726, 64,746, 64,762, 64,767-68. In their stay application, the States made three independently sufficient statutory arguments as to why this assertion of authority is unlawful under the CAA. In its opposition, EPA has defaulted on the first two arguments, meaning the States have satisfied their burden of showing likelihood of success. And as to the third argument, EPA's response is entirely inadequate, presenting an additional ground to issue relief to the States.

1. In the States' stay application, their primary merits argument was that EPA's generation-shifting theory violates *UARG*'s clear statement rule. Generation-shifting finds no precedent in Section 111(d)'s 45-year history, States Appl. 17-18, would authorize EPA to completely eliminate coal-fired generation, *id.* 16, and

would empower EPA to become the nation's central planner for any stationary source that emits any air pollutant, *id.* at 16-17. EPA's far-reaching claim thus falls squarely within the *UARG*'s rule requiring "clear[]" congressional authorization to invoke "an unheralded power to regulate a significant portion of the American economy." 134 S. Ct. at 2444 (quotation omitted). Since EPA did not argue in the Power Plan that it could satisfy such a clear statement rule, States Appl. 18, the Plan is unlawful on that basis alone. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (agency action can only be upheld on "grounds upon which the agency itself based its action").

In its opposition, EPA effectively concedes the States' primary merits argument. Specifically, EPA concedes by its silence that: (1) the agency has never before attempted to use generation-shifting in Section 111(d)'s 45 year history; (2) the agency's regulatory logic means that EPA would have the authority to shut down all coal-fired power plants in this country by requiring their owners to "shift" to wind and solar power; (3) the agency's logic means that EPA would now have similar central planning authority for *any* source category regulated emitting *any* air pollutant; and (4) EPA could not prevail if *UARG*'s clear statement rule is held to apply under the *Chenery* doctrine. This silence alone is sufficient to satisfy the States' burden to show likelihood of merits success for purposes of this application.

Indeed, EPA's *only* answer in its 73-page opposition to the States' primary merits argument is a terse paragraph that *admits* that Section 111(d) does not "expressly address" generation-shifting, EPA Opp. 41, which is a *concession* that the

agency cannot satisfy the *UARG* clear statement rule. EPA then declares that because it is an "expert" agency, it can adopt *any* measures aimed at reducing carbon dioxide emissions. EPA Opp. 41-42 (quotation omitted). *UARG* rejected that very proposition when dealing with the *same* agency and the *same* pollutant.

2. The States' next merits argument, States Appl. 18-20, was that EPA must also satisfy a clear statement rule because "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quotations omitted); *accord Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2001); *Gregory v. Ashcroft*, 501 US 452, 460–61 (1991). Given that the intrastate generation and consumption of energy is "one of the most important functions traditionally associated with the police powers of the States," *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983), EPA's claim of authority to reorder the States' domestic energy mix would need to satisfy the clear statement rule, which EPA has not even attempted to meet.

EPA fails to respond to this argument as well. EPA does not address this Court's decisions in *Bond*, *Raygor*, *Gregory,* or *Arkansas Electric*, or answer the States' point that generation-shifting intrudes upon their primacy over intrastate generation and consumption sufficient to trigger the clear statement requirement. EPA merely points out that Congress has the constitutional authority to override State regulatory primacy under the Commerce Clause, when engaged in

"'regulation of activities causing [interstate] air . . . pollution.'" EPA Opp. 48 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981)). While EPA misrepresents the States' Tenth Amendment arguments, *see infra* at pp. 8-11, for purposes of the doctrine this Court articulated in *Bond*, *Raygor*, *Gregory*, the key point is that even if Congress had the constitutional authority to require the Power Plan, Congress did *not* do so "clearly," and EPA does not argue otherwise.

3. In their third statutory argument, the States explained that the CAA unambiguously foreclosed EPA's claim to generation-shifting authority, States Appl. 20-23, even if no clear statement rule applied. Section 111(d) permits EPA to adopt a "*standard of performance*" that is "*appl[icable] . . . to* a[] particular source" within a regulated source category. 42 U.S.C. § 7411(d)(1)(B) (emphases added). Generation-shifting falls outside of this authorization because such shifting does not "administer[] *to*" or "bring to bear" any "thing" upon individual sources, 1 Oxford English Dictionary 576 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) (emphasis added), and mandates non-performance rather than improved "performance," *see Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

In its opposition, EPA attempts to change the subject, without offering any serious answer to the statutory text. EPA argues that generation-shifting fits within the dictionary definition of "best system of emission reduction," EPA Opp. 35 (quoting 42 U.S.C. 7411(a)(1)), as applied to the "interconnected 'grid'," *id.* at 36

(quoting *FERC v. Electric Power Supply Ass'n*, No. 14-840 (Jan. 25, 2016), slip op. 4). This is a red herring. The statutory term "best system of emission reduction" is not a stand-alone, roving authorization of regulatory authority. Rather, the CAA uses this term only as part of the statutory definition of "standard of performance." Section 111(d) requires that a "standard of performance" must be "appl[icable] . . . to a[] particular source," which means the "best system of emission reduction" must also be "appl[icable] . . . to . . . particular source[s]." Section 111(d) does not authorize EPA to impose its view of the "best system" for reducing emissions from the "integrated" power grid as a whole. Rather, it only authorizes the agency and the States to reduce emission by improving the "performance" of "particular source[s]."[1]

EPA also fails to defend its attempt to conflate two concepts the CAA specifically separates: "sources" and "owners or operators" of those sources. States Appl. 22. EPA argues that "CAA holds owners and operators responsible for implementing the emissions limitations," EPA Opp. 44, but this ignores what sorts of "limitations" can be imposed upon such owners. That is, the limitations

[1] EPA seeks to call the "appl[icable] . . . to a[] particular source" requirement into question by citing a new source standard of performance under Section 111(b) that involved "pretreat[ing] coal or oil." EPA Opp. 43. But the requirement that sources clean the fuel they burn—either by doing it themselves or by contracting with a third party to do the cleaning—is a traditional measure to improve the "performance" of a plant, which is "appl[icable] . . . to" each source burning the fuel. EPA also cites its 1995 waste combustor rule under Section 111(d), EPA Opp. 43, but fails to explain that the emission reductions there were based entirely upon pollution control technologies, and emission trading was permitted only as an alternative compliance option. *See* 60 Fed. Reg. 65,387, 65,401, 65,415-17 (Dec. 19, 1995).

themselves must be "appl[icable] . . . to a[] particular source," not to the owners and operators.

Finally, EPA praises generation-shifting as superior to regulations "appl[icable] . . . to a[] particular source." EPA Opp. 40. Regardless of whether EPA is correct to prefer central planning over the installation of pollution control devices, as a policy matter, the agency "may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

### B. The Power Plan Unconstitutionally Commandeers And Coerces States And Their Officials Into Carrying Out Federal Energy Policy.

By compelling States to restructure their electric systems, the Power Plan "use[s] the States as implements of regulation" and thereby violates the Constitution's bar on commandeering and coercion of the States and their officials to achieve federal ends. *New York v. United States*, 505 U.S. 144, 161 (1992). The States showed in detail the actions that the Plan compels them to undertake at this time and in the coming months, but EPA simply refuses to acknowledge that showing, as well as the fact that the Plan itself expressly contemplates the need for those actions.

*First*, while EPA asserts that no State action is required to implement the Plan, EPA Opp. 50-51, it does not address or dispute the States' detailed showing that extensive state regulatory action is required to achieve the Plan's mandatory transition from carbon-intensive generation to increased utilization of natural gas and renewables. For example, officials of States challenging the Plan are currently undertaking substantial efforts to mitigate the Plan's impacts through planning

new electric generation, transmission, and infrastructure capacity, as well as undertaking related regulatory actions and proceedings. *See, e.g.*, Wreath Decl. ¶¶ 2, 4, 6, 15–20; Lloyd Decl. ¶¶ 61, 78-81, 88-93; Nowak Decl. ¶¶ 7, 16-17; Bracht Decl. ¶¶ 12-13; McClanahan Decl. ¶¶ 4, 11. They are doing these things because they have to, not because they comport with state policy choices and priorities.

Indeed, as EPA itself acknowledges in the Plan, *see, e.g.,* 80 Fed. Reg. at 64,678, exercise of such state regulatory authority is necessary regardless of whether a State's electric system is subject to a state or federal implementation plan. In either instance, state agencies will have to be involved in decommissioning coal-fired plants, addressing replacement capacity, addressing transmission and integration issues, and undertaking all manner of related regulatory proceedings. *See, e.g.*, Lloyd Decl. ¶¶ 6, 57, 59; Nowak Decl. ¶ 12; McClanahan Decl. ¶ 7. These actions are necessary to keep the lights on; in fact, EPA's proposed federal plan expressly relies on state authorities to address reliability issues caused by the Plan. 80 Fed. Reg. 64,966, 64,981 (Oct. 23, 2015). Likewise, the States supporting the Plan acknowledge the Plan itself "anticipates that state regulators will continue exercising their traditional oversight in reviewing measures taken by power plants to comply with the Rule." State Int. Opp. 6.

So while EPA places great weight on a State's ability to choose whether or not to promulgate a state plan, EPA Opp. 48-49; State Int. Opp. 5, that choice "only underscores the critical alternative a State lacks: A State may not decline to administer the federal program," *New York,* 505 U.S. at 176-77, through the

exercise of its "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like," *Pac. Gas & Elec. Co.*, 461 U.S. at 212. This is commandeering: the "choice" to carry out federal policy under either a state plan or a federal plan is indistinguishable from the regulate-or-take-title choice put to States in *New York* that was soundly rejected as "infringing upon the core of state sovereignty reserved by the Tenth Amendment." 505 U.S. at 177.

*Second*, confirming that this is no "textbook exercise of cooperative federalism," EPA Opp. 48, EPA does not even attempt to identify federal authority that could displace the need for state actors to implement the Plan. While EPA declares itself prepared to "directly regulate[] [in-state] sources' $CO_2$ emissions," EPA. Opp. 48, it cites no authority by which it or another federal agency could accomplish the Plan's forced retirement or reduced utilization of massive amounts of generating capacity; the construction of commensurate replacement capacity consistent with the Plan's requirements; or the substantial legislative, regulatory, planning, and other activities that are necessary to achieve the Plan's mandatory targets while maintaining electric service. Instead, as EPA's silence concedes, all those activities are pushed on the States—again, just like the low-level nuclear waste program struck down in *New York*. *See* 505 U.S. at 176 ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all.").

*Third*, EPA identifies no precedent for this invasion of state sovereignty. "[H]aving the power to make decisions and to set policy is what gives the State its

sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). Consistent with that principle, the mining statute at issue in *Hodel allowed* States to displace federal mining regulation with their own programs, but did not *require* them to do anything. 452 U.S. at 288 ("If a State does not wish to [regulate consistent with the statute], the full regulatory burden will be borne by the Federal Government."); *see also Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 175 (D.C. Cir. 2015) (same).[2] But, as in *New York* and *NFIB*, the Power Plan deprives the States of that core aspect of their sovereignty, requiring them to exercise regulatory authority while stripping them of policymaking discretion. This is not cooperative federalism. It is a plain violation of the principle that "the Federal Government may not compel the States to implement . . . federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997).

*Finally*, the suggestion by States supporting EPA that the Plan advances state sovereignty, State Int. Opp. 6, is utterly false. The difference between the Plan and other rules that may affect state regulatory efforts is that the Plan relies on and compels state implementation—which EPA and its Intervenors concede. *See id.* If EPA's supporters were correct, the federal government could demand obedience in any area of traditional state authority, and States would be powerless to resist.

[2] As concerns coercion, the prospect of the lights going out, which would frustrate a State's exercise of its police powers, is far more of a "gun to the head," *NFIB v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (Roberts, C.J), than the minor diversion of federal funding at issue in *Miss. Comm'n on Envtl. Quality*. *See* 790 F.3d at 177-78.

### C. The Section 112 Exclusion Unambiguously Prohibits The Power Plan.

The Section 112 Exclusion is an independently sufficient prohibition against the Power Plan. States Appl. 29–38. The Exclusion prohibits EPA from invoking Section 111(d) to require States to regulate "any air pollutant" emitted from a "source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d)(1)(A)(i). Or, as this Court observed in *American Electric Power Company, Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) ("*AEP*"), "EPA may not employ § [1]11(d) if existing stationary sources of the pollutant in question are regulated . . . under . . . § [1]12." *Id.* at 2537 n.7. Given EPA's voluntary decision to continue to regulate power plants under Section 112—notwithstanding this Court's ruling in *Michigan v. EPA*—EPA simply may not invoke Section 111(d) for those same power plants.[3]

In its opposition, EPA makes no effort to defend—as a matter of the statutory text—the interpretation of the Exclusion that the agency adopted in the Power Plan. As the States explained in their application, that interpretation is based upon an impermissible "rewrit[ing of] clear statutory terms to suit [EPA's] own sense of how the statute should operate," *UARG*, 134 S. Ct. at 2446, including inserting whole phrases nowhere found in the text, *see* States Appl. 33. EPA offers no answer for this argument, and in doing so fails to give meaning to the critical statutory phrase "source category which is regulated under [Section 112]." 42 U.S.C. § 7411(d)(1)(A)(i). Remarkably, EPA's opposition articulates a different

[3] EPA cites *AEP* for the claim that the agency "has well-established authority under Section 7411 to limit air pollution emitted by power plants." EPA Opp. 21. But that is true only to the extent EPA does not trigger one of Section 111(d)'s exclusions, *AEP*, 131 S. Ct. at 2537 n.7, which EPA did by adopting the regulation of existing power plants in 2012 *after AEP* was decided. 77 Fed. Reg. 9,304 (Feb. 16, 2012).

understanding of the Exclusion from what it adopted in the Power Plan. In the Plan, EPA explained that, in its view, the Exclusion prohibits "the regulation of HAP emissions under CAA section 111(d) *and only when that source category is regulated under CAA section 112*." 80 Fed. Reg. at 64,714 (emphasis added). But in its opposition, EPA claims that the Exclusion "permit[s] EPA to regulate emissions of specific pollutants that are not themselves regulated under . . . [Section 112]," without any mention of whether the source category is regulated under Section 112 or not. EPA Opp. 22. This attempt to change the agency's reading of the Exclusion during litigation is forbidden by the *Chenery* doctrine, and is a transparent effort to distract from the fact that EPA has no plausible textual defense for the interpretation it actually adopted.

Having no serious argument based upon the statutory text, EPA turns to a scattershot, spaghetti-against-the-wall approach.

*First*, EPA argues that because Congress used the word "or" to separate two of the exclusions in Section 111(d), the Section 112 Exclusion does not operate to independently prohibit *any* rule. EPA Opp. 23. But EPA fails to disclose that the agency *rejected* that "or" interpretation in the Plan as "not a reasonable reading of the statute" because it would render the Exclusion entirely meaningless. 80 Fed. Reg. at 64,713. Of course, agency action can only be upheld on "grounds upon which the agency itself based its action." *Chenery*, 318 U.S. at 88.

*Second*, EPA claims that the States' reading of the Exclusion—which the agency itself articulated just five years after the 1990 Amendments, *see* EPA, *Air*

*Emissions from Municipal Solid Waste Landfills*, Pub. No. EPA-453/R-94-021, 1-6 (1995) ("1995 EPA Analysis")—was "plainly [] not intended" by the 1990 Congress because it would "create[] an unexplained gap in the CAA[]," and "strip Section 7411(d) of nearly all effect." EPA Opp. 26. But EPA's *only* support for this "gap" concept is the 1970 legislative history of the CAA, which entirely ignores the fact that the dispute is about what the Congress did in *1990*. *Critically, EPA has absolutely no response to the States' argument that their interpretation is entirely consistent with EPA's regulatory practice since 1990*, in which the agency has properly treated Section 111(d) as a rarely-used alternative to the widely-used Section 112 regime. States Appl. 34-35. In any event, even if EPA had raised some genuine practical concerns arising from a faithful application of the literal statutory text, that would not permit the agency to "rewrite clear statutory terms to suit [EPA's] own sense of how the statute should operate." *UARG*, 134 S. Ct. at 2446.

*Third*, EPA claims that the 1990 Congress did not mean to alter the Exclusion through a provision listed within "Miscellaneous Guidance" amendments. EPA Opp. 27-29. But in the Power Plan, EPA itself argued that the amendment listed in the "Miscellaneous Guidance" section changed the Exclusion from simply prohibiting the regulation of HAPs under Section 111(d) to prohibiting "the regulation of HAP emissions under CAA section 111(d) *and only when that source category is regulated under CAA section 112*." 80 Fed. Reg. at 64,714 (emphasis added); *see also* 2007 EPA Brief, 2007 WL 2155494, at *n.35 (explaining that the "Miscellaneous Guidance" amendments made numerous substantive revisions to the

CAA). Accordingly, *all* parties agree that Congress in 1990 made an important, substantive change to the Exclusion. But, critically, only the States' argument gives a plausible meaning to the actual text the 1990 amendment added to Section 111(d). *See supra* at pp. 12-13.

*Fourth*, EPA argues that "[n]othing in the CAA suggests . . . that Congress expected EPA to evaluate th[e] tradeoff [between regulating existing power plants under Section 111(d) and Section 112] in deciding whether power plants should be regulated under Section [112]." EPA Opp. 28-29. However, as EPA explained to the D.C. Circuit in 2007, the House of Representatives—which drafted both Section 112(n)(1)'s provision permitting EPA to regulate power plants under Section 112 if such regulations are "appropriate and necessary," *and* the substantive change in the Exclusion found in the Miscellaneous Guidance section—specifically intended for those two provisions to operate in tandem, such that EPA must make a considered choice whether to regulate emissions from existing power plants under *either* Section 111(d) or Section 112, but never both. 2007 EPA Brief, 2007 WL 2155494; *accord* 70 Fed. Reg. 15,994, 16,030-31 (Mar. 29, 2005). This is reflected in the statutory text, as Section 112(n)(1) mandates that EPA consider "alternative control strategies" for HAPs. 42 U.S.C. § 7412(n)(1)(A). Such "alternative[s]" include regulating *all* pollutants emitted from the source category under Section 111(d), including HAPs, such that Section 112 regulation would not be "appropriate and necessary." *See also* Statement of Issues ¶ 2, *UARG v. EPA*, No. 01-1074 (D.C. Cir. Mar. 26, 2001) (faulting EPA for assuming that Section 112 is the "sole source of

regulatory authority for hazardous air pollutant emissions from coal- and oil-fired power plants.").

*Fifth*, EPA seeks to rely upon a conforming amendment, which Office of Law Revision Counsel excluded from the U.S. Code because it "could not be executed." *See* Revisor's Note, 42 U.S.C. § 7411. As the States explained in their application, this conforming amendment was a simple clerical error, of the type common in modern complex legislation. States Appl. 35. The States also cited dozens of identical, impossible-to-execute conforming amendments, which have also been excluded from the U.S. Code under a straightforward application of the official drafting manuals. States Appl. 36-37 & n.15. EPA offers no response to this cascade of examples, and simply asserts that the States have cited "no [court] decision" giving these errors no meaning. EPA Opp. 55. But the reason for this lack of caselaw is plain: the argument that a confirming amendment that "cannot be executed" because of substantive amendments should be given substantive meaning is so insubstantial that no one even appears to have made it outside of this specific case. Indeed, no party in this litigation has found an example of any party advancing such an argument in litigation or administrative proceedings, despite numerous such examples throughout the U.S. Code. States Appl. 36-37 & n.15. As EPA recognized just five years after the 1990 Amendments, the conforming amendment is properly not part of the U.S. Code. *See* 1995 EPA Analysis.

EPA also argues that the conforming amendment—originally adopted by the Senate—and the amendment found in the Miscellaneous Guidance section—

originally adopted by the House of Representatives—should both be treated as conforming amendments. EPA Opp. 31. But as EPA explained in 2007, it is factually "incorrect" to describe the House's Miscellaneous Guidance amendments as conforming amendments because, *inter alia*, the other changes in the Miscellaneous Guidance list were also substantive revisions to the law, and the House included a separate "designated 'conforming' or 'technical' amendments" section. 2007 EPA Brief, 2007 WL 2155494.

Nor is EPA's response to the States' alternative point that its two-version theory of the Exclusion would not salvage the Plan's legality any more persuasive. While EPA claims that Section 111(d) is an "affirmative grant of regulatory authority," EPA Opp. 33, the two amendments deal not with two different versions of Section 111(d) itself, but with two different versions of the Exclusion, which is a *limitation* on EPA's authority. *AEP*, 131 S. Ct. at 2537 n.7. So if the Court were to accept EPA's unprecedented theory of how to read an un-executable conforming amendment, that would only mean that "effect" would need to be given to "every word" of *both* Exclusions the agency believes Congress enacted, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), rendering the Plan unlawful, *see* States Appl. 38.

Finally, EPA's claim that this Court should treat the Law Revision Counsel as "irrelevant," EPA Opp. 32 n.9, while deferring to EPA, *id.* at 34, gets matters backwards. Congress provided that "the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States ," 1 U.S.C. § 204, meaning that the U.S. Code is *presumed* accurate unless it is plain that some

error has been made. Here, the Law Revision Counsel simply followed uniform legislative practice. *See supra* at pp. 16-17. To the extent anyone is entitled to deference as to the contents of the U.S. Code, it is the statutorily-authorized Law Revision Counsel. *See* 2 U.S.C. §§ 285a-285g. It is not an environmental regulator, whose expertise as to the proper resolution of irreconcilable substantive and conforming amendments, as a matter of legislative drafting protocol, is no greater than IRS's expertise over health care policy. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

## II. A Stay Is Necessary To Prevent Continued Irreparable Harm To The Applicant States.

Absent a stay, the Power Plan will continue to immediately and irreparably impact the resources and sovereignty of the States. As explained in the Application, States have been and will keep spending significant time and money in direct response to the Plan. States are also being forced to change laws and regulations, and are suffering an unconstitutional intrusion on their Tenth Amendment rights. EPA and its intervenors offer three broad responses, none of which is persuasive.

### A. The States' Harms Are Not Voluntary.

The primary argument of EPA and its intervenors is that any harms to the States during the pendency of the D.C. Circuit litigation are "voluntary." State Int. Opp. 8. States, they contend, "can elect to expend no effort at all and simply opt to not submit any plan." *Id.* at 5 (quotation marks omitted); *accord* EPA Opp. 57. And even those States that intend to develop their own state plans "face no imminent burdens warranting a stay," State Int. Opp. 7, because "a State need not submit a

plan until September 2018 if it seeks a readily procurable extension," EPA Opp. 58-59. Neither argument withstands scrutiny.

1. As the States have explained, there is no merit to the notion that the States can do nothing now and simply await a Federal Plan that the agency has not even finalized. Stay Appl. 44-45. To maintain a meaningful choice between a state or federal approach, a State must be working right now to evaluate and develop a state plan. *E.g.,* Gross Reply Decl. ¶ 3. Given the uncertainty over when EPA will finalize the Federal Plan, that sort of preparatory work is the only way to ensure that the State has a viable alternative if it ultimately determines that it does not want the Federal Plan. *Id.* ("If the federal plan were finalized and [Kansas] decided it would prefer a state plan, there would not be time to comply with the deadlines. Absent a stay, [Kansas] must act now to develop a state plan.").

Moreover, "the immediacy of the impact of the [Power Plan] on regulatory decisions, absent a stay, is independent of the type of compliance plan [a State] will ultimately adopt." Nowak Reply Decl. ¶ 5. This is because under any compliance plan—state or federal—there *will be* a shift in power generation away from fossil fuel-fired energy. *Id.*; *see also* Thomas Reply Decl. ¶ 5. As EPA readily concedes, "generation-shifting" is the only way to achieve the emission reductions under the rule. EPA Opp. 40. Or as the Administration has said, the Power Plan will "aggressive[ly] transform[] . . . the domestic energy industry."[4] Thus, "[i]f the Court

[4] Joby Warrick, *White House set to adopt sweeping curbs on carbon pollution*, WASH. POST (Aug. 1, 2015) (quoting White House Fact Sheet), *available at* https://www.washingtonpost.com/national/healthscience/white-house-set-to-adopt-

does not grant a stay, the [Power Plan] will immediately and significantly impact nearly every regulatory decision affecting the energy industry in" the States, including approving new generation and transmission construction, while authorizing utilities to raise rates on customers to pay for Power Plan-driven projects. Nowak Reply Decl. ¶¶ 3, 6, 10, 11.

EPA and its intervenors contend that "the Rule merely anticipates that state regulators will continue exercising their traditional oversight in reviewing measures taken by power plants to comply with the Rule, just as state regulators would review any changes caused by other regulations." State Int. Opp. 6. But that is precisely the point. The Power Plan is "caus[ing]" changes that require regulatory action by the States—whether they opt for a state or federal compliance plan. It is thus entirely false that States "can elect to expend no effort at all." *Id.* at 5 (quotations omitted).

EPA's intervenors baldly assert that "[a]ny actions States must take to oversee power plants' decisions in complying with the Rule are not imminent," *id.* at 6, but that is disproven by clear facts on the ground. The Public Service Commission of Wisconsin is currently considering an application for a Certification of Public Convenience and Necessity ("CPCN"), requesting approval to construct a new natural gas generator known as the Riverside Energy Center. Nowak Reply Decl. ¶ 10. In determining the need for that new facility, the public service commission must take into account the fact that the Power Plan "forces generation shifting,

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sweeping-curbs-oncarbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html.

which alters the evaluation of need." *Id.* Similarly, "Kansas utilities are already adding new generation resources that help ensure compliance with the final rule." McClanahan Reply Decl. ¶ 6; *see also* Bracht Reply Decl. ¶ 5. In Nebraska, "public utilities are statutorily required by state law to rely exclusively on ratepayer fees and bonds to pay the costs of compliance with the [Power Plan]", which means "any increases to rates or the levying of bonds must be decided in the immediate future." Macy Reply Decl. ¶ 4. The fact of the matter is that no one seriously disputes that absent a stay, the Power Plan will require a massive shift in power generation that has already begun. That is why the intervenors from the clean energy industry explain that "[a] stay would introduce uncertainty among investors" in the billion-dollar "advanced energy market." Non-State Int. Opp. 22.

2. Equally meritless is the contention that the 2018 deadline for State Plans allows States, at a minimum, to do nothing for the duration of the D.C. Circuit litigation. EPA makes much of the expedited schedule in the D.C. Circuit, asserting that "it is reasonable to expect that court to decide the case on the merits during the late summer or early fall of 2016, approximately two years before the September 2018 deadline." EPA Opp. 59. According to EPA and its intervenors, those two years are more than sufficient for States to develop State Plans. This reasoning is flawed in numerous respects.

*First*, EPA's estimate of the D.C. Circuit proceedings is the most optimistic possible. Taking into account possible rehearing or rehearing *en banc* proceedings, the D.C. Circuit proceedings could stretch well into 2017. *Cf. White Stallion Energy*

*Center, LLC v. EPA*, 748 F.3d 1222 (petition for review filed February 16, 2012, argued December 10, 2013, and decided April 15, 2014), *rev'd by Michigan v. EPA*, 135 S. Ct. 2699 (cert. petition filed July 14, 2014, argued March 25, 2015, and decided June 29, 2015).

*Second*, the arguments of EPA and its intervenors ignore that States are differently situated. The States supporting EPA note that the Power Plan tracks what they have already been doing. *See, e.g.*, Dykes Decl. ¶ 26 ("very similar to the process . . . RGGI participating states took"); Thornton Decl. ¶ 23 (Power Plan "reflect[s] many strategies that Minnesota has demonstrated"). But the fact that certain States have already been phasing out coal-fired generation as a matter of their own policy choices says nothing about the burden the Plan places on States that have made different choices or are more heavily coal-reliant. In a State like Kansas, the unique geographic distribution of resources makes any "shift in generation" from coal-fired power to renewable energy particularly "time consuming and expensive." McClanahan Reply Decl. ¶ 7. EPA blithely asserts that all States "can join existing state trading programs (such as the Regional Greenhouse Gas Initiative)," EPA Opp. 58, but recent news reports indicate that may be far easier said than done. *See* Emily Holden, *Clean Power Plan: RGGI gets mixed signals on mingling with other states*, E&E News (Feb. 3, 2016). Thus, while some States may not find it challenging to devise a State Plan, it is hardly difficult to understand why regulators in other States would be willing to state under penalty of perjury

that the Power Plan is "the most complex air pollution rulemaking undertaken" by their state agencies. Gore Reply Decl. ¶ 3.

*Third*, EPA and its intervenors also equate the Power Plan's obligations to creating a state implementation plan under the National Ambient Air Quality Standards ("NAAQS") program and other similar CAA duties. *See, e.g.*, State Int. Opp. 7 n.8. But that comparison does not stand up. While the Power Plan "shares some process similarities," it "includes potentially regulating a whole universe of new activities that [state environmental regulators] do[] not have experience with and may not have clear statutory authority to include in a plan without getting changes in state law." Gross Reply Decl. ¶ 4. In particular, state environmental regulators "must take into consideration new factors . . . never before considered when regulating the environment"—namely, "the reliability of the electric system and the effects of [their] action[s] on the electric rates charged to consumers." *Id.*; *see also* 80 Fed. Reg. at 64,876 ("[W]e are including in the final rule a requirement that each state demonstrate in its final state plan submittal that it has considered reliability issues in developing its plan.").

*Fourth*, the assertion by EPA and its intervenors that immediate expenditures are not required is refuted their own statements. Declarants from States supporting EPA admit that their States "already begun [their] efforts to develop a state plan for compliance with the Clean Power Plan . . . includ[ing] stakeholder outreach, ongoing modeling and other analyses of the electric power

system, [and] collaboration" among state agencies. Snyder Decl. ¶ 47 (New York).[5] EPA, too, admits that the Clean Air Act "clearly contemplates that States will begin developing their plans before judicial review is complete." EPA Opp. 57.

*Finally*, EPA and its intervenors fail to acknowledge the resources that must be expended to meet deadlines prior to the 2018 deadline. Foremost, they entirely ignore that the Power Plan requires States to submit an "update" to EPA by September 2017, describing "the type of approach it will take in the final plan submittal and to draft legislation or regulations for this approach." 80 Fed. Reg. at 64,859. This is no small task. *E.g.*, McClanahan Reply Decl. ¶ 5; Vehr Reply Decl. ¶¶ 4-11. They also do not dispute that some immediate and unrecoverable resources must be expended to obtain the extension in September 2016.

**B. Unrecoverable Compliance Costs Constitute Irreparable Harm.**

EPA and its intervenors fall back to the argument that even if States are incurring massive unrecoverable costs at this time, those costs are insufficient as a matter of law to establish irreparable harm for the purpose of a stay. State Int. Opp. 8; EPA Opp. 56. But they cite no authority from any court or agency that supports this principle. *Contra Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring) ("[A] regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs.").

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[5] *Accord* Chang Decl. ¶ 30 (California) ("planning process began . . . in 2015, and is expected to unfold throughout 2016); Clark Decl. ¶ 16 (Washington) ("begun its efforts"); Klee Decl. ¶ 31 (Connecticut) ("already begun"); McVay Decl. ¶ 18 (Rhode Island) ("already begun"); Pedersen Decl. ¶ 12 (Oregon) ("begun working"); Wright Decl. ¶ 24 (New Hampshire) ("already").

The only two decisions cited by EPA do not stand for such a sweeping proposition. In *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir. 2005), the irreparable nature of the compliance costs was highly speculative, where the court speculated that "the interest earned on any escrowed funds may not adequately compensate [them] for the time-value of their money." *Id.* In *A.O. Smith Corp. v. Federal Trade Commission*, 530 F.2d 515 (3d. Cir. 1976), the Third Circuit's decision also turned on whether the alleged compliance costs were certain and substantial in fact. The court found that the compliance costs, which were "unsupported by basic findings of fact," would not constitute irreparable harm when they would cause neither "significant changes" to operations nor "permanent[] injury[]" to reputation or goodwill. *Id.* at 527-28. The Third Circuit was also careful to explain that it was not announcing a general rule but only a "specific rule" based on the facts presented before it. *Id.* at 527 & n.9a.

These cases are thus irrelevant to this matter, where the resource costs to the States are indisputably substantial and certain. Here, where no "adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation," for the States' significant expenditures of time and money, those costs are sufficiently irreparable for purposes of a stay. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015); *see Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1 (2010) (Scalia, J., in chambers) ("If expenditures cannot be recouped, the resulting loss may be irreparable"); *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous

courts have held that the inability to recover monetary damages . . . renders the harm suffered irreparable."); *In re EPA*, 803 F.3d 804, 808 (6th Cir. 2015) ("unrecoverable expenditure of resources" by States "to comply with the new [regulatory] regime" would constitute "irreparable harm").

With no supporting authority, EPA and its intervenors' argument reduces to the assertion that "[p]reparation to develop a state plan or consider other compliance options is inherent in every cooperative-federalism scheme." State Int. Opp. 8; EPA Opp. 56-57 ("The fact that States may devote staff time to development of a plan to implement CAA requirements pursuant to an EPA rule before judicial review is complete is an inherent and foreseeable consequence of the CAA's basic design."). "If the cost of such preparatory work were sufficient to establish irreparable harm," they caution, "then opponents could cite such efforts to support a stay of any rule issued under a cooperative-federalism approach." State Int. Opp. 8-9.

But as the States explained in their Application, the check on this alleged slippery slope is that courts do not look only to irreparable harm in granting a stay. They also consider likelihood of success, the balance of equities, and the public interest—factors that are satisfied here but that would not be in challenges to most rules. *See Philip Morris USA Inc.*, 131 S. Ct. at 4 (Scalia, J., in chambers) ("A stay will not issue simply because the necessary conditions are satisfied. Rather, sound equitable discretion will deny the stay when a decided balance of convenience weighs against it." (quotations omitted)).

### C. The States Have And Will Continue To Suffer Irreparable Sovereign Harm.

Lastly, EPA and its intervenors offer half-hearted responses to the States' claims of irreparable sovereign harm. Changes in state laws and lost legislative time during this litigation due to the Power Plan will irrevocably infringe on the States' sovereign power "to create and enforce a legal code." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). An example of such a change is the proposal to lift Wisconsin's moratorium on building new nuclear facilities, which recently passed one house of the State's legislature. Nowak Reply Decl. ¶ 13. EPA's only response is that the Power Plan does not "prevent[] a State from exercising its regulatory authority at all." EPA Opp. 55. But they cite no authority for that crabbed view of state sovereignty. To the contrary, this Court has recognized that interference with a State's ability to "effectuat[e]" its laws constitutes "a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quotations omitted).

EPA also cursorily responds to the States' contention that the Power Plan's invasion of the States' Tenth Amendment rights constitutes ongoing and *per se* irreparable harm. EPA asserts that it is not irreparable harm to a State's sovereignty when "its exercise of regulatory authority is constrained by a federal law under a scheme of cooperative federalism." EPA Opp. 55. But this merely assumes that the Power Plan is a constitutional scheme of cooperative federalism, which it is not. *See supra* at pp. 8-11.

## III. Allowing The Power Plan's Immense Consequences Is Contrary To The Public Interest.

This Court has been flooded with an unprecedented number of parties and declarations on the stay issue precisely because the consequences of denying a stay would be so substantial. To the sovereign States on *both* sides of this case, denial of a stay will mean the forced expenditure of thousands of hours of employee time and millions of unrecoverable taxpayer funds, as well as significant changes in laws and regulations. *See supra* at pp. 18-25. To utilities, coal companies, and coal-miners, it will mean the closures of additional power plants in 2016, and lost jobs in some of the poorest areas in this country. States App. 45-47. To the solar and wind energy companies, it will mean continued driving of "billions" of dollars in capital investment to their coffers. Non-State Int. Opp. 22. And to this Administration, it will mean securing additional international commitments by continuing to claim that EPA has the legal authority to "shift" the power grid away from fossil-fuels. EPA Opp. 71-72.

EPA does not and cannot possibly dispute that if this Court agrees with the States that the Power Plan is likely unlawful, then all of these immensely consequential impacts are contrary to the public interest as a matter of law. States Appl. 47. Denying the stay will simply duplicate the unseemly spectacle that followed EPA's loss before this Court in *Michigan v. EPA*, but now on a far-grander scale. When the Plan is ultimately judged unlawful, EPA will again brag that

regulated parties are "already in compliance or well on their way to compliance,"[6] and point out that power plants have shuttered, billions have poured into renewable energy, and international commitments have been cemented.

Finally, contrary to EPA's assertion, EPA Opp. 2, the States' requested relief is a straightforward APA stay, which "halt[s] or postpone[s] [the Power Plan, [including] by temporarily divesting [the Power Plan] of enforceability." *Nken v. Holder*, 556 U.S. 418, 428 (2009). That would mean that the States need not comply with *any* of the Plan's deadlines that will occur during this litigation. *See, e.g.*, *Michigan v. EPA*, Order, No. 98-1497 (D.C. Cir. May 25, 1999) (staying the States' obligation to submit a revised SIP). As the States' declarants have explained, if such an order were granted, they would cease both working on State Plans and shaping their sovereign decisions in response to the Power Plan, including no longer approving consumer rate increases attributable to the Power Plan so that utilities can cost recover for new projects that are being driven by the Plan's generation-shifting mandate. *E.g.*, Nowak Reply Decl. ¶¶ 3, 6, 10, 11; Christmann Decl. ¶ 23; Nowak Decl. ¶¶ 13, 18; McClanahan Decl. ¶ 8.

Nor does the extremely remote possibility of an eventual decision on the tolling of the Plan's deadlines offer any reason to deny the States' requested relief. If, as the States expect, the Power Plan is declared unlawful at the conclusion of litigation, then no issue of tolling would ever arise because *all* of the Plan's mandates—which would have been "divested . . . of enforceability" during litigation,

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[6] Janet McCabe, https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/.

*Nken*, 556 U.S. at 428—would simply be null and void. In the unlikely event the Plan survives judicial review (which would, at minimum, require effectively overruling *UARG, see supra* at pp.3-5), tolling would be appropriate as a matter of basic fairness. But the exact shape of such an equitable disposition need not be decided today. *See Michigan v. EPA*, No. 98-1497, Dkt. 524995 (D.C. Cir. May 25, 1999) (accepting post-decision briefing and then tolling the revised SIP deadline, after the stayed SIP rule survived judicial review).[7]

## IV. There Is No Merit To The Suggestion That The States' Stay Application Should Be Viewed With Special Skepticism.

Contrary to the assertion of EPA and its intervenors, the States' Application is not subject to a higher bar than any other request for a stay from this Court. The States' request is unusual, they suggest, because the States seek a stay "before *any* court has expressed a view about, let alone rendered a final decision concerning, the merits of their legal claims." EPA Opp. 3; Non-State Int. Opp. 4. It is even more unusual, they assert, because the States seek "to block Executive Branch regulations that no lower court has found faulty." Non-State Int. Opp. 5. And finally, because the D.C. Circuit has declined to issue a stay, they claim that decision is due "considerable deference." *Id.* None of these assertions withstand scrutiny.

[7] EPA's speculation that "[g]ranting the relief that applicants seek would create an obvious incentive for delay by the applicants in the conduct of the litigation," EPA Opp. 71, is baseless. The D.C. Circuit has already scheduled oral argument in the case, and subsequent proceedings—whether *en banc* review before the D.C. Circuit or on *certiorari* review before this Court—generally progress on the schedule proscribed by each court's rules.

There is nothing inherently suspect about a request for equitable relief from a higher court, including the Supreme Court, that comes before any court has passed final judgment on the merits of a case. That is exactly what happens any time a party appeals the denial of a preliminary injunction, which is specifically authorized by statute. *See* 28 U.S.C. § 1292(a)(1). When a district court denies a preliminary injunction, it makes no greater a judgment about the merits of a case than the D.C. Circuit did in denying the stay in this matter. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party denied the injunction is then entitled, by statute, to do exactly what the States have done here: seek a stay "before *any* court has expressed a view about, let alone rendered a final decision concerning, the merits of their legal claims." EPA Opp. 3 (emphasis in original).

Nor does the analysis change simply because the States' request for injunctive relief concerns a federal regulation. As the States pointed out in their Application, uncontested by EPA or its intervenors, the Administrative Procedure Act specifically authorizes a higher court to issue "all necessary and appropriate process to postpone the effective date of an agency action" before any court has passed on the merits of any challenge to that agency action. 5 U.S.C. § 705. That provision includes within its grant of authority courts "to which a case *may be taken* on appeal from or on application for certiorari or other writ to a reviewing court." *Id.* (emphasis added). Congress thus explicitly contemplated the issuance of a stay by a court that has *possible future* jurisdiction, including this Court, the only Court to which "a case may be taken . . . on application for certiorari." *Id.*

Lastly, the cases cited by EPA and its intervenors for the principle of "considerable deference" to the D.C. Circuit, *see, e.g.*, *Ruckelhaus v. Monsanto Co.*, 463 U.S. 1315 (1983) (Blackmun, J., in chambers), do not suggest that anything other than the "well settled" multi-pronged test for "equitable relief" applies here, *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). For example, in *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J., in chambers), the Court did state that a lower court's denial of interim relief was entitled to a "rebut[table] . . . presumption" of "correct[ness]." *Id.* at 1308. But in the very next sentence, the Court made clear that the presumption was merely shorthand for the "well established" "four-part showing" for "in-chambers stay applications": (1) that there is a reasonable probability that four Justices will vote to grant certiorari; (2) that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; (3) that irreparable harm is likely to result from the denial of a stay; and (4) that in a close case, the balance of equities and public interest favor a stay. *Id.* A review of most of the remaining cases cited by EPA and its intervenors reveal similar shorthand use of words like "deference" and "presumption." *See, e.g.*, *Ruckelhaus*, 463 U.S. at 1316 (Blackmun, J., in chambers); *Nken v. Holder*, 556 U.S. 418, 438-39 (2006) (Kennedy, J., concurring); *Bateman v. Arizona*, 429 U.S. 1302, 1304-05 (1976) (Rehnquist, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers).[8]

[8] Two cases cited by the opposing intervenors concern requests of Justices to lift a stay imposed by a lower court, which is not the circumstance here and appears to be subject to a different standard. *See Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005)

To the extent the cases suggest any special deference to a lower court's decision denying a stay, they do so only where "the [lower court] opinions attest to a conscientious application of principles enunciated by this Court." *Graves*, 405 U.S. at 1204. Here, the D.C. Circuit did not issue such an opinion, but rather denied the stay in cursory fashion.

To be sure, requests of this Court for a stay of agency action pending review in the court of appeals appear to be rare. The States have not identified any case "in which this Court has granted a stay of a generally-applicable regulation pending initial judicial review in the court of appeals." EPA Opp. 3. At the same time, EPA and its intervenors have not identified a single instance where this Court has rejected such a request. Critically, there is nothing to suggest that the scarce precedent reflects anything more than that the circumstances rarely warrant the time and expense of seeking such a stay from this Court. It certainly should not diminish the fact that Congress plainly contemplated and authorized such stays in the APA.

For a number of reasons, the States believe this is the kind of unique case that Congress had in mind when it passed Section 705. As many experienced regulators in the Applicant States have declared under oath, the Power Plan is the most far-reaching and burdensome rule EPA has ever forced onto the States. *E.g.,* Gross Decl. ¶ 3, Stevens Decl. ¶ 8. It threatens to fundamentally reorder the States'

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(Ginsburg, J., in chambers); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring in denial of application to vacate stay).

mix of energy generation—a matter that ranks among the highest in economic and political significance and which affects the lives of nearly every American.

The Power Plan is also unique because it has been imposed on the States in a highly irregular manner that has greatly exacerbated the harms that a regulated entity ordinarily incurs during the course of a judicial challenge. EPA unusually chose to ignore the date of Federal Register publication—the date on which judicial challenges may be filed and stays may be sought—in setting the effective date for the Power Plan. Instead, EPA made the States' obligations due on date-certain deadlines. As a result, the clock began to run and harms began to accrue for States on the day the Power Plan issued, August 3, 2015, even though it would be nearly three more months before the Plan was published in the Federal Register and the States could seek a judicial stay in the normal course. By the time the D.C. Circuit ruled on the stay on January 21, 2016, the States had incurred nearly six months of harm and were almost halfway to their first deadline under the Power Plan.

Finally, it cannot be stressed enough that the *Michigan* case last Term has fundamentally altered the relationship between regulated parties and EPA. The agency's actions after the *Michigan* decision laid bare its cynical approach to regulation: only the ends matter. Even where the agency had been found to have violated the law, what was important was the amount of compliance that had already been achieved. In the face of such an agency, the need for a stay has become ever more acute.

## CONCLUSION

For the foregoing reasons and those stated in their Application, the States respectfully request an immediate stay of the Power Plan.

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Respectfully submitted,


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